SUPREME COURT OF CALIFORNIA
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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHNNY MORALES, Defendant and Appellant.	**Capital Case** No. S137307 (San Bernardino Co. Superior Court No. FVA 015456)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Bernardino

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STATEMENT OF APPEAL

This appeal is from a final judgment of death following a trial and is authorized by Penal Code section 1239, subdivision (b). [1]

STATEMENT OF THE CASE

On July 17, 2001, the San Bernardino County District Attorney filed a complaint against appellant, Johnny Morales, and a co-defendant, Xiomara Escobar, alleging that on June 9, 2001, Mr. Morales committed a single violation of Penal Code section 187 (murder of Elia Torres-Lopez), two violations of section 211 (robbery of Elia Torres-Lopez and Carlos Gutierrez), and two violations of section 459 (first degree burglary). (3CT 591-595.)[2] The complaint added firearm use allegations under sections 12022.5 and 12022.53. (*Ibid.*) Finally, the complaint alleged that Ms. Escobar violated section 32 (accessory after the fact to murder). (*Ibid.*) On December 10, 2001, the District Attorney amended the complaint to add special circumstance allegations that the murder was committed while Mr. Morales was engaged in the commission of robbery, burglary, and rape within the meaning of section 190.2, subdivision (a)(17). (3CT 639-644.)

On June 20, 2002, Mr. Morales and Ms. Escobar were held to answer on all of the allegations following a preliminary hearing. (3CT 661-662, 721-722.) In addition, based upon proof presented at the preliminary hearing without objection, the district attorney was permitted to add an allegation that

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[1] All statutory references are to the Penal Code unless otherwise noted.

[2] "CT" refers to the clerk's transcript on appeal. "SCT" refers to the first supplemental clerk's transcript. "SCT2" refers to the second supplemental clerk's transcript. "SCT3" refers to the third supplemental clerk's transcript. "RT" refers to the reporter's transcript.

Mr. Morales committed an additional violation of section 211 on May 13, 2001 (robbery of Margarita Martinez) not charged in the complaint. (3CT 721-722.)

On June 27, 2002, the San Bernardino County District Attorney filed a seven-count information against Mr. Morales and Ms. Escobar, charging the following Penal Code violations:

1) Count one charged Mr. Morales with a June 9, 2001 violation of section 187, subdivision (a) (murder of Elia Torres-Lopez);
2) Count two charged Mr. Morales with a June 9, 2001 violation of section 211 ("home invasion robbery" of Elia Torres-Lopez);
3) Count three charged Mr. Morales with a June 9, 2001 violation of section 459 (first degree burglary);
4) Count four charged Mr. Morales with a June 9, 2001 violation of section 211 ("home invasion robbery" of Carlos Gutierrez);
5) Count five charged Mr. Morales with a June 9, 2001 violation of section 459 (first degree burglary);
6) Count six charged Ms. Escobar with a June 9, 2001 violation of section 32 (accessory after the fact to murder);
7) Count seven charged Mr. Morales with a May 13, 2001 violation of section 211 ("home invasion robbery" of Margarita Martinez).

(3CT 663-667.)

As to count one, the information added special circumstance allegations that the murder was committed while Mr. Morales was engaged in the commission of robbery, burglary, and attempted rape within the meaning of section 190.2, subdivision (a)(17). (3CT 664-665.)[3] As to counts one and two, the information added allegations that Mr. Morales personally used and

[3] The attempted rape felony-murder special circumstance allegation was later dismissed under section 995. (27CT 7597.)

discharged a firearm (a rifle) causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b) through (d). (3CT 664-665.) As to counts one through five and seven, the information added allegations that Mr. Morales personally used a firearm in the commission of the offenses within the meaning of section 12022.5. (3CT 664-667.) As to counts two, four, and seven, the information added allegations that Mr. Morales entered a structure described in section 213 while acting in concert, within the meaning of section 213, subdivision (a)(1)(A). (3CT 665-667.)

On October 16, 2003, the District Attorney announced his intention to seek the death penalty. (3CT 748; 2RT 146-147.) Jury selection began on July 12, 2004. (8CT 2155.)

On August 30, 2004, the prosecution's guilt phase case commenced with opening statements. (7RT 1414-1424; 8RT 1427-1432.) On September 20, 2004, the prosecution rested and the defense case commenced. (12RT 2535.) On September 22, 2004, the jurors commenced their deliberations. (27CT 7750-7751.)

On September 24, 2004, the jury acquitted Mr. Morales of the robbery of Margarita Martinez as charged in count seven. (27CT 7774, 7785.) Otherwise, the jury found Mr. Morales guilty as charged and found true the robbery and burglary felony-murder special circumstance allegations under section 190.2, subdivision (a)(17) and all of the gun use enhancement allegations under sections 12022.53 and 12022.5. (27CT 7756-7773, 7784-7785.)

On October 27, 2004, the penalty phase of trial commenced with opening statements. (28CT 7991-7992.) On the morning of November 4, 2004, the jurors commenced their penalty phase deliberations. (28CT 8041.) On November 5, 2004, the jury the announced itself deadlocked on the question of penalty and requested the court's assistance with a holdout juror

who would not "budge." (28CT 8043-8045.) The court directed the jurors to recess for lunch; immediately after the lunch break, the jury announced that it had reached a death verdict. (28CT 8044-8045.)

On August 12, 2005, the trial court heard and denied appellant's motions for new trial, to modify the death judgment, to set aside the death judgment, and a petition for access to jury information to obtain discoverable evidence of jury misconduct in support of a new trial motion. (29CT 8254-8256; see also 28CT 7876-7919, 7920-7970, 7983-7986, 8050-8093, 8094-8103, 8104-8132, 8133-8136.) On September 12, 2005, the court heard and denied appellant's supplemental motion to set aside the death verdict. (29CT 8275-8279; see also 29CT 8257-8273.)

On the same date, the trial court imposed judgment and sentenced Mr. Morales to death on count one. (29CT 8277; 2SCT 466.) In addition, the court imposed a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d). (29CT 8276; 2SCT 466.) As to count four, the court imposed the middle term of six years plus four years pursuant to section 12022.5, subdivision (a)(1). (29CT 8276; 2SCT 467.) As to count two, the court imposed one-third of the middle term for a total of two years plus one-third the middle term for a total of six years, eight months pursuant to section 12022.53, subdivision (c), to run consecutive to the term imposed on count four. (29CT 8276; 2SCT 467.) As to count five, the court imposed the middle term of four years plus four years pursuant to section 12022.5, subdivision (a)(1), to run concurrent to the term imposed on count four. (29CT 8276; 2SCT 467.) As to count three, the court imposed the middle term of four years plus four years, which it stayed pursuant to section 654. (29CT 8276; 2SCT 467.)

This appeal is automatic.

STATEMENT OF FACTS

A. Introduction

The sole theory of liability on which Mr. Morales was tried and convicted for first degree murder was felony murder, premised on the charged felonies of burglary and robbery. There was no dispute below that the murder victim was killed in the course of a burglary and robbery or that all of the six or more of the men who committed those felonies were strictly liable for her murder under the then-extant felony murder rule. Nor was there any real dispute that Mr. Morales – the only perpetrator charged and tried for the crimes – was one of those men.

The critical guilt phase dispute was over the identity of the actual killer, for whom felony murder special-circumstance liability, and hence death eligibility, was automatic. The prosecutor relied solely on the theory that Mr. Morales was the actual killer. Although defense counsel disputed that theory, the prosecution persuaded the jurors, who found that Mr. Morales was the actual killer and that the special circumstance allegations were true based solely on that finding.

B. The Guilt Phase

1. Eyewitness Accounts and Forensic Evidence Relating to the Burglaries, Robberies, and Murder Charged in Counts One through Five

In June 2001, Elia Torres-Lopez, her boyfriend, Mario Izaguirre, and her four children – 11-year-old Brianda, 9-year-old Jennifer, 7-year-old Joe, and 4-month-old Crystal – resided in the main house at 11927 Cactus Avenue in Bloomington. (8RT 1436-1437, 1523-1524, 1630; 9RT 1708, 1779.) Carlos Gutierrez, his girlfriend, Mayra Lopez, and his son lived in the guesthouse on the same property. (8RT 1434-1436, 1523-1524.)

On June 9, 2001, sometime between 8 and 9:00 p.m., Mr. Gutierrez and Ms. Lopez were watching television when two armed Latino men entered the unlocked sliding glass door to the living room. (8RT 1437-1440, 1525.) Mr. Gutierrez and Ms. Lopez complied with the men's order to lie face down on the floor. (8RT 1440, 1442, 1546-1547, 1579.) One of the men placed his foot on Mr. Gutierrez's back; both men continued to point their guns at him while demanding in Spanish money and "everything" they had in the house. (8RT 1440, 1442, 1548.) The men assured Ms. Lopez that they did not intend to harm her or anyone else; they only wanted their money. (8RT 1547, 1581.)

Although Mr. Gutierrez and Ms. Lopez were face down on the floor and could not see them, they heard two or three other men enter the house. (8RT 1441, 1547-1548.) All of the men were speaking Spanish. (8RT 1442.) Their accents sounded Honduran to Ms. Lopez's native ear. (8RT 1547.)

As two of the men continued to hold Mr. Gutierrez and Ms. Lopez at gunpoint, the other intruders searched through the house. (8RT 1442-1446, 1548, 1579, 1584-1587.) One of the intruders either asked if anyone was at home in the main house (8RT 1549, 1587-1588, 1976) or "if the man of the house" was home (8RT 1444, 1499). Mr. Gutierrez replied that no one was home if there was no car in front of the main house. (8RT 1444, 1499.) Two of the men continued to hold Mr. Gutierrez and Ms. Lopez at gunpoint while the others left. (8RT 1589.)

Both Mr. Gutierrez and Ms. Lopez eventually identified appellant, Johnny Morales – a Honduran national – as one of the first two armed intruders who entered their home and held them at gunpoint. (8RT 1451, 1554-1555.) Their police statements, as well as Ms. Lopez's trial testimony, suggested that Mr. Morales and his accomplice continued to hold them at gunpoint while the other men went next door. (8RT 1548-1549, 1579, 1584-1587, 1589-1591, 1975-1981, 1984, 1989.) At trial, however, Mr. Gutierrez testified he could not

be certain that, at some point of which he was unaware, other men did not switch places with the first two intruders and hold Ms. Lopez and him at gunpoint while the first two joined the others next door. (8RT 1442-1446.)

On the same evening, Ms. Torres-Lopez and her children had gone out shopping to several stores, including the Cardenas Market in Fontana. (8RT 1631-1632; 9RT 1676-1677, 1710-1711, 1781-1782.) According to surveillance video from the Cardenas Market, they left the market around 9:07 p.m.; according to the children, they drove directly to their Bloomington home, arriving about 15 minutes later. (9RT 1784, 1837.)

Ms. Torres-Lopez parked her vehicle in the back of the property and the family carried their groceries into the house through the back kitchen door. (8RT 1635-1636; 9RT 1680-1681, 1714-1715, 1787, 1840.) While Ms. Torres- Lopez and Jennifer put away the groceries, Brianda, Joe, and Crystal went into the master bedroom. (8RT 1636-1637; 9RT 1681, 1715, 1734, 1787-1788, 1844-1845.)

As Jennifer was working in the kitchen with her mother, she saw two (according to her trial testimony) or three (according to her prior statements) men enter the house through the back door. (9RT 1715-1717, 1725; 10RT 1968, 1990-1993; 3SCT 719.) At trial and in her prior statements, Jennifer described one man as heavier with a dark complexion, bald and carrying a gun and a second as thinner with a light complexion, a bald or closely-shaved head and carrying a knife. (3SCT 719; 9RT 1716-1717, 1725, 1968, 1990-1993.) In a prior statement, she also described another man in a ponytail who carried a rifle. (3SCT 719.) One of the men pointed a gun at her and her mother and ordered them to lie face down on the floor. (9RT 1717-1718, 1735-1736.)

Brianda entered the kitchen at that point and saw about four armed Latino men in the kitchen; perhaps two other men were standing outside the kitchen door. (9RT 1788-1789.) Two of the men carried rifles; two carried

other guns; and one of the men carried a knife. (9RT 1789-1791, 1836, 1846, 1854, 1858, 1866, 1877.) Brianda described one of the rifle-wielding men as tall, "fat," and wearing his hair in a ponytail. (9RT 1782; 10RT 2005, 2007, 2009-2010, 2037-2040; 3SCT 718.) The single knife-wielding man had a bald or closely-shaved head. (9RT 1791-1793, 1795-1796, 1860, 1863, 1912-1914; 10RT 2009, 2038; 3SCT 718.) The other men had "normal haircut[s]" (9RT 1789) or "regular haircut[s]" (9RT 1863), one of whom was short and carried one gun in his pocket and a rifle in his hands (10RT 2005-2006, 2009, 2038; 3SCT 718).

Joe remained in the bedroom for the most part and therefore did not see all of the intruders. (8RT 1640-1641, 1678-1679, 1684-1685; see also 9RT 1844-1845, 1859.) However, he did see four and was able to describe three of them. (8RT 1691-1692; 3SCT 721.) In his prior statements and his trial testimony, he described one of the men as having long curly hair in a ponytail and carrying a rifle or shotgun. (8RT 1640-1642, 1678-1679, 1684-1685; 3SCT 721.) Another had a bald or closely-shaved head and carried a knife. (8RT 1643, 1687-1688; 3SCT 721.) At trial, he described a third perpetrator as wearing a "beanie" and carrying a gun. (8RT 1643-1644.) In a prior statement, he described the third perpetrator as bald, wearing all black, and carrying a gun. (3SCT 721.)

At trial and in her prior statements, Brianda identified the only knife-wielding man with the closely-shaved or almost bald head as Mr. Morales. (9RT 1836, 1846, 1863, 1866, 1913; 10RT 2023, 2056, 2434, 2454; 3SCT 718; see also 10RT 2009, 2038.) She had seen Mr. Morales on a prior occasion with an enemy of her mother's named Melvin. (9RT 1794-1795; 3SCT 718.)[4]

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[4] Jennifer also reported that she recognized one of the burglars as a friend of Melvin's, but was never able to identify Mr. Morales as that man,

The other children were never able to identify Mr. Morales as one of the intruders. (See 10RT 2056-2057; 11RT 2434-2435, 2450-2451; see also 8RT 1650, 1656-1658, 1664-1665.) However, consistent with Brianda's account, they also described a single knife-wielding perpetrator with a light complexion and a bald or closely-shaved head in both their prior statements and trial testimony. (8RT 1643, 1687-1688; 3SCT 719, 721.) Video images taken of Mr. Morales only days before the crimes depicted him with a light complexion and – as the trial judge described it – a "really close-shaved head." (8RT 1657; 10RT 2247, 2273, 2433-2434; 3SCT 691-694 [Exhibits 94 and 95].)

The children, as well as Mr. Gutierrez and Ms. Lopez, were shown lineups containing photographs of Mr. Morales and other men, as well as a videotape of a baby shower and birthday party taken from Mr. Morales's residence depicting him and several other men. (8RT 1466-1467, 1469, 1621; 10RT 2020-2022, 2035, 2041-2042, 2055-2057, 2062, 2068-2070, 2091, 2022-2023; 11RT 2271, 2280-2281, 2427, 2430-2434, 2450-2452; Exhibits 94-99, 103.) At different points in time, some of the witnesses identified various other suspects from those sources as other perpetrators of the crimes, including Jorge Morales, Mr. Morales's cousin; Javier Ever Flores, the brother of Mr. Morales's girlfriend and original codefendant turned prosecution witness, Xiomara Escobar; and Enrique "Kiki" Lujan, an acquaintance of Mr. Morales's who was a named codefendant in the original complaint but who ultimately was never charged or tried for the crimes. (8RT 1468, 1493, 1546, 1566-1567, 1570-1571, 1575-1576, 1615-1616, 1622-1623; 9RT 1831-1832; 10RT 2056-2057, 2131, 2182; 11RT 2282, 2301-2302, 2431-2435, 2448-2451, 2453.) Mr. Morales was the only participant charged and tried for the crimes.

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either before or during trial. (See 9RT 1723-1724, 1726, 1971, 1994; 10RT, 2056-2057.)

According to Brianda's account in the "forensic interview" conducted by a social worker about a month after the crimes, when she entered the kitchen one of the men asked for her "step-father," Mario, by name, and demanded to know the location of the money and "the gold." (3SCT 717-718.) The man in the ponytail with the rifle then ordered the family into the master bedroom. (9RT 1858-1861; see also 9RT 1719, 1736, 1738-1739.) Joe stepped out of the bedroom into the hallway as the family was being ushered back into the bedroom by the ponytailed man. (8RT 1640-1641, 1678-1679; 9RT 1684-1685.)

While the other men remained behind and searched the rest of the house, two to four of the men – depending on the children's various accounts – eventually entered the bedroom with the family and ordered the children to lie prone on the floor. (8RT 1640-1642; 9RT 1719, 1736, 1738-1739, 1799, 1861, 1970, 1993; 3SCT 718-721.) The men searched the bedroom, demanding to know the locations of their "step-father's" "stuff," money, and jewelry. (8RT 1642-1644; 9RT 1689, 1739-1740, 1799-1800, 1793, 1863.)

At trial, Brianda described three of the men in the master bedroom as Mr. Morales (the knife-wielding man), the rifle-wielding man with the ponytail, and a third man with a "regular haircut." (9RT 1791-1793, 1795-1796, 1860, 1863, 1912-1914; see also 3SCT 717-718.) Jennifer described two of the men in the bedroom as the thinner knife-wielding bald man and the heavier gun-wielding bald man. (3SCT 719; 9RT 1740-1741; 10RT 1970, 1993.) Joe described three of the men in the bedroom as the knife-wielding man with the bald or closely-shaved head, the rifle-wielding man with the ponytail, and another gun-wielding man wearing a "beanie." (8RT 1643; 9RT 1687-1688; 3SCT 721.) Joe saw a fourth man enter the bedroom later, but was unable to describe him. (9RT 1691-1692.) According to all of the children, one of the men held Ms. Torres-Lopez near the bedroom door. (8RT 1645-1646; 9RT

1690, 1692-1694, 1720, 1741-1742, 1792, 1862-1863.) Brianda identified that man as the knife-wielding intruder, Mr. Morales. (9RT 1863, 1866.) According to Joe, however, it was a different man who held his mother, not the knife-wielding man. (8RT 1645, 1648, 1690-1694.) Jennifer could not recall which of the men held her mother. (9RT 1720; see also 9RT 1742.) According to Joe, the man holding his mother pulled her shirt down while the ponytailed man touched or grabbed her chest and removed her necklace from her neck and jewelry from her hand. (8RT 1647-1648; 9RT 1678-1679, 1694-1695, 1923, 1927-1928; 3SCT 721.)

According to all of the children, one of the men removed their mother from the bedroom, accompanied by at least one or more of the other men. (8RT 1648; 9RT 1694-1695, 1720-1721, 1741-1742, 1799-1800, 1868; 3SCT 717, 719, 721.)[5] While the children testified that the men took their mother into the kitchen (where they later discovered her body), they could not have seen anyone in the kitchen from their vantage point in the master bedroom. The master bedroom was in the northwest corner of the house and the kitchen in the southeast corner, the rooms being separated by four doors, a hallway and a living room, without a clear sight line between them. (Ex. 81 [diagram of floor

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[5] According to Jennifer, one of the men hit their mother and dragged her out of the bedroom by the hair. (8RT 1720-1721, 1742; 3SCT 719.) According to a prior statement, Joe also reported that one of the men stabbed their mother in the neck and dragged her out of the bedroom by the hair. (3SCT 721.) Brianda denied that her mother was dragged out of the bedroom by her hair. (9RT 1868; 3SCT 717.) Rather, one of the men had her by the hair while she walked backward out of the bedroom. (9RT 1868; see also 3SCT 717 [reporting that mother was removed, without reference to hair pulling].) Jennifer and Joe's inconsistent reports were not only contradicted by Brianda, but also by the forensic evidence, which established that Ms. Torres-Lopez had suffered no kind of injury, including bruising or abrasions, to any part of her body other than those caused by the single gunshot wound that killed her. (12RT 2484-2485, 2487, 2492-2493.)

plan]; 9RT 1758-1761 [identifying master bedroom as "N/W bedroom" on diagram]; 9RT 1807 [marking master bedroom on diagram with "TV"].)

At trial, Brianda identified Mr. Morales, the knife-wielding man, as the man who physically removed their mother from the bedroom. (9RT 1796, 1799-1800, 1863.) The other children gave conflicting descriptions of the man or men who removed their mother from the bedroom. However, according to both Joe and Jennifer, the knife-wielding man was not one of them; he remained behind searching the bedroom when the other men left with Ms. Torres-Lopez. (8RT 1648; 9RT 1695-1696, 1721, 1742; 10RT 1968-1971, 1993; 3SCT 719.)

According to Brianda's trial testimony and prior forensic interview statement, after removing their mother from the master bedroom, Mr. Morales returned to the bedroom alone and joined the other intruders in their search. (9RT 1863-1864, 1868, 1876-1877; 3SCT 718.) Mr. Morales found a suitcase or briefcase and ordered Brianda to open it. (9RT 1863-1864, 1868, 1876-1877; 3SCT 718.) According to her forensic interview account, the man with the ponytail left the bedroom and went into the kitchen, immediately after which she could hear her mother screaming from the kitchen. (3SCT 717.)

Jennifer also heard her mother's screams, followed by a single gunshot. (9RT 1721-1722; 10RT 2007-2008; 3SCT 719.) Joe, too, heard the shot. (9RT 1696-1697; 3SCT 721.) Her siblings told Brianda that they heard a shot, but she did not hear it. (9RT 1811-1812; 3SCT 717.)

According to Brianda's forensic interview statement, she could not hear the shot because one of the intruders was still searching the bedroom and making too much noise. (3SCT 717.) Brianda did not explicitly identify or describe which one of the intruders was still in the bedroom when the shot was fired; however, according to the details of that account, that man had to be Mr. Morales because the only other man who had been in the bedroom – the man in

the ponytail – had left. (3SCT 717.)[6] Similarly, according to Jennifer's prior statements, the bald knife-wielding intruder was still in the bedroom searching it when she heard the gunshot coming from the kitchen. (10RT 1993-1994; 3SCT 719.)[7] Finally, according to Joe's trial testimony and prior "forensic interview" statement, all of the men had left the bedroom by the time he heard the gunshot. (9RT 1697; 3SCT 721; see also 8RT 1650.)

Meanwhile, Mr. Gutierrez and Ms. Lopez were still on the floor of their home, held at gunpoint by two of the intruders, when Mr. Gutierrez heard the gunshot coming from the main house. (8RT 1446.) One of the gun-wielding men told his accomplice to go to the main house and see what had happened. (8RT 1446, 1551.) Mr. Gutierrez heard one of the men leave and quickly return, telling the other that they needed to "leave quickly." (8RT 1446, 1551.) Both men fled the scene. (8RT 1446, 1551; 10RT 1977-1981.)

Back at the main house, the children left the bedroom and went into the kitchen, where they discovered their mother dead on the floor. (8RT 1651-1652; 9RT 1722-1723, 1743-1744, 1801-1802, 1812-1813, 1821, 1869; 10RT 2008.) She was bleeding and her shorts and underwear were on the floor near her feet. (8RT 1760, 1770-1771, 1821.)

Mr. Gutierrez and Ms. Lopez either went directly to the main house after the men fled (10RT 1977, 1980, 2008) or one or more of the children appeared at their house and accompanied them back to the main house after the men fled (8RT 1447-1448; 1551-1552; see also 8RT 1652-1653; 9RT 1698-

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[6] At trial, Brianda testified on cross-examination that after Mr. Morales returned to the bedroom, two of the men left the bedroom, leaving one behind. (RT 1868-1869.) She could no longer recall, however, who had left and who stayed behind. (*Ibid.*)

[7] At trial, Jennifer could no longer remember if anyone was still in the bedroom with them at the time she heard the shot. (9RT 1722.)

1699, 1723, 1746, 1801-1802). In any event, the neighbors found Ms. Torres-Lopez dead on the kitchen floor of the main house. (8RT 1448-1449, 1551-1552; 9RT 1977, 1981.) Ms. Lopez found a towel to cover the exposed lower part of Ms. Torres-Lopez's body. (10RT 1977, 1982.) She and Mr. Gutierrez returned to their own house with the children and waited for police. (8RT 1653-1654; 9RT 1702-1703, 1872.)

Ms. Torres-Lopez had been shot once in the chest from close range, piercing her heart and lung, which was the cause of her death. (12RT 2465-2467.) The gunshot wound would have caused a "rapid death," meaning no more than minutes. (12RT 2466.) Small bullet particles near the exit wound indicated to the pathologist that she had been supine on a firm surface when she was shot. (12RT 2470.) The wounds caused by the bullet were consistent with a "high powered rifle." (12RT 2481.) Other than injuries caused by the bullet, Ms. Lopez did not have any other injuries, including bruises, abrasions, or cuts, to any part of her body. (12RT 2484-2485, 2487, 2492-2493.) Because Ms. Lopez was not wearing underpants or shorts when her body was discovered, a sexual assault "kit" was performed. (9RT 1900; 12RT 2487.) However, there was no physical evidence to indicate that a sexual crime had been committed or attempted against her. (See 12RT 2487.)

According to Joe and Brianda's trial testimony and Jennifer's police statement on the night of the crimes, the intruders had removed some jewelry from their mother. (8RT 1647; 9RT 1803, 1916-1919.) Numerous other valuables in the home were not taken, including a pistol in the master bedroom, gold jewelry Ms. Torres-Lopez and the children were wearing, and cash hidden in Crystal's bedroom. (See 9RT 1761, 1803, 1891-1892, 1919.) Approximately $800 in cash and some jewelry had been taken from the home of Mr. Gutierrez and Ms. Lopez. (8RT 1452.) The burglars did not take jewelry Ms. Lopez had been wearing. (8RT 1580-1581.)

Because none of the eyewitnesses had reported seeing gloves on the intruders, police lifted approximately 30 to 40 fingerprints from Ms. Torres-Lopez's house and additional fingerprints from Mr. Gutierrez and Ms. Lopez's house. (9RT 1767-1769, 1884-1885, 1894, 1901.) Police also collected numerous shoe impressions from both houses. (9RT 1756-1759, 1761, 1764-1765, 1885-1886.) None of the fingerprints or shoe impressions, nor any other physical evidence, linked Mr. Morales to the crimes and thus no physical evidence tended circumstantially to prove what acts Mr. Morales had personally committed during the burglaries. (9RT 1769, 1884-1886.)[8]

2. Evidence of Mr. Morales's Admissions

Shortly after the crimes, Mr. Morales, his live-in girlfriend, Xiomara Escobar, their infant daughter, and Ms. Escobar's four other children moved to Minnesota. (11RT 2255, 2262, 2280, 2290.) In Mr. Morales's absence, police

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[8] In some of their accounts, the children recalled encountering a group of men who followed them around the Cardenas market before the burglary. (8RT 1631-1634; 9RT 1711-1713, 1782-1784; 10RT 2002-2003, 2053; 29CT 8287-8291; 3SCT 717.) In some statements, one or more of the children claimed that they recognized some of the men from the store as the burglars while in others they did not. (8RT 1643; 9RT 1782, 1784; 10RT 1971, 1994, 2017-2018, 2037-2038, 2040, 2052, 2054, 2058; 29CT 8287-8307; 3SCT 717, 719-721.) In one statement, Jennifer claimed that the men followed them home from the market in a green Mustang while in other statements she did not. (9RT 1711-1714, 1724; 10RT 1961, 1964-1965; 3SCT 720.) In her first police statement, Brianda reported that the men got into a car in the parking lot of the store and followed them out of the lot, at which point she lost sight of them. (10RT 2003.) In her later forensic interview, her story had changed to match one of Jennifer's accounts, claiming for the first time that two of the men got into a green Mustang and followed them almost all the way home and that she later saw the same car parked outside of the house at some point during the burglary. (3SCT 717; see also 9RT 1784-1785.) However, as set forth in the next section and footnote 13, *post*, this evidence was contradicted by the prosecution's own evidence of Mr. Morales's admissions.

focused their investigative efforts on Mr. Morales's family, including his mother, Alejandra Sanchez, and brother, Angel Ivan Morales. (11RT 2321-2322, 2363, 2416-2417.) Mrs. Sanchez told police that she believed her son, Mr. Morales, was involved in the crimes. (11RT 2417-2420.) She explained that she had learned about his possible involvement from her other son, Angel Ivan Morales, who, in turn, had learned the information from their cousin, Jorge Morales. (11RT 2354-2355, 2417, 2420.)

a. Angel Ivan Morales's Police Statement Purporting to Relay Mr. Morales's Admissions

According to Angel Ivan, he had heard about the crimes from his wife, who worked at a local bar frequented by members of the Honduran community where the crimes had been the topic of conversation, as well as his cousin, Jorge Morales. (10RT 2130-2131, 2177, 2186, 2202-2203; 11RT 2223-2224.) On July 9, 2001 at about 5:20 p.m., Detective Brad Toms and another police officer went to Angel Ivan's home and told him they wanted to question him at the sheriff's station about his brother's involvement in a home invasion robbery and homicide. (10RT 2096-2099, 2125-2127, 2146-2149, 2151-2152; see also 11RT 2231-2232.) The officers told Angel Ivan that if he did not come voluntarily and agree to the interview, they would arrest him. (10RT 2097-2098.) Angel Ivan agreed to go to the station. (10RT 2098.)

At two different sheriff's stations, Angel Ivan was interrogated as a suspect by three detectives – Detectives Toms, Espinoza, and Wolf – for "several hours," until midnight. (10RT RT 2133, 2171-2172, 2189-2191, 2216; 11RT 2232-2235.) At trial, Angel Ivan testified that although he remembered the circumstances under which he was interrogated and telling the officers that he had no knowledge of his brother's involvement in the crimes, he did not recall the statements he made implicating his brother in any crimes. (10RT

2099-2103, 2118-2119.) Therefore, Detectives Wolf and Toms testified to the substance of those statements.

At the first sheriff's station, Detective Wolf told Angel Ivan that his mother had reported that he had information about the crimes. (10RT 2176.) Although Angel Ivan told the detectives that he knew his brother was a suspect in the crimes from his mother and his cousin, Jorge, he repeatedly denied having any personal knowledge about the crimes. (10RT 2097-2098, 2123-2124, 2129, 2149, 2166-2167, 2171-2172, 2174, 2195-2196, 2198-2000.) He admitted to having spoken to Mr. Morales by phone but said that his brother never said anything about killing anyone. (10RT 2203; 11RT 2223.) The detectives told him that they knew he was lying and took a photograph of him, which they took to the victim's children. (10RT 2120, 2128, 2159-2162, 2165-2167, 2169, 2177, 2186, 2198-2199, 2217-2218; 11RT 2227.)

Later that evening, the detectives told Angel Ivan that "the victims" had identified him as one of the armed perpetrators of the robbery homicide. (10RT 2120-2121, 2128-2129, 2138; 11RT 2227-2229.) They told him several times that they could arrest him on the spot based on that identification. (10RT 2121-2122, 2129, 2132, 2165-2166.) They also told Angel Ivan that they had information that he was the driver of one of the getaway cars and asked him about his own involvement in the crimes. (10RT 2168, 2206-2209; 11RT 2228-2230.)

Angel Ivan had never been arrested or questioned by the police before. (10RT 2127, 2134.) He was very scared that he would be arrested for the crimes. (10RT 2121-2122, 2129, 2132.) Both Detectives Toms and Wolf agreed that one of them told Angel Ivan, "You're either a witness or you're a suspect." (10RT 2165, 2185, 2198, 2209.) Angel Ivan repeatedly insisted that the only information he had about the crimes came from his cousin, Jorge. (10RT 2177, 2186, 2202-2203; 11RT 2223-2224.) The detectives told him that

if he did not tell the "truth," they would arrest him as a suspect and his life would be ruined. (10RT 2165-2166; see also 10RT 2198-2201.) Even if he were only a witness, the officers told Angel Ivan that if did not tell the "truth," they would arrest him and put him in jail and the District Attorney could file charges against him. (10RT 2208; 11RT 2225-2226.)[9]

Again, Angel Ivan said that the "truth" was that the only information he knew had come from Jorge. (10RT 2201-2205, 2211-2215.) He also expressed fear that Jorge and his associates would harm him and his family if he cooperated with the police. (11RT 2226.) Finally, the officers threatened to bring his mother to the police station. (10RT 2177-2178, 2199-2201.) When they tried to call his mother from the interrogation room, Angel Ivan told them, "you don't need to go that far" and finally "changed his story." (10RT 2177-2179, 2202.)

Angel Ivan told the detectives that he had a number of conversations with his brother by phone while his brother was in Minnesota. (10RT 2184.) Mr. Morales told him during these conversations that he had been involved in a burglary and a robbery of a woman. (10RT 2181.) He said that two of their cousins were also involved. (10RT 2181-2182.) He reported that there were children at the house they had burglarized. (10RT 2182.) They took $600 and some chains from the occupants of the house. (10RT 2184.) Mr. Morales also told Angel Ivan that the woman recognized him by name although he did not know her. (10RT 2183-2184.)

Angel Ivan insisted that his brother only admitted to participating in the robbery, not to killing the victim. (10RT 2215-2216.) But, Detective Wolf

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[9] Although both Detective Toms and Angel Ivan testified that the officers threatened Angel Ivan with arrest during the interrogation, Detective Wolf denied it. (10RT 2165-2166, 2189-2190.)

testified, in the face of the officers' "persistence," Angel Ivan eventually agreed that Mr. Morales said he had killed the woman. (10RT 2216; see also 10RT 2183-2184.) After giving that statement, Angel Ivan was – in Detective Wolf's words – finally "allowed to go home" around midnight, nearly seven hours after the interrogation began. (10RT 2191; see also 10RT 2147.)[10]

b. The Surreptitiously Recorded "Pretext" Telephone Conversation between Mr. Morales and his Mother

From June through July of 2001, San Bernardino County Sheriff's detectives were in contact with Mr. Morales's mother about their investigation. (11RT 2321-2323, 2345, 2363, 2416-2417.) Detectives Toms and Wolf convinced Mrs. Sanchez to make a "pretext" call to Mr. Morales on July 13, 2001 while Detective Wolf listened in and recorded the conversation. (11RT 2319-2321, 2337, 2354-2359, 2368, 2374-2375.)

Neither Detective Wolf nor Mrs. Sanchez testified to the substance of the conversation. (See 11RT 2309-2310, 2374-2375, 2384-2385.) Instead, the prosecution presented a transcript of that conversation to the jury, which was originally in Spanish but transcribed and translated into English for the jury. (Exhibits 107 & 108; 10RT 2112-2113.) The transcript itself totaled 24 pages

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[10] Angel Ivan initially told the officers that Jorge had told him that Mr. Morales was "involved in a robbery and a rape of a woman." (10RT 2179-2180.) However, after Detective Wolf pressed Angel Ivan to relay only the statements Mr. Morales actually made to him by having him "role-play" with him, there was no further mention of a "rape" or other sexual crime. (10RT 2180-2185, 2217, 2224.) No sexual offense was charged against Mr. Morales nor was the jury instructed on a felony-murder theory premised on a sexual crime or a sexual crime as the target offense of the charged burglary. While the prosecution did allege an attempted rape felony-murder special circumstance, it was dismissed pursuant to Penal Code section 995 due to insufficient preliminary hearing evidence to hold Mr. Morales to answer to it. (27CT 7597.)

and denoted 134 instances in which the conversation was designated as "unintelligible." (29CT 8308-8332 [Ex. 108].) The conversation covered a wide variety of topics, including but not limited to the crimes themselves. In the intelligible segments of the recording, Mr. Morales did make statements that admitted to participation in the burglaries and the robberies.

Mr. Morales told his mother that the "the guy that took us" had told him and the others that the house was a front for "cooking" and selling drugs, where they could steal large amounts of cash from drug sales. (29CT 8319-8320.) Mr. Morales only realized later that they had burglarized the wrong house; the man they were targeting had two houses and the house they had burglarized was where his mistress – the victim – lived, not where the man and his wife sold drugs. (29CT 8319-8321.) He insisted that he had never been at a store or market before the crimes. (29CT 8317.) Mr. Morales also told his mother that there were "about six of us" who burglarized the victim's house, he and his accomplices had traveled to the property by taxi, there were three children in the house, and there was another house on the property that they also burglarized. (29CT 8323-8325.) Mr. Morales reported that the victim died from "a shot" (29CT 8317-8313) and that the "woman" recognized him, although he did not know her (29CT 8310). Mr. Morales did not identify any of the other participants or attribute any particular act to one participant or another. His mother repeatedly asked him to identify the other men who participated in the crimes. (29CT 8311-8312, 8325.) However, Mr. Morales insisted that he and his mother "don't know them, they're from Los Angeles." (29CT 8311, 8325.)

Otherwise, the prosecution relied on isolated words taken from significantly unintelligible passages of the recording to argue that Mr. Morales was the actual killer. Those words were part of Mr. Morales's answers to questions posed by his mother that were often ambiguous, compound, or

significantly unintelligible. For instance, Mrs. Sanchez asked her son, "you did that or where you there at the time or what[?]" to which Mr. Morales replied, "Yes it was me." (29CT 8310-8311.) However, there was no preceding discussion to explain whether "that" referred to the felonious course of conduct as a whole or whether it referred to the actual shooting. Similarly, given the compound nature of Mrs. Sanchez's question, it was unclear whether Mr. Morales was admitting that he "did that *or*" whether he was admitting that he was "there at the time." In another passage both preceding and following unintelligible questions and answers, Mrs. Sanchez did ask Mr. Morales, "where did you shoot the lady?" to which Mr. Morales replied "I think the heart." (29CT 8325-8326.) However, throughout the conversation, Mrs. Sanchez used the phrases "you" and "you guys" interchangeably and therefore it was unclear whether Mr. Morales's answers were in the first person plural or the first person singular.[11]

c. Xiomara Escobar's Testimony about Mr. Morales's Admissions

At the time of the crimes, Mr. Morales and Xiomara Escobar, his girlfriend of about two years and the mother of his daughter, were living together in San Bernardino. (11RT 2244-2246.) Ms. Escobar was originally charged as a codefendant in this case for being an accessory after the fact to murder and had prior convictions for burglary and theft. (11RT 2273; 3CT 591-595, 639-644, 663-667.) She was arrested in Minnesota with Mr. Morales and extradited to California. (11RT 2292-2295.) She was interrogated by

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[11] Mr. Morales quotes from the transcript at length in Argument III, *post.*

police in both California and Minnesota, but denied any knowledge of Mr. Morales's commission of the charged crimes. (11RT 2293, 2295-2297.)

In California, Ms. Escobar appeared as Mr. Morales's codefendant throughout the pretrial proceedings, including the preliminary hearing. Based on the information from these hearings, she agreed she "could kind of put the story together" about the accusations against Mr. Morales. (11RT 2296, 2298.) Mr. Morales's mother also told her that Mr. Morales was being accused not only of the underlying felonies but also of the actual killing. (11RT 2291, 2301.)

After she was held to answer following the preliminary hearing, Ms. Escobar finally changed her story and implicated Mr. Morales when the police impressed upon her that she could be sentenced to 15 to 50 years in prison and lose her five children forever. (11RT 2299.) Almost a year after she and Mr. Morales were arrested, Ms. Escobar entered into a bargain in which she agreed to testify against Mr. Morales and plead guilty to an accessory charge that carried only a maximum penalty of three years (not 15 to 50) in exchange for the prosecution's promise to recommend leniency, which she understood would "probably" result in her having to serve only some jail time. (11RT 2273-2277, 2299; 3SCT 707-711; Ex. 111.)[12]

Ms. Escobar also agreed to testify against Mr. Morales and change her story after her brother, Javier Ever Flores, was identified as one of the participants in the burglaries and robberies. (8RT 1566-1567, 1569-1570; 11RT 2281-2282.) In fact, she admitted that her brother was living with them

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[12] Although the prosecution elicited from Ms. Escobar that the plea bargain was not dependent on a conviction (10RT 2277-2278), Ms. Escobar's sentencing was repeatedly continued for nearly three years until after Mr. Morales was convicted and sentenced to death (see 2SCT 326-361). On May 27, 2005, she was granted probation. (1 SCT 154-162.)

at the time of the crimes and regularly brought guns to the house and stored them there. (11RT 2281-2282, 2302.) "Kiki" Lujan and Jorge Morales also stored guns at the house, including handguns and a rifle. (11RT 2272.) Before her brother moved in with them, there had never been any guns in their house. (11RT 2302-2303.) Her brother had given Mr. Morales a handgun about a week or two before the crimes. (11RT 2272-2273, 2281-2282.)

According to Ms. Escobar's trial testimony, on June 9, 2001, she, Mr. Morales, and several other people were at a barbecue at her sister's home. (11RT 2248.) She overheard him speaking to someone on the telephone about burglarizing a house where there was supposed to be a lot of money and discussing how easy the crime would be to commit. (11RT 2248-2251.) About 15 to 20 minutes later, several men, including Enrique "Kiki" Lujan, a man named Ivan Aleman, and other men whom she did not know, arrived by taxi and a second car. (11RT 2249-2250.) The men were at the house for about 15 to 20 minutes before they all left with Mr. Morales at about 3:00 p.m. in the taxi and a second car she did not describe. (11RT 2251.)[13]

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[13] Ms. Escobar's testimony that Mr. Morales left the barbecue with his accomplices in a taxi was consistent with Mr. Morales's recorded admission to his mother. (29CT 8323-8325.) Also in both admissions, Mr. Morales insisted that he was never at a store or market before the crimes. (11RT 2297; 29CT 8317.) According to both admissions, the men had targeted the house for the burglary before they set out. (29CT 8319-8321; 11RT 2248-2251.) This evidence was inconsistent with the various and contradictory accounts of the children that the burglars happened upon the family at the store and followed them around there before following them home in a green Mustang or green car. (See footnote 8, *ante*.) Indeed, according to his recorded admissions, Mr. Morales did not even know that a family occupied the house targeted for the burglary. (29CT 8319-8321.) There was no evidence that law enforcement ever connected a green Mustang or green car to Mr. Morales or any of the other identified participants in the burglary. The children's testimony that the men demanded to know the location of their "step-father's" money and "stuff" along with the evidence that a substantial amount of jewelry, money, and other

Mr. Morales did not come home that night. (11RT 2251.) That evening, Mr. Morales called Ms. Escobar; he was crying and saying he had done "something real bad." (11RT 2253.) Ms. Escobar, who was pregnant at the time with their daughter, told Mr. Morales to come home because she was in labor. (11RT 2253.) He came home and took her to the hospital, where she gave birth to their daughter on the morning of June 11. (11RT 2253-2254; see also 11RT 2247.) On their way home from the hospital, Mr. Morales began crying again and told Ms. Escobar that he had done something "very serious" and was involved in an "ugly problem." (11RT 2254-2255.) He told her that he had been "involved in a robbery" but did not say anything about killing anyone. (11RT 2254-2256.) Nevertheless, Ms. Escobar suspected that someone had been killed given how upset Mr. Morales was over the incident. (11RT 2300-2301.) At some point, he also identified at least two of the other participants as "Kiki" Lujan and "the guy that drove the taxi." (11RT 2301-2302.) Ms. Escobar did not implicate her brother.

After they returned home, Mr. Morales drove Ms. Escobar's car to Minnesota, where she and her five children eventually joined him. (11RT 2255, 2262, 2280, 2290.) In Minnesota, Ms. Escobar overheard Mr. Morales speaking with his mother on the phone about a woman being shot and killed. (11RT 2262-2264.) Ms. Escobar claimed that Mr. Morales eventually admitted to killing the victim. She provided conflicting accounts regarding that admission, however.

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personal valuables were left in the house tended to corroborate Mr. Morales's admission that the plan was to steal drugs and large sums of cash from drug proceeds at the house, as opposed to an impulsive plan to steal personal valuables from a mother and her children that the men happened upon at a market.

At one point, Ms. Escobar claimed that Mr. Morales never admitted to killing the victim directly but simply said he had "done it." (11RT 2297, 2302.) At another, she agreed with the prosecutor that he admitted that he had killed the victim because she recognized him. (11RT 2264.) Similarly, at one point, she claimed that Mr. Morales made the admission to her for the first time when they were in the back of the police car after their arrest. (11RT 2263-2264, 2297.) At another, she claimed that Mr. Morales told her he had "done it" for the first time in their Minnesota bedroom after his phone conversation with his mother. (11RT 2264.)

2. The Count Seven Charge of Robbing Margarita Martinez on May 13, 2001

The jurors acquitted Mr. Morales of the count seven robbery charge. (27CT 7774, 7785.) Nevertheless, because some of the evidence offered in support of that charge came from the same sources as evidence offered in support of the charges of which Mr. Morales was convicted, a brief summary thereof is relevant to illuminate how the jurors resolved or may have resolved some of the facts in convicting Mr. Morales.

On May 31, 2001, a group of masked Honduran men committed a home invasion robbery at the Ontario residence of Margarita "Mago" Martinez, looking for drugs and money. (11RT 2388-2395; 12RT 2495-2502, 2516.) Xiomara Escobar knew Ms. Martinez. (11RT 2257.) Ms. Martinez never identified Mr. Morales as one of the robbers. (See 11RT 2400.) One of the occupants of Ms. Martinez's house at the time of the robbery, Elda Esperanza Velazquez, also knew Xiomara and Mr. Morales, as well as the murder victim. (12RT 2502-2503, 2505-2508, 2518-2519.) Although Ms. Velazquez did identify other participants from lineups after the crime, including Jorge Morales and possibly Javier Ever Flores, she did not identify Mr. Morales by name or

from a lineup. (12RT 2502-2504, 2512-2514, 2521-2522, 2540; see also 11RT 2282-2283.) According to police, when she viewed photographic lineups after the crimes, she became visibly upset and began crying when she saw Javier Ever Flores's photograph and told officers that she thought he was possibly involved in Ms. Torres-Lopez's murder. (12RT 2539-2540, 2521.) She had no reaction to Mr. Morales's photograph and failed to identify him. (12RT 2540-2542.) It was only after she heard that Mr. Morales was involved in the death of Ms. Torres-Lopez and for the first time at trial that Ms. Velazquez purported to identify him by name as one of the men who robbed her; however, she was unable to identify him in the courtroom even after the prosecution specially pointed him out. (12RT 2502-2504.) After a recess, the prosecution had Mr. Morales stand up in the courtroom and she identified him at that time. (12RT 2506-2507.)

In his guilt phase summation and as he did with respect to the other eyewitness testimony, the prosecutor told the jurors that they did not need to believe Ms. Velazquez's identification in order to convict Mr. Morales of the robbery charged in count seven because of the overwhelming evidence that he "confessed" to that crime. (12RT 2678.) Specifically, according to the prosecution, Mr. Morales confessed to robbing "Mago" in his recorded conversation with his mother. (12RT 2677-2678.) According to the intelligible segments of the conversation about this incident, "Mago" or "Margo" called the police but "they don't have any proof to say I was the problem because she never saw my face or anything . . . ." (29CT 8321-8322.) Like the other excerpted parts of the conversation, the discussion concerning this incident was interspersed with "unintelligible" matter. The intelligible segments on their own, and taken out of the context of the unintelligible segments, appeared to incriminate Mr. Morales in that robbery, as the prosecutor argued. (12RT 2677-2678.) In addition, Xiomara Escobar testified that Mr. Morales confessed

to the robbery of "Mago" at the same time that he confessed to the other charged crimes. (12RT 2556-2557.)

C. The Penalty Phase

1. Aggravation

In March of 1999, Mr. Morales pleaded guilty to violating Penal Code section 273.5, subdivision (a) (corporal injury on cohabitant), resulting in a felony conviction and grant of probation. (3SCT 732-738.)

Brianda testified to the trauma of the crimes and her mother's murder on her and her siblings' lives. (13RT 2969-2974.) She, the victim's mother, boyfriend, and sister, all testified to the victim's good and loving character and the impact of their loss. (13RT 2952-2968, 2922-2937, 2938-2950.)

Otherwise, the prosecution's case for aggravation turned entirely on the evidence introduced at the guilt phase.

2. Mitigation

Mr. Morales grew up in Honduras with three brothers, Angel Ivan, Manfredo, and Samuel. (14RT 3025-3027, 3043-3044; 29CT 8365.) His family was very poor and lived in a one-room house. (14RT 3045-3047; 29CT 8377, 8390-8392.) They barely had enough money to eat. (29CT 8377.) After Angel Ivan was born, the family sent Mr. Morales alone away to live with grandparents, who had died by the time of trial. (14RT 3025-3028, 3050; 29CT 8369; see also 11RT 2314-2315.) Mr. Morales eventually returned home when he was about four to six years old. (14RT 3028, 3052; 29CT 8369, 8393.)

Throughout his childhood, Mr. Morales and his brothers witnessed the extreme violence his father inflicted on his mother. (14RT 3029, 3045, 3049, 3053.) The abuse commonly included brutal beatings with weapons like a wet

rope, a belt, brick, and a fan belt, as well as his fists that he used to punch her in the face. (14RT 3029-3030, 3045, 3048-3049, 3053-3054.) Indeed, Mrs. Sanchez was physically abused by her husband even when she was pregnant with Mr. Morales. (14RT 3048-3049.)

Mr. Morales was described by his family members and in school records from Honduras as a very good, respectful, and well-behaved boy. (29CT 8368, 8396, 8400, 8405, 8411-8413, 8418, 8420, 8422, 8424, 8426, 8428.) Nevertheless, both his mother and his father beat him as a young child both with weapons, like a tree branch, a fan belt, a rope, and even "part of a machete," and with their hands, beating him with such force as to leave marks on his small body. (14RT 3032-3035, 3053-3054.) Mrs. Sanchez admitted that she would inflict astonishingly brutal punishment on her young son for normal childhood behavior. (14RT 3054-3055.) She described one incident in which she shoved his nine-year-old head into a wall for "mess[ing] up" his clothes. (14RT 3054.) Angel Ivan, whom his mother also abused, remembered wishing that she would die. (14RT 3035.)

Mrs. Sanchez abandoned her children for good when Mr. Morales was eight or nine years old, leaving him and his brothers in the care of their abusive and impoverished father to move to the United States. (14RT 3031, 3035, 3056; 29CT 8371-8373, 8396-8397, 8406.) Mr. Morales's father told him and his brothers that his mother had abandoned them. (14RT 3031.) Mr. Morales's only contact with her thereafter was the occasional phone call in which he would beg to come and live with her. (14RT 3056; see also 14RT 3031.) Her abandonment was very hard on Mr. Morales; his father described it as a "desperate situation." (29CT 8373-8374; see also 14RT 3056-3057.)

The family was so poor that they could not afford to educate their children. (29CT 8371.) Mr. Morales was forced to leave school at a very young age and sent to work in the fields, gathering coconuts that fell from the

palm trees, for eight to nine hours a day. (29CT 8371; 14RT 3038-3039; 29CT 8384-8395.)

Mr. Morales eventually escaped to the United States himself when he was around 18. (29CT 8376-8377, 8399.) He first stayed with relatives in Texas before eventually finding his mother in California and relocating here. (11RT 2317.) Shortly after he fled to the United States, his brother, Samuel, was murdered in Honduras. (29CT 8379, 8410.)

A clinical forensic psychologist, Dr. Michael Kania, testified generally about the life-long impact that poverty, both witnessing and experiencing violent abuse, and childhood abandonment by a caregiver can have on children. The kind of instability and abuse Mr. Morales experienced prevents children from developing normally and are well-recognized factors putting children at risk for violent and criminal behavior in adulthood. (14RT 3085-3093.) "For some reason," the results of studies reveal that the pernicious effects of physical abuse by mothers (as opposed to fathers) on boys (as opposed to girls) are particularly profound and likely to result in antisocial adult behavior. (14RT 3092-3093.) The more "risk factors" that exist – such as one or more incidents of abandonment or other attachment disturbance, witnessing or suffering physical violence, physical violence inflicted by mothers on their young sons, particularly combined with a lack of education – the more vulnerable the child becomes to violence and criminality in adulthood. (14RT 3086, 3089-3096.) Responding to stressful situations with violence becomes learned behavior that is more automatic and unthinking than conscious. (14RT 3089-3090, 3099-3101.)

Finally, Dr. Anthony Casas, a former warden and assistant director of the California Department of Corrections, testified to the harsh living conditions of a prisoner sentenced to life without the possibility of parole.

(13RT 2986-2999.) Far from letting a person "off," a life without parole sentence is still an extraordinarily severe punishment.

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PRETRIAL DEFECTS IN THE PROCEEDINGS

I.

THE SPECIAL CIRCUMSTANCE FINDINGS AND DEATH JUDGMENT MUST BE REVERSED BECAUSE THE STATE DEPRIVED MR. MORALES OF HIS RIGHT TO THE ASSISTANCE OF CAPITAL DEFENSE COUNSEL AT THE CRITICAL PRETRIAL AND PLEA-BARGAINING STAGES IN VIOLATON OF THE SIXTH AMENDMENT AND ARTICLE I, SECTION 14 OF THE CALIFORNIA CONSTITUTION; ALTERNATIVELY, THE MATTER MUST BE REMANDED TO THE TRIAL COURT TO CONDUCT A NEW HEARING INTO MR. MORALES'S CLAIM THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA-BARGAINING STAGE

A. Overview

Mr. Morales was briefly represented by retained counsel between the filing of the original complaint and the filing of the amended complaint which added special circumstance allegations and exposed Mr. Morales to the death penalty. (3CT 591-594, 612, 639-645; 2SCT 314, 318.) Retained counsel moved to withdraw because the filing of special circumstance allegations exceeded the scope of his retainer agreement with Mr. Morales and moved on Mr. Morales's behalf for the appointment of counsel in his stead. (3CT 649; 1RT 19-20; 2SCT 318.)

As discussed in Parts B-5 and C-1, *post*, Rule 1413 of the San Bernardino County Rules of Court, which had long been in effect at the time substitute counsel was appointed, mandates the appointment of the Public Defender whenever special circumstances are alleged. (Hereafter "Local Rule

1413.")[14] If the Public Defender declares a conflict of interest and/or is relieved from representing a person charged with special circumstances for other good cause, Local Rule 1413 mandates that the court "shall" appoint counsel from the "Capital/LWOP Case Panel." (*Ibid.*) The "Capital/LWOP" panel consists of counsel the superior court has specially qualified to represent defendants charged with death-eligible offenses. (*Ibid.*; 28CT 7958 [declaration of Appointed Counsel Administrator]; see also § 987, subds. (c)-(e).)

Despite the unambiguous mandate of the rule, the superior court in this case neither appointed the Public Defender nor made any inquiry of the Public Defender or his representatives to obtain his "declar[ation of] a conflict of interest." (Local Rule 1413.) Instead, the court erroneously assumed that this was a "conflict matter." (1RT 20.) Because the Public Defender did not have a conflict of interest, the failure to appoint him violated Local Rule 1413, which has the force of a procedural statute, as well as other state law under which the Public Defender enjoys priority of appointment. (§ 987.2, subds. (d) & (e); Gov. Code, § 27706.)

Similarly, despite the unambiguous mandate of the rule requiring the appointment of counsel from the "Capital/LWOP Case Panel" in the event the Public Defender is unavailable, the court appointed private counsel, Wayne Rozenberg, who was not a member of that panel. The court's appointment of Mr. Rozenberg was made off the record, without any discussion on the record regarding his suitability or availability for appointment, including whether or

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[14] Local Rule 1413 was enacted in 1997 as Local Rule 1323. It has since been renumbered several times without substantive change. At the time of the appointment of counsel in this case in 2002, the rule was numbered 1450.3. It was renumbered as Rule 1419, effective January 1, 2004. It has since been renumbered as Rule 1413.

not he was a member of the "Capital/LWOP Case Panel," his qualifications or availability for appointment, or any particular reason for appointing him. Mr. Rozenberg was appointed counsel of record for a year and a half, from before the preliminary hearing through failed plea negotiations that would have avoided the death penalty.

As set forth in Part B-5, *post*, Local Rule 1413 effectuates death-eligible defendants' state and federal constitutional rights to the effective assistance of counsel as measured under prevailing professional norms in capital cases. These rights apply immediately upon the filing of death-eligibility special circumstance allegations, unless and until the prosecution formally opts not to seek the death penalty. Without an assurance from the prosecution that it will not seek the death penalty, California law and prevailing professional norms across the country dictate that counsel immediately begin preparation for a capital murder trial – including investigation, client consultation, and the filing of pretrial motions to exclude or admit evidence – which requires specialized legal knowledge, training, and experience. Early capital trial preparation is essential to explore and advise the defendant concerning plea negotiations that can avoid the death penalty and to attempt to persuade the prosecution to forgo seeking that penalty for a death-eligible offense. This case illustrates why adherence to Local Rule 1413 is essential to guarantee these rights.

Mr. Rozenberg was counsel of record for a year and a half. As set forth in Part C, *post*, at the end of Mr. Rozenberg's tenure, the prosecution made a plea bargain offer to accept Mr. Morales's guilty pleas to offenses carrying a 50-year-to-life term. If Mr. Morales refused the offer, the prosecutor would – in accord with the District Attorney's internal policy – submit the case to the District Attorney's Death Penalty Review Board for death penalty evaluation and approval and, once approved, seek that penalty at trial. The offer was an "exploding" one that would expire with prejudice if not accepted that day.

Before consulting with Mr. Morales over the offer, Mr. Rozenberg announced in open court that he was unqualified and incompetent to handle a capital case. In his view, that simply meant that he could not represent Mr. Morales at a capital murder *trial* and therefore would have to withdraw if Mr. Morales rejected the offer and the prosecution sought the death penalty at trial. The court and the prosecutor credited Mr. Rozenberg's self-avowal of incompetency. Nevertheless, the plea bargaining proceedings continued without interruption with Mr. Rozenberg as Mr. Morales's only counsel. Mr. Morales was permitted to consult with Mr. Rozenberg about the offer for 30 minutes off the record, after which he rejected it.

At the next scheduled hearing, the prosecutor announced that he would, as promised, seek the death penalty at trial. He effectively joined in Mr. Rozenberg's request to withdraw on the ground of incompetency and immediately offered the Public Defender as substitute counsel. The court granted both motions, relieving Mr. Rozenberg and substituting the Public Defender. However, the court's ruling came too late.

From the moment the prosecution charged Mr. Morales with a death-eligible offense and through the capital plea negotiations, Mr. Morales was entitled to the effective assistance of counsel as measured under prevailing professional norms in capital cases. If – as Mr. Rozenberg declared and the court ruled –Mr. Rozenberg was unqualified and incompetent to defend Mr. Morales against a potential death sentence at trial, he was necessarily unqualified and incompetent to assist Mr. Morales in making a fully informed choice between the plea bargain offer and facing a potential death sentence at trial. The court's failure to remove Mr. Rozenberg earlier upon his credited self-avowal of incompetency, together with its initial violation of Local Rule 1413, deprived Mr. Morales of his state and federal constitutional rights to the

effective assistance of counsel, as measured under prevailing professional norms in capital cases, at the critical pretrial and plea-bargaining stages.

Furthermore, as set forth in Part D, *post*, the very result that Local Rule 1413 is intended to avoid was realized in this case. As a direct and foreseeable result of the court's violation of that rule, the record of Mr. Rozenberg's actual pretrial performance demonstrates that he failed entirely to function as Mr. Morales's capital defense counsel during the critical period between the filing of the death-eligibility special circumstance allegations and the prosecution's discretionary decision to actually seek the death penalty at trial. Put another way, he failed to function as the prosecution's adversary and Mr. Morales's advocate with respect to the capital nature of this prosecution. Because the state was "directly responsible" for the impairment of Mr. Morales's right to the effective assistance of counsel, prejudice must be presumed. (*Strickland v. Washington* (1984) 466 U.S. 668, 694-695 ["*Strickland*"]; accord, e.g., *Hill v. Lockhart* (1985) 474 U.S. 52, 57.)

Finally, as set forth in Part E, *post*, if this Court determines that the two-part "*Strickland* test" for ineffective assistance of counsel governs Mr. Morales's claim, the matter must be remanded back to the trial court. The court did hear and resolve Mr. Morales's request for relief from the deprivation of his right to the effective assistance of counsel during the pretrial and plea-bargaining stages under that test. In so doing, however, the court misapplied that test, made factual findings based on conjecture and not actual evidence, and refused to hear Mr. Morales's testimony and other evidence bearing directly on the factual issues it purported to resolve. The court having exercised its discretion to hear and resolve Mr. Morales's claim, Mr. Morales was entitled to a fair hearing wherein the court correctly applied the law, based its factual findings on the evidence, and allowed Mr. Morales a reasonable opportunity to present relevant evidence to support his claim. Barring outright

reversal on the ground that the state constructively deprived Mr. Morales of the assistance of counsel to which he was entitled at the critical pretrial and plea-bargaining stages, the matter must be remanded for the trial court to conduct a new hearing on the question of whether Mr. Morales was deprived of the effective assistance of counsel under the *Strickland* standard.

B. Criminal Defendants are Entitled to the Assistance of Counsel During the Critical Pretrial and Plea-Bargaining Stages, the Actual or Constructive Denial of Which is Presumptively Prejudicial

1. The State and Federal Constitutional Rights to Counsel Guarantee the Right to the Effective Assistance of Counsel

The Sixth Amendment right to counsel attaches at or after the initiation of adversary criminal proceedings. (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-689; U.S. Const., Amend. VI; see also Cal. Const., art. I, § 14.) Once the right to counsel attaches, that right extends to every "critical stage" in the adversarial criminal proceeding. (See, e.g., *Bell v. Cone* (2002) 535 U.S. 685, 695-696; *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25 ["*Cronic*"].) This right is at the apex of the pyramid of protections afforded criminal defendants: attorneys "in criminal cases are necessities, not luxuries." (*Cronic, supra*, at p. 653 & fn.7, quoting *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) Further, "'the right to counsel is the right to the *effective* assistance of counsel'" or the right to "'counsel acting in the role of an advocate'" for the defendant and adversary to the prosecution. (*Cronic, supra*, 466 U.S. at pp. 654-656, italics added.)

2. Counsel's Assistance Must be Objectively Reasonable as Measured Under "Prevailing Professional Norms"

In *Strickland v. Washington, supra*, 466 U.S. 668, the Supreme Court addressed the standard to apply when judging "a contention that the

Constitution requires a criminal judgment be overturned because of the actual ineffective assistance of counsel." (466 U.S. at p. 684.) The Court first held that "the defendant must show that counsel's representation fell below an objective standard of reasonableness," as judged by "prevailing professional norms." (*Id.* at pp. 687-691, citing *McMann v. Richardson* (1970) 397 U.S. 759, 770; *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59.)

Apart from certain fundamental duties the Supreme Court identified in *Strickland*, as well as in other cases, as essential to the assistance required under the Sixth Amendment in every criminal case or in every capital case, the *Strickland* Court recognized that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*Strickland, supra,* 466 U.S. at p. 688.) Hence, "[t]he proper measure of attorney performance [is] reasonableness under prevailing professional norms" at the time the representation took place. (*Strickland, supra*, at p. 688; accord, e.g., *Padilla v. Kentucky* (2010) 559 U.S. 356, 366-367, and authorities cited therein; *In re Thomas* (2006) 37 Cal.4th 1249, 1257-1258, 1262, and authorities cited therein.) In determining prevailing professional norms, courts look to a variety of sources, including judicial decisions (see, e.g., *Missouri v. Frye* (2012) 566 U.S. 134, 145-146; *Wiggins v. Smith* (2003) 539 U.S. 510, 521-523; *Kimmelman v. Morrison* (1986) 477 U.S. 365, 385) and local "standard practice" (*In re Thomas*, *supra*, 37 Cal.4th at p. 1262). Although not necessarily "inexorable commands" in every case (*Bobby v. Van Hook* (2009) 558 U.S. 4, 17), since *Strickland*, the Supreme Court has consistently turned to the American Bar Association's Standards and Guidelines and other restatements of professional standards as "guides to determining what is reasonable'" or effective assistance under prevailing professional norms for

purposes of the Sixth Amendment. (*Strickland, supra,* 466 U.S. at pp. 688-689; accord, *Wiggins v. Smith, supra,* at pp. 524-525 [referring to ABA Guidelines as reflecting prevailing professional norms in capital case]; *Rompilla v. Beard* (2005) 545 U.S. 374, 387-388 & fn. 7 [ABA Guidelines and ABA standards]; *Williams v. Taylor* (2000) 529 U.S. 362, 396 [ABA standards]; see also *In re Thomas, supra,* 37 Cal.4th at p. 1262.)[15]

3. The Test for Determining Whether Counsel's Deficient Performance Violates the Sixth Amendment Depends on the Nature and/or Extent of the Impairment of the Right to the Effective Assistance of Counsel

The *Strickland* Court next addressed whether counsel's unreasonable or deficient performance alone violates the Sixth Amendment. When counsel is at fault for discrete acts or omissions that are unreasonable under *Strickland*'s first prong, or "a deficiency in attorney performance," the answer is no. (*Strickland, supra*, 466 U.S. at p. 693.) Under these circumstances, in order to establish a Sixth Amendment violation, the defendant bears the burden of demonstrating a "reasonable probability" that, but for counsel's deficient performance, the outcome would have been different. (*Id*. at p. 694.) The Court explained that the rationale for imposing the burden of proving "prejudice" on the defendant under these circumstances is based on two considerations.

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[15] In this case, the professional norms that prevailed at the time of Mr. Rozenberg's tenure, from April 2002 through October 2003, are the appropriate measure of the assistance he provided. (See *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. Feb. 10, 2003), reprinted in 31 Hofstra L.Rev. 913 [hereafter "2003 ABA Guidelines"]; *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) [hereafter "1989 ABA Guidelines"]; *ABA Standards for Criminal Justice: Prosecution and Defense Function* (3d ed. 1993) [hereafter "1993 ABA Standards"].)

First, counsel has satisfied the minimum requirements to provide assistance at the critical stages of the proceedings but for specific errors, the impact of which on the outcome can be readily measured. (*Strickland*, *supra*, 466 U.S. at p. 693; accord, e.g., *Bell v. Cone*, *supra*, 535 U.S. at p. 697 [*Strickland* prejudice requirement applied where defendant did not claim that "his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points"]; *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 482-483 [same – to " 'specific errors of counsel'" or "mere 'attorney error'"].) Second, because "[t]he government is not responsible for, and hence not able to prevent, [the] attorney errors," it is reasonable to allocate the burden of proving prejudice on the defendant. (*Strickland*, *supra*, 466 U.S. at pp. 694-695; accord, e.g., *Hill v. Lockhart* (1985) 474 U.S. 52, 57 [two-part *Strickland* test applies to challenges to attorney's deficient performance concerning advice regarding entry of plea when "'[t]he government is not responsible for, and hence not able to prevent, attorney error'" in advice].)

In contrast, the *Strickland* Court recognized:

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and *because the prosecution is directly responsible, easy for the government to prevent*.

(*Strickland*, *supra*, 466 U.S. at p. 692, italics added.)

In its companion decision in *United States v. Cronic*, *supra*, 466 U.S. 648, the Court elaborated on this presumed-prejudice exception, recognizing that it applies in two general contexts. The first is the state or government's

actual denial of counsel for the accused at a critical stage of the proceedings. (*Id*. at p. 659.) The second is where counsel is present but fails to function as the defendant's advocate and the prosecution's adversary at a critical stage of the proceedings – or a stage that holds "significant consequences for the accused" (*Bell v. Cone*, *supra*, 535 U.S. at p. 696) – which justifies a presumption of prejudice and amounts to a "constructive" denial of counsel in violation of the Sixth Amendment. (*Cronic*, *supra*, at p. 659.)

The Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel . . . was prevented [by state or government action] from assisting the accused during a critical stage in the proceedings." (*Cronic*, *supra*, 466 U.S. at p. 659, fn. 25, citing, inter alia, *Geders v. United States* (1976) 425 U.S. 80, 91 [order preventing defendant from consulting his counsel during a 17–hour overnight recess], *Herring v. New York* (1975) 422 U.S. 853, 865 [order denying counsel the opportunity to make closing argument].) Similarly, "although counsel is available to assist the accused" at a critical stage, the state may place him or her in circumstances in which "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small" that it is appropriate to presume prejudice and find a constructive denial of counsel. (*Cronic*, *supra*, at pp. 659-660, citing *Powell v. Alabama* (1932) 287 U.S. 45, 53 [discussed in Part 4, *post*]; see, e.g., *United States v. Morris* (6th Cir. 2006) 470 F.3d 596, 598-602 [government action that prevented counsel from adequately consulting with defendant, investigating, or providing advice concerning sentencing exposure under law with which counsel was unfamiliar before plea-bargaining stage constructively deprived defendant of assistance of counsel].)

State action that impairs the right to counsel for purposes of presuming prejudice also includes the court's failure to discharge obligations intended to prevent counsel's deficient performance, with the direct and foreseeable result

counsel's deficient performance at a critical stage. (*Strickland, supra*, 466 U.S. at p. 692, citing *Cuyler v. Sullivan* (1980) 446 U.S. 335, 345-350 [where court fails to discharge its obligation to inquire into potential for joint representation conflict to adversely affect counsel's performance and take appropriate action, court is deemed responsible if counsel's actual performance is impaired and prejudice is therefore presumed]; see also *Holloway v. Arkansas* (1978) 435 U.S. 475, 488-490 [where counsel declares disabling conflict of interest and court fails to relieve him or take other appropriate action, prejudice is presumed without inquiry into actual performance or impact on proceedings].) Put simply, "If the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted." (*Walberg v. Israel* (7th Cir. 1985) 766 F.2d 1071, 1076.) Under such circumstances, it is inappropriate to place the burden of proving prejudice on the defendant and instead appropriate to presume prejudice precisely *because* the "the prosecution [or the state] is directly responsible" and able "to prevent" the impairment of counsel. (*Strickland, supra*, 466 U.S. at p. 692, citing *Cronic, supra*, 466 U.S. at p. 659 & fn. 25; accord, *Bell v. Cone*, *supra*, 535 U.S. at p. 696, fn. 3 [affirming that Court has appropriately presumed prejudice in cases where "government action" has impaired counsel's ability to assist at various critical stages].)

Even in the absence of state or government fault, there may be circumstances in which "the performance of counsel is so inadequate that, in effect, no assistance of counsel is provided." (*Cronic*, *supra*, 466 U.S. at p. 654, fn. 11.) The defendant is constructively denied the assistance of effective counsel when there has been a complete "breakdown of the adversarial process," or when counsel "fails to subject the prosecution's case to meaningful adversarial testing," at a critical stage. (*Id.* at p. 659; accord, *Bell v. Cone*, *supra*, 535 U.S. at p. 697.) It is appropriate to presume prejudice under these

circumstances because the "high probability of prejudice" or corresponding "difficulty of proving that prejudice" (*Mickens v. Taylor* (2002) 535 U.S. 162, 175) are such that "the cost of litigating their effect in a particular case is unjustified" (*Cronic*, *supra*, at p. 659).

Importantly, the duty to subject the state's case to "adversarial testing," or the "adversarial process," is not limited to the trial itself: the Sixth Amendment's "protections are not designed simply to protect the trial . . . ." (*Lafler v. Cooper* (2012) 566 U.S. 156, 164-165.) The "adversarial process" for Sixth Amendment purposes begins "at or after the time adversary judicial proceedings have been initiated against" the defendant (*Kirby v. Illinois*, *supra*, 406 U.S. at p. 688) and continues through every critical stage of the proceedings that hold significant consequences to the defendant and in which he or she is entitled to the assistance of counsel acting as the prosecution's adversary and as the defendant's advocate. (See, e.g., *Powell v. Alabama*, *supra*, 287 U.S. at p. 57 [post-indictment pretrial stage]; *Lafler v. Cooper*, *supra*, at p. 169 [plea-bargaining stage]; *Missouri v. Frye*, *supra*, 566 U.S. at pp. 143-145 [same]; *White v. Maryland* (1963) 373 U.S. 59, 60 [preliminary hearings]; *Hill v. Lockhart* (1985) 474 U.S. 52, 57 [entry of guilty plea]; *Mempa v. Rhay* (1967) 389 U.S. 128, 134 [sentencing]; *Evitts v. Lucey* (1985) 469 U.S. 387 [appeal].)

For example, "[b]ecause the Sixth Amendment's guarantee of effective assistance of counsel applies at the plea-bargaining stage, *Missouri v. Frye*, [*supra*], constructive denial of counsel can occur at that phase just as it can at trial." (*United States v. Velazquez* (9th Cir. 2017) 855 F.3d 1021, 1034-1036; accord, *United States v. Morris*, *supra*, 470 F.3d at pp. 598-602 [constructive denial at plea-bargaining stage].) Therefore, even absent state action, when counsel fails to function under prevailing professional norms as the defendant's advocate and the prosecution's adversary at a critical stage that holds

significant legal consequences for the defendant, the defendant is constructively deprived of his Sixth Amendment right to the effective assistance of counsel. (See, e.g., *Mitchell v. Mason* (6th Cir. 2003) 325 F.3d 732, 744 [constructive denial under *Cronic* and *Cone* where "no effort to consult with (the defendant) was made" by counsel during seven-month period of pretrial appointment, apart from brief meetings in "bullpen" on three occasions totaling approximately six minutes, warranting presumption of prejudice and reversal of judgment following trial notwithstanding active assistance provided at trial]; *Appel v. Horn* (3d Cir. 2001) 250 F.3d 203, 206-207, 213-218 [constructive denial under *Cronic* during 10-day period between counsel's appointment and court's acceptance of defendant's waiver of right to counsel, during which time counsel did not investigate or participate in proceedings to determine defendant's competency to waive right to counsel; reversal per se of defendant's guilty plea, entered after waiver of counsel taken, required]; *Childress v. Johnson* (5th Cir. 1997) 103 F.3d 1221, 1231 & fn. 14 [constructive denial under *Cronic* where defense counsel appeared in court only "to stand by, listen to the judge, and respond to any contingencies that might arise," taking "no responsibility for advocating the defendant's interests at a critical stage of the" guilty plea hearing]; *Tucker v. Day* (5th Cir. 1992) 969 F.2d 155, 159 [constructive denial where counsel failed to advocate for defendant at noncapital sentencing].)

4. The Pretrial and Plea-Bargaining Phases are not Only "Critical Stages," but "Perhaps the Most Critical Period" of Criminal Proceedings for Purposes of the Sixth Amendment's Guarantee to the Assistance of Counsel

In its seminal decision in *Powell v. Alabama, supra*, 287 U.S. 45, the Supreme Court identified the pretrial stage, from arraignment to trial or plea, as "perhaps the most critical period" of criminal proceedings, particularly in

capital cases. (*Id.* at p. 57.) In that case, the Supreme Court held that the trial court's failure to appoint an attorney to represent the defendants until the day trial commenced deprived the defendants of the assistance of counsel to which they were constitutionally entitled. The provision of counsel for the trial itself did not vitiate or remedy the violation; as the Court explained: "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, *when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense*, although they were as much entitled to such aid during that period as at the trial itself." (*Id*. at p. 57, italics added.) The Court held that the denial of counsel's assistance pretrial demanded reversal per se of the defendants' ensuing convictions, without inquiry into the conduct of counsel's actual trial performance or its effect. (*Id*. at p. 58.)

Since *Powell*, the Supreme Court has consistently recognized the importance of the Sixth Amendment's guarantee to the assistance of counsel at the critical pretrial stage. (See, e.g., *Lafler v. Cooper*, *supra*, 566 U.S. at p. 165, and authorities cited therein; *Missouri v. Frye*, *supra*, 566 U.S. at pp. 140-141, and authorities cited therein; *Maine v. Moulton* (1985) 474 U.S. 159, 170.) Indeed, the Supreme Court has emphasized that *the very "core of th[e] right* [to counsel] has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense'" – assistance that occurs in the pretrial stage. (*Kansas v. Ventris* (2009) 556 U.S. 586, 590-591, quoting *Michigan v. Harvey* (1990) 494 U.S. 344, 348, italics added; see also, e.g., *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1202-1203 [pretrial investigation and preparation are "keys to effective representation"]; *Mitchell v. Mason*, *supra*, 325 F.3d at p. 743 [pretrial consultation is indispensable to assistance demanded by Sixth Amendment];

Goodwin v. Balkcom (11th Cir. 1982) 684 F.2d 794, 805 ["At the heart of effective representation is the independent duty to investigate and prepare"]; *In re Jones* (1996) 13 Cal.4th 552, 564-567.)

With respect to these core functions, defense counsel's "first duty" in any criminal case is to investigate the relevant facts and the applicable law. (*People v. Ledesma* (1987) 43 Cal. 3d 171, 222; accord, e.g., *Strickland, supra,* 466 U.S. at p. 691 [counsel has "the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"]; *Kimmelman v. Morrison, supra,* 477 U.S. at pp. 384-385 [counsel has duty to conduct "investigation into the prosecution's case and into various defense strategies" and to know the applicable law]; *In re Saunders* (1970) 2 Cal.3d 1033, 1041.) As this Court has recognized, under long standing "[p]revailing norms of practice" in every criminal case (*Strickland*, 466 U.S. at p. 688), "'it is the duty of the lawyer to conduct a *prompt* investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in case of conviction.' (1 ABA Stds. for Crim. Justice (2d ed.1982 supp.) std. 4–4.1.)" (*In re Thomas*, *supra,* 37 Cal.4th at p. 1262, italics added; accord, e.g., *Rompilla v. Beard*, *supra,* 545 U.S. at p. 387 [relying on same standard as reflection of prevailing professional norms at time of 1985 representation]; see also ABA Standards for Crim. Justice (3d ed. 1993), Standard 4-3.6 & Commentary ["counsel must also promptly undertake whatever legal research is necessary to assure vindication of his or her client's rights"].)

As to counsel's fundamental pretrial obligation to consult with the defendant, it serves two functions essential to providing the assistance demanded by the Sixth Amendment. First, "[t]he Supreme Court has . . . recognized that without pretrial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." (*Mitchell v. Mason, supra,* 325

F.3d at pp. 743-744, citing *Strickland*, *supra*, 466 U.S. at p. 691 and *Geders v. United States* (1976) 425 U.S. 80, 88-91.) "The client is usually the lawyer's primary source of information for an effective defense." (1991 ABA Standards, Std. 4-3.2, Commentary; 1993 ABA Standards, std. 4-3.2(a) ["Interviewing the Client . . . As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused . . . [and] probe for all legally relevant information . . . ."].) Second, client consultation is necessary to discharge counsel's duty to "seek to establish a relationship of trust and confidence with the accused . . . . (1993 ABA Standards, std. 4-3.1(a).) As this Court has recognized, "the attorney client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) "When clients and lawyers lack rapport and mutual confidence the quality of representation may be so undermined as to render it an empty formality." (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 613.) Indeed, at least since 1980, prevailing professional norms in criminal cases recognize that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." (ABA Standards, Std. 4-2.9 (2d ed. 1980), Commentary; accord 1993 ABA Standards, Std. 4-3.1, Commentary; see also, e.g., *Linton v. Perini* (6th Cir. 1981) 656 F.2d 207, 212 ["[b]asic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel"].) State action that prevents counsel from consulting with the client during a critical stage, or counsel's own failure to consult with the client before trial, amounts to a constructive denial of counsel. (See, e.g., *Mitchell v. Mason*, *supra*, 325 F.3d at p. 744 [defense counsel's own negligence for seven-month period before trial];

Geders v. United States, *supra*, 425 U.S. at p. 91 [order preventing consultation during overnight trial recess]; *Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 583-584 [trial court's appointment of substitute counsel immediately before trial commenced, which precluded meaningful client consultation until recess on third day of trial]; *United States v. Morris*, *supra*, 470 F.3d at pp. 598-602 [court's appointment of counsel five days before plea bargain proceeding commenced, which allowed only one consultation with client in bullpen before plea bargain proceeding]; see also *Commonwealth v. Brooks* (PA 2003) 839 A.2d 245, 337-339 [trial counsel's failure to meet with client before trial in a death penalty case was inherently prejudicial and demanded reversal].)

Pretrial investigation and client consultation are essential not only to prepare for trial but also to discharge counsel's obligation to provide effective assistance in plea negotiations. In this regard, both this Court and the United States Supreme Court have "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (*Padilla v. Kentucky*, *supra*, 559 U.S. at p. 373; accord, *Missouri v. Frye*, *supra*, 566 U.S. at pp. 140-141, 144-149; *Lafler v. Cooper*, *supra*, 566 U.S. at pp. 162-164; *Von Moltke v. Gillies* (1948) 332 U.S. 708, 721-722; *In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

Indeed, the United States Supreme Court has recognized that the reality of the modern criminal justice system makes the plea negotiation stage arguably the most important stage of, and counsel's assistance therein his or her most important role in, the adversarial process:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because *ours* "*is for the most part a system of pleas, not a system of trials*," it is insufficient simply to point to the guarantee of a fair trial as a backstop

> that inoculates any errors in the pretrial process. 'To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. *It is not some adjunct to the criminal justice system; it is the criminal justice system.'* [Citations.] *In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant*."

(*Missouri v. Frye, supra*, 566 U.S. at pp. 143-144, italics added; accord, *Lafler v. Cooper, supra,* 566 U.S. at pp. 162-170.)

Given the importance of the plea bargaining process to the disposition of a case, the Sixth Amendment imposes on counsel the same duties to conduct reasonable investigation, consult with the client, and know the law in order to provide constitutionally adequate assistance at the plea-bargaining stage that he or she must discharge to provide assistance at trial. The Sixth Amendment imposes a "critical obligation o[n] counsel to advise the client of 'the advantages and disadvantages of a plea agreement.' (*Libretti v. United States* (1995) 516 U.S. 29, 50-51.)" (*Padilla v. Kentucky, supra*, 559 U.S. at p. 370.) Counsel's advice must enable the defendant to "make an informed and conscious choice between accepting the prosecution's offer and going to trial" (*Wofford v. Wainwright* (11th Cir. 1984) 748 F.2d 1505, 1508; accord, e.g., *United States v. Day* (3d Cir. 1992) 969 F.2d 39, 42 ["a defendant has the right to make a reasonably informed decision whether to accept a plea offer"].)

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." (*Von Moltke v. Gillies, supra,* 332 U.S. at p. 721; accord, e.g., *In re Hawley* (1967) 67 Cal.2d 824, 828 ["at the time of determining whether to accept [a plea] bargain the accused is entitled to the advice and assistance of counsel, based upon investigation of the law and the facts"].) As this Court has explained, "[a]lthough [the decision as to whether to plead guilty pursuant to a

plea bargain is a decision ultimately made by the client], it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain. The defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, *and of the risks and probable outcome of trial*." (*In re Alvernaz, supra*, 2 Cal.4th at p. 933, italics added.)

Hence, long-standing professional norms dictate that defense counsel offer the defendant his or her professional opinion about the alternatives that serve the defendant's best interests, informed by his or her expertise in the law and adequate investigation into the facts. (See, e.g., *People v. Maguire* (1998) 67 Cal.App.4th 1022, 1029; *Bradbury v. Wainwright* (5th Cir. 1981) 658 F.2d 1083, 1087; *Boria v. Keane* (2nd Cir. 1996) 99 F.3d 492, 496-497.) Defense counsel must be able to "provide [the defendant] with a reasonably accurate description of" the relevant law (*Ostrander v. Green* (4th Cir. 1995) 46 F.3d 347, 355, overruled on another ground in *O'Dell v. Netherland* (4th Cir. 1996) 95 F.3d 1214, 1222), "inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed" (*Purdy v. United States* (2nd Cir. 2000) 208 F.3d 41, 45), and advise the defendant concerning "all defenses, explore the factual bases for defenses (*In re Neely* (1993) 6 Cal.4th 901, 919) and the applicable law (*People v. Plager* (1987) 196 Cal.App.3d 1537, 1543)" (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1029). (Accord, e.g., *Moore v. Bryant* (7th Cir. 2003) 348 F.3d 238, 241, and authorities cited therein ["A reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis" to the client to make an informed decision over whether or not to plead guilty or go to trial]; *In re Vargas* (2000) 83 Cal.App.4th 1125, 1133, 1139-1140; *Heard v. Addison* (10th Cir. 2013) 728 F.3d 1170, 1179-1182 & fn. 4, and authorities cited therein;

United States v. Day (3d Cir. 1992) 969 F.2d 39, 43; *Jones v. Cunningham* (4th Cir. 1963) 313 F.2d 347, 353; *Smith v. United States* (6th Cir. 2003) 348 F.3d 545, 553.) Counsel has a duty to advise the defendant of the "*probable* outcome" based on "all aspects" of the case. (1993 ABA Standards, Std. 4-5.1(a), italics added; accord, *In re Alvernaz, supra*, 2 Cal.4th at p. 933.) The decision over whether or not to "plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices." (1993 ABA Standards, St. 4-5.1, Commentary.) "Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial." (1993 ABA Standards, *supra*, Standard 4-6.1, subd. (b); accord, e.g., *Woodard v. Collins* (5th Cir. 1990) 898 F.2d 1027, 1029; see also 1989 ABA Guidelines, Guideline 11.4.2 & Commentary [in capital cases, counsel has duty to investigate both guilt and penalty phases before recommending that a guilty plea be entered].)

From the duty to advise the defendant of the "probable outcome of alternative choices," it necessarily follows that simply informing the defendant of the *potential* maximum sentence or other consequence to which he or she will be exposed under either alternative is not always enough. (*In re Vargas, supra*, 83 Cal.App.4th at pp. 1139-1140; see also *In re Resendiz* (2001) 25 Cal.4th 230, 240-241, 248.) In *In re Resendiz, supra*, for instance, the defendant received standard statutory admonitions that conviction upon his guilty plea exposed him to potential immigration consequences, including deportation. (25 Cal.4th at pp. 236-237.) The defendant subsequently moved to withdraw his plea on the ground that his attorney's advice that he would have ""no problems with immigration'" was deficient. (*Ibid*.) The state argued that the defendant could not challenge his attorney's performance and advice

because the immigration consequences he actually suffered – the initiation of deportation proceedings – fell within the range of consequences of which he was explicitly admonished. (*Id.* at pp. 240-241.) This Court flatly rejected that argument, relying on the fundamental principle that "[t]he defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and *probable outcome* of trial" versus the plea. (*In re Resendiz, supra*, at p. 240, quoting from *In re Alvernaz*, 2 Cal.4th at p. 933, italics added.) Consistent with that principle, the Court held, the fact that the defendant was accurately advised by the court, as well as in the standard form he completed and signed before entering the plea, regarding the *potential* immigration consequences to which his conviction exposed him did not mean that he "received effective assistance of counsel in *evaluating or responding* to such advisement." (*In re Resendiz, supra*, at pp. 240-241, italics added.)

The same logic applies when the defendant is accurately informed – whether by the court, counsel, or both – of the "*maximum potential* sentence" to which the defendant will be exposed if he rejects a plea offer and is convicted following trial. (*In re Vargas, supra*, 83 Cal.App.4th at p. 1140, italics in original.) "[T]he maximum potential sentence [is] but *one* factor which [must be] discussed with" the defendant in deciding whether to accept or reject a plea bargain offer:

> To meet the required standard of professionalism with regard to whether a plea agreement should be accepted, [defense counsel is] obligated to provide [her client] with competent advice as to all aspects of the case, including a candid evaluation of the case. This should . . . include[] an accurate discussion about the rules and regulations affecting the determination of the maximum and minimum periods of confinement, the average length of confinement served by prisoners on like charges, as well as all relevant circumstances. (*In re Alvernaz, supra*, 2 Cal.4th at pp. 936 & 937, fn. 6; *People v. Hunt* (1985) 174 Cal.App.3d 95,

104; ABA Stds. for Crim. Justice (3d ed. 1993) The Defense Function, ch. 4, std. 4-5.1 & com.)

(*In re Vargas*, *supra*, 83 Cal.App.4th at pp. 1139-1140, original italics.)

"In many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term." (*People v. Mancebo* (2002) 27 Cal.4th 735, 752.) Where the sentence exposure is a critical component of the decision over whether to enter a plea or go to trial, and understanding and conveying information concerning the sentencing risks entailed under both alternatives requires specialized legal knowledge, "familiarity with the structure and basic content of the" relevant sentencing laws is "a *necessity* for counsel who seek to give effective representation." (*United States v. Day* (3d Cir. 1992) 969 F.2d 39, 43, italics added; accord, e.g., *Smith v. United States*, *supra*, 348 F.3d at p. 553; *United States v. Rodriguez* (DC Cir. 2012) 676 F.3d 183, 191.) "The criminal defendant has a right to this information [concerning the risks of sentence exposure], just as he is entitled to the benefit of his attorney's superior experience and training in the criminal law." (*Smith v. United States*, *supra*, at p. 553; see also *United States v. Morris*, *supra*, 470 F.3d at pp. 598-602 [constructive denial of counsel at critical plea bargain stage where, inter alia, counsel who was unfamiliar with federal sentencing law was required to assist in plea bargaining proceedings held five days after her appointment, leaving her unable to become familiar with the sentencing law, assess the evidence, or meaningfully consult with the defendant].) "More than a 'warm body' is required to satisfy the Sixth Amendment." (*United States v. Smith* (4th Cir. 2011) 640 F.3d 580, 590; accord, *United States ex rel Thomas v. O'Leary* (7th Cir. 1988) 856 F.2d 1011, 1015 ["The Sixth Amendment right to counsel, of course, guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings. . . ."].)

5. Prevailing Professional Norms of Pretrial Assistance Are Different and More Expansive When Counsel Undertakes Representation of a Death-Eligible Defendant

"Effective representation today requires counsel experienced in the particular field of law involved. . . . [T]o acquire this experience and maintain an acceptable level of competency in a given field of the law demands continuous study, application and practice." (*Luke v. County of Los Angeles* (1969) 269 Cal.App.2d 495, 499.) Nowhere is this principle truer than in capital cases.

a. Counsel's Expanded Pretrial Duties in Capital Cases

At the outset, under California law and prevailing professional norms, a "death penalty" or "capital" case for purposes of effective representation at all critical stages of the proceedings, including the pretrial stage, includes any case in which the statutory maximum for the charge is the death penalty. (1989 Guidelines, Guideline 11.3; 2003 ABA Guidelines, Guideline 1.1(B) & 10.2 & Commentary, *supra*, 31 Hofstra L. Rev. at pp. 919, 993-995[16]; *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1007; *Sand v. Superior Court* (1984) 34 Cal.3d 567, 571-575; see also *In re Sterling-Suarez* (1st Cir. 2002) 306 F.3d 1170, 1172-1175 [same under federal statute entitling defendants to appointment of specially qualified capital counsel].) Because special circumstances carry a maximum penalty of death in California, they create a "capital" case for the purposes of the assistance of counsel unless and until the prosecution gives notice of its intent *not* to seek that penalty. (*Gardner v. Superior Court*, *supra*, at p. 1007; accord, *Sand v. Superior Court*, *supra*, 34

[16] Hereafter, Mr. Morales's pinpoint citations to the 2003 version of the ABA Guidelines shall be to volume 31 of the Hofstra Law Review, where they are reprinted.

Cal.3d at pp. 571-575.) "Put otherwise, when the district attorney has filed a complaint alleging a charge of murder and special circumstances, the district attorney has effectively—albeit impliedly—'elected' to seek the death penalty, an 'election' in force unless and until the district attorney stipulates otherwise." (*Gardner v. Superior Court, supra,* at p. 1012; see also, e.g., *In re Sterling-Suarez, supra,* at pp. 1172-1175 [same under federal statute, even before prosecution formally certifies case for death pursuant to federal rule].)

"[D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from counsel in ordinary criminal cases." (1989 ABA Guidelines, Guideline 1.1, Commentary; accord, e.g., *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430-432; *People v. Bigelow* (1984) 37 Cal.3d 731, 743 & fn. 7; *Sand v. Superior Court, supra,* 34 Cal.3d at pp. 573-575.) In cases in which the defendant has been charged with a death-eligible offense, "[d]efense counsel should comply with the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." (1993 ABA Standards, Standard 4-1.2, subd. (c).)

As previously noted, the United States Supreme Court has consistently relied on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases as guides in determining "prevailing professional norms," or "reasonable" attorney performance. (See, e.g., *Wiggins v. Smith, supra,* 539 U.S. at pp. 524-525; *Rompilla v. Beard, supra,* 545 U.S. at p. 387 & fn. 7.) The professional norms reflected in those guidelines "apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial . . . and any connected litigation." (2003 Guidelines, Guideline 1.1(B), *supra,* at p. 919; accord, 1989 Guidelines, Guideline 11.3; 2003 Guidelines, Guideline 10.2, *supra,* at p. 919.) This is so because "[c]ounsel appointed in any case in

which the death penalty is a possible punishment should, *even if the prosecutor has not indicated that the death penalty will be sought*, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a noncapital one." (1989 Guidelines, Guideline 11.3, italics added; accord, 2003 ABA Guidelines, Guideline 10.2, Commentary, *supra*, at p. 995 ["In accordance with Guideline 1.1 (B), once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought"].) California law, which provides for ancillary defense services in capital cases immediately upon the filing of special circumstance allegations that remain available unless and until the prosecution announces its intention not to seek the death penalty, reflects this norm. (*Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at pp. 1007, 1010 [Penal Code section 987.9, authorizing funds for investigators, experts, and others in preparation for "the trial of a capital case"]; *Abernathy v. Superior Court* (2007) 157 Cal.App.4th 642, 646, 649-650 [Penal Code section 190.9, providing for daily transcripts in capital cases]; *Sand v. Superior Court*, *supra*, 34 Cal.3d at pp. 571-575.)

The core function of counsel in capital cases remains pretrial preparation, including investigation and client consultation. However, the duties to investigate and consult are different and more expansive when counsel is representing a client who faces a potential death sentence.

With respect to pretrial legal "investigation," both this Court and the United States Supreme Court have recognized that the substantive law governing the penalty or sentencing phase of capital trials, as well as jury selection in capital cases, differs substantially from that which governs noncapital sentencing proceedings and jury selection in noncapital cases. (*People v. Danielson* (1992) 3 Cal.4th 691, 720, and authorities cited therein ["capital case sentencing involves wholly different considerations than ordinary

criminal sentencing" and the "distinction" results in "differences in treatment" in capital versus noncapital cases under the law]; accord, e.g., *People v. Burney* (2009) 47 Cal.4th 203, 267, 268, and authorities cited therein; *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243; *People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1232-1235; see also *People v. Cash* (2002) 28 Cal.4th 703, 719-723 and authorities cited therein [jury selection based on "death qualification" criteria].) As Justice Stevens has observed, the United States Supreme "Court's death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master." (*Murray v. Giarratano* (1989) 492 U.S. 1, 28, dis. opn. of Stevens, J.; accord, *Mc-Farland v. Scott* (1994) 512 U.S. 849, 855 [noting the uniqueness and complexity of death penalty jurisprudence]; Vick D, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences* (1995) 43 Buffalo L. Rev. 329, 357-359 ["*Poorhouse Justice*] ["defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law"].) The "body of law affecting death penalty cases" is "complex" and "rapidly developing." (1989 ABA Guidelines, Guideline 2.1, Commentary; accord, *id*., Guideline 8.1, Commentary.) "At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation." (1989 Guidelines, Guideline 1.1 & Commentary.) Further, "[c]ounsel should be familiar with the procedures for capital sentencing in the given jurisdiction, with the prosecutor's practice in preparing for and presenting the prosecution's case at the sentencing phase, and with the case law and rules regarding what information may be presented to the sentencing entity or

entities, and how that information may be presented." (1989 Guidelines, Guideline 11.8.2.)

With respect to pretrial factual investigation, counsel has an "obligation to conduct a thorough investigation of the defendant's background" and be able to "present[ ] and explain[ ] the significance of all the available [mitigating] evidence." (*Williams v. Taylor*, *supra*, 529 U.S. at pp. 393, 396, 399 [trial counsel rendered ineffective assistance by failing to conduct adequate mitigation investigation]; accord, *Rompilla v. Beard*, *supra,* 545 U.S. at pp. 390-391; *Wiggins v. Smith*, *supra,* 539 U.S. at pp. 523-525; *Porter v. McCollum* (2009) 558 U.S. 30, 39 [counsel's obligation in this regard was "unquestioned" under prevailing professional norms at the time of trial]; see also *Sears v. Upton* (2001) 561 U.S. 945, 1032 [noting it was "unsurprising" that the state postconviction court found "the cursory nature of counsel's investigation into mitigation evidence — 'limited to one day or less, talking to witnesses selected by [the defendant's] mother' — was 'on its face . . . constitutionally inadequate'"]; 1989 ABA Guidelines, Guideline 11.4.1 & Commentary; 2003 ABA Guidelines, Guideline 10.7 & Commentary, *supra*, at pp. 1015-1027.) Mitigation investigation "requires extensive and generally unparalleled investigation into personal and family history," as well as school, medical and psychological records. (2003 ABA Guidelines, Guideline 10.7, *supra,* at p. 1033; 1989 ABA Guidelines, Guideline 11.4.1.) Furthermore, counsel is "bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." (*Rompilla v. Beard*, *supra*, 545 U.S. at p. 388; *id.* at pp. 387-399 & fn. 7 [citing 1989 and 2003 ABA Guidelines to same effect as reflection of prevailing professional norms]; see also 2003 ABA Guidelines, Commentary to Guideline 1.1, *supra*, at pp. 926-927 [counsel must

assume that the prosecution will seek to introduce prior convictions and uncharged criminal conduct and investigate accordingly].)

"Prompt" investigation is always important in any criminal case. (ABA Standards, Standard 4-4.1.) In capital cases, the "investigation and planning for *both phases* must begin *immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty*." (2003 ABA Guidelines, Guideline 1.1, Commentary, *supra*, at pp. 925-926, italics added; accord, 1989 Guidelines, Guidelines 11.3, 11.4.1, 11.8.3.) This is so, as the ABA Guidelines explain, because:

> [c]omprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence [and/or] to persuade the prosecution to forego seeking a death sentence at trial . . . . [Fn.] At the same time, counsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress. [Fn.]

(2003 ABA Guidelines, Guideline 1.1, Commentary *supra*, at pp. 925-926; accord, 1989 ABA Guidelines 11.3, 11.4.1, 11.8.3.)

Consistent with the duty to promptly or immediately commence preparation of the case, "an interview of the client should be conducted within 24 hours of counsel's entry into the case" absent "exceptional circumstances" and thereafter counsel should "maintain close contact with the client" and engage in "continuing interactive dialogue with the client concerning all matters that reasonably might be expected to have a material impact on the case . . . ." (2003 ABA Guidelines, Guideline 10.5, *supra*, at p. 1005; accord, 1989 ABA Guidelines, Guidelines 11.4.1(D)(2) & 11.4.2 & Commentaries.) Indeed, the importance of open communication between attorney and client is never more important than in cases in which the defendant faces a potential death sentence given both the severity of that penalty and the sensitivity of the topics that must be explored in order to discharge counsel's duty to investigate

potential mitigating evidence from the outset. Hence, the ABA Guidelines direct:

> Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsels advice on important matters such as whether to testify and the advisability of a plea. [Fn.] *Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not--with good reason--trust a lawyer who visits only a few times before trial*, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.

(2003 ABA Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008, italics added; accord, 1989 Guidelines, Guidelines 11.4.1, 11.4.2 11.6.1 & 11.8.3 & Commentaries; see also 2003 ABA Guidelines, Guideline 10.9.1, *supra*, at p. 1039 [counsel must "enter into a continuing dialogue with the client about the content of any [pursued or offered plea] agreement, including advantages, disadvantages, and potential consequences"].)

As the ABA Guidelines reflect – and repeatedly stress – the need for "immediate" capital case investigation and preparation is "critically important" when the prosecution has not yet decided whether to actually seek the death penalty after charging a death-eligible offense. (2003 ABA Guidelines, Guideline 1.1, Commentary, at p. 921; accord, 1989 Guidelines, Guideline 1.1, Commentary, and Guidelines 11.3, 11.4.1, 11.8.3.) "Early investigation is key for both sides – even before the preliminary hearing – including defense investigation into mitigating factors." (*Gardner v. Superior Court*, *supra*, 185

Cal.App.4th at pp. 1015-1016.) Such preparation is indispensable both to determining whether and how to pursue plea negotiations that might avoid the prosecution's pursuit of the death penalty and/or to attempting to convince the prosecution to forgo seeking the death penalty at trial. (*Id.* at p. 1016.)

"The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase offenses, decisions about the need for expert evaluations, motions practice, and *plea negotiations*." (2003 ABA Guidelines, Guideline 10.7 at p. 1023, italics added.) Counsel have a duty to pursue favorable plea negotiations but before doing so "counsel does need to have thoroughly examined the quality of the prosecution's case and investigated possible first-phase defenses and mitigation." (2003 ABA Guidelines, Guideline 10.9.1 & Commentary, at p. 1040; *id.*, Guideline 10.9.2 & Commentary, *supra*, at pp. 1046-1046; see also 1989 ABA Guidelines 11.4.1, Commentary [duty to investigate both phases before recommending that a guilty plea be taken or sought]; *id.* Guidelines, 11.6.1, 11.6.2, 11.6.3.) "In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well." (2003 ABA Guidelines, Guideline 10.9.1, Commentary, *supra*, at p. 1042.) "The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel's advice regarding the advisability of a plea. The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible. . . . [A] client will, quite reasonably, not accept counsel's advice about the case if the attorney has failed to conduct a meaningful investigation" or endeavored to create a relationship of trust and confidence. (2003 ABA Guidelines, Guideline 10.9.2, Commentary, *supra*, at pp. 1045-1046; *id*. Guideline 10.5 & Commentary, *supra*, 1005-1010; 1989 Guidelines 10.4.2, 11.4.1 & Commentary.) "The entire defense team must work *from the outset of the case* with the client and

others close to him to lay the groundwork for acceptance of a reasonable resolution." (2003 ABA Guidelines, Guideline 10.9.1, Commentary, *supra*, at p. 1043, italics added.)

Moreover, "[c]apital defense often includes an attempt to convince the district attorney to forego the death penalty, often accomplished by presenting mitigation evidence as early as possible . . . ." (*Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at p. 1016.) As the ABA Guidelines state, "effective advocacy by defense counsel during this period" – before the prosecution has decided whether or not to actually seek the death penalty for a death-eligible charge – "may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible – *well before the prosecution has actually determined that the death penalty will be sought*." (2003 ABA Guidelines, Guideline 1.1, Commentary, *supra*, at p. 921, italics added; accord, 1989 Guidelines, Guideline 11.3 & Commentary to Guideline 11.4; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524 ["'The lawyer also has a substantial and important role to perform in raising mitigating factors" *both pretrial* and at trial]; *State v. Ziegler* (Ala. Crim. App. 2014) 159 So.3d 96, 105 [counsel's failure to attempt to persuade prosecution not to seek death penalty during eight-month period before decision was made fell below objective standards of reasonableness].)

b. The Importance of Uniquely Qualified Counsel in Capital Cases under Prevailing Professional Norms and California Law

Because a sentence of death is "qualitatively different from a sentence of imprisonment, however long" (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305) "[e]very task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing

execution" (*Poorhouse Justice, supra,* 43 Buff. L.Rev. at p. 357). (Accord, e.g., 2003 ABA Guidelines, Guideline 1.1, Commentary, *supra*, at p. 923 [the responsibilities of capital defense counsel "are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master . . . ."]; 1989 ABA Guidelines, Guideline 1.1, Commentary.)

Given the significant differences between a noncapital and capital murder prosecution from the inception, and the prevailing professional norms for counsel in noncapital versus capital cases that govern from the moment of an attorney's entry into a death-eligible case, it is essential that counsel who is competent under prevailing professional norms in capital cases represent the defendant from the outset. It is well recognized that "because of the extraordinary complexity of capital cases, a significantly greater degree of skill and experience [is required] on the part of counsel [representing a defendant in a capital case] than is required in a noncapital case." (2003 ABA Guidelines, Guideline 1.1, Commentary, *supra,* at p. 921; accord, 1989 Guidelines, Guidelines 1.1, 2.1, 11.4, 11.8 & Commentaries.) "The evidence to be presented by the defense – indeed, the whole theory of the proceeding – at the sentencing phase stands outside normal criminal practice." (1989 ABA Guidelines, Guideline 11.8, Commentary.) Even "[e]xperienced criminal counsel familiar with sentencing practices in noncapital cases may not recognize the different form of advocacy required at a death penalty sentencing trial" or "the importance of developing meaningful sources of mitigation.'" (1989 Guidelines, Guidelines 11.4 & 11.8, Commentaries.) Indeed, this Court has recognized time and again that "capital case sentencing involves wholly different considerations than ordinary criminal sentencing" (*People v. Danielson, supra*, 3 Cal.4th at p. 720, and authorities cited therein) and hence "cannot readily be compared to ordinary sentencing" (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1235, and authorities cited therein).

At bottom, "[e]xperience has demonstrated that capital trials and appeals are extremely specialized and demanding and that the appointment of unqualified, inexperienced counsel can be very costly in terms of delay and expense." (1989 ABA Guidelines, Introduction.) Accordingly, since 1989 the ABA Guidelines have counseled that each jurisdiction adopt and implement plans to ensure representation in capital cases by counsel uniquely qualified to comply with prevailing professional norms in capital cases. (1989 ABA Guidelines, Guidelines 3.1, 4.1, 5.1(I) & Commentaries; 2003 ABA Guidelines, Guidelines 2.1, 3.1, 5.1, *supra,* at pp. 939-940, 944-946, 961-962.)

Consistent with these Guidelines and given the "unique demands of . . . representation in capital cases," California has adopted and follows extensive "procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal" and at trial in order "to ensure . . . competent representation." (*People v. Holt* (1997) 15 Cal.4th 619, 709; see also Cal. Rules of Court, rules 4.117 & 8.605 [minimum qualifications for trial counsel in capital cases];§§ 987, subd. (d), 987.9.) San Bernardino County in particular has enacted rules that reflect the need for uniquely qualified counsel whenever special circumstances are alleged.

In 1997, the San Bernardino County Superior Court enacted Local Rule 1413 governing the appointment of "Counsel in Death Penalty/LWOP Cases." That rule provides:

> The Public Defender of San Bernardino County shall represent all indigent persons charged with a capital or life-without-possibility-of-parole (LWOP) case. If the Public Defender declares a conflict of interest and/or is relieved from representing a person charge with a capital or LWOP case, then the Court shall appoint counsel from the "Capital/LWOP Case Panel." The Court and counsel shall adhere to the requirements and procedures of the Capital/LWOP Case Panel.
>
> The San Bernardino County Superior Court established a Capital/Life Without Parole (LWOP) Case Panel of qualified

> attorneys to be appointed to represent indigent defendants in Capital and LWOP cases. Every attorney who has permitted his or her name to be included on and to remain on the Capital Case Panel agrees to accept the appointment in Capital and/or LWOP cases according to the terms of the Fee Schedule Agreement for Capital/LWOP Case Appointments, in effect for cases appointed after September 1, 1997.

Local rules of court have the force of procedural statutes. (See *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 28-29, overruled on another ground in *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 540-543; accord, e.g., *O'Hare v. Superior Court* (1987) 43 Cal.3d 86, 88, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also Gov. Code, § 68070; Cal. Rules of Court, rule 10.613.) Local Rule 1413 is consistent with other features of California law and prevailing professional norms for counsel in capital cases across the country.

The requirement that the Public Defender be appointed unless he or she is unavailable is consistent with state statutes applicable in every criminal case in counties that have established a Public Defender Office. (§ 987.2, subds. (d) & (e); Gov. Code, § 27706; *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 863.) As under Local Rule 1413, when the Public Defender is unavailable, the court should appoint the alternate public defender – if the county has created one – or counsel from "a panel of attorneys" that "categorizes attorneys for panel placement on the basis of experience." (§ 987.2, subds. (c)-(e).)[17]

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[17] Local Rule 1413's focus on specially qualified capital counsel is also consistent with Rule 4.117 of the California Rules of Court, enacted on January 1, 2003. Rule 4.117 defines the "minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts" and provides for specialized appointment procedures in order to "promote adequate representation in death penalty cases" and "avoid

Local Rule 1413's creation of a single panel of capitally qualified counsel whenever special circumstances are alleged is also consistent with other features of California law, as well as professional norms as reflected in the ABA Guidelines, under which the filing of special circumstances creates a "capital" case for purposes of the assistance of counsel and therefore imposes attendant duties on counsel to begin immediate preparation as if the death penalty will be sought. Compliance with Local Rule 1413 also avoids the dangers ABA Guidelines have warned against: "Attorney error is often the result of systemic problems, not individual deficiency. [Fn.] The provision of counsel for indigent capital defendants is too frequently made through ad hoc appointment, a system inimical to effective representation. [Fn.] . . . . *[P]rivate counsel often discover too late that they have taken on a task for which they are unqualified* . . . ." (2003 ABA Guidelines, Guideline 1.1, Commentary, at pp. 938-939, italics added; accord, 1989 ABA Guidelines, Guideline 1.1, Commentary, fn. 27.)

C. The State Denied Mr. Morales the Effective Assistance of Counsel During the Critical Pretrial and Plea Negotiation Stages

1. The Superior Court Committed Two Violations of State Law by First Failing to Appoint the Public Defender and Second Appointing Unqualified Counsel to Represent Mr. Morales

On August 6, 2001, Mr. Morales was arraigned on the first complaint, which did not include any special circumstance allegations. (3CT 591-594, 612.) Without explanation on the record, and although the Public Defender was the appointed counsel on Mr. Morales's simultaneous probation violation prosecution, the arraignment judge appointed the "conflict panel" to represent

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unnecessary delay and expense by assisting the trial court in appointing qualified counsel."

him. (3CT 612; 1 SCT 241; see also 28CT 7905, fn. 19.) The "conflict panel" was appointed for only a matter of days before private counsel, Earl Carter, was retained to represent Mr. Morales on or about August 14, 2001. (2SCT 318; 1 SCT 241; see also 15RT 3356-3357.) Mr. Carter's representation was also brief, consisting entirely of obtaining continuances for the preliminary hearing. (1RT 2, 6, 8, 10, 12, 14, 17.)

On December 10, 2001, the prosecution amended the complaint to allege felony murder special circumstance allegations. (3CT 639-645.) Three months later, on March 25, 2002, Mr. Carter was permitted to withdraw on the ground that the filing of special circumstance allegations exceeded the scope of his retainer agreement. (3CT 649; 2RT 19-20; 2SCT 318; see also 2SCT 294-295; 15RT 3356-3357.)

On Mr. Morales's behalf, Mr. Carter's associate, Sean O'Connor, moved for the appointment of counsel in his stead, requesting that the court set the matter for "confirmation of counsel." (1RT 20.) The court inquired of Mr. O'Connor, "is this not a conflict matter?" Mr. O'Connor inexplicably replied, "that's right." (1RT 20.) The court scheduled a "confirmation of counsel" hearing for March 29, 2002. (1RT 20-21.)

That proceeding, however, was never held due to patent oversight. On March 29, 2002, Mr. O'Connor and the prosecutor appeared without Mr. Morales. The only reported proceeding on that date was as follows:

> THE COURT: Johnny Morales.
>
> MR. O'CONNOR: I think it was calendered [sic] in error. He [Mr. Morales] wasn't transported. It's on for a different date.
>
> MR. GALE: William Gale appearing for Mr. Young for the People.
>
> THE BAILIFF: The jail shows April 29th.
>
> MR. O'CONNOR: That's correct.
>
> THE COURT: Off calendar. Thank you.

(Discussions in the above-entitled matter were concluded.)

(1RT 23.) Thus, due to the court's and the parties' obvious mistake, there was no "confirmation of counsel" proceeding in which counsel was appointed on the record or the Public Defender declared whether or not he was available. Instead, at the next court session on April 11, 2002 (not April 29), private counsel Wayne Rozenberg appeared on Mr. Morales's behalf without explanation other than his statement, "I was appointed as counsel." (1RT 24.)

Because special circumstances were alleged against Mr. Morales, the appointment rules contained in Local Rule 1413 of the San Bernardino County Superior Court Rules applied and were binding on the court, Local Rule 1413 having the force of a procedural statute. (See *Mann v. Cracchiolo, supra*, 38 Cal.3d at pp. 28-29; accord, e.g., *O'Hare v. Superior Court, supra*, 43 Cal.3d at p. 88; see also Gov. Code, § 68070; Cal. Rules of Court, rule 10.613.) Despite the clear mandate of Local Rule 1413, the superior court did not appoint the Public Defender. Having mistakenly overlooked the "confirmation of counsel" proceeding, the court made no inquiry of the Public Defender or his representative concerning his availability or to obtain his "declar[ation of] a conflict of interest," as required under Local Rule 1413. Instead, the only oblique reference to the possibility of appointing the Public Defender was the court's expression of its assumption that this was a "conflict matter" and Mr. O'Connor's inexplicable confirmation that it was.[18] (1RT 20.)

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[18] The likely explanation for the judge's assumption that this "is a conflict matter" is that it was laboring under the misimpression that Mr. Carter and his associate, Sean O'Connor, were representing Mr. Morales as "conflict panel" counsel. When Mr. Carter's associate, Sean O'Connor, first appeared on Mr. Morales's behalf on August 14, 2001, it is clear from the court's remarks that it was laboring under that misimpression, which Mr. O'Connor inexplicably failed to correct. (1RT 1.) The clerk's minutes thereafter erroneously identified Mr. Carter as "conflict" counsel for all of the proceedings except the final proceeding at which they appeared on March 25,

In truth, the Public Defender was available and did not have a conflict of interest – a fact the court would have realized had it made any inquiry of the Public Defender or any attempt obtain his "declar[ation]" of a conflict. (See 3CT 748 & 2RT 147-151 [court's appointment of Public Defender on October 16, 2003]; 28CT 7905, fn. 19, 7922-7923 & fn. 2 [Public Defender's representation that he never had a conflict of interest and should have been appointed at the outset].) The court's failure to appoint the Public Defender when the special circumstances were alleged violated Local Rule 1413. Since that rule has the force of a procedural statute, the failure violated state law as well. (*McMann v. Cracchilo, supra,* 38 Cal.3d at pp. 28-29; *O'Hare v. Superior Court, supra*, 43 Cal.3d at p. 88; Gov. Code, § 68070; Cal. Rules of Court, rule 10.613.) It also violated the separate state law prescribing that the Public Defender enjoys priority of appointment in any felony case. (*Charlton v. Superior Court, supra*, 93 Cal.App.3d at p. 863; Gov. Code, § 27706; § 987.2, subds. (d) & (e).)

If (and only if) the Public Defender is unavailable due to a conflict or other good cause, Local Rule 1413 further mandates that the court "*shall* appoint counsel from the 'Capital/LWOP Case Panel.'" (Local Rule 1413, italics added; see also § 987.2, subds. (c)-(e).) As previously stated, this mandatory appointment of counsel uniquely qualified to represent defendants facing a potential death sentence, whenever special circumstances are alleged, reflects prevailing professional norms under which counsel must immediately commence preparing for trial as if the death penalty will be sought.

2002. Those errors appeared in the original record but were corrected on appellate counsel's motion. (2SCT 251-253 [motion to correct]; see, e.g., 1 SCT 5-6, 8, 10-11, 13-14, 24-25, 27, 29.)

Mr. Rozenberg, however, was not a member of the "Capital/LWOP Case Panel." (29CT 8245 [Mr. Rozenberg's declaration]; 28CT 7958 [declaration of Appointed Counsel Administrator].) The court's appointment of Mr. Rozenberg was made off the record, without any discussion on the record regarding his suitability or availability for appointment, including whether or not he was a member of the "Capital/LWOP Case Panel," or any particular reason for appointing him. The only available record concerning the circumstances of Mr. Rozenberg's appointment was his own declaration, later obtained and submitted by the prosecution to the trial court. (29CT 8245-8247; see also 2SCT 316 [declaration of Mr. Rozenberg obtained and filed postjudgment]; 15RT 3350 [postjudgment declaration ordered as part of appellate record].) According to Mr. Rozenberg's sworn declaration, he had simply received a telephone call from the superior court clerk informing him that he had been appointed to represent Mr. Morales and directing him to appear at the next court date. (29CT 8245.) He informed the clerk at the time that he was not a member of any appointment panel. (*Ibid.*) Nevertheless, he appeared as ordered and accepted the appointment without any discussion of the matter on the record for the next year and a half. As set forth in the next section, Mr. Rozenberg eventually did inform the court on the record that he was not a member of the "Capital/LWOP Case Panel," and indeed was not competent for appointment to capital cases, and successfully moved to be relieved on that ground. (2RT 138-139, 144, 147-148.)

Hence, the superior court violated Local Rule 1413 by failing to appoint the Public Defender from the outset once the special circumstances were alleged and Mr. Carter withdrew on that ground. It also violated Local Rule

1413 by appointing private counsel who was not a qualified member of the "Capital/LWOP Case Panel." [19]

While a violation of these rules does offend state law, it does not per se constitute a violation of the Sixth Amendment. (See *Cronic*, *supra*, 466 U.S. at pp. 665-666 [representation by young attorney inexperienced in complex capital litigation did not amount to per se deprivation of Sixth Amendment right].) While counsel's status is relevant to assessing his or her ability to satisfy prevailing professional norms, the constitutional question turns on counsel's actual performance and whether he or she in fact satisfied his or her fundamental duties under prevailing professional norms. (*Ibid.*; accord, e.g., *Ortiz v. Stewart* (9th Cir. 1998) 149 F.3d 923, 933.)

However, when the state violates duties intended to ensure effective, competent representation and the violation *actually* results in a lapse of representation by competent counsel under prevailing professional norms at a

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[19] Local Rule 1413 does not contemplate any deviation from its clear mandate. It is true that Rule 4.117(f) of the California Rules of Court allows the court to appoint counsel who does not meet the ordinary qualifications for appointment in capital cases under limited circumstances, guided by enumerated, alternative qualification criteria. However, that rule was not adopted until January 1, 2003 – nine months after Mr. Rozenberg was appointed, albeit during the tenure of his representation. Even if Rule 4.117 applied retroactively here and permitted the superior court to deviate from Local Rule 1413, the superior court did not comply with Rule 4.117 because it made no record or finding, supported by a statement of reasons, on the record that Mr. Rozenberg was otherwise qualified to represent Mr. Morales notwithstanding his panel status. (Compare, e.g., *People v. Rices* (2017) 4 Cal.5th 49, 58-64.) In fact, had the superior court inquired into Mr. Rozenberg's qualifications on the record, Mr. Rozenberg would have informed the court – as he eventually did a year and a half later – that he was not qualified or competent to represent defendants facing a potential death sentence.

critical stage, the state is responsible for the lapse. Under these circumstances, it is inappropriate to thrust upon the defendant the burden of proving prejudice.

As set forth in Part B-2, *ante*, under clearly established United States Supreme Court precedent, the burden is placed on the defendant to prove "prejudice" under *Strickland's* second prong when counsel's deficient performance is attributable to the attorney's own errors because "[t]he government is not responsible for, and hence not able to prevent, [the] attorney errors . . . ." (*Strickland, supra*, 466 U.S. at pp. 694-695; accord, e.g., *Hill v. Lockhart, supra*, 474 U.S. at p. 57.) In contrast, when a potential impairment of the defendant's Sixth Amendment rights is "easy to identify" and the state is required "to prevent" it but fails to do so, the state is "directly responsible" for any actual impairment that results and therefore prejudice must be presumed. (*Strickland, supra*, 466 U.S. at p. 692, citing *Cronic, supra*, 466 U.S. at p. 659 & fn. 25; accord, *Bell v. Cone, supra*, 535 U.S. at p. 696, fn. 3; *Cuyler v. Sullivan, supra*, 446 U.S. at pp. 345-350; *Holloway v. Arkansas* (1978) 435 U.S. 475, 485.)

Here, the patent purpose of Local Rule 1413 is to ensure representation by counsel competent under unique prevailing professional norms in capital cases at *all* stages of a capital case. (Cf. Cal. Rules of Court, rule 4.117(a) ["These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel"]; 1989 ABA Guidelines, Guidelines 1.1-5.1.) Such "guidelines . . . reject the ad hoc or informal assignment of criminal cases because that method frequently results in inexperienced counsel and overall lack of quality control." (1989 ABA Guidelines, Guideline 1.1, Commentary, fn. 27.) As discussed in Part B-5, *ante*, the filing of death-eligibility special-circumstance allegations constituted the prosecution's "election" to seek the death penalty and created a "capital"

case for purposes of the assistance of counsel, unless and until the prosecution announced its intention not to seek that penalty. (*Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at p. 1007; see also *Abernathy v. Superior Court*, *supra*, 157 Cal.App.4th at p. 648; *Sand v. Superior Court, supra*, 34 Cal.3d at pp. 571-575; 1989 ABA Guidelines, Guideline 11.3; 2003 ABA Guidelines, Guidelines 1.1(B) & 10.2, *supra*, at pp. 919, 993-995)

Although California law imposes no requirement to seek the death penalty beyond the filing of special circumstance allegations, the policy of the San Bernardino County District Attorney is for a prosecutor who believes that death is warranted in a special circumstance case to submit the case to its "Death Penalty Review Board" (2RT 136), or the "Death Penalty Review Committee" (13RT 2803), for evaluation and approval to seek that penalty. (See also 2RT 136-145; 13RT 2792-2793, 2806, 2829.) Although Mr. Morales's case was not submitted to the Board for death penalty evaluation and approval for nearly two years after the special circumstances were alleged (2RT 138), the prosecution never formally elected *not* to seek the death penalty. To the contrary, the prosecution insisted and the trial court found – consistent with California law – that the death penalty was *always* a possibility from the moment the special circumstances were alleged and that the potential consequence of failed plea negotiations was always that the prosecution would approve the case for death and seek that penalty at trial. (13RT 2803-2807, 2809-2810, 2845-2846, 2850-2852; 14RT 3262-3263, 3267-3268.)

Consequently, as set forth in Part B-5, prevailing professional norms governing counsel in "capital" cases applied from the moment the special circumstances were alleged and Mr. Morales faced a potential death sentence. (See 1989 ABA Guidelines, Guideline 11.3; 2003 ABA Guidelines, Guidelines 1.1(B) & Commentary & 10.2, *supra*, at pp. 919, 993; *Gardner v. Superior Court, supra*, 185 Cal.App.4th at pp. 1015-1016.) In jurisdictions like San

Bernardino County, the need to commence immediate preparation for a death penalty trial is particularly important during the period between the prosecution's "election" to seek the death penalty by charging a death-eligible offense and the prosecution's decision over whether to exercise its discretion to pursue that election at trial. (*Gardner v. Superior Court, supra*, 185 Cal.App.4th at pp. 1007-1014, citing, inter alia, *Sand v. Superior Court, supra*, 34 Cal.3d at p. 571 [where special circumstances were alleged, superior court erred in ruling that case was not a "capital" one for purposes of the assistance of counsel and ancillary services for capital case preparation before the prosecution had made a "final decision" about whether to actually seek death or LWOP].) Counsel must immediately proceed as if the death penalty will be sought, including "[c]omprehensive pretrial investigation [as] a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, [and] to persuade the prosecution to forego seeking a death sentence at trial . . . ." (2003 ABA Guidelines, Guideline 1.1, Commentary, *supra*, at pp. 925-926; accord, *Gardner v. Superior Court, supra*, 185 Cal.App.4th at pp. 1015-1016; 1989 ABA Guidelines, Guidelines 11.3, 11.4.1, 11.8.3; *Wiggins v. Smith, supra*, 539 U.S. at p. 524, italics added ["'The lawyer also has a substantial and important role to perform in raising mitigating factors *both to the prosecutor initially*'" *before* trial, as well as to the sentencing body at trial; "Investigation is essential to fulfillment of these functions"]; *State v. Ziegler, supra*, 159 So.3d at p.105 [counsel's failure to attempt to persuade prosecution not to seek death penalty during eight-month period before decision was made fell below objective standards of reasonableness].)

As demonstrated below, as a direct and foreseeable result of the superior court's violation of both Local Rule 1413 and its duty to protect Mr. Morales's right to the effective assistance of counsel when Mr. Rozenberg declared during plea bargain proceedings that he was incompetent to defend Mr.

Morales against a potential death sentence, Mr. Morales was deprived of the assistance of competent counsel as measured under prevailing professional norms in capital cases throughout the critical pretrial and plea-bargains stages. Because the state was responsible for the lapse, prejudice must be presumed.

2. After a Year and a Half and During Plea Bargain Proceedings, Mr. Rozenberg Declared That He was Not Only Unqualified under Court Rules but Also Incompetent as a Matter of Fact to Represent Defendants Facing a Potential Death Sentence and the Court Relieved Him on that Ground After the Plea Bargain Proceedings Terminated

Much to the superior court's increasing frustration, Mr. Morales's case stalled without progress for the year and a half of Mr. Rozenberg's tenure. (See Part D-2-a, *post*.) Finally, on September 12, 2003 – 17 months after Mr. Rozenberg's appointment – Mr. Morales invoked his right to a speedy trial no later than November 11, 2003. (2RT 131; see also 2RT 127-128, 130-131, 148-149, 153.) After Mr. Morales invoked his speedy trial right, the prosecutor's first mention on the record regarding a potential penalty phase was made as part of a plea bargain offer he made on the afternoon of October 7, 2003 – only 33 days before the last date by which Mr. Morales was entitled to be tried.

On the afternoon of October 7, 2003, the court and the parties convened off the record in chambers concerning "the possibility of this matter being resolved without having to go to trial." (2RT 135.) The court recited for the record the parties' discussion concerning the plea offer the prosecution was making to Mr. Morales. The choice Mr. Morales was given was between pleading guilty to murder in exchange for a sentence of 50 years to life imprisonment or invoking his trial rights, in which case the prosecutor would submit the case to the District Attorney's internal "Death Penalty Review

Board" for approval to seek the death penalty and, once approved, would in fact seek that penalty at trial. (2RT 136-137.)

The offer was an "exploding" one that had to be accepted or rejected that afternoon. (2RT 136-141.) Both the prosecutor and the court repeatedly emphasized that if the offer were not accepted that day, "there will be no looking back. There will be no further negotiations. There will be no further offers." (2RT 137; see also 2RT 136, 138-141.) "This is simply the last chance today." (2RT 139.)

Mr. Rozenberg confirmed the terms of the offer discussed off the record, adding the court and the parties' understanding that an additional consequence of rejecting the offer and the prosecution seeking the death penalty would be that a new, qualified attorney would have to be substituted in because Mr. Rozenberg was not qualified or competent to represent defendants facing a potential death sentence. (2RT 138-139, 144.) Mr. Rozenberg explained that he was not on the panel of attorneys qualified to handle death penalty cases. (2RT 138, 144.) Although that panel consists of attorneys pre-screened and qualified to handle *any* special circumstance case – without regard to whether the defendant ultimately faces death or "LWOP" – Mr. Rozenberg had no qualms about being *actually* capable of representing Mr. Morales if he faced a maximum "LWOP" sentence notwithstanding the fact that he was not a member of that panel. (See Local Rule 1413.) If Mr. Morales rejected the offer and the District Attorney's "Death Penalty Review Board" decided *not* to seek the death penalty, Mr. Rozenberg stated that he was prepared to represent Mr. Morales at a special circumstances murder trial with an "LWOP" maximum penalty. (2RT 138-139.) However, if Mr. Morales rejected the offer and the prosecution exercised its discretion to seek the death penalty – which all agreed was the likely consequence of rejecting the offer – he would have to withdraw because he was not actually qualified to represent

defendants facing a potential death penalty and therefore qualified counsel would have to be substituted in. (2RT 138-139, 144.) The court confirmed Mr. Rozenberg's recitation of the court and the parties' discussion and their understanding of the terms of the offer and consequences of rejecting it. (2RT 138-139.)

Despite Mr. Rozenberg's declaration that he was incompetent to defend Mr. Morales against a potential death penalty and despite the fact that a potential death sentence was the consequence of rejecting the plea offer, the plea bargain proceedings continued without interruption. The trial court ordered Mr. Rozenberg and Mr. Morales to confer about the prosecution's "exploding" plea offer for 30 minutes. (2RT 140-141.) After Mr. Morales conferred with Mr. Rozenberg off the record, the parties went back on the record and Mr. Rozenberg advised the court that Mr. Morales had decided to reject the plea offer and exercise his trial rights. (2RT 140-141.) The court encouraged Mr. Morales not to let his sense of "machismo" interfere with accepting the prosecution's offer. (2RT 141-143.) Mr. Morales replied that under either alternative, "it's my life in prison" and therefore he was rejecting the offer. (2RT 143.)

While Mr. Rozenberg made clear on the record that he had advised Mr. Morales that "in all likelihood Mr. Morales would be *convicted*" if he rejected the offer and went to trial (2RT 139, italics added), he did not mention any advice or discussion he had with Mr. Morales concerning the relative advantages and disadvantages of the *sentencing* component of the offer versus the *sentencing* consequences of rejecting the offer. Instead, after Mr. Morales rejected the offer, Mr. Rozenberg reminded the court that he would have to withdraw on the grounds of his own incompetence if the Death Penalty Review Board approved the case for death. (2RT 144.) The proceedings were recessed for nine days.

On October 16, 2003, the parties appeared in court and the prosecutor announced that the Board did, as predicted, approve the case for death and he would in fact seek that penalty at trial. (2RT 146.) After announcing his office's death decision, the prosecutor immediately reminded the court that Mr. Rozenberg would need to be relieved because he was not qualified or competent to defend Mr. Morales against a potential death sentence. (2RT 147.) The prosecutor also explained that a representative from the Public Defender was present at his request for the purpose of accepting appointment as substitute counsel upon Mr. Rozenberg's removal. (2RT 147; see also 13RT 2795.) Without any input from or inquiry of Mr. Rozenberg or Mr. Morales, the court granted both motions without question: the court relieved Mr. Rozenberg on the ground of his admitted incompetency to defend Mr. Morales against a potential death sentence and the Public Defender was appointed as substitute, qualified counsel. (2RT 148.)

Mr. Rozenberg's request to withdraw necessarily meant that he was not merely unqualified by court rule but actually incompetent *in fact* to defend Mr. Morales against a potential death sentence. He was, after all, unqualified by court rule to defend Mr. Morales even against a potential "LWOP" maximum sentence. (Local Rule 1413.) Nevertheless, he represented that he was still prepared to represent Mr. Morales in such a trial, thus signaling his self-appraisal that he was *actually* competent to do so notwithstanding the fact that he was not on the panel of attorneys qualified for such cases. (2RT 138-139.) Thus, his further declaration that he was *not* prepared or qualified to represent Mr. Morales against a potential death sentence necessarily reflected his self-appraisal that he was *actually* incompetent to do so.

Furthermore, Mr. Rozenberg's ethical obligations concerning withdrawal necessarily meant that he had taken no steps during his representation to become qualified and competent to handle a capital case

during his tenure. Rule 3-700, subdivision (B)(2) of the California Rules of Professional Conduct, operative from 1992 through 2017, provides for mandatory withdrawal if "The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act . . . ." Otherwise, permissive withdrawal is limited and prohibits counsel's withdrawal if it will result in prejudice to the client's rights. (Rule 3-700, subd. (A)(2); see, e.g., *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915 [attorney may not withdraw "at a critical point" and thereby prejudice the client's interests].) In this case, the court and the parties all understood that Mr. Rozenberg's withdrawal on the virtual eve of trial and the appointment of substitute counsel at that late date would subvert Mr. Morales's invocation of his speedy trial right. (2RT 148-151.) And in fact Mr. Morales did have to surrender the invocation of his speedy trial right upon the substitution, in order to allow the Public Defender time to prepare for the trial. (See 2RT 152-154.) Hence, permissive withdrawal was no longer an option; it was only appropriate for Mr. Rozenberg to withdraw at that late date if he was *required* to do so. If Mr. Rozenberg had taken steps to become competent in fact to defend Mr. Morales against a potential death sentence, notwithstanding his status on the panel, his ethical obligation was to continue his representation. He was only required to withdraw if he was incompetent in fact to represent Mr. Morales.

In this regard, Rule 3-110 of the Rules of Professional Conduct provides:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.
>
> (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
>
> (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless

> perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

This rule contemplates that an attorney who is not already qualified to represent a particular defendant may *become* qualified to do so in a particular case. By moving to withdraw on the ground of incompetency only 33 days before the last day on which Mr. Morales was entitled to be tried, Mr. Rozenberg necessarily admitted that he had not investigated the law or facts sufficient to "perform legal services with competence" in this capital case.

The importance of the court's ruling relieving Mr. Rozenberg on the grounds of his self-avowal of incompetency cannot be overstated. "[A] judge enjoys less discretion in removing counsel than in appointing counsel." (*People v. Daniels* (1991) 52 Cal.3d 815, 846-847; accord, *People v. Jones* (2004) 33 Cal.4th 234, 244-245 *Smith v. Superior Court* (1968) 68 Cal.2d 547, 559, 561-562.) Mr. Rozenberg had been appointed counsel of record for a year and a half. Furthermore, the court and the parties all recognized that Mr. Rozenberg's withdrawal only a month before trial was scheduled to commence and the appointment of substitute counsel at that late date would subvert Mr. Morales's invocation of his speedy trial right. (2RT 148-151; see also 2RT 152-154.) Under these circumstances, the law strongly favored continuity of counsel *if* current counsel were actually competent to represent Mr. Morales. (*People v. Bolton* (2008) 166 Cal.App.4th 343, 356-359 [where defense counsel moves to withdraw after defendant has invoked speedy trial rights, trial court should deny motion unless absolutely necessary as only option to ensure competent representation]; see also, e.g., *Smith v. Superior Court*, *supra*, 68 Cal.2d at pp. 559, 561-562.)

Hence, while the fact that Mr. Rozenberg was not a member of the "Capital/LWOP Case Panel" was alone enough to preclude his *appointment* at

the outset, it was not alone enough to justify *relieving* him under the circumstances. (Cf. *People v. Rices* (2017) 4 Cal.5th 49, 58-64; *People v. Woodruff* (2018) 5 Cal.5th 697, 724-730; see also Cal. Rules of Court, rule 4.117(f) [permitting appointment of counsel in capital case who does not satisfy standard qualification criteria if the court determines that counsel is otherwise qualified to represent this particular defendant].) Given the interests in retaining counsel in order to avoid unnecessary delay and expense and the unnecessary subversion of Mr. Morales's speedy trial rights, if there were any possibility that Mr. Rozenberg was actually competent to continue to represent Mr. Morales, the court would at least have inquired into his actual qualifications, his trial preparations, and whether he had become sufficiently competent or could become sufficiently competent to represent him by, inter alia, associating qualified counsel before relieving him. (Compare *People v. Woodruff, supra,* at pp. 724-730 [upon question regarding attorney's qualifications to handle capital case, court held hearings into same and properly determined not to relieve counsel]; *People v. Rices, supra,* 4 Cal.5th at pp. 58-64 [same].) Certainly, if there were any possibility that Mr. Rozenberg could competently represent Mr. Morales, the court would have inquired of Mr. Morales whether he wished to continue with Mr. Rozenberg as counsel given the year and a half of the presumptive attorney-client relationship. (Compare *People v. Woodruff, supra,* at pp. 724-730; *People v. Rices, supra,* at pp. 58-64.) The court's failure to do so can only be reconciled with a determination that Mr. Morales's own wishes – as well as his speedy trial invocation – were irrelevant because Mr. Rozenberg was *actually* incompetent to represent him. (*People v. Daniels, supra,* 52 Cal.3d at p. 846 ["the involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified . . . only in the most flagrant circumstances of . . . incompetence when all other judicial controls have failed"]; accord, *Smith v. Superior Court, supra,*

68 Cal.2d at pp. 561-562 [indigent enjoys right to continued representation by appointed counsel from the time of appointment through the completion of trial absent counsel's clear and actual incompetence].) For all of these reasons, the court's ruling relieving Mr. Rozenberg on the ground of his self-avowed incompetence after a year and a half and only a month before trial was scheduled to commence, and without any inquiry of Mr. Morales or further inquiry of Mr. Rozenberg, could only be explained by the court's determination that Mr. Rozenberg was, as he represented, *actually* incompetent to represent Mr. Morales in capital murder proceedings and thus that his removal was necessary "'to prevent substantial impairment of court proceedings.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1188, quoting from *People v. McKenzie* (1983) 34 Cal.3d 616, 629; see also *People v. Daniels, supra*, at pp. 846-847; *Smith v. Superior Court, supra*, at pp. 561-562.)

3. Mr. Morales was Denied the Assistance of Counsel and Presumptively Prejudiced During the Critical Pretrial and Plea-Bargaining Stages When the Court Initially Appointed an Attorney Who was Unqualified Under the Local Rules and Then Failed to Remove that Attorney When he Declared Himself to be Actually Incompetent

The constitutional problem is that Mr. Rozenberg's withdrawal and the substitute appointment of the Public Defender – who should have been appointed at the outset under state law – came too late. The court's ruling crediting Mr. Rozenberg's admission of actual incompetence to handle a capital case necessarily meant that Mr. Morales had been deprived of the assistance of competent counsel – measured under prevailing professional norms in capital cases – throughout the critical pretrial period following the filing of special circumstance allegations, through the plea bargaining proceedings, and even to the prosecution's exercise of discretion to act on its election and actually seek the death penalty.

The Public Defender's appointment came too late to substitute for qualified, competent assistance at the critical plea-bargaining and pretrial stages wherein the prosecution exercised its discretion to act on its election to seek the death penalty. By the time the Public Defender was appointed, Mr. Morales had already rejected the plea-bargain offer and the plea negotiations were terminated with prejudice. The court and the prosecutor repeatedly emphasized on the record that if the offer were not accepted that same afternoon, the prosecution would not entertain or offer any further plea negotiations. (2RT 136-137, 138-141.) Indeed, the deputy public defenders ("DPDs") later represented that they did not pursue negotiations because one of the explicit and repeatedly stated terms of the offer was that it would expire immediately upon rejection and no further negotiations or offers would be entertained. (13RT 2816.)[20] In this regard, the United States Supreme Court has unequivocally held that representation by competent counsel *at trial* does not vitiate a deprivation of a defendant's right to the effective assistance of counsel during critical pretrial stages. (See, e.g., *Lafler v. Cooper*, *supra*, 566 U.S. at pp. 164-170, and authorities cited therein; accord, *In re Alvernaz*, *supra*, 2 Cal.4th at p. 928.)

Pursuant to the authorities set forth in Part B, *ante*, "[d]uring plea negotiations [Mr. Morales was] 'entitled to the effective assistance of *competent* counsel'" (*Lafler v. Cooper*, *supra*, 566 U.S. at p. 162, italics added)

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[20] Likewise, it was also too late for the Public Defender to investigate a potential penalty phase and attempt to persuade the prosecutor not to submit the case to the Death Penalty Review Board, or to persuade the Death Penalty Review Board not to approve the case for death, based, inter alia, on mitigation and the absence of particular aggravation. (See, e.g., 1989 ABA Guidelines, Guideline 11.3; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524; *Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at p. 1016; *State v. Ziegler*, *supra*, 159 So.3d at p. 105.)

– "competency" as measured under prevailing professional norms in capital cases (*Strickland v. Washington*, *supra*, p. 688; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 523) – for "'[t]he art of negotiation is at least as nuanced as the art of trial advocacy . . . .'" (*Missouri v. Frye*, *supra*, 566 U.S. at p. 144). An attorney who is incompetent to defend the accused against a potential death penalty at trial is necessarily incompetent to defend the accused against a potential death penalty in plea negotiations.

As set forth in Part B-4, *ante,* the advice required concerning plea bargain offers must be adequate for the defendant to make an informed choice between the plea bargain offer and going to trial. Hence, preparing for plea proceedings like plea negotiations necessarily entails *trial* preparation, including investigation into the law that will apply, the evidence likely to be introduced, and the potential defenses to present *at trial.* (See, e.g., *In re Alvernaz*, *supra,* 2 Cal.4th at p. 933; *Von Moltke v. Gillies*, *supra*, 332 U.S. at p. 721; *In re Hawley*, *supra*, 67 Cal.2d at p. 828; *People v. Maguire*, *supra,* 67 Cal.App.4th at p. 1029; 1993 ABA Standards, Std., 4-6.1 & Comment; see also Part B-4, *ante,* and authorities cited therein.) In order to competently advise the defendant, counsel must know and explain to the defendant the relevant law and the strengths and weaknesses of the case against him based on the law and evidence, inform the defendant of potential defenses based on the law and facts, and provide his or her independent evaluation "of the risks and probable outcome *of trial*." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 933, italics added; accord, e.g., *People v. Maguire*, *supra,* at p. 1029; *Moore v. Bryant*, *supra,* 348 F.3d at p. 241; *Ostrander v. Green*, *supra*, 46 F.3d at p. 355; *Purdy v. United States*, *supra*, 208 F.3d at p. 45.) The "trial," of course, refers to both the guilt and penalty phases of a unitary capital murder trial when that is the consequence of rejecting a plea offer. (See, e.g., *People v. Superior Court*

(*Mitchell*) (1993) 5 Cal.4th 1229, 1233-1235, and authorities cited therein [guilt and penalty phases are not distinct proceedings but part of unitary capital trial].)

Consistent with these duties, at the time of Mr. Rozenberg's representation objective standards of reasonable competence demanded that counsel begin preparing for a potential penalty phase – including investigation into potential mitigation and available aggravation – "immediately upon counsel's entry" into a death-eligible or "capital" case. (2003 ABA Guidelines, Guideline 1.1, Commentary, *supra*, at pp. 925-926; accord, 1989 ABA Guidelines, Guidelines 11.3, 11.4.1, 11.8.3; 2003 ABA Guidelines, Guidelines 1.1, 10.7, 10.9.1, 10.9.2 & Commentaries, *supra*, at pp. 82, 1041, 1046-1046; *Rompilla v. Beard*, *supra*, 545 U.S. at p. 387 [citing ABA standard requiring prompt investigation as reflection of prevailing professional norms]; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524 [citing ABA standards requiring early investigation into potential mitigation for pretrial purposes as reflection of prevailing professional norms].) As stated in Part B-4, *ante*, among other reasons, prompt preparation for both phases of a capital murder trial is a "necessary prerequisite" to negotiating a plea agreement – and convincing the defendant to agree to a favorable plea bargain – that will avoid the death penalty. (2003 ABA Guidelines, Guideline 1.1, 10.7, 10.9.2 & Commentaries, *supra*, at pp. 921, 925-926, 1023, 1045-1046; accord, 1989 ABA Guidelines, Guidelines 11.3, 11.4.1, 11.8.3; *Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at pp. 1015-1016.)

By the time of the plea-bargain proceedings in this case, Mr. Morales was entitled "to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial" based on a year and a half of capital murder trial preparation. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 933.) He was entitled to counsel who understood the unique complexity of death penalty law and procedure and could explain the

process of a capital murder trial and the penalty phase in particular, including the kind of evidence that may be considered in determining the appropriate penalty, the burden of proof, if any, and the manner in which the sentencer ultimately chooses between life and death. Mr. Morales was entitled to counsel who understood and could explain the *meaning* of relevant mitigating and aggravating evidence based on his knowledge of the law, who was aware of and could describe potential mitigating and aggravating evidence that could be presented based on his investigation of the facts, and who could offer his informed evaluation of both and his assessment "of the risks and probable outcome" of a penalty phase proceeding. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 933; see also Part B, subparts 4-5, *ante*, and authorities cited therein.) Even barring a prediction of the "probable outcome" of a penalty phase, Mr. Morales was at least entitled to the assistance of an attorney who could explain that such a prediction would be difficult to make and *why* based on the law, his investigation of the facts, and his knowledge of the outcome of other penalty phase proceedings, so that *Mr. Morales* could make an informed decision over whether to gamble his very life on rejecting the offer.

It is true that Mr. Rozenberg did state on the record that he had advised Mr. Morales, "It is my belief based on the review of the facts . . . that in all likelihood Mr. Morales would be *convicted*" if he rejected the bargain and went to trial. (2RT 139.) Tellingly absent from his recitation of the advice he gave Mr. Morales, however, was any indication that he had discussed with him the "likelihood" of actually receiving a *death sentence* if he went to trial. While Mr. Morales does not contend that the face of the record reveals the exact advice Mr. Rozenberg did give him, he does submit that it establishes what advice he simply *could not* give him: by his own admission, he could not give him any meaningful advice about the potential *death sentence* he faced by rejecting the offer. In fact, Mr. Morales's own failure to appreciate the very

realistic possibility that he would be sentenced to death if convicted following a trial is illustrated by his own remarks in rejecting the bargain. In Mr. Morales's view, the result of the plea bargain was "the same" as that contemplated by going to trial: under either alternative, it was still "*my life* in prison." (2RT 143, italics added.)

It is also true that the court advised Mr. Morales on the record that a *possible* consequence of rejecting the prosecution's offer was the death penalty. (2RT 141-142.) As this Court has recognized, however, the court's admonition concerning the maximum potential sentence to which Mr. Morales would be exposed if he rejected the offer did not substitute for " 'counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.'" (*In re Resendiz, supra,* 25 Cal.4th at p. 240, quoting from *In re Alvernaz, supra,* 2 Cal.4th at p. 933.)

Similarly, assuming Mr. Rozenberg's own advice mentioned that Mr. Morales would be exposed to a possible maximum sentence of death if he rejected the offer, that was not enough. (See, e.g., *In re Vargas, supra*, 83 Cal.App.4th at p. 1139, citing, inter alia, *In re Alvernaz, supra,* at p. 936-937, fn. 6 & 1993 ABA Standards, Std. 4-5.1 & Com. ["the maximum potential sentence [is] but *one* factor which [must be] discussed with" the defendant for counsel in advising him over whether to accept a plea bargain offer or reject it and go to trial].) Again, Mr. Morales was entitled to the assistance of counsel who could discuss the law that would apply at the penalty phase, the evidence that would likely be introduced in that phase, and the likelihood of actually receiving a death sentence.

Thus, there was – by definition – a lapse in representation during the critical plea bargain proceedings. The court was directly responsible for that lapse, first by violating Local Rule 1413 and second by crediting Mr. Rozenberg's declaration of incompetence but failing to remove him on that

ground until after he had conferred with Mr. Morales about the plea offer, Mr. Morales rejected the offer, and the plea bargaining proceedings had terminated for good.

"Upon the trial judge rests the duty of seeing that [a critical stage of a prosecution] is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71.) When the trial court is alerted to facts that will impair the defendant's constitutional rights to the effective assistance of counsel, it has the duty "to protect the right of the accused to have the assistance of counsel" (*id.* at p. 72) and "ensure that criminal defendants receive [representation that] does not contravene the Sixth Amendment" (*Wheat v. United States* (1988) 486 U.S. 153, 161). (Accord, *Holloway v. Arkansas*, *supra*, 435 U.S. at p. 485; *Johnson v. Zerbst* (1938) 304 U.S. 458, 465; *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627.)

Mr. Rozenberg's declaration of incompetency, which the court credited and acted upon in *subsequently* removed him, demanded that the court act *before* Mr. Rozenberg was called upon to give advice in accord with objective standards of reasonableness in *capital* cases. The resulting lapse in representation was "easy to identify" and "easy to prevent." (*Strickland, supra*, 466 U.S. at p. 692; accord, *Hill v. Lockhart*, *supra*, 474 U.S. at p. 57.) Because the court failed to do so, the state is "directly responsible" for the lapse and prejudice must be presumed. (*Strickland, supra,* at p. 692, citing *Cronic*, *supra*, 466 U.S. at p. 659 & fn. 25; accord, *Bell v. Cone*, *supra*, 535 U.S. at p. 696, fn. 3.)

When the defendant has been deprived of the effective assistance of counsel in rejecting a plea bargain offer and as a result receives a greater conviction or a longer sentence than he would have had he accepted the offer, the "correct remedy . . . is to order the State to reoffer the plea agreement." (*Lafler v. Cooper*, *supra*, 566 U.S. at p. 174.) In *Lafler v. Cooper*, *supra*, the

United States Supreme Court stopped short of holding that specific performance of the offer is always required because many states, like California, require court approval before a plea bargain can be effectuated and the benefit of the bargain may involve vacating only some or all of the convictions or reducing the sentence. Hence, the appropriate remedy is remand for the state to reoffer the plea agreement and, presuming the defendant accepts it, for the court to exercise its discretion in approving and effectuating it. (*Lafler v. Cooper*, *supra*, at p. 174.)

In this case, there is no question that the court was prepared to approve the plea bargain offer. The judge who presided over the plea bargain proceedings participated in them by encouraging Mr. Morales to take the offer. (2RT 141-143.) In so doing, the court clearly indicated that it was prepared to approve the offer if Mr. Morales accepted it. Moreover, there has been no intervening change of circumstances that would justify a contrary course on remand.

At the same time, the terms of the offer were not made explicit on the record. They clearly contemplated the prosecution's dismissal of the special circumstance allegations, Mr. Morales's entry of a guilty plea to first degree murder, and a sentence of 50-years-to-life. Since a first degree murder conviction alone only carries a term of 25 years to life (Pen. Code, § 190, subd. (a)), the offer obviously contemplated guilty pleas to other charges and/or allegations that were never stated on the record. The 50-year-to-life sentence could have been imposed in a number of ways based on some combination of pleas to the two separate robbery and two burglary charges and the gun use enhancement allegations. Hence, the appropriate remedy is to reverse the judgment and remand with orders to the prosecution to reinstate the plea bargain, clarify to what charges Mr. Morales must plead under the terms of the offer, and provide Mr. Morales with the assistance of competent counsel to

assess the offer. Should Mr. Morales accept the offer and agree to plead guilty after meaningfully consulting with competent counsel, the court should exercise its discretion in accepting the pleas and imposing the 50-year-to-life term.

Finally, even if the foregoing record alone is not enough to establish that Mr. Rozenberg was incompetent in fact to represent Mr. Morales during the critical pretrial and plea-bargaining stages of this capital murder proceeding and thus that the state deprived Mr. Morales of his Sixth Amendment right to the assistance of competent counsel during those stages, the record of Mr. Rozenberg's actual pretrial performance is enough. As expected from the court's violation of Local Rule 1413 and its ruling crediting Mr. Rozenberg's self-avowal of incompetency, the record of Mr. Rozenberg's actual pretrial performance demonstrates that he failed entirely to function as Mr. Morales's *capital* defense counsel throughout the proceedings.

D. As a Direct and Foreseeable Result of the Trial Court's Errors, the Record of Mr. Rozenberg's Actual Performance Demonstrates that Mr. Morales Was Deprived of His Right to the Assistance of Competent Counsel During the Critical Pretrial and Plea-Bargaining Stages

1. The Public Defender's Motion for Relief on the Ground that the Court's Appointment Errors Resulted in the Deprivation of the Assistance of Counsel to Which Mr. Morales Was Entitled

During and after the guilt phase, the DPDs discovered the superior court's appointment errors -- errors which were not immediately apparent from the face of the record. For instance, the clerk's minutes consistently misidentified Mr. Carter as "conflict counsel" and Mr. Rozenberg as "*retained* counsel" – errors that were only corrected after the judgment. (2CT 251-253.) The Public Defender's own pretrial pleadings reflected the errors, referring to Mr. Rozenberg as "retained" counsel. (See, e.g., 3CT 794.) Having eventually

discovered the errors, they investigated their effect on the pretrial and plea-bargaining proceedings. (See 13RT 2852.) Based on their discoveries, after the guilt phase but before the penalty phase commenced, the DPDs moved to strike the special circumstances, or at least preclude the prosecution from proceeding to the penalty phase and seeking death due, inter alia, to the errors in the appointment of counsel and Mr. Rozenberg's resulting failure to provide Mr. Morales with the assistance of counsel to which he was entitled during the pretrial and plea negotiation stages of this capital case. (28CT 7920-7971, 7977-7981, 8133-8136; see also 28CT 7904-7905, 7942, fn. 33.)

In support of their motion, the DPDs recited the procedural history discussed above and brought the superior court's appointment errors to the attention of the trial court.[21] It was undisputed below, and the trial court ultimately found, that the superior court erred first in failing to appoint the Public Defender and second in appointing unqualified counsel. (28CT 7904-7905, 7935-7939, 7958; 1RT 137-138, 143-144, 146-150; 13RT 2829-2830, 2974-2975; 14RT 3265-3266.) The DPDs argued that the superior court's appointment errors produced the very result the law was intended to avoid: Mr. Morales was in fact deprived of his right to the assistance of counsel to which he was entitled in this capital case during the critical pretrial and plea-bargaining stages. (28CT 7935-7948, 7949-7951; see also 28CT 7904-7905, 7942, fn. 33; 13RT 2823-2824; 14RT 3250, 3259.) As the DPDs succinctly

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[21] The court and the parties referred to the superior court that presided over the pretrial proceedings as the "Fontana" court. The pretrial proceedings were held in the Fontana Division of the Superior Court for San Bernardino County. Once the prosecution exercised its discretion to seek the death penalty, the case was transferred to a different division of the court for trial, where the parties litigated the pretrial errors.

put it, "There [was] a total failure of representation" as a result of the superior court's errors. (13RT 2824.)

As discussed in detail in the following sections, in support of their arguments, the DPDs relied on evidence apparent from the face of the record, made a number of relevant representations as officers of the court concerning information they had obtained from Mr. Rozenberg and the investigators appointed to assist Mr. Rozenberg, and presented substantial additional documentary evidence, including sworn declarations, they had unearthed in their investigation of the pretrial proceedings. The prosecutor opposed the motions, presented a declaration from Mr. Rozenberg, and otherwise made a number of representations to the court concerning the pretrial proceedings based on his review of the record and certain notes in the files. (29CT 8233-8253; 13RT 2809-2810, 2812-2813, 2817-2820, 2828-2929.)

The trial court reviewed the pleadings and the evidence contained therein and addressed them over the course of several court sessions. As discussed in more detail in Part E, *post*, the trial court denied Mr. Morales's request for relief by applying the two-pronged *Strickland* test to his claim that he was deprived of the effective assistance of counsel.

On this appeal, Mr. Morales raises two related but distinct claims. In Part E, *post*, Mr. Morales contends that the trial court's ruling on his motion was erroneous based on the record before the court at the time the ruling was made and that the court deprived Mr. Morales of his right to a full and fair hearing on his allegations. In this section, separate and apart from any challenge to the trial court's ruling, Mr. Morales challenges, for the first time on appeal, the death-eligibility findings and death judgment on the ground that he was deprived of his state and federal constitutional rights to the effective assistance of competent counsel at the critical pretrial and plea-bargaining stages. Mr. Morales is entitled to raise that challenge for the first time on

appeal, without regard to the manner in which his trial level claims were raised and resolved. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581.) The litigation in the trial court is relevant to Mr. Morales's argument in this regard to the extent that both parties presented evidence and made representations of historical fact, beyond the face of the record of the pretrial proceedings, concerning the scope and quality of Mr. Rozenberg's representation. Unless otherwise noted, much of that relevant evidence was undisputed.

2. Mr. Rozenberg Did Not Render Pretrial Assistance in Accord with Prevailing Professional Norms in Capital Cases

It is immediately apparent from Mr. Rozenberg's statements and conduct at the plea bargain proceeding, as well as his "representation" as a whole throughout the pretrial stage, that he believed he could ignore the death-eligibility or capital component of the prosecution and treat this as a noncapital case up to the time the prosecution decided to act on its election to seek the death penalty. It is also apparent that he believed he could treat the case as a noncapital prosecution, and that no capital case preparation was necessary, during the time period in which he hoped to negotiate a plea agreement that would avoid that penalty. His understanding could not be further from the truth and his representation in accord with that misunderstanding could not be more inconsistent with prevailing professional norms governing counsel who undertakes to represent a defendant charged with a death-eligible offense.

As set forth in Part B-5, *ante,* prevailing professional norms in existence at the time of Mr. Rozenberg's representation dictate that the pretrial period between charging the defendant with a death-eligible offense, and before the prosecution decides whether or not to exercise its discretion to actually seek the death penalty, is one of the most critical periods in which the defendant is in need of the assistance of *capital* defense counsel. Counsel must immediately

begin preparing for a capital murder trial, which requires close consultation with the client and investigation into both the guilt and penalty phases, which in turn requires investigation into mitigation and potential aggravation. Even without notice of aggravation, counsel is expected to investigate the client's criminal background by consulting with the client and utilizing other available sources, such as discovery and public records, to obtain information about his background.

The ABA Guidelines "in circulation at the time of" Mr. Rozenberg's representation, "describe[d] the obligation in terms no one could misunderstand in the circumstance of a case like this one" (*Rompilla v. Beard, supra*, 545 U.S. at p. 387): "Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a noncapital one" (1989 Guidelines, Guideline 11.3; accord 2003 ABA Guidelines, Guidelines 1.1, 10.2 & Commentaries, *supra*, at pp. 925-926, 993-995). Furthermore, "[t]he existence of ongoing plea negotiations with the prosecution does *not* relieve counsel of the obligation to take steps necessary to prepare a defense." (1989 Guidelines, Guideline 11.6.1(E), italics added; accord, *id.*, Guideline 11.4.1; 2003 Guidelines, 10.7 & 10.9.1 & Commentary, *supra*, 31 Hofstra L. Rev. at pp. 1015, 1021, 1040; *Rompilla v. Beard*, 545 U.S. at p. 387 [duty to conduct "prompt investigation" into potential mitigating and aggravating evidence is not relieved by client's stated desire to enter guilty plea]; *Wiggins v. Smith, supra*, 539 U.S. at pp. 524-525, italics added ["'the lawyer has a substantial and important role to perform in raising mitigating factors *both*" before and during trial; "'Investigation is essential to fulfillment of these functions'"].)

a. Mr. Rozenberg met with Mr. Morales in custody only once in his year-and-a-half tenure and consistently failed to appear in court in defiance of court orders

In the year and a half of his tenure, Mr. Rozenberg had a single private attorney-client consultation, with the assistance of an interpreter, with Mr. Morales at the jail – on July 23, 2002. (1 SCT 137-139.) This undisputed fact was established by the Sheriff's official visiting records, as well as Mr. Rozenberg's own declaration, obtained and submitted by the prosecution, attesting that "Mr. Morales was visited at the jail with the assistance of the court interpreter on one occasion." (29CT 8246.) That isolated visit occurred over a month after the preliminary hearing and 15 months before the plea offer was made and the prosecution acted on its election to seek the death penalty.

As to courtroom presence, Mr. Rozenberg's appearances were sporadic, often separated by months, and – apart from the truncated preliminary hearing – limited to requesting continuances. Most of his appearances were made by a variety of different "stand-in" counsel; the most frequent "stand-in" was Reza Khanjan, who made his first appearance on Mr. Rozenberg's behalf on February 7, 2003, only two months after Mr. Khanjan had been admitted to the California State Bar. [22] On two different occasions, Mr. Rozenberg neither appeared nor sent anyone to stand in for him, provoking the court on one occasion to threaten him with contempt. On three different occasions, he defied court orders to appear personally, sending instead Mr. Khanjan or another representative to "stand in" for him. In fact, out of a total of 26 sessions demanding an appearance by counsel for Mr. Morales over the course

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[22] According to the California State Bar website, Mr. Khanjan was admitted to the bar on December 3, 2002. A separate motion for judicial notice of this fact accompanies this brief.

of Mr. Rozenberg's tenure, he personally appeared at only 10 of them; in other words, he showed up little more than 38% of the time.

Specifically, Mr. Rozenberg made his first courtroom appearance on Mr. Morales's behalf on April 11, 2002. (1RT 24.) Mr. Rozenberg briefly appeared again on May 7 and 10, 2002, but did not appear at either of the next two sessions held on May 28 and June 26, 2002, until the June 20, 2002 preliminary hearing. (1RT 27-32.) As previously noted, Mr. Rozenberg had not visited Mr. Morales at the jail before that hearing.

Mr. Rozenberg did not make another appearance until July 25, 2002, when he requested another continuance for trial to commence within 60 days of August 29, 2002.[23] Upon the court's query into why it was taking so long to prepare the case, Mr. Rozenberg advised the court that he still had not obtained all of the discovery and that he had an investigator "out trying to track down several witnesses." (2RT 88-89.) In fact, as discussed in the next section, the latter representation was false; although an investigator had been *appointed* at that time, the investigator was not even aware of his appointment, and had no contact with Mr. Rozenberg or anyone on his behalf relating to Mr. Morales's case until February of 2003 – nearly a year after Mr. Rozenberg and the investigator were appointed. (See Part b, *post*; see also Bus. & Prof. Code, § 6068, subd. (d) [attorney shall not mislead the judge by false statement of fact or law]; Rules of Prof. Conduct, Rule 5-200(B) [same].) Nevertheless, based on that representation – and Mr. Rozenberg's assurance in response to the court's concern that this case "absolutely" would not "hit its second anniversary" – the trial was continued to August 29, 2002. (2RT 88-89.)

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[23] Hereafter, Mr. Morales will refer to these continuances by their date "plus 60 days."

On August 29, 2002, Mr. Rozenberg again failed to appear and sent stand-in counsel to request another continuance to October 28, 2002 plus 60 days. (2RT 91-92.) On October 3, 2002, the prosecution was ready to confirm a pretrial date of October 11 and a trial date of October 15, 2002. (2RT 92-93.) However, at Mr. Rozenberg's request, the court continued the case for one more week for a pretrial date of October 18, 2002. (2RT 92-93.) Mr. Rozenberg did not appear on the October 18 date or any other for the next six weeks, until November 18, 2002. (2RT 99.)

In the interim, on October 18, 2002, Mr. Rozenberg had "stand-in" counsel appear on his behalf. (2RT 94-95.) However, it was the prosecutor, Mr. Young, who represented that Mr. Rozenberg was requesting another continuance due to the press of business – specifically a trial in Barstow that he expected to last for three weeks. (2RT 94-95.) The court again continued the matter at Mr. Rozenberg's request. At the next scheduled session on November 11, 2002, Mr. Rozenberg was a "no show," meaning he did not appear personally, send anyone to appear for him, or notify the court or the prosecution that no one would be appearing. (2RT 97-98.) At the prosecutor's request, the matter was trailed to November 18, 2002. (*Ibid*.)

When Mr. Rozenberg finally did appear on November 18, 2002, he represented that he was still in trial in Barstow, which he expected to last through the first of the year. (2RT 99-101.) Thus, again at Mr. Rozenberg's request due to the press of business in other cases, the matter was continued. (2RT 99-101.) On December 18, 2002, Mr. Rozenberg again appeared, representing that his other trial should end around the middle to the end of January 2003. (2RT 102-103; see also 2RT 94-95.) Therefore, he obtained another continuance to February 7, 2003 for a pretrial date and February 10 for a trial date. (2RT 102-103.) Mr. Rozenberg did not appear again until April 14, 2003.

In the interim, on February 7, 2003, Mr. Rozenberg sent Mr. Khanjan (for the first time) to stand in for him and request yet another continuance due to his press of business in other cases, to April 11 and 14, 2003. (2RT 104-106.) On April 11, however, Mr. Rozenberg was again a "no show," leaving Mr. Morales entirely unrepresented. (2RT 107-108.) The judge issued an oral order to show cause why Mr. Rozenberg "should not be sanctioned for non-appearance in court and not being diligent with representation of [his] client[] . . . Also in regard to contempt of court." (2RT 107-108.) However, nothing came of that order. (See 2SCT 268-269, 462; see also 15RT 3331-3332.)

On April 14, 2003, Mr. Rozenberg did appear and represented that he was "essentially ready" apart from the fact that the prosecutor had provided a tape recording that day as additional discovery. (2RT 108-1.) Based on that additional discovery, he requested another continuance to May 9 and 12, at which point both he and the prosecutor indicated they would be ready for trial. (*Ibid.*)

On May 9, 2003, Mr. Rozenberg and Mr. Young appeared and represented that they had been having discussions about "discovery" and therefore obtained another short continuance to June 12 for a pretrial date, June 20 for calendar assignment and June 23 for trial. (2RT 110-111.) However, Mr. Rozenberg did not appear in court again for another *four months*, until September 2, 2003.

In the interim, on June 12, 2003, a representative of the District Attorney's Office appeared for Mr. Young and stand-in counsel again appeared for Mr. Rozenberg. From the discussion between the court and the parties, it was clear that a new prosecutor would be assigned to the case in Mr. Young's stead. (2RT 112-113.) The June 20 and 23 pretrial and trial dates, however, remained in full force and effect. (2RT 112-113.)

On June 20, 2003 – exactly a year since Mr. Morales had been held to answer on the amended complaint – the newly assigned prosecutor, Mr. Mazurek, made his first appearance on the case, indicating that he had just been assigned that week and "have read a little bit of it [but] I'm not fully up to speed on it. At this point not having read anything, I don't have any offers." (2RT 114-115.) He also wished to speak directly with Mr. Rozenberg about the case. (2RT 115.) The court immediately responded by telling Mr. Khanjan, who again appeared as "stand-in" counsel for Mr. Rozenberg, "I don't know how much more time your client is willing to give on this one, Mr. Khanjan." (2RT 115.) The court recommended continuing the trial to July 24, 2003 plus 60 days, with the parties' agreement. (2RT 115.) The court directed Mr. Khanjan to relay to Mr. Rozenberg that he needed to personally appear at the next session in order to communicate with Mr. Mazurek on his behalf, emphasizing the case "is old enough that I don't want to let this drag out." (2RT 116.)

In defiance of the court's order and contrary to his assurance to the court a year earlier that the case would "absolutely" not "hit its second anniversary" (2RT 99-89), Mr. Rozenberg did not appear on July 24, 2003. (2RT 118-120.) Instead, Mr. Khanjan again stood in for him, representing that Mr. Rozenberg was presently in trial in another matter. (2RT 118-119.) The court immediately replied, "Mr. Rozenberg is always in trial, so let's set some dates." (2RT 119.) Mr. Khanjan explained that Mr. Rozenberg's other trial was expected to last until September. (2RT 119.) However, he assured the court that Mr. Rozenberg would appear "on Monday" (July 28), particularly because "*Mr. Morales would also like to talk to Mr. Rozenberg*." (2RT 119, italics added.) The Court immediately replied, "*I'm sure he would*." (*Ibid*., italics added.) Once again, the court directed Mr. Khanjan: "Tell Mr. Rozenberg I'm

ordering him here at 10:30 on Monday morning. I've applied the rule of got you." (2RT 120.)

But once again, in defiance of that order and Mr. Morales's own request to speak with Mr. Rozenberg, Mr. Rozenberg did not appear on Monday, July 28. (2RT 121-123.) Nor did he appear a month later on August 28, 2003. (2RT 124-125.) By that point, it had been nearly *four months* since his last courtroom appearance. (2RT 110-112.) It had been *over a year* since his one and only visit to Mr. Morales at the jail. (1 SCT 137-139; 29CT 8246.) And he had no contact at all with Mr. Mazurek since his June assignment, despite Mr. Mazurek's representations to the court and Mr. Khanjan at his first appearance that he wanted to speak with him about Mr. Morales's case. (See 2RT 115, 126-128.)

Finally, on September 2, 2003, Mr. Rozenberg appeared and informed the court, "This is my first opportunity to discuss the matter" with the District Attorney's Office since Mr. Mazurek's assignment to the case in June. (2RT 126-128.) He represented to the court that he had discussed a "possible resolution" with Mr. Mazurek that Mr. Mazurek needed to discuss with his "higher ups." (2RT 126-128.) Based on that representation, the matter was once again continued to September 12, 2003 plus 60 days, or no later than November 11, 2003. (2RT 126-128.)

On September 12, however, Mr. Rozenberg again failed to appear, again sending Mr. Khanjan as "stand-in" counsel. (2RT 129.) As Mr. Rozenberg had represented on September 2, the prosecutor said that the parties were having "ongoing discussions" about the case (since September 2) and that he needed to speak to his supervisors about a possible resolution. The prosecutor explained that the discussions would require Mr. Morales to again waive the statutory time-period to be tried, but he understood that Mr. Morales was no longer willing to waive time. (2RT 130-131.) These "ongoing

discussions" obviously did not involve Mr. Morales, whom Mr. Rozenberg had not visited for over a year and had seen only briefly in court once – on September 2, 2003 – over the preceding four months. Mr. Khanjan confirmed to the court that Mr. Morales wished to invoke his speedy trial rights. The court said to Mr. Khanjan, "Well, okay, your client wants these conversations to be pursued. Your client wants to be represented by Mr. Rozenberg for these discussions. We can either make it happen or he can waive time. It's his choice." (2RT 131.) The court then addressed Mr. Morales, asking him if he wished to waive any more time. Mr. Morales responded, "I want to go to trial. I do not want to waive any more time." (2RT 131.) Hence, upon Mr. Morales's invocation of his speedy trial rights, the last day by which he was entitled to be tried was November 11, 2003. (2RT 1237-128, 130-131, 148-149, 153.) The court once again ordered Mr. Rozenberg, through stand-in counsel, to appear on October 3 and be ready either to resolve or try the case. (2RT 129-132.)

Mr. Rozenberg, however, failed to appear on October 3 to discuss plea negotiations with Mr. Morales or indicate his readiness to commence trial by November 11, 2003. (2RT 133-134.) And, yet again, the court issued it fifth order through stand-in counsel to Mr. Rozenberg that he was "under court order" to personally appear at 1:30 p.m. on October 7, 2003. (2RT 133-134.)

Finally, on the afternoon of October 7, 2003, Mr. Rozenberg and the prosecutor appeared in court and the prosecutor made the exploding plea offer, discussed in Part C-2, *ante*, and Part D-3, *post*. (2RT 135-145.)

As discussed in Part B-4, *ante*, the Supreme Court has long recognized that a defendant's opportunity to consult with counsel prior to trial is part of the "core" of the right to counsel. (*Kansas v. Ventris*, *supra*, 566 U.S. at pp. 590-591; accord, *Michigan v. Harvey*, *supra*, 494 U.S. at p. 348; *Powell v. Alabama*, *supra*, 287 U.S. at p. 57.) This obligation is so important that the

failure to consult alone may amount to a constructive denial of counsel. (See, e.g., *Mitchell v. Mason*, *supra*, 325 F.3d 732, 744 [constructive denial under *Cronic* and *Cone* where "no effort to consult with (the defendant) was made" by counsel during seven-month period of pretrial appointment, apart from brief meetings in "bullpen" on three occasions].) At the time of Mr. Rozenberg's representation, prevailing professional norms stressed the importance of early and ongoing client consultation in death-eligible cases as an indispensable component of counsel's role as advocate. (1989 ABA Guidelines, Guidelines 11.4.1(D)(2), 11.4.2, 11.6.1, 11.8.3 & Commentaries; 2003 ABA Guidelines, Guidelines 10.5, 10.9.1 & Commentaries, *supra*, at pp. 1005, 1008, 1039, 1042-1043.) The client himself is the preliminary, primary source of information regarding potential mitigation, as well as potential aggravation in the absence of notice of the aggravating circumstances on which the prosecution intends to rely. Hence, client consultation is an essential prerequisite to discharging counsel's duty to conduct prompt pretrial investigation into potential mitigation and aggravation in capital cases. (1989 Guidelines, Guidelines 11.3, 11.4.1, 11.8.3; 2003 ABA Guidelines, Guidelines 1.1, 10.5 & 10.7 & Commentary, *supra*, at pp. 925-926, 1005-1009, 1023-1024.)

Client consultation is also necessary to build a relationship of trust and confidence with the client, which is important in every case but an absolute necessity to enable counsel to fulfill his role at every stage of the proceedings in a capital case. (2003 ABA Guidelines, Guideline 10.5 & Commentary; 1989 ABA Guidelines, Guideline 11.4.2.) Particularly when counsel is attempting to negotiate a plea bargain that will avoid the death penalty, "full consultation with the client" (1989 ABA Guidelines, Guideline 11.4.2, Commentary) and "[e]stablishing a relationship of trust with the client is essential . . . to ensure that the client will listen to counsel's advice on important matters such as . . .

the advisability of a plea" (2003 ABA Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008). (See also 2003 ABA Guidelines, Guidelines 10.9.1, 10.9.2 & Commentaries, *supra*, at pp. 1039, 1046-1046.) Counsel's duty to consult in capital cases demands an immediate interview with the defendant upon counsel's entry into the case followed by "ongoing," "close client contact throughout preparation of the case, discussing, inter alia, the investigation, potential legal issues that exist or develop, and the development of a defense theory." (1989 ABA Guidelines, Guideline 11.4.2; accord *id.*, Commentary; 2003 ABA Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008 [duty to consult requires "ongoing" client contact that is not discharged by "an occasional hurried interview"].) "A client will not – with good reason – trust a lawyer who visits only a few times before trial . . . ." (*Ibid.*)

Mr. Rozenberg's single jail visit and sporadic courtroom appearances over the course of a year and a half fell well below prevailing professional norms governing the duty to consult with the client in capital cases. Mr. Rozenberg's failure to visit Mr. Morales at the jail and his abysmal courtroom attendance and conduct could only have undermined Mr. Morales's ability to trust him as his medium and advocate. Mr. Rozenberg's "no shows;" his extended absences for months at a time in repeated defiance of court orders and Mr. Morales's own understandable request that Mr. Rozenberg appear personally to speak with him; his failure to make any progress on the case due to his other trials; and his failure to even communicate with the newly assigned prosecutor for three months, all conveyed to Mr. Morales that he and his case were unimportant to him and that Mr. Rozenberg's other cases – and not his defense of Mr. Morale's very *life* – were his priority.

b. Mr. Rozenberg conducted no penalty phase investigation at all and the belated investigation he did direct fell below objective standards of reasonably competent assistance in capital cases

Mr. Rozenberg also delayed his investigation, directed de minimis investigation into the guilt phase, and directed no investigation into a potential penalty phase. On April 24, 2002, Mr. Rozenberg applied under Penal Code section 987.2 – not section Penal Code section 987.9, applicable in capital cases – for an order appointing Brite Star Investigations to assist in the preparation of the defense. (987.2CT 1.) On April 26, 2002, the court signed the order appointing Brite Star. (987.2CT 3; 28CT 7926, 7939-7940.) However, jail visiting records, the investigative agency's billing records, and the investigators' declaration and statements to the DPDs all confirm that Mr. Rozenberg did not alert Brite Star to its appointment, and thus *no investigation at all* was commenced, until *10 months* later.

The owner of Brite Star, Eric Martin, informed one of Mr. Morales's DPDs that he did not receive notice that his agency had been appointed to assist Mr. Rozenberg until February of 2003 – nearly a year after Brite Star's April 2002 appointment. (28CT 7966; see also 28CT 7926, 7939-7940.) That statement is consistent with Brite Star's billing records, which reflect that the first task they undertook was meeting with Mr. Morales's attorney on February 26, 2003. (987.2CT 5.)[24] Hence, it is hard to credit Mr. Rozenberg's July 2002 statement to the court, in response to its query about the delay in preparing for trial, that he had an investigator out trying to contact witnesses. (2RT 88-89;

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[24] The DPDs presented all of the evidence discussed in this section to the trial court other than Brite Star's actual billing records. The DPDs did present the declarations and representations of the investigators concerning their work, or the lack thereof, on Mr. Morales's case. (28CT 7960-7969.)

see Bus. & Prof. Code, § 6068, subd. (d) [attorney shall not mislead the judge by false statement of fact or law]; Rules of Prof. Conduct, Rule 5-200(B) [same]; see also 28CT 7926.) Moreover, Mr. Rozenberg's considerable delay in commencing any investigation at all was contrary to prevailing professional norms in capital cases, which demand *immediate* investigation into both phases of a capital murder trial upon counsel's entry into a death-eligible case. (1989 ABA Guidelines, Guidelines 11.3, 11.4.1, 11.8.3; 2003 ABA Guidelines, Guideline 1.1, Commentary, at pp. 921, 925-926.)

When investigation finally did commence 10 months into Mr. Rozenberg's appointment, it was de minimis, directed solely to the guilt phase, and conducted with virtually no direction from Mr. Rozenberg himself. According to Mr. Martin's statements to the DPDs, he was not informed that this was a capital case. (28CT 7966.) The investigators' Penal Code section 987.2 records likewise reflect their misunderstanding that this was *not* a death-eligible case but rather was a noncapital "LWOP" case. (987.2CT 4, 10.)[25]

Consistent with the investigators' ignorance of the capital nature of the case, the DPDs represented below, as officers of the court who had access to Mr. Morales's files generated by Mr. Rozenberg and spoke with him and his investigators, that "no attorney for [Mr. Morales] considered the case to be a death case and no mitigation efforts began until the Public Defender was appointed." (28CT 7905; see also 28CT 7939-7940; 15RT 3331.) These representations were "tantamount to sworn testimony." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 286; accord, *People v. Mroczko* (1983) 35 Cal.3d 86, 112, quoting *Holloway v. Arkansas* (1978) 435 U.S. 475, 486 [""attorneys are

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[25] The "Investigator and Expert Services Claim" designates the fee schedule for "Capital/LWOP" cases. On both forms the investigators completed and submitted, they circled "LWOP," not "Capital." (987.2CT 4, 10.)

officers of the court, and "'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'"'].) Indeed, Mr. Rozenberg failed to inform his investigators that this was a capital case because Mr. Morales was exposed to a potential death sentence and thus failed to inform them that investigation into potential mitigation and aggravation was necessary. Nor did he apply for funding for any of the ancillary services available in capital cases. (§§ 987.9, 987, subd. (d); San Bernardino County Superior Court, Former Rule 1451.) Similarly, Mr. Rozenberg did not demand a notice of aggravating evidence despite the invocation of Mr. Morales's speedy trial rights to be tried no later than November 11, 2003. (§190.3 [notice must be given within a "reasonable period of time" before trial]; *People v. Miranda* (1987) 44 Cal.3d 57, 95-96 [purpose of section 190.3's notice requirement "is to advise an accused of the evidence against him *so that he may have a reasonable opportunity to prepare a defense* at the penalty trial"]; 1989 Guidelines, Guideline 11.8.5(A) ["Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof. . . .. If the Jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance . . . ."].)

It is apparent that Mr. Rozenberg did not investigate or prepare for a *capital* murder trial because he was laboring under a misunderstanding that this was not a "capital" case until the prosecution submitted the case to the Death Penalty Review Board and it approved the case for death. In Mr. Rozenberg's own declaration concerning his representation – obtained and submitted by the prosecution – the only reference to the capital nature of the case was Mr. Rozenberg's statement that "part" of his "discussions" with the original prosecutor, Mr. Young, "included the factors taken into consideration in *not* filing the matter as a Death Penalty Case." (29CT 8246, italics added.) This

statement apparently referred to the fact – raised by Mr. Rozenberg during the plea bargaining proceedings – that during Mr. Young's own tenure from the inception of the case through June of 2003, he did not submit the case to the Death Penalty Review Board for death penalty evaluation and approval. (See 2RT 138.) According to Mr. Rozenberg's declaration, it was only when "Mr. Mazurek came onto the case" that the prosecution "represented to both myself and the court that it was his intent to file this matter as a Death Penalty Case." (29CT 8246.)

From these remarks, the investigators' understanding that this was a noncapital or "LWOP" case, Mr. Rozenberg's failure to investigate or otherwise prepare for a capital murder trial, and his belated request to withdraw *if* the Death Penalty Review Board approved the case for death on the ground that he was not qualified to handle a capital case, it is clear that Mr. Rozenberg labored under the misunderstanding that this was not a capital case, or not "filed" as a "Death Penalty Case," unless and until the prosecution exercised its discretion to actually seek death. This misunderstanding was the direct product of his inexperience and incompetence to handle death penalty cases.

Competent counsel familiar with death penalty law and prevailing professional norms in capital cases understand that the filing of special circumstance allegations renders a defendant death-eligible and hence creates a "capital" case unless and until the prosecution formally exercises its discretion *not* to seek the death penalty. (*Gardner v. Superior Court, supra*, 185 Cal.App.4th at p. 1007; *Sand v. Superior Court, supra*, 34 Cal.3d at pp. 571-575; 1989 ABA Guidelines, Guideline 11.3; 2003 ABA Guidelines, Guideline 1(B) & 10.2, *supra*, at pp. 919, 993-995; see also *In re Sterling-Suarez, supra*, 306 F.3d 1172-1175 [even where federal rule requires formal death penalty certification for a death-eligible offense, case is still considered a "capital" case for purposes of the assistance of counsel before certification and after filing of

death-eligible charges].) As the prosecution later insisted and the trial court agreed, the prosecution *never* elected not to seek the death penalty. (13RT 2803-2807, 2809-2810, 2845-2846, 2850-2852; 14RT 3262-3263, 3267-3268.) To the contrary, the death penalty was always a potential consequence of failed plea negotiations from the moment the special circumstances were alleged. (*Ibid.*) As the trial prosecutor later represented and the trial court accepted, the People simply had been "holding off" on deciding whether to submit the case to the Board and actually seek death until they could determine whether or not Mr. Morales would enter a plea and waive his trial rights. (13RT 2850-2852; see also 13RT 2803-2807, 2809-2810.) Hence, under the law and prevailing professional norms, this was a "capital" case that demanded *immediate* preparation and investigation into both phases of the trial both to discharge counsel's obligations to explore plea negotiations that could avoid the death penalty and to attempt to persuade the prosecution to exercise its discretion not to seek the death penalty for a death-eligible offense.

Of course, had the superior court complied with Local Rule 1413, Mr. Morales would have had counsel qualified and experienced in capital litigation who would have understood the need to render such assistance and presumably would have provided it. Mr. Rozenberg, as unqualified counsel appointed in violation of Local Rule 1413, did not even understand the need to provide such assistance, much less provide it. His failure to conduct any penalty phase investigation before advising Mr. Morales whether to accept or reject the prosecution's plea offer fell well below objective standards of reasonableness in capital cases. (1989 Guidelines, Guideline 1.1, 11.3, 11.4.1, 11.8.3 & Commentaries; 2003 ABA Guidelines, Guidelines 1.1, 10.2, 10.5, 10.7, 10.9.1, 10.9.2 & Commentaries, *supra*, at pp. 921, 925-926, 993-995, 1028, 1040, 1045-1046; *Gardner v. Superior Court*, *supra*, 185 Cal.App.4th at pp. 1015-1016; see also *Wiggins v. Smith*, *supra*, 539 U.S. at pp. 524-525 [referring to

ABA Guidelines of investigation as reflection of prevailing professional norms]; accord, *Rompilla v. Beard, supra*, 545 U.S. at p. 387 & fn. 7 [same].)

Indeed, even with respect to the guilt phase investigation, the delayed investigation that was finally done was minimal and conducted with virtually no direction from Mr. Rozenberg. Mr. Martin recalled that he did have some contact with Mr. Rozenberg, which is reflected by his invoice for the February 26, 2003 meeting with him. (28CT 7966-7967; 987.2CT 5; see, e.g., *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927 & fns. 12 & 14 [relying on investigator and counsel's billing records in holding that counsel's pretrial assistance fell below objective standards of reasonableness in capital case].) According to Mr. Martin and his invoices, he reviewed unidentified discovery in order to assign the case to another investigator. (28CT 7966; see also 987.2CT 5.) In addition, on April 3, 2003, he made an unsuccessful attempt to locate witnesses at the crime scene residences. (28CT 7967; see also 987.2CT 5.) Finally, Mr. Martin visited Mr. Morales at the jail on April 8, 2003, utilizing the services of Art Vasquez as an interpreter. (28CT 7967; see also 28CT 7960.) His billing records confirm this visit. (987.2CT 5.) According to Mr. Vasquez's declaration and Mr. Martin's statements to the DPD, as reported by the DPD, this was the entirety of Mr. Martin's work on the case before he assigned it to Mr. Vasquez. (28CT 7960, 7966.)[26]

According to Mr. Vasquez, he never had any contact with Mr. Rozenberg in any form. (28CT 7960-7961.) His only contact was with Reza Khanjan; that contact was limited to Mr. Khanjan's direction to visit both Mr. Morales and his mother in order to play for them the tape recording of the

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[26] Mr. Martin's statements in this regard were presented to the trial court through the declaration of one of the DPDs subsequently assigned to represent Mr. Morales at trial, who interviewed Mr. Martin. (28CT 7939-7940, 7964-7965.)

"pretext" phone conversation between them containing Mr. Morales's admissions. (28CT 7960-7961.) Mr. Vasquez's understanding was that Mr. Khanjan was Mr. Rozenberg's "assistant," not one of the trial attorneys. (*Ibid.*) He was correct; Mr. Khanjan was not Mr. Morales's appointed counsel and was not qualified to represent him in this capital case, having only been admitted to the State Bar eight months *after* Mr. Rozenberg was appointed and two months before Brite Star became aware of its appointment. (See Rule 4.117 (e) & (f) [qualifications for associate counsel in capital cases]; § 987, subd. (d); 1989 ABA Guidelines, Guideline 5.1(B).)

In accord with Mr. Khanjan's request, Mr. Vasquez did visit Mr. Morales at the jail twice to play the tape recording. (28CT 7960; 987.2CT 11.) Mr. Vasquez also met with Mr. Morales's mother on one occasion, but "lost contact with her when I was making arrangements for her to listen to the audio tape." (28CT 7960-7961.) Brite Star's billing records reflected investigative tasks consisting of "calls made to defendants family" (1 hour); a 60-mile round-trip to Fontana to "me[e]t with witnesses for statements" (3.5 hours); speaking "to the defendants [sic] family" (during a 2.5-hour block of time that also included time spent preparing an "attorney memo" and contacting an "investigator to obtain audio tapes"); and "calls made to locate and contact witnesses" (.5 hour). (987.2CT 5, 11.) These tasks were conducted with limited direction; as Mr. Martin later represented to the DPDs, "The only requests that were made were in the way of locating witnesses; which was attempted on 4-3-03 and the later pretext phone call issues followed up by Art Vasquez." (28CT 7967; see also 28CT 7964-7965.)

For his part, Mr. Vasquez attempted to communicate with Mr. Rozenberg himself, to no avail. He faxed two memos to Mr. Rozenberg documenting his meetings with Mr. Morales and his mother, but never received any response from him. (28CT 7961.) Nor did Mr. Rozenberg return any of

Mr. Vasquez's phone calls seeking direction for the investigation. (28CT 7961.) Indeed, Brite Star did not even become aware that Mr. Rozenberg was no longer counsel and that its own appointment had expired until Mr. Vasquez was informed by court staff when he called on October 21, 2003 to inquire into whether additional investigative funds had been authorized. (28CT 7962, 7968.)

Both Mr. Martin and Mr. Vasquez described their overall impressions about the amount and quality of the investigation done in the case. According to Mr. Martin's statements, "[t]he investigation in general was not as full blown as normally it would be on a 187 case," even without special circumstances. (28CT 7967; see also 28CT 7964-7965.) The limitation on their investigation was not the product of their own decisions but rather the product of the minimal direction counsel gave them. (28CT 7967; see also 28CT 7964-7965.) As Mr. Vasquez recalled, his impression was that Mr. Rozenberg "was not prepared for trial" because he had "no contact or responses from him." (28CT 7961.) In Mr. Vasquez's experience, attorneys discuss their cases with their investigators, return their phone calls, and are involved over the course of the investigation. (28CT 7961.)

Instead of preparing for a capital murder trial, the only "representation" Mr. Rozenberg recounted in his own declaration consisted of his "discussions" with the original prosecutor, Mr. Young, to negotiate a plea bargain that would strike the special circumstances. (29CT 8245-8247.) But those efforts were empty without conducting essential investigation into potential mitigation and aggravation for all of the reasons set forth in Part B, subparts 4 and 5, *ante*. (See, e.g., *Von Moltke v. Gillies, supra*, 332 U.S. at p. 721; *In re Hawley*, *supra*, 67 Cal.2d at p. 828; *In re Alvernaz, supra*, 2 Cal.4th at p. 933; see also *United States v. Morris, supra*, 470 F.3d at pp. 598-602 [inability to investigate and meaningfully consult before plea bargain proceedings constructively deprived

defendant of the assistance of counsel to which he was entitled during plea bargain proceedings]; Part B, subparts 4 & 5, *ante*, and authorities cited therein.) Again, the duty to conduct such investigation is not lifted while counsel is engaged in plea negotiations. (1989 Guidelines, Guideline 11.6.1(E); accord, *id.*, Guideline 11.4.1; 2003 Guidelines, Guideline 10.2 & Commentary; *Rompilla v. Beard*, 545 U.S. at p. 387 [duty to conduct "prompt investigation" into potential mitigating and aggravating evidence is not relieved by desire to enter a guilty plea].) To the contrary, where the consequence of failed plea negotiations is a potential penalty phase and death sentence, investigation and preparation for a capital murder trial is a necessary prerequisite to discharging an attorney's duty to provide the guiding hand of counsel in plea negotiations. (2003 ABA Guidelines, Guidelines 1.1, 10.7, 10.9.1 10.9.2 & Commentaries, *supra,* at pp. 921, 925-926, 1028, 1040, 1045-1046; 1989 ABA Guidelines 10.4.2, 11.3, 11.4.1, 11.8.3; see also *Von Moltke v. Gillies, supra*, at p. 721; *In re Hawley, supra*, at p. 828; *In re Alvernaz, supra*, at p. 933.)

Moreover, even setting aside Mr. Rozenberg's complete disregard for a potential penalty phase throughout his tenure, his efforts to negotiate the plea bargain were dilatory and fell well below prevailing professional norms in capital cases. According to Mr. Rozenberg, when Mr. Morales learned about the surreptitiously recorded telephone conversation with his mother, he said that he wanted to hear the recording himself; "if it contained what was represented to him that it contained, he would take the deal." (29CT 8245-8246.) Mr. Rozenberg's declaration did not elaborate on his consultation over this critical condition to the bargain, such as the timing of this conversation with Mr. Morales, whether and how Mr. Rozenberg responded to Mr. Morales's request and condition, or whether or how Mr. Morales reviewed the

recording and responded to it. (See *Ibid.*) The rest of the record, however, fills in some of the blanks.

The record of the preliminary hearing reveals that Mr. Morales was made aware of the tape recording at least as of the date of that hearing – June 20, 2002. (3CT 697-698, 704-705 [testimony referring to recording of pretext call].) Therefore, according to Mr. Rozenberg, Mr. Morales must have indicated his amenability to a plea, depending on his review of the contents of the tape recording, at least as of June 20, 2002. (See 29CT 8245.)

However, the record further reveals that Mr. Rozenberg did not arrange for Mr. Morales to listen to the recording for *a year*. According to investigator Art Vasquez's declaration, he took the recording to the jail for Mr. Morales's review sometime after April 8, 2003. (28CT 7960-7961.) According to his billing records, Mr. Vasquez met with Mr. Morales at the jail to play the recording for him on June 19, 2003 and August 27, 2003. (987.2CT 11.) The jail visiting logs confirm that Mr. Vasquez met with Mr. Morales on those dates. (1 SCT 140.) But by that point, Mr. Young had been reassigned and the plea negotiations with him were over. (See 2RT 114-115.)

The jail visiting logs also reveal that Mr. Rozenberg himself did not meet with Mr. Morales at the jail at any time after Mr. Morales reviewed the recording. (1 SCT 137-141.) A private meeting with Mr. Morales at the jail was essential to consult meaningfully over its contents. As set forth in the Statement of Facts, the recording was significantly unintelligible, the conversation was in Spanish, and the incriminating segments took their meaning from the context of the conversation as a whole. Discussing and discerning the contents of the recording alone required considerable time and attention. Indeed, Mr. Vasquez's first visit with Mr. Morales to play the recording consumed two and a half hours. (987.2CT 11.) In addition, objective standards of reasonable competency in capital cases demanded

consultation with Mr. Morales over the relevance of the recording's contents to the law that would apply to both phases of the trial. Given the significance of the recording both to the prosecution's guilt and penalty phase cases as well as to Mr. Morales's willingness to agree to the bargain, it was not a topic that could be addressed adequately during a brief courtroom contact before or after one of Mr. Rozenberg's sporadic courtroom appearances.

In this regard, Mr. Rozenberg's declaration did vaguely represent that when he appeared in court, "there would be discussions with Mr. Morales wherein he indicated that he understood what was happening and did not have any questions that were not answered." (29CT 8245.) Mr. Rozenberg did not elaborate on what he meant by "what was happening." (*Ibid*.) However, it is clear from the record that they could not have been discussing Mr. Morales's review of the recording at any of the appearances before Mr. Morales actually reviewed it on June 19, 2003.

After June 19, 2003, Mr. Rozenberg was absent for the next four court sessions – from June 20 until September 2, 2003. (2RT 112-126.) Therefore, he could not discuss the recording as it related to the plea negotiations with Mr. Morales in court, either. Indeed, during that period, Mr. Rozenberg defied two different court orders to appear personally. (2RT 114-123.) On July 24, 2003, in response to the court's complaints about Mr. Rozenberg's absences, stand-in counsel added that "Mr. Morales would also like to talk to Mr. Rozenberg." (2RT 118-120.) Although the court ordered Mr. Rozenberg, through stand-in counsel Khanjan, to personally appear at the next session to consult with his client, Mr. Rozenberg failed to appear at either the next or the following session. (2RT 120-126.)

On September 2, 2003, Mr. Rozenberg finally did appear in court. Thus, this was the earliest date on which he could have discussed with Mr. Morales his June 2003 review of the contents of the recording, off the record in

the courtroom or the lock up before or after Mr. Rozenberg's brief appearance. Assuming the topic was discussed at that time and place, the conditions were not amenable to a thorough, confidential attorney-client consultation concerning the contents of the recording for the reasons previously stated. Also assuming the topic was discussed at the time of that appearance, Mr. Morales must still have been open to the possibility of a negotiated disposition. During this appearance, Mr. Rozenberg informed the court, "this is my first opportunity to discuss" the case with the prosecutor's office since Mr. Young's departure and the assignment of Mr. Mazurek and that he had proposed a "possible resolution" that Mr. Mazurek needed to discuss with his "higher ups." (2RT 126-128.) Following his September 2, 2003 appearance, Mr. Rozenberg again missed the next two court sessions and therefore did not have contact with Mr. Morales again until October 7, 2003 – the date on which the "exploding" plea bargain offer was made on the record and rejected by Mr. Morales. Thus, the first real opportunity Mr. Morales had to discuss his June 2003 review of the tape recording with Mr. Rozenberg was during the 30-minute consultation he was afforded during the plea bargain proceedings. (2RT 140-141.)

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interest often can be adversely affected by the passage of time or the change of conditions . . . . Even when the client's interests are not affected in substance . . . unreasonable delay can cause a client's needless anxiety and undermine confidence in the lawyer's trustworthiness.

(1993 ABA Standards, Std. 4-1.3, Commentary.)

Not only did Mr. Rozenberg fail to investigate and prepare for a potential penalty phase, in contravention of prevailing professional norms in capital cases, but he failed to diligently consult with Mr. Morales over the critical condition of his amenability to a plea bargain that would save his life. His performance in this regard, as well, was counter to prevailing professional

norms in capital cases at the time of his representation, which dictated that early and ongoing "*full consultation* during the process of plea bargaining in a capital case is crucial . . . ." (1989 ABA Guidelines, Guideline 11.4.2, Commentary, italics added; accord 2003 ABA Guidelines, Guideline 10.9.1 [counsel must "enter into a *continuing dialogue* with the client about the content of any" pursued or offered plea agreement], Guideline 10.9.2 & Commentary.) By disregarding Mr. Morales's requests to consult over his conditional agreement to the plea disposition for over a year, and at best doing so only at the 11th hour, Mr. Rozenberg eroded any possible basis on which Mr. Morales could trust and have confidence in his opinions and recommendations.

c. Mr. Rozenberg Never Moved to Associate Qualified Second Counsel or to Appoint a Mitigation Specialist

Section 987, subdivision (d), authorizes the superior court to appoint second counsel in capital cases upon the written request of appointed first counsel. While appointment falls within the discretion of the court, a defendant is entitled to the appointment of second counsel upon a showing of "specific, compelling reasons" for the appointment. (*Keenan v. Superior Court, supra*, 31 Cal.3d at p. 429; accord, e.g., *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 285.) In *Keenan*, this Court emphasized the unique demands on counsel in capital cases and the critical role pretrial preparation plays in providing capital defendants with the effective assistance of counsel under the state and federal Constitutions. (*Keenan v. Superior Court, supra*, 31 Cal.3d at pp. 431-432.)

In this case, Mr. Rozenberg never applied under section 987 to associate second counsel with capital case experience or training. Mr. Morales would have been entitled to second counsel with capital case experience upon Mr. Rozenberg's credited declaration that he was unqualified and incompetent to

represent a defendant, like Mr. Morales, facing a potential death sentence. (See Rule 4.117 [delineating qualifications for second counsel in capital cases].)

When lead counsel is qualified and competent to satisfy prevailing professional norms in capital cases, it may not necessarily be deficient performance to fail to request second counsel, or "*Keenan* counsel," in every case. However, it certainly was under the circumstances of *this case* given Mr. Rozenberg's own admission that he was unqualified and incompetent to assist Mr. Morales in defending against a potential death sentence.

Indeed, as previously stated, Rule 3-110 of the Rules of Professional Conduct, long in effect at the time of Mr. Rozenberg's representation, provided that "if a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill *before* performance is required." (Italics added.) Under this rule, Mr. Rozenberg had only two options when he was informed that the court had appointed him to represent a defendant who had been charged with death-eligibility special circumstance allegations: (1) refuse the appointment on the grounds that he lacked the "learning and skill" necessary to competently defend someone against a potential death sentence and could not "acquire" that competence in time to render the immediate capital defense assistance that prevailing professional norms demanded; or (2) associate counsel competent to satisfy prevailing professional norms in capital cases. Having failed to exercise the former option, both Mr. Rozenberg's ethical obligations and objective standards of reasonableness at least demanded that he pursue the latter. (See also, e.g., 2003 ABA Guidelines, Guideline 4.1.A.1 [from the outset of the case, the defense team should include "no fewer than two" capitally-qualified attorneys]; 1989 Guidelines, Guidelines 2.1

[same]; *Allen v. Woodford* (9th Cir. 2005) 395 F.3d 979, 998 [failure to move to associate second counsel in a capital case falls below objective standards of reasonableness if counsel "was or should have been aware at the outset that he could not try th[e] capital case on his own"]; *Mayfield v. Woodford*, *supra*, 270 F.3d at pp. 927-928 [counsel's pretrial preparation fell below objective standards of reasonable competency by, inter alia, not seeking to associate qualified *Keenan* counsel].)

Nor did Mr. Rozenberg attempt to fill the gap in his own training and experience by seeking the appointment of a mitigation specialist. At the time of Mr. Rozenberg's tenure, the San Bernardino County Rules of Court specifically provided for the appointment of mitigation specialists, or "penalty phase coordinators," in capital cases upon application. (San Bernardino County Rules of Court, Former Rule 1451.)[27] Moreover, an easy computer search would have turned up the 1989 ABA Guidelines, which advised the use of a "mitigation specialist" in preparing and presenting mitigating evidence as part of the immediate capital case preparation demanded when the defendant has been charged with a death-eligible offense. (1989 Guidelines, Guideline 11.4.1(D)(3)(C); *id*., Guideline 8.1, Commentary [advising use of "expert" "supporting services" such as "personnel skilled in social work and related disciplines"].) From February of 2003, an easy computer search would have turned up the revised ABA Guidelines, which unambiguously directed that "[c]ounsel must promptly obtain the investigative resources necessary to prepare for both phases, including *at minimum the assistance of* a professional investigator and *a mitigation specialist . . . .*" (2003 ABA Guidelines,

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[27] This rule was amended and renumbered on January 1, 2018. Current Local Rule 1418.5 uses the term "mitigation specialists" in place of "penalty phase coordinators."

Guideline 1.1, Commentary, at p. 925, italics added; *id*. Guideline 4.1(A)(1) & Commentary, at pp. 952, 959 [a "mitigation specialist is also an indispensable member of the defense team. . . . [T]he use of mitigation specialists has become 'part of the existing "standard of care"' in capital cases, ensuring "high quality investigation and preparation of the penalty phase"'"].)

Even if the guidelines advising use of a mitigation specialist are not "inexorable commands" in every case, they were in this case. Again, given Mr. Rozenberg's own self-appraisal that he lacked the training and experience to satisfy prevailing professional norms in capital cases, and given that those norms applied from the moment the death-eligibility special circumstances were alleged, Mr. Rozenberg should have refused the appointment at the outset. Failing that, at the very least he should have attempted to *become* competent or attempted to render competent capital assistance by associating qualified professionals to assist and guide him. A reasonable attorney as measured under prevailing professional norms in 2002 and 2003 would have been aware of the availability of a mitigation specialist under Local Rule 1451, the advisability of retaining one under the 1989 and 2003 ABA Guidelines, and the demand to do so when the attorney himself lacks training and experience in conducting mitigation investigation or defending against potential death sentences. Mr. Rozenberg's failure to make use of available local procedures to seek appointment of a mitigation specialist violated his ethical obligations and fell below objective standards of reasonable competence in capital cases under these circumstances. (See, e.g., *Hamilton v. Ayers* (9th Cir. 2009) 583 F3d 1100, 1114 [criticizing counsel's deficient penalty phase performance where, inter alia, he "never even thought about retaining a mitigation expert or a mental health expert"].)

Mr. Rozenberg's failure even to attempt to utilize available procedures to employ a mitigation specialist was particularly inexcusable given his

wholesale failure to form any kind of attorney-client relationship with Mr. Morales while pursuing plea negotiations. As the ABA Guidelines admonish: "The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. *The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death."* (2003 ABA Guidelines, Guideline 4.1, Commentary, at p. 960, italics added.)

d. Mr. Rozenberg's Performance at the Preliminary Hearing was "Negligent," "Ridiculous," and He Failed to File a Meritorious Motion to Dismiss the Attempted Rape Felony-Murder Special Circumstance Allegation Before it was Considered by The Prosecution in Exercising its Discretion to Seek the Death Penalty

Mr. Rozenberg's representation of Mr. Morales at the preliminary hearing constituted no representation at all. The attempted rape felony-murder special circumstance allegation was arguably the most damaging and inherently prejudicial of the three special circumstance allegations. (See *Coker v. Georgia* (1977) 433 U.S. 584, 597; *People v. Alcala* (1984) 36 Cal.3d 604, 632-636, superseded on another ground by statute as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Yet, Mr. Rozenberg never challenged that allegation in any way. Then, after Mr. Rozenberg was relieved and the Public Defender finally appointed, the DPDs successfully moved to dismiss that allegation due to insufficient preliminary hearing evidence to support it. (26CT 7514-7520; 7RT 1326-1335.)

Mr. Rozenberg's lack of familiarity with the basic facts of the case and the applicable law was also evident from his omissions at the hearing. For instance, he made no objection to the prosecution's presentation of evidence concerning another home invasion robbery that was entirely unrelated to the crimes alleged in the complaint. (3CT 703-704, 707.) As a result and without

objection, Mr. Morales was held to answer to a charge that was not included in the complaint. (See 3CT 721.)

Furthermore, out of seven witnesses, Mr. Rozenberg subjected only Mayra Lopez and Carlos Gutierrez to *extremely* cursory and misleading cross-examination limited to their identifications of Mr. Morales. As to Ms. Lopez, on direct examination, she identified Mr. Morales in court as one of the men who burglarized her home and robbed her. (3CT 676-677.) Mr. Rozenberg's cross-examination of Ms. Lopez was limited to confirming her in-court identification of him and eliciting that she had been shown photographs of Mr. Morales on "one" occasion – stills taken from the party video – and identified him at that time. (3CT 682-683.) In *truth* – as the prosecution later stipulated and the DPDs elicited at trial – Ms. Lopez had been shown a photographic lineup bearing Mr. Morales's photograph on one occasion and stills from the party video on another but was unavailable to identify Mr. Morales on either occasion. (7RT 1370; 8RT 1621; 11RT 2431, 2433-3434.) In fact, the first time she identified Mr. Morales was at the preliminary hearing, where the prosecution pointed him out as the person wearing an orange jumpsuit. (8RT 1622; see also 3CT 681-682.) Having limited his cross-examination of Ms. Lopez to the issue of identification, Mr. Rozenberg's conduct in falsely bolstering the reliability of that identification was inexcusable. As to Mr. Gutierrez, Mr. Rozenberg's cross-examination was limited to eliciting his confirmation that he was sure Mr. Morales was one of the men who burglarized his home and robbed him. (3CT 689-690.) Moreover, the inference from Mr. Gutierrez's direct examination testimony and prior statements was that Mr. Morales had remained in his house holding him at gunpoint while the *other* men went next door and fired the shot that killed the victim. Mr. Rozenberg undermined that inference on cross-examination by eliciting from Mr. Gutierrez that Mr. Morales could in fact have left his house and gone to the

other house while Mr. Gutierrez was facing the floor. (3CT 690.) Once again, having limited his cross-examination to the issue of his identification, Mr. Rozenberg's conduct in eliciting testimony that bolstered the identification and undermined room for reasonable doubt that Mr. Morales was the actual shooter was unreasonable.

Mr. Rozenberg did not cross-examine *any* of the other witnesses, including Detective Wolf who misleadingly testified that in his recorded telephone conversation with his mother, Mr. Morales admitted that he had followed the victim home from the store and purported to quote his statement, "'I shot her.'" (3CT 704-705.) In truth, Mr. Morales insisted that he had never been at the store before the crimes (29CT 8317) and never made any unequivocal statement like "I shot her" (see 29CT 8308-8332).

In addition to failing to correct or test false and misleading testimony, Mr. Rozenberg did not object to patently inadmissible testimony. For example, he did not object when the prosecutor elicited that – after providing a police statement implicating Mr. Morales in the crimes – Angel Ivan Morales was given a lie-detector test and passed. (3CT 719; see Evid. Code, § 351.1 [absolute prohibition to any reference to taking a polygraph in any criminal proceeding, including pretrial hearings].)

As the trial court later characterized it, "the entire prelim was a negligent way of handling this." The parties "treated that case like a 10851," as quickly as possible, *without "in my opinion, any kind of thought process that this potentially could be a death penalty case the way they treated it. . . .* It was ridiculous." (13RT 2829-2830, italics added.)

Furthermore, Mr. Rozenberg never filed or argued a single motion – apart from his requests to continue Mr. Morales's case due to his press of business in other cases. In contrast, the DPDs filed several pretrial motions. (3CT 770-790 [motion to suppress recorded statements]; 3CT 792-802 [motion

for relief due to Vienna Convention violation]; 4CT 817-852 [supplemental motion to exclude tape recorded statements]; 26CT 7514-7522 [motion to dismiss attempted rape special circumstance allegation]; 26CT 7531-7526 [motion to sever unrelated robbery charge]; 26CT 7537-7538 [motion to exclude eyewitness identification as tainted]; 27CT 7607-7609 [motion to exclude evidence of tattoos]; 27CT 7615-7620 [motion to preclude testimony concerning accuracy of transcript and interpretation of pretext audio tape]; see also 28CT 7853-7875 [opposition to notice of aggravating evidence].)

One of the motions the DPDs filed was the successful motion to dismiss the attempted rape felony-murder special circumstance allegation due to insufficient preliminary hearing evidence. As a result of Mr. Rozenberg's failure to file that meritorious motion earlier, the prosecution relied on that tremendously inflammatory allegation in exercising its discretion to actually seek the death penalty. (See 2RT 136; see also 28CT 7903, 7942.) Mr. Rozenberg's conduct in this regard fell well below prevailing professional norms that impose on counsel the obligation to make efforts to persuade the prosecution to exercise its discretion not to seek the death penalty for a death-eligible offense. (1989 ABA Guidelines, Guideline 11.3 [counsel should "employ strategies to have the case designated by the prosecution as a noncapital case"]; 2003 ABA Guidelines, Guideline 1.1, Commentary, *supra,* at pp. 925-926; *State v. Ziegler*, *supra,* 159 So.3d at p. 105 [under prevailing professional norms, counsel has a duty to attempt to persuade the prosecution not to seek death penalty]; see also *Wiggins v. Smith*, *supra,* 539 U.S. at p. 524 [recognizing counsel's duty to raise mitigation to the prosecution initially].)

The DPDs also filed a motion for relief from the state's violation of Article 36 of the Vienna Convention and Penal Code section 834c, which resulted in Mr. Morales's ignorance of his right to consular assistance during Mr. Rozenberg's tenure. As discussed in Part f, *post,* Mr. Rozenberg's own

failure to alert the court to those violations or to himself apprise Mr. Morales of his right to consular assistance during his tenure also fell below an objective standard of reasonably competent assistance in capital cases.

Further, Mr. Rozenberg's failure to litigate *anything* on Mr. Morales's behalf for a year and a half only added to the overall impression he gave Mr. Morales that his case was unimportant and his best interests were being ignored. Considered together with his failure to visit Mr. Morales and his sporadic and rare courtroom appearances, Mr. Rozenberg non-performance left Mr. Morales with no basis on which to trust him or have confidence that he was advocating in his best interests and thus no reason to trust or have confidence in his opinion that the plea bargain offer was in his best interests. "In order to provide effective assistance of counsel, it is essential that a defendant have full confidence that his attorney is representing the defendant's interests with all due competence. (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.) 'When clients and lawyers lack rapport and mutual confidence the quality of representation may be so undermined as to render it an empty formality.' (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 613.)" (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 430.) This is just such a case.

e. Mr. Rozenberg Expended So Little Time and Attention to Defending Mr. Morales's Life During the Year and a Half of his Tenure that It was not Worth his "Effort" to Bill for It

The amount of "assistance" Mr. Rozenberg provided is reflected in the fact that he never billed the court for his work on Mr. Morales's case over the course of a year and a half. (See 2SCT 309-310, 314; 15RT 3350.) In his own words in a sworn declaration obtained after the trial concluded, "I never requested or received any payment from any source for my services in this case. This was an *oversight* by my office; by the time it was discovered, so much time had passed that *it hardly seemed worth the effort* to go back and deal

with it." (2SCT 316, italics added; see also 15RT 3350 [ordering declaration to be included in the record].)

Mr. Rozenberg's declaration is emblematic of his representation as a whole: Mr. Morales was consistently overlooked and so little effort was put into his case that it was outweighed by the effort it would take to seek payment for it. Mr. Morales was charged with a murder with three special circumstances along with other serious felonies, which involved multiple victims, multiple perpetrators, and multiple witnesses, for which he could be sentenced to death if convicted. Mr. Rozenberg was appointed counsel for a year and a half, from before the preliminary hearing through the virtual eve of trial (measured by the expiration of the speedy trial period Mr. Morales had invoked). The assistance of counsel demanded by the Sixth Amendment in such a case and for such an extended period during the rigorous, critical pretrial stage would necessarily entail a considerable amount of time. (Compare *ABA Ten Principles of a Public Defense Delivery System* (Feb. 2002), Principle 5 & fn. 19 ["the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and *over 1,200 hours even where a case is resolved by guilty plea*"]; *Poorhouse Justice*, *supra*, 43 Buffalo L. Rev. 329 at pp. 373-374 [citing results of surveys and opinions of death penalty experts that "defense lawyers must invest several hundred hours into research and investigation to properly prepare for a capital trial"]; NLADA, *American Council of Chief Defenders Statement on Caseloads and Workloads* (Aug. 2007) ["Capital defense can require thousands of attorney hours"].) The fact that Mr. Rozenberg first overlooked and then did not believe it was "worth the effort" to seek payment for the time he actually devoted to preparing for trial and plea negotiations is telling of the little time, attention, and effort he expended in "assisting" Mr. Morales, as well. (See, e.g., *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 927 & fn. 12

[considering billing records showing that counsel billed for only 40 hours of work in finding that he did not provide adequate pretrial assistance in a capital case and that counsel's claim that he worked more than 200 hours on the case was "inherently implausible"].)

f. Mr. Rozenberg Did Not Alert the Court to the State's Violations of Article 36 of the Vienna Convention on Consular Relations and Penal Code Section 834c, Inform Mr. Morales of his Right to Consular Assistance, or Utilize Consular Assistance in Communicating with Mr. Morales

Mr. Morales is a Honduran national who spoke only Spanish at the time of his arrest and trial. (3CT 793.) Both Honduras and the United States are signatories to the Vienna Convention on Consular Relations ("VCCR").

The Vienna Convention "is an international treaty that governs relations between individual nations and foreign consular officials." (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 336, dis. opn. of Breyer, J.) When the United States ratified the treaty in 1969, it became the "supreme Law of the Land." (U.S. Const, art. VI, cl. 2.) Article 36 of the Convention is phrased in terms of the detained foreign national and his or her individual rights. Article 36 imposes three separate obligations on a detaining authority: (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay; and (3) inform a detained foreign national of "his rights" under Article 36 without delay. (Vienna Convention, art. 36(1)(b), 21 U.S.T. 77, 596 U.N.T.S. 261.) Although this third obligation might be more properly termed a "right to notification," the right embodied in Article 36 as a whole is commonly referred to as the "right to consular assistance."

Consistent with the treaty, Penal Code section 834c, enacted in 1999, mandates that "every peace officer, upon arrest and booking or detention for

more than two hours of a known or suspected foreign national, shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country. . . If the foreign national chooses to exercise that right, the peace officer shall notify the pertinent official in his or her agency or department of the arrest or detention and that the foreign national wants his or her consulate notified."[28]

In this case, the prosecution stipulated that the state had violated Article 36 of the VCCR and Penal Code section 834c. (2RT 225.) Before the guilt phase, the Public Defender filed a motion to preclude the death penalty based on the state's violation. (3CT 792-802.) The trial court denied the motion on the ground that Mr. Morales had adequate legal representation, absent which there was no remedy for the violation. (2RT 225-227; see also 13RT 2797-2798.)

However, after the Public Defender discovered the errors in the appointment of counsel and Mr. Rozenberg's resulting failure to perform in accord with prevailing professional norms, he filed additional motions that renewed and supplemented his first motion. (28CT 7876-7919, 7941-7942; 29CT 8257-8273.) The Public Defender alleged that if the consulate had been notified, it would have participated in such a way as to monitor whether Mr. Morales was receiving the effective assistance of counsel by Mr. Rozenberg. (28CT 7877, 7903, 7941-7942, 7963-7964.) The Public Defender further alleged that although the DPDs had obtained consulate assistance for purposes of trial, it did not vitiate the effect of the violation during the critical pretrial period, when Mr. Rozenberg failed to prepare for trial and did not and could not adequately assist Mr. Morales in plea-bargaining negotiations and

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[28] Subdivision (d) of Penal Code section 834c lists countries that are excluded from the provision of the statute, which does not include Honduras.

attempting to persuade the prosecution not to seek the death penalty. (28CT 7896-7897, 7902-7905; 29CT 8269, 8272.) Had Mr. Morales been notified of his rights by anyone and received consular assistance, the Consulate "would have been monitoring this case and would have advised Mr. Morales of the shortcomings concerning Mr. Morales's representation. They would also have checked with the attorney on the progress of the case." (28CT 7941-7942; see also 28CT 7963-7964, 8133-8135.) In support of their assertion, the DPDs submitted a signed letter from a Honduran General Consul to the effect that when the Consulate is notified that one of its nationals has been detained and charged with a crime, it:

> take[s] steps to make sure that the Honduran Citizen arrestee is receiving proper representation and being treated fairly in the courtroom. We do such things as meet with the Honduran citizen who has been arrested. We meet with the family; we meet with the attorney. We even ask the attorney to provide an explanation of the case as well as what strategy they will be using. *We then hire a separate attorney for an independent review and second opinion*. It is common for us to routinely contact the attorney to find out what progress is being made on the case. In particular, if the attorney were not meeting with the client, or failing to perform their duties and investigate the case as well as file appropriate motions we would advise the Honduran citizen of such, the family and even the court depending on the situation. We in fact have a list of attorneys that we refer cases to when this happens and even participate in assisting the family to make the appropriate arrangements. . . .

(28CT 8135, italics added.)

The Public Defender's motions were directed to the state's violation of Article 36 and how it contributed to the deprivation of the assistance of counsel to which Mr. Morales was entitled during the critical pretrial stage, which is discussed in Part E, *post*. The substance of those motions alleged that: (1) Mr. Morales was entirely ignorant of his right to consular assistance during the critical pretrial period before the Public Defender's appointment (29CT 8271);

(2) had Mr. Morales been notified of his right to consular assistance, he would have availed himself of its assistance (29CT 8268 & fn. 6 8271; see also 14RT 3251-3255); and (3) the consulate was not notified that one of its nationals was detained and facing murder charges until the Public Defender was appointed and contacted it (3CT 794, 798; 28CT 7897, fn. 12). These allegations necessarily meant that *Mr. Rozenberg* did not notify Mr. Morales of his right to consular assistance or avail himself of their assistance with Mr. Morales's consent. The trial court never questioned those allegations. (See 13RT 2827, 2837-2838; 14RT 3265-3266, 3293-3294.) Nor did the prosecution dispute them, despite being given ample opportunity to do so.

Hence, although the Public Defender did raise the state's violation of Article 36 below and argued its relevance to their ineffective assistance of counsel claim, they did not explicitly argue that Mr. Rozenberg's performance was deficient because *he* failed to raise the violation pretrial, notify Mr. Morales himself of his right to consular assistance, or avail himself of that assistance with Mr. Morales's consent. Nevertheless, the foregoing record is adequate for this Court to determine in the first instance that Mr. Rozenberg's performance in this regard fell below an objective standard of reasonably competent assistance. (See *People v. Fosselman, supra,* 33 Cal.3d at p. 581.)

The Court of Appeals for the Seventh Circuit, among others, has explained the importance of the right to consular assistance:

> Article 36 furthers an essential consular function: "protecting . . . the interests of the sending State and of its nationals." Vienna Convention, arts. 5(a), (e), 21 U.S.T. at 82–83. This "protective function" is one of the most important functions performed by a consulate. Lee, Consular Law and Practice 125–88. Foreign nationals who are detained within the United States find themselves in a very vulnerable position. Separated from their families and far from their homelands, they suddenly find themselves swept into a foreign legal system. Language barriers, cultural barriers, lack of resources, isolation and unfamiliarity

> with local law create "an aura of chaos" around the foreign detainees, which can lead them to make serious legal missteps. Linda A. Malone, *From* Breard *to* Atkins *to* Malvo: *Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty*, 13 Wm. & Mary Bill Rts. J. 363, 392–93 (2004).

(*Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 402-403 ["*Osagiede*"].)

While foreign nationals charged with crimes within the territory of the United States are protected by the Sixth Amendment (see *Wong Wing v. United States* (1896) 163 U.S. 228, 238), sometimes:

> the assistance of an attorney cannot entirely replace the unique assistance that can be provided by the consulate. The consulate can provide not only an explanation of the receiving state's legal system but an explanation of how that system differs from the sending state's system. See Linda Jane Springrose, Note, Strangers in a Strange Land: The Rights of Non–Citizens Under Article 36 of the Vienna Convention on Consular Relations, 14 Geo. Immigr. L.J. 185, 195 (1999). This assistance can be invaluable because cultural misunderstandings can lead a detainee to make serious legal mistakes, particularly where a detainee's cultural background informs the way he interacts with law enforcement officials and judges.

(*Osagiede, supra*, 543 F.3d at p. 403.)

While the United States Supreme Court has rejected the argument that the VCCR itself requires suppression as a remedy for a violation, the Court has stressed that there are other means of "vindicating Vienna Convention rights," such as an ineffective assistance of counsel claim predicated on counsel's failure to assert a violation of those rights. (*United States v. Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350, 357, fn. 6 & *id.* at pp. 363-364 & fn. 3 (conc. opn. of Ginsburg, J.); *Osagiede, supra,* 543 F.3d at pp. 407-408.*)*

During Mr. Rozenberg's tenure, from April of 2002 through October of 2003, reasonably competent counsel would have been aware of the right to consular assistance under both the VCCR and Penal Code section 834c.

(*Osagiede, supra*, 543 F.3d at p. 409 [treaty violation law and similar federal regulation was clear and a "simple computer search would have turned it up" for attorney who represented a defendant in 2003].) Moreover, "numerous courts had held by 2003 that Article 36 created individual rights, even in the criminal setting. [Fn.] The courts that did not hold that Article 36 created individual rights almost invariably assumed that Article 36 did confer individual rights. [Fn.]." (*Ibid.*, and authorities cited therein.) As this Court has likewise observed, the United States Supreme Court, as well as this Court, have "assumed for purposes of review that petitioner[s] ha[ve] individually enforceable rights under article 36." (*In re Martinez* (2009) 46 Cal.4th 945, 957, citing, inter alia, *Breard v. Greene* (1998) 523 U.S. 371, 376.) Furthermore, in 2001, the International Court of Justice issued a "landmark decision[] holding that Article 36 did, in fact, provide the detained foreign national with individual rights" in *LaGrand Case (Germany v. United States)*, 2001 I.C.J. 466 (June 27, 2001). (*Osagiede, supra*, 543 F.3d at p. 410.) That decision "drew widespread attention at local, national and international levels." (*Osagiede, supra*, at p. 410.)

Hence, at the time of Mr. Rozenberg's representation, "it was clearly established across the country that either the Vienna Convention created individual rights or courts would proceed as if it did." (*Osagiede, supra*, 543 F.3d at p. 410.) Prevailing professional norms at the time of Mr. Rozenberg's representation demanded that counsel would have known as much and "would have known to raise the Article 36 violation." (*Ibid.;* see also *Ledezma v. State* (Iowa 2001) 626 N.W.2d 134, 152 ["all criminal defense attorneys representing foreign nationals should be aware of the right to consular access as provided by Article 36, and should advise their clients of this right" because local counsel "are not equipped to provide the same services as the local consulate"].)

Had Mr. Rozenberg raised the Article 36 violation pretrial, the superior court would have been in a position to remedy it before it harmed Mr. Morales. (*Osagiede, supra*, 543 F.3d at p. 412, italics added ["the *trial court judge* is in a unique position to remedy an Article 36 violation before prejudice has occurred"]; see also *Breard v. Pruett* (4th Cir. 1998) 134 F.3d 615, 622 (conc. opn. of Butzner, J.) ["The provisions of the Convention should be implemented before trial when they can be appropriately addressed"].) Mr. Rozenberg could have taken a simple action to remedy the state's violation: he could have informed Mr. Morales of his rights and raised the violation with the presiding judge. (*Osagiede*, *supra*, at p. 412.)

As to raising the violation before the presiding judge, the United States Supreme Court directed in *Sanchez-Llamas* that if a defendant "raises an Article 36 violation at trial, a court can make the appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance." (*Sanchez-Llamas, supra*, 548 U.S. at p. 350; accord, *Osagiede, supra*, 543 F.3d at p. 412.) After being apprised of a potential violation, "a court might … inquire as to whether a defendant knows that he may contact his consulate; it might even order that the prosecuting authority allow a foreign national to contact his consulate." (*Mora v. New York* (2nd Cir. 2008) 524 F.3d 183, 200, fn. 24; accord, *Osagiede, supra*, at p. 412.)

As to Mr. Rozenberg's own failures to notify Mr. Morales of his right to consular assistance, the ABA Guidelines issued in February 2003 – during Mr. Rozenberg's tenure as counsel – include a specific guideline entitled "Additional Obligations of Counsel Representing a Foreign National." That guideline directs that counsel representing a foreign national must:

> 1. immediately advise the client of his or her right to communicate with the relevant consular office; and
>
> 2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the

> client's consular office and inform it of the client's detention or arrest.
>
> 3. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

(2003 ABA Guidelines, Guideline 10.6, *supra,* at p. 1012.)

Mr. Rozenberg failed to undertake even these modest actions on behalf of his client. Given Mr. Rozenberg's failure to create a relationship of trust and confidence with Mr. Morales or to conduct any potential penalty phase investigation, he could have had no conceivable tactical reason for failing to raise the state's violation before the court and/or notify Mr. Morales of his rights to consular assistance in order to avail himself of the consulate's assistance in communicating with Mr. Morales and preparing for trial. Mr. Rozenberg's performance in this regard, as in his others, fell well below objective standards of reasonably competent assistance. (See, e.g., *Valdez v. State* (Okla. Crim. App. 2002) 46 P.3d 703, 710 [granting postconviction relief because it was ineffective assistance for trial counsel not to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"].)

As the Public Defender argued below, had the consulate been contacted earlier, during Mr. Rozenberg's tenure and before or during the plea negotiations, the consulate would have assisted counsel in communicating with Mr. Morales and explaining the differences between the legal systems in the United States and Honduras, would have assisted Mr. Morales in making life and death decisions, and indeed would have monitored Mr. Rozenberg himself. (3CT 797-798; 28CT 7902-7905, 7941-7942, 8133-8135.) Given that Mr. Rozenberg himself had done nothing to develop a relationship of trust and confidence with Mr. Morales, the consulate might have made a difference and persuaded Mr. Morales that the benefits of the plea offer far outweighed the risk of death he faced by rejecting it and invoking his trial rights. (3CT 798.)

Since Mr. Rozenberg did not make any effort to create in Mr. Morales any degree of trust and confidence in his own opinion, at the very least he should have undertaken the simple steps of availing himself of consular assistance to provide Mr. Morales with the kind of support and trust from the consulate that could have saved his life. As discussed in more detail in Part E-4, *post*, given strict liability for felony murder for all participants in the underlying felony or felonies, the reality was that going to trial had no chance of producing a meaningfully better result than that offered in the plea agreement while it carried a tremendous risk: Mr. Morales's own death. In making that life and death decision, Mr. Morales all but stood alone as he had no "counsel" or advice that he could trust. Importantly, had Mr. Rozenberg advised Mr. Morales of his right to consular assistance and availed himself of that assistance, the Consulate *would have retained another attorney to review Mr. Morales's case and offer a second opinion over whether or not to accept the plea bargain.* Any competent attorney offering his or her second opinion would have advised Mr. Morales that the risk of death far outweighed any realistic hope of reward by going to trial. Thus, Mr. Rozenberg would have received assistance in obtaining the very result he hoped to achieve: Mr. Morales's acceptance of the bargain. Given Mr. Rozenberg's own goal and the assistance he would have received in achieving it, together with his effective abandonment of Mr. Morales throughout the critical pretrial stage, his failure to inform Mr. Morales of his right to consulate assistance and to avail himself of that assistance for Mr. Morales fell well below objective standards of reasonableness in a capital case.

3. By His Own Credited Admission and Based on His Actual Performance, Mr. Rozenberg Could Not Competently Advise Mr. Morales Concerning the Advantages and Disadvantages of Rejecting a Plea Offer That Would Spare Him a Death Sentence

As the foregoing demonstrates, the record of Mr. Rozenberg's pretrial performance bears out his declaration, and the superior court's finding, of incompetence. Mr. Rozenberg's pretrial performance as a whole was contrary to prevailing professional norms in *capital* cases. Indeed, the foregoing demonstrates that Mr. Rozenberg failed entirely to function in any sense as Mr. Morales's *capital* defense counsel.

Mr. Rozenberg effectively admitted that he was not functioning as capital defense counsel when he declared at the plea bargain proceeding that he was unqualified and unwilling to handle a capital case. He simply labored under the misimpression that he was not required to function as capital defense counsel unless and until the prosecution exercised its discretion to actually seek the death penalty. This misunderstanding and his objectively unreasonable performance in conformity with it was directly attributable to the court's error in appointing counsel who was *not* qualified for appointment to a "Capital/LWOP" case under Rule 1413. Qualified, experienced capital defense counsel understand that unless and until the prosecution formally exercises its discretion *not* to act on its election to seek the death penalty for a death-eligible offense, the defendant is entitled to the assistance of competent *capital* defense counsel who immediately commences preparation for a capital murder trial. The Public Defender understood as much. (28CT 7904-7905.) This case illustrates one of the reasons for this norm.

As discussed in Part C-3, *ante*, in considering the prosecution's pretrial plea bargain offer, Mr. Morales was entitled to the assistance of counsel who could explain the law that would apply and the evidence likely to be introduced at a *capital* murder trial and who could offer his or her informed, expert opinion

about the chances of receiving a death sentence at trial if he rejected the offer. Mr. Rozenberg was not qualified to know or explain complex and highly specialized death penalty law and procedure, which is significantly different from the noncapital sentencing with which he had any experience. (See, e.g., *People v. Danielson, supra,* 3 Cal.4th at p. 720, and authorities cited therein; *People v. Superior Court* (*Mitchell*), *supra,* 5 Cal.4th at p. 1235, and authorities cited therein.) Furthermore, having failed to investigate or undertake any efforts to prepare for a capital murder trial, he could not explain how the law would or could apply to the likely evidence in this case. In short, Mr. Rozenberg was utterly unequipped to provide Mr. Morales with the assistance to which he was entitled. [29]

Moreover, Mr. Rozenberg's pretrial performance left Mr. Morales without any basis on which to trust him and have confidence in his recommendation to accept the bargain. Again, it is difficult to conceive of a position demanding of more trust and confidence than that of an attorney counseling a client to voluntarily surrender the rest of his life in prison. Mr. Rozenberg's pretrial performance only assured that Mr. Morales would not have a fundamental base of trust and confidence in him, his knowledge of the case, or in his skill as an attorney whose opinion mattered. Viewing things

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[29] Similarly, representation by competent capital defense counsel – i.e., counsel who satisfies prevailing professional norms in capital cases by immediately commencing preparation for a capital murder trial – during the period between the filing of special circumstance allegations and the prosecution's discretionary decision over whether or not to actually seek the death penalty is critical to attempt to persuade the prosecution to exercise its discretion in favor of life. (1989 ABA Guidelines, Guideline 11.3; *Wiggins v. Smith, supra,* 539 U.S. at p. 524; *Gardner v. Superior Court, supra,* 185 Cal.App.4th at p. 1016; *State v. Ziegler, supra,* 159 So.3d at p. 105.) Having failed to function as capital defense counsel during that period, Mr. Rozenberg was also unequipped to provide such assistance.

through Mr. Morales's eyes, Mr. Rozenberg had all but abandoned him before the October 7 plea bargain proceeding. While creating a relationship of trust and confidence between attorney and client is always important, it is essential when attempting to negotiate a plea bargain that will avoid the death penalty. It bears repeating here: "The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel's advice regarding the advisability of a plea. . . . [A] client will, quite reasonably, not accept counsel's advice about the case if the attorney has failed to conduct a meaningful investigation." (2003 ABA Guidelines, Guideline 10.9.2, Commentary, *supra*, at pp. 1045-1046.) Likewise, "a client will not – with good reason – trust a lawyer who visits only a few times . . . ." (2003 ABA Guidelines, Guideline 10.5, Commentary, *supra*, at p. 1008, italics added; accord, 1989 Guidelines. Guidelines 11.4.1, 11.4.2 11.6.1 & 11.8.3 & Commentaries.)

4. Prejudice Must be Presumed from Mr. Rozenberg's Lack of Pretrial Capital Assistance

a. Prejudice Must be Presumed Because Mr. Rozenberg Failed to Function as the *Capital* Defense Counsel to Which Mr. Morales was Entitled and/or the State Was Responsible for the Impairment of Mr. Morales's Right to the Assistance of Capital Defense Counsel During the Critical Pretrial and Plea-Bargaining Stages

As set forth in Part B-3, the actual or constructive denial of the assistance of counsel to which a defendant is entitled at a critical stage of the proceeding is presumptively prejudicial and violates both the Sixth Amendment of the federal Constitution and Article I, section 14 of the California Constitution. As the foregoing demonstrates, Mr. Rozenberg failed to function as *capital* defense counsel during the critical pretrial and plea-bargaining stages. Put another way, he failed entirely to act as the

prosecution's adversary and Mr. Morales's advocate with respect to the prosecution's case for death. (See *Cronic, supra,* 466 U.S. at p. 659.) For this reason alone, Mr. Morales was constructively deprived of the assistance of counsel to which he was entitled during the critical pretrial and plea-bargaining stages. (*Ibid.*; see, e.g., *United States v. Morris, supra,* 470 F.3d at pp. 598-602 [constructive denial at plea bargaining stage]; *Mitchell v. Mason, supra,* 325 F.3d at p. 744 [constructive denial during seven-month period of pretrial appointment]; *Appel v. Horn, supra,* 250 F.3d at pp. 206-207, 213-218 [constructive denial during 10-day period between counsel's appointment and court's acceptance of defendant's waiver of right to counsel]; *Childress v. Johnson* (5th Cir. 1997) 103 F.3d 1221, 1231 & fn. 14 [constructive denial at guilty plea hearing]; *Tucker v. Day* (5th Cir. 1992) 969 F.2d 155, 159 [constructive denial at noncapital sentencing].)

Even if Mr. Rozenberg's own performance were not alone enough to violate Mr. Morales's rights to the effective assistance of counsel at critical stages under the Sixth Amendment and Article I, section 14, prejudice must be presumed for another reason. As discussed in Part B, *ante,* the very premise of the *Strickland* decision's allocation of the burden of proving prejudice on the defendant for ordinary attorney error for which the state is not at fault is precisely that "[t]he government is not responsible for, and hence not able to prevent, [the] attorney errors . . . . " (*Strickland, supra,* 466 U.S. at pp. 694-695; accord, *Hill v. Lockhart, supra,* 474 U.S. at p. 57.) In contrast, when a potential impairment of the defendant's Sixth Amendment rights is "easy to identify" and the state is able or required "to prevent" it but fails to do so, the state is "directly responsible" for any actual impairment that results and therefore prejudice must be presumed. (*Strickland, supra,* 466 U.S. at p. 692, citing *Cronic, supra,* 466 U.S. at p. 659 & fn. 25; accord, *Bell v. Cone, supra,*

535 U.S. at p. 696, fn. 3.) It is inappropriate and unfair to force the defendant to shoulder the difficult burden of proving prejudice under these circumstances.

Here, Local Rule 1413 effectuates a death-eligible defendant's right to the assistance of capital defense counsel – i.e., competent counsel as measured by prevailing professional norms in capital cases – at every stage of a capital proceeding. Rule 1413 imposes on the superior court the obligation to prevent a potential impairment of a death-eligible defendant's right to the assistance of counsel. As a direct and foreseeable consequence of the court's violation of that rule in this case, an actual impairment of that right resulted. Indeed, the court was explicitly alerted to as much when Mr. Rozenberg declared that he was incompetent to represent someone against a potential death sentence; a statement he made a year and a half into his tenure as counsel but before he purported to "assist" Mr. Morales in considering the plea bargain offer that could save his life. While the court credited Mr. Rozenberg's declaration and did relieve him on that ground *after* Mr. Morales rejected the plea bargain offer and the prosecution exercised its discretion to actually seek death at trial, its ruling came too late to remedy its appointment errors and the resulting deprivation of Mr. Morales's right to the assistance of capital defense counsel during the critical pretrial and plea-bargaining stages of this capital case. Under clearly established law, it is inappropriate to place the burden of proving prejudice on Mr. Morales for the *state's* deprivation of his right to the assistance of competent counsel as measured under prevailing professional norms in capital cases.

b. The State Compounded Its Errors by Violating Mr. Morales's Rights to Consular Assistance Under Article 36 of the VCCR and Penal Code Section 834c

The state's fault for Mr. Rozenberg's failure to act as Mr. Morales's capital defense advocate and the prosecution's adversary during the critical

pretrial and plea-bargaining stages was compounded by its violation of international law. As set forth in Part D-2-f, *ante*, the state conceded that it had violated Article 36 of the VCCR and Penal Code section 834c by failing to advise Mr. Morales of his right to consular assistance. (2RT 225.) When the violation was eventually raised in the trial court by the DPDs, Mr. Morales "stood ready to testify . . . that had he known of his consular rights, he would have asserted them and would have availed himself of their assistance . . . ." (29CT 8268 & fn. 6, 8271.) Had the consulate been notified, it would have *monitored* Mr. Rozenberg's performance and "taken steps to make sure that [Mr. Morales] [wa]s receiving proper representation and being treated fairly in the courtroom." (28CT 8135.) The Consulate would have asked Mr. Rozenberg "to provide an explanation of the case as well as what strategy" he was using. (*Ibid*.) And it would have "hire[d] a separate attorney for an independent review and second opinion." (*Ibid*.) Moreover, if, in monitoring Mr. Rozenberg's progress and work, the Consulate had discovered that Mr. Rozenberg was "not meeting with [Mr. Morales] or failing to perform [his] duties and investigate the case as well as file appropriate motions," the Consulate would have advised Mr. Morales and "even the court depending on the situation." (*Ibid.*) "We in fact have a list of attorneys that we refer cases to when this happens and even participate in assisting the family to make the appropriate arrangements. . . . ." (28CT 8135.) Notably, the United States itself emphasizes this kind of assistance as among the central purposes of the notification requirement and among the central responsibilities of the United States Consulate when its own nationals are detained in foreign countries. (See U.S. Dept. of State, 7 *Foreign Affairs Manual* (2004), § 433.1 [instructing U.S. consulates abroad to "monitor whether attorneys retained by U.S. inmates are in contact with them and rendering them appropriate and adequate counsel and other legal services"]; *U.S. Dept. of State, Daily Press Briefing* (Sept. 29,

1995), R. Nicholas Burns, Spokesperson, available at http://www.hri.org/news/usa/std/1995/95-09-29.std.html [one of the "fundamental responsibilities" of the U.S. Consulate is "helping Americans who are incarcerated, advising them of their legal rights when they're incarcerated," and "helping them get legal assistance"]; *U.S. Dept. of State, Foreign Affairs Manual* (2004), 7 FAM 422 Access, at (a), (e) and (f) [U.S. consular officers "must make every effort to gain prompt personal access to an arrested U.S. citizen or national" in order to "provide the arrestee with a list of reputable lawyers or information concerning local legal aid" and to have "the opportunity to explain the legal and judicial procedures of the host government and the detainee's rights under that government at a time when such information is most useful"].)

In other words, similar to Local Rule 1413, one of the purposes served by Article 36 and Penal Code section 834c in this case was to ensure that Mr. Morales was receiving the effective assistance of counsel to which he was entitled. The state's violation of those rules only compounded the degree of its own fault for Mr. Rozenberg's failure to provide competent assistance to Mr. Morales as measured by prevailing professional norms in capital cases. For this reason, as well, it is appropriate to presume prejudice from Mr. Rozenberg's systematically inadequate performance.

For any or all of the foregoing reasons, Mr. Morales was deprived of his rights to the effective assistance of counsel at the critical pretrial and plea-bargaining stages as guaranteed by the Sixth Amendment of the United States Constitution and Article I section 14 of the California Constitution. The judgment must be reversed and the matter remanded for: (1) the prosecution to reinstitute the plea bargain offer; (2) Mr. Morales to consider the offer with the assistance of competent counsel; and (3) the trial court to exercise its discretion in approving and effectuating bargain should Mr. Morales agree to it.

E. If this Court Determines that the Two-Part *Strickland v. Washington* Test Applies to Mr. Morales's Claim, the Matter Must be Remanded to the Superior Court to Hold a New Hearing that Comports with the Law

Should this Court determine that the *Strickland* test for prejudice applies to Mr. Morales's ineffective assistance of counsel claim, that does not end the matter. As set forth below, the trial court heard and resolved Mr. Morales's claim on the merits under the *Strickland* test by assuming that even if Mr. Rozenberg performed deficiently, there was no conceivable way Mr. Morales could satisfy the prejudice prong of the *Strickland* test. In so doing, the court misapplied that test, made factual findings based on speculation and not evidence, and refused to hear relevant testimony from Messrs. Morales and Rozenberg bearing directly on the factual issues the court resolved. The matter must be remanded to the trial court to hold a new hearing into whether Mr. Morales was deprived of the effective assistance of counsel under the *Strickland* test wherein the court applies the correct law, makes factual findings based on the evidence, and gives Mr. Morales a meaningful opportunity to present relevant evidence.

1. Procedural History

a. Mr. Morales's motion for relief from the denial of his right to the effective assistance of counsel

As previously discussed, after the guilt phase and before the penalty phase commenced, the DPDs presented the trial court with the evidence described in the preceding sections in arguing that the superior court's appointment errors had the effect of depriving Mr. Morales of his state and federal constitutional rights to the effective assistance of counsel during the pretrial and plea-bargaining stages. (28CT 7920-7971, 7977-7981, 8133-8136; see also 28CT 7904-7905, 7942, fn. 33.) As Mr. Morales has set forth above,

the DPDs argued below that as a result of the court's appointment errors, "no attorney for [Mr. Morales] considered the case to be a death case" or prepared for a capital murder trial "until the Public Defender was appointed." (28CT 7904-7905, 7942, fn. 33; see also 28CT 7939-7940, 7942-7943, 7946-7948.) Mr. Rozenberg's pretrial performance, as set forth in the preceding sections, fell well below objective standards of reasonable competence in capital cases. (28CT 7942-7947.) "A complete breakdown of the attorney-client relationship ensued . . . ." (28CT 7950-7952; see also 14RT 3254) and "[t]here [was] a total failure of representation" (13RT 2824). Under the circumstances, Mr. Morales did not and could not have made a fully informed decision, aided by competent counsel, to reject the plea bargain offer. (28CT 7950-7952.) The fault for the impairment of Mr. Morales's right to the assistance of competent counsel in considering the plea bargain offer lay squarely with the state. (28CT 7950-7951.) The remedy for the violation, the DPDs urged, was to give Mr. Morales the benefit of the plea bargain offer by striking the special circumstances or at the very least precluding the prosecution from proceeding to a penalty phase and seeking death. (28CT 7950-7952.)

b. Proceedings on the motion before the penalty phase

In a series of hearings both before and after the penalty phase, the court considered Mr. Morales's allegations and the evidence offered in support thereof on the merits. In the first of these proceedings, held on October 20, 2004, the court noted that it understood the superior court had violated the local rules by appointing Mr. Rozenberg. (13RT 2794-2795.) The court also stated that it had "found some significant problems" with regard to the assistance Mr. Morales was provided pretrial in the Fontana division of the superior court. (13RT 2791.) The court was particularly concerned that even though the case had been pending for over two years, the consequence of rejecting the plea

bargain offer was that the prosecution submitted the case to the Death Penalty Review Board. (13RT 2791-2792.) Typically, the court observed, the prosecution makes the decision whether to submit to the Board and seek the death penalty "very quickly" after the preliminary hearing. (13RT 2792.) Yet, in this case, the prosecution's decision to seek death was tied to Mr. Morales's decision to exercise his right to trial; a decision that could only be an informed one if based upon the receipt of adequate assistance from trial counsel. (13RT 2791-2792.) In this regard, the court "had some significant problems in the fact that it appears that Mr. Rozenberg made very little effort in representing Mr. Morales and trying to have some type of relationship or rapport so that he could actually sit down and try to convey the importance of perhaps Mr. Morales accepting the plea bargain agreement." (13RT 2792.)

In hopes of reaching a just solution in light of the case's background, the court directed the deputy district attorney to bring Mr. Morales's motion and supporting evidence to the attention of the elected District Attorney to determine whether he would exercise discretion not to seek the death penalty. As the court directed:

> I am unclear as to whether or not he [the elected District Attorney] knew the exact type of representation that Mr. Morales had in the Fontana Superior Court, the lack of rapport probably or relationship he had with Mr. Rozenberg, the fact that Mr. Rozenberg spent little or no time with Mr. Morales. He never even showed up to court 90 percent of the time, and even Judge Skropos at one time was going to set it for an order to show cause and contempt hearing for his failure to come to court. With all that being said, I think in all fairness perhaps we should just end it now and he has been convicted and the special circumstances have been found true and go forward from there. But that is up to the prosecution.

(13RT 2793.) The court also directed the deputy district attorney to alert the District Attorney to the state's violation of Article 36 of the VCCR and Penal Code section 834c as it related to the assistance Mr. Morales received pretrial.

(13RT 2797.) The court reasoned that its first ruling denying Mr. Morales's claim for relief from the violation was based on the assumption that he had received effective assistance during the period in which he was unaware of his right to consular assistance. But now putting it "in the context of the type of representation he was provided, then maybe that becomes more of an issue." (13RT 2797-2798.) The court trailed the matter for a day until the District Attorney could consider and respond.

The parties reconvened the next day. In response to the court's concern over the previous court's appointment errors, the prosecutor urged that they were irrelevant. (13RT 2801-2802.) Instead, the prosecutor argued, the only issue was whether Mr. Rozenberg's performance fell below prevailing professional norms. (13RT 2802.) With respect to Mr. Rozenberg's performance, the prosecutor urged only that Mr. Rozenberg continued the case because he was trying to negotiate a plea agreement for a 50-year-to-life term. (13RT 2802-2807.) The prosecutor did not explain how or why that assistance fell within prevailing professional norms.[30]

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[30] Much of the discussion in these proceedings related to the DPDs position that Mr. Rozenberg's failure to prepare for and try the case during the tenure of the original prosecutor, Mr. Young, was prejudicial because Mr. Young was apparently prepared to try the case noncapitally. Ultimately, the trial court agreed with the prosecutor's argument that Mr. Morales could not prove prejudice in this regard because the death penalty was always a possibility and Mr. Young had simply held off on deciding whether or not to submit the case for death penalty evaluation and approval until he could determine whether or not Mr. Morales would exercise his trial rights. (14RT 3262-3263, 3267-3268.) The parties also discussed whether it would be appropriate to inform the jurors at penalty that the prosecution was willing to negotiate for a sentence of 50-years-to life as a way to balance out the harm from Mr. Rozenberg's deficient performance. (13RT 2846-2847.) Mr. Morales's summary of the proceedings is limited to the issue of Mr. Rozenberg's erroneous appointment and ineffective assistance of counsel as it related to the plea bargain proceedings.

The trial court again expressed its "concerns because of the fact I know Mr. Rozenberg in terms of his attendance record in my court and other courts, and it's awful. I see that half the time he is not there." (13RT 2812.) Further, "I see the fact that he went one time to the jail facility to meet with Mr. Morales in the very beginning of the relationship and the fact that there was never any investigation." (13RT 2812.) The DPDs reiterated the points from their written motions that Mr. Rozenberg effectively failed to function as Mr. Morales's counsel throughout the pretrial proceedings, which was the fault of the superior court's appointment errors. (13RT 2807, 2816-2817.)

The prosecutor suggested that Mr. Rozenberg's performance could not have harmed Mr. Morales with respect to the plea bargain because the DPDs had never approached him to reinstate the offer after Mr. Morales was provided with competent representation. (13RT 2816.) The trial court warned him not to "go down that road" because it was clear from the plea bargain proceeding that the plea bargaining had terminated with prejudice when Mr. Morales rejected the offer on October 7, 2003. (*Ibid.*) The DPDs confirmed that they did not attempt to negotiate because the prosecutor made it abundantly clear on October 7, 2003, that he would not entertain any further negotiations. (*Ibid.*)

The court reiterated its concerns about the VCCR violation in light of the superior court's violations of state law in failing to appoint the Public Defender and appointing counsel who was "not on the list" of attorneys qualified for appointment to "Capital/LWOP" cases and who refused to represent Mr. Morales in a death penalty trial. (13RT 2816-2817.) The court added that it was troubled that the previous court was also concerned that Mr. Rozenberg "was not paying particular attention to this case" given that it set the matter for a contempt hearing when Mr. Rozenberg did not show up at a scheduled court setting. (13RT 2820.)

The prosecutor agreed that Mr. Rozenberg was not qualified to handle a death penalty case but argued that it did not matter because "as soon as it became a death penalty, he got off the case." (13RT 2817.) At the same time, he insisted that the death penalty had always been a possibility from the moment the special circumstances were alleged. (13RT 2803-2806, 2810-2811, 2812-2813.) The court responded that the prosecutor was "talking out of both sides of your mouth . . . ." (13RT 2817-2818.) Nevertheless, the prosecutor pressed that Mr. Rozenberg did not have to be qualified to try a capital case in order to provide adequate assistance at the plea-bargaining hearing, despite the fact that the consequence of rejecting the bargain was potentially a capital murder trial and death sentence. (13RT 2818.) It was enough, according to the prosecutor, for Mr. Rozenberg to warn Mr. Morales that he would likely be convicted if he went to trial and a potential consequence of his convictions was a death sentence. (13RT 2818.)

The court did not address the premise of the prosecutor's position but did question whether Mr. Rozenberg could provide meaningful, adequate advice in only half an hour. (13RT 2818.) The prosecutor countered that there had been ongoing plea negotiations between Mr. Young and Mr. Rozenberg. (13RT 2819.) The DPDs, in turn, countered that those negotiations did not incorporate seeking the death penalty if they failed. To the contrary, the offer whose terms provided for seeking the death penalty if rejected was not made until October 7, 2003. (13RT 2819-2820.) Furthermore, any prior plea negotiations could not have been effective because Mr. Rozenberg did not conduct any investigation into the case at all for the first 10 months of his tenure. (13RT 2822-2823.) Further, the DPDs argued, even after the court-appointed investigator began working on the case, the investigation was inadequate. (13RT 2823.)

Under all of the circumstances, the DPDs argued, Mr. Rozenberg simply could not provide adequate assistance to Mr. Morales:

> [A]s an attorney, . . . if I have a case and I get it investigated and later on I get an offer, I can go over the investigation with my client and say this is what we have done, this is what we have turned up or what we haven't turned up. *In this case Mr. Rozenberg failed to act as an attorney and failed to fully investigate the case and fully inform his client what he was doing*. So the client is sitting there thinking that nothing has been done. There is no relationship. . . . The more we look into it, the more we found out what wasn't done. *There is a total failure of representation.*

(13RT 2823-2824, italics added.)

The prosecution responded that the case against Mr. Morales was strong given his own admissions in the tape-recorded conversation with his mother. (13RT 2824.) The court replied:

> I realize it is a strong prosecution case, Mr. Mazurek. That is not the point. And I realize that Mr. Rozenberg even allowed the defendant to listen to the tape before making a decision. I realize that. But I have to look at the entire situation at hand, and *I don't see much relationship between Mr. Rozenberg and the defendant in this case. I do have problems with the fact that I don't even know how these attorneys get appointed. And rules and procedures that are in the code and the policies of the county were all violated. . . . I'm not so sure that Mr. Rozenberg spent any time or effort on this case, quite frankly*. Maybe he felt he didn't have to. Maybe he felt that because there was a confession on tape. But *he treated it very lightly*. And he goes to the jail facility one time. He comes to court merely to continue it. He sends Mr. Khanjan in more than half the time to the point where a judicial officer says, you know what, we want to see you come to court. If you are not going to come to court, we are going to hold you in contempt. *And then we have a final ending, where it was called for or not, additional time or not, Mr. Morales who has probably not much of a relationship with Mr. Rozenberg because he never shows up half the time, gets a half hour to discuss his fate*. And all those things bother me. I have been losing sleep over that in the sense this is not the

> typical situation I have seen in death penalty cases. This is not how it is normally handled. I have never seen a district attorney's office wait for – whether it is because of the attorney saying put it off . . . . But the fact of waiting two and a half years before making that decision when in every other situation it is right after prelim. And all the -- all the I's are dotted and all The T's are crossed and that is -- probably the reason it should be done that way is because we know the magnitude and the seriousness of what we have to do in terms of appellate review. Now you have all this muck happen before you made that decision. And there is going to be a lot of issues in terms of court of appeals, the Ninth Circuit and whoever else is going to review.

(13RT 2824-2826, italics added.)

Moreover, the court remarked, "the entire prelim was a negligent way of handling this." The parties "treated that case like a 10851," as quickly as possible, *without "in my opinion, any kind of thought process that this potentially could be a death penalty case the way they treated it. . . .* It was ridiculous." (13RT 2829-2830, italics added.)

The court continued that it had thought "the best remedy" was for the prosecution to exercise its discretion not to seek the death penalty in light of the pretrial errors. (13RT 2831.) Since the prosecution had insisted on proceeding to the penalty phase as planned, it had to decide what relief to provide Mr. Morales. (13RT 2831.) In resolving that question, the court determined that it would take testimony at the next scheduled hearing date, before the penalty phase commenced, from, inter alia, Mr. Rozenberg as well as the investigators he utilized. (13RT 2831-2832, 2834, 2837-2838, 2841.) The court also suggested that the DPDs call a representative from the Honduran Consulate to attest to whether it monitors proceedings for the purpose of ensuring that its nationals are represented effectively. (13RT 2838.)

On the date scheduled to take the testimony, however, the trial judge changed her mind about the procedure. The court noted that "there are still

issues as to what happened in the lower court or Fontana court" concerning the appointment of counsel. (13RT 2846.) However, the court determined that the better course of action was to proceed to the penalty phase before taking testimony and ruling on Mr. Morales's requests for relief grounded on his claim that the state had deprived him of the effective assistance of counsel at the pretrial and plea-bargaining stages. (13RT 2847-2848, 2852-2853.)

The matter proceeded to penalty and the jurors returned their death verdict on November 5, 2004. Following some continuances, the court set the matter for a final hearing, and the taking of testimony relating to Mr. Morales's allegations of ineffective assistance of counsel, on August 12, 2005. (13RT 3243-3247.)

c. The final post-death verdict hearing on the motion and the court's ruling

The day before the hearing was scheduled to commence, the prosecution finally filed a written opposition to Mr. Morales's request for relief. (29CT 8233-8253.) The prosecution argued that the two-prong *Strickland* standard applied to Mr. Morales's claim. (29CT 8236-8237.) The prosecution also urged the court to dispose of Mr. Morales's claims "'on the ground of lack of sufficient prejudice,'" without resolving whether the first prong of the *Strickland* standard was satisfied. (29CT 8238-8239, quoting from *In re Cox* (2003) 30 Cal.4th 974, 1019.) In this regard, the prosecution argued that there could be no prejudice from Mr. Rozenberg's pretrial performance because Mr. Morales was provided with competent counsel – the Public Defender – at trial. (29CT 8239.) With respect to the plea bargain offer, the prosecution simply argued that Mr. Morales was given adequate time to consider it, without addressing Mr. Rozenberg's actual performance throughout the pretrial and plea-bargaining stages. (29CT 8239-8240.)

The prosecution also tendered Mr. Rozenberg's declaration concerning his representation. (29CT 8245-8247.) As discussed in Part D-2-b, *ante*, the representation Mr. Rozenberg recounted in the declaration was limited to his "discussions" with the prosecutors to negotiate a plea disposition calling for a 50-year-to-life term. The declaration did not address or discuss his actual performance or advice to Mr. Morales concerning the plea agreement apart from recounting Mr. Morales's statement that if his own review of the "pretext" call confirmed that "it contained what was represented to him that it contained, he would take the deal." (29CT 8245-8246.)

On August 12, 2005, the parties convened for the final hearing. The court noted that Mr. Rozenberg was present and stated, "I'm going to allow the defense to call Mr. Rozenberg in regards to the type of relationship that he had with Mr. Morales, in terms of conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement." (14RT 3248.) The court remarked that it wanted further information concerning the attorney-client relationship between Messrs. Rozenberg and Morales that Mr. Rozenberg did not address in his declaration. (14RT 3248.)

Immediately following the court's direction to Mr. Rozenberg to "come up," the prosecution interjected that his testimony was unnecessary and irrelevant. (14RT 3249.) Rather than determining whether Mr. Rozenberg had rendered deficient performance, the prosecutor urged, the trial court could and should resolve the merits of Mr. Morales's claim by finding that even assuming Mr. Rozenberg performed deficiently, Mr. Morales did not suffer prejudice. (14RT 3249-3250.) In this regard, the prosecutor pointed out that the DPDs had not tendered Mr. Morales's declaration that he would have taken the plea bargain offer had qualified, competent counsel represented him. (14RT 3250.) In any event, the prosecutor argued, Mr. Morales could not present objective

evidence independent of his "self-serving" testimony to prove as much and therefore could not carry his burden of proving prejudice. (14RT 3251.)

The DPDs initially responded "the entire thrust" of their motion was that Mr. Rozenberg's performance was inadequate and deficient as a result of the court's appointment errors. (14RT 3250.) The "prejudice" Mr. Morales suffered from the appointment errors was that he was unrepresented by counsel who could assist Mr. Morales "to even understand the scope of what he was facing." (14RT 3250; see also 14RT 3254.) As they put it, "It was a court-created fiasco. They appointed inadequate counsel based on the Court's own declaration. That's why we have a system in place. It failed. The reason they have that statutory creation in place is so that capital/LWOP attorneys on the conflict panel know what they're doing and can assist their clients." (14RT 3259; see also 14RT 3254.)

The prosecutor responded that even assuming the DPDs were correct and "Mr. Rozenberg was completely ineffective," Mr. Morales still bore the burden of proving prejudice but could not satisfy it with "independently objective evidence, not just the defendant's self-serving statement." (14RT 3250-3251.) "Rather than going through this charade of putting Mr. Rozenberg on to ask what he did or didn't do," the prosecutor urged, the court could and should deny Mr. Morales's motion on the merits. (14RT 3251.)

The court agreed with the prosecutor's position that the two-part *Strickland* test applied, under which Mr. Morales could only show prejudice by proving that he would have taken the plea bargain offer had he been represented by competent counsel. (14RT 3251, 3253-3254.) The court directed the DPDs: "If you would like to call Mr. Morales to the stand to obviously establish for the court some prejudice, you're more than welcome. If you can establish prejudice, I'll be happy to have Mr. Rozenberg testify."

(14RT 3255.) The court gave the DPDs a moment to confer with Mr. Morales after which they announced, "I call Mr. Morales to the stand." (14RT 3255.)

Once again, the prosecutor immediately interjected that even though Mr. Morales evidently was prepared to testify that he would have taken the offer had he been represented by competent counsel, his "self-serving statements" should be discounted. (14RT 3255.) Reasoning that there was no "objective, independent" evidence to corroborate Mr. Morales's proposed testimony, the prosecutor argued that Mr. Morales simply could not prove prejudice. (14RT 3255.) The trial court agreed.

The trial court did find that the superior court had violated state law and Local Rule 1413 by failing to appoint the Public Defender and by appointing Mr. Rozenberg, who was not qualified for appointment in "Capital/LWOP" cases. (14RT 3265-3266.) The court also ruled that the case had always been a capital case inasmuch as Mr. Morales was facing a potential death sentence from the moment the special circumstances were alleged. (14RT 3262-3264, 3267-3268.) The court further ruled that the DPDs had "established everything through declarations, through your argument here in court, through minute orders and prior transcripts, and I don't think [the prosecutor] Mr. Mazurek is disputing any of that." (14RT 3269-3270.)

Nevertheless, the court agreed with the prosecutor's position that no matter how deficient Mr. Rozenberg's performance might have been, and no matter what testimony Mr. Rozenberg and Mr. Morales might provide, Mr. Morales simply could not prove to the court's satisfaction that he would have taken the plea bargain offer had he been represented by the Public Defender (or other competent counsel) from the outset. (14RT 3256-3260, 3264-3273.) In making this ruling, the court speculated at length concerning the counsel and advice Mr. Rozenberg actually gave.

The court surmised that Mr. Morales was told that the prosecution had a very strong case against him for guilt but Mr. Morales said that he did not want to take the deal. (14RT 3256-3257.) Further, the court remarked, Mr. Morales was "specifically told by the Court, by Mr. Rozenberg, he was explained about the strength, weaknesses of the case," and that he faced a potential death sentence if he rejected the offer; yet Mr. Morales refused the offer. (14RT 3257.) The court continued:

> . . . . I agree with the prosecution that I don't see how you can establish prejudice because of the fact whether he had Mr. Rozenberg, Mr. Goldstein, one from the conflict panel, one on the LWOP panel, your client [k]new exactly what kind of evidence that the prosecution had. You're [sic] client knew that they would probably seek death. Your client rejected that offer. He went to trial. He had you and Mr. Mape's [sic] [the DPDs] representations. You and Mr. Mapes represented him to the best of your ability. You provided him effective assistance of counsel. A jury convicted him, told him they agree that the death penalty is an appropriate punishment. So I can't fix what happened in Fontana. I can't go back to the original plea bargain agreement. Mr. Morales had an opportunity to accept it just like all the other defendants in my court when I tell them these are the consequences, these are the strengths and weaknesses of this case. Potentially this is what could happen. You should probably take the plea bargain agreement. He rejected it. He wanted to throw the dice. He thought maybe – I don't know what he was thinking. Perhaps somehow the phone call was going to be – maybe lost or destroyed or concealed. Who knows. But he went with the thought I'm taking the risk. I'm taking those consequences. I'm going to trial. He made it very clear on the record, [counsel]. . . . The bottom line is that Mr. Morales was given competent counsel in the sense that Mr. Rozenberg told him, and made it very specific in his declaration, and by the other evidence, he was told by an independent judicial officer that these are the risks these are the consequences. He said fine. I want to go to trial.

(14RT 3257-3258; see also 14RT 3259-3260, 3264-3269.) Under the circumstances, the court reasoned, Mr. Morales made a "conscious, intelligent

decision both explained to him by an attorney and by a judge." (14RT 3270.) Therefore, the court ruled, no matter what testimony Mr. Morales or Mr. Rozenberg might provide, Mr. Morales simply could not prove to the court's satisfaction that he would have taken the plea bargain offer had he been represented by the Public Defender or other qualified, competent counsel. (14RT 3269-3270, 3272.)

The court made clear that its ruling was based solely on the absence of any conceivable prejudice from Mr. Rozenberg's assumed deficient performance. Reasoning that: (a) it was therefore unnecessary to resolve the deficient performance prong; and (b) the testimony of Mr. Rozenberg, as well as offered testimony from his investigators, Art Vasquez and Eric Martin, was relevant *only* to the deficient performance prong, the court ruled that the offered testimony was irrelevant and therefore refused to hear it. (RT 3269-3270, 3272-3273.) And because the court believed it would be inherently incredible, the court refused to hear Mr. Morales's own testimony that he would have taken the plea bargain offer absent Mr. Rozenberg's deficient performance. (RT 3255, 3262-3273.) Otherwise, the court explained, if Mr. Morales had been able to satisfy his burden of proving prejudice, it would have resolved the deficient performance prong of the test and in so doing would have heard and considered the offered "testimony of Mr. Rozenberg and other witnesses." (14RT 3272.)

In light of that ruling, the court also ruled that Mr. Morales could not complain about the errors resulting in his ignorance of his right to consular assistance under Article 36 of the VCCR and Penal Code section 834c during Mr. Rozenberg's tenure. (14RT 3293-3295.) The court reasoned that because the Public Defender finally informed Mr. Morales of his right to consular assistance before trial and he and his attorneys availed themselves of that assistance during trial, the errors had no impact on the trial itself. (14RT 3293.)

Although Mr. Morales was ignorant, and deprived, of his right to consular assistance throughout the pretrial proceedings during Mr. Rozenberg's tenure, the court reasoned that it was harmless because both Mr. Rozenberg and the court presiding over the plea bargain proceedings "provided [Mr. Morales] ample information in terms of the pros and the cons of him taking or not taking a plea bargain agreement" and "the strengths and the weaknesses of his case" and Mr. Morales still rejected the plea bargain. (14RT 3292-3294.)

2. Legal Principles Governing a Trial Court's Hearing on a Motion for Relief from a Deprivation of the Right to the Effective Assistance of Counsel at a Critical Stage

Although ineffective assistance of counsel claims are usually raised postconviction on habeas corpus, a defendant is not relegated to habeas corpus as the sole means by which to vindicate or prevent the ineffective assistance of counsel at a critical stage of the trial proceedings. A defendant may raise challenges to the effective assistance of counsel at the trial level before imposition of judgment, both before and after conviction. (See, e.g., *People v. Smith* (1993) 6 Cal.4th 684, 692-696; *People v. Fosselman, supra,* 33 Cal.3d at pp. 582-583; *People v. Marsden* (1970) 2 Cal.3d 118, 123-126.) In *People v. Fosselman, supra,* for instance, the trial court refused to hear the defendant's challenges to counsel's effectiveness by way of a new trial motion because ineffective assistance of counsel was not an explicitly stated statutory basis for granting a new trial. This Court agreed that ineffective assistance of counsel is not a statutory basis for granting a new trial. Nevertheless, this Court held, "the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.' (*Glasser v. United States* (1942) 315 U.S. 60, 71.)" (*People v. Fosselman, supra,* at p. 582.) "[I]n appropriate circumstances

justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it *should* do so." (*People v. Fosselman, supra*, at pp. 582-583, italics added.) As this Court later confirmed in *People v. Smith, supra*, 6 Cal.4th at p. 683, "justice is expedited when the issue of counsel's ineffectiveness can be resolved promptly at the trial level. In those cases in which counsel *was* ineffective, *this is best determined early*." (*Id.* at p. 695, initial italics in original, latter italics added.)

To be sure, this Court has since held that a trial court may, in its discretion, refuse to hear a new trial motion alleging ineffective assistance of counsel in favor of relegating the issue to habeas corpus when the court does not have sufficient information to resolve the claim and a hearing to obtain that information would entail an undue consumption of time. (*People v. Cornwell* (2005) 37 Cal.4th 50, 100-102.) When sufficient information to resolve the motion on its merits is readily available, on the other hand, and its resolution may obviate the need for appeal, habeas corpus, or further trial proceedings, the court can and should hear and resolve the claim promptly at the trial level. (*People v. Smith* (1993) 6 Cal.4th 684, 695; *People v Fosselman, supra*, 33 Cal.3d at pp. 582-583.) Indeed, in the specific context of a defendant's claim that he rejected a plea bargain offer due to ineffective assistance of counsel, this Court has explicitly cautioned that although a defendant *can* raise the claim for the first time in postconviction collateral proceedings, the delay can undermine the persuasiveness of the challenge. Postconviction collateral challenges are often litigated years after the challenged acts and omissions and therefore the danger of using that vehicle is that "defense counsel's recollection of the communications and advice given the client and the client's response to that advice, if unrecorded, may well have faded or disappeared entirely." (*In re*

Alvernaz, supra, 2 Cal.4th at p. 938.) That danger is particularly acute in capital cases given the crisis-level delays in the appointment of habeas corpus counsel. (See, e.g., *People v. Superior Court* (*Morales*) (2017) 2 Cal.5th 523, 532; *In re Morgan* (2010) 50 Cal.4th 932, 937-938.) It necessarily follows that when a capital defendant endeavors to avoid that danger and raises the claim early at the trial level and before final judgment, the trial court should hear and resolve it promptly on the merits.

In any event, regardless of whether and under what circumstances a trial court *should* hear and resolve a challenge to counsel's effectiveness raised at the trial level, when the court *does* exercise its discretion to hear and resolve such a challenge, both parties are entitled to a fair hearing thereon. Resolving the merits of a motion alleging ineffective assistance of counsel "must, of course, be part of a fully adversarial proceeding." (*People v. Smith, supra,* 6 Cal.4th at p. 694, fn. 2, citing *People v. Dennis* (1986) 177 Cal.App.3d 863.) "A defendant is entitled to competent representation at all times, including presentation of a new trial motion or motion to withdraw a plea" based on ineffective assistance of counsel. (*People v. Smith, supra,* 6 Cal.4th at p. 695.) And due process entitles both parties to a meaningful opportunity to be heard, including the presentation of relevant evidence. (*People v. Dennis, supra*, at pp. 869-873, cited with approval in *People v. Smith, supra*, at p. 694, fn. 2; *People v. Sarazzawski* (1945) 27 Cal.2d 7, 16 [once hearing is afforded on motion for new trial, parties are entitled to reasonable opportunity to be heard thereon].) "A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.'" (*People v. Marsden, supra*, 2 Cal.3d at p. 124; accord, *People v. Sarazzawski, supra*, at p. 16; *People v. Dennis, supra*, at p. 872; U.S. Const., Amend. V; Ca. Const., art. I, §§ 7 & 15.)

In hearing and ruling upon the merits of an ineffective assistance of counsel claim brought at the trial level, the trial court must first find the relevant facts "based upon its own observations and the evidence presented to it." (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.) The court must next determine, based upon those factual findings, whether the defendant was deprived of the effective assistance of counsel based upon the appropriate legal test. (*Id.* at pp. 724-725.) "A trial court may be found to have abused its discretion on the issue of ineffective assistance of counsel if its factual findings are not supported by substantial evidence or if it misinterprets or misapplies the applicable legal standard." (*People v. Gonzalez* (2018) 27 Cal.App.5th 738, 748.)

When the court hearing the claim has failed to take evidence due to a misapplication of the law, failed to resolve or improperly resolved factual questions, or deprived a party of a meaningful opportunity to present relevant evidence in support or opposition, it is appropriate to remand the matter to the trial court pursuant to Penal Code section 1260 to conduct a fair and adequate hearing. As this Court has observed:

> "[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand." [*People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, 405.] In other words, "when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made." ([*People* v.] *Minor* [1980] 104 Cal.App.3d [194,] 199.)

People v. Moore (2006) 39 Cal.4th 168, 176, 177 [remand for new suppression hearing to give the People the opportunity to present evidence justifying search]; accord, e.g., *People v. Fosselman, supra*, 33 Cal.3d at pp. 582-583 [remand for purpose of trial court to hear and resolve defendant's new trial motion based on ineffective assistance of counsel]; *People v. Dennis, supra*, 177 Cal.App.3d at p. 876-877 [remand for purpose of holding hearing on new trial motion based on ineffective assistance of counsel and permitting parties opportunity to present relevant evidence thereon]; *People v. Simpson* (1973) 30 Cal.App.3d 177, 185-186 [remand for purpose of allowing parties opportunity to present evidence concerning prejudice in connection to speedy trial claim]; *People v. Anderson* (1976) 59 Cal.App.3d 831, 843 [remand for purpose of determining whether prosecution's destruction of evidence was in bad faith]; *People v. MacDonald* (1972) 27 Cal.App.3d 508, 511-512 [remand for purpose of resolving speedy trial issue].)

3. Application of the Two-Pronged *Strickland v. Washington* Test to a Claim that the Defendant Rejected a Plea Bargain Offer Due to Ineffective Assistance of Counsel

As discussed in Part B-3, *ante*, challenges to ordinary attorney error for which counsel alone is responsible are governed by the two-part test articulated in *Strickland v. Washington, supra,* 466 U.S. 668. The defendant must show that: (1) counsel's performance "fell below an objective standard of reasonableness" as measured under prevailing professional norms; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at pp. 688, 693-694.) This test applies to claims that a defendant was deprived of the effective assistance of counsel because he accepted or rejected a plea bargain offer as a result of ordinary attorney error. (See, e.g., *Lafler v. Cooper, supra,* 566 U.S. at pp. 162-163; *In re Alvernaz, supra,* 2 Cal.4th at pp. 933-934.)

Mr. Morales has set forth the legal principles governing the deficient performance prong of the test -- and the prevailing professional norms governing an attorney's duties in counseling a defendant to accept or reject a plea bargain offer -- in Part B, *ante*, which is incorporated here by reference. Application of *Strickland*'s prejudice prong to a claim that a defendant rejected a plea bargain offer due to ineffective assistance of counsel places the burden on the defendant to demonstrate a reasonable probability that he would have accepted the offer had he received competent assistance. (*In re Alvernaz*, supra, 2 Cal.4th at p. 937; *Missouri v. Frye, supra*, 566 U.S. at pp. 147-148; *Lafler v. Cooper, supra*, 566 U.S. at p. 164.) The defendant must also demonstrate that it is reasonably probable the superior court would have approved the terms of the bargain. (*In re Alvernaz, supra*, at pp. 940-941; *Missouri v. Frye, supra*, at pp. 147-148; *Lafler v. Cooper, supra*, 566 U.S. at p. 164.) Finally, the defendant must show "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Lafler v. Cooper, supra*, at p. 164.) Importantly, both this Court and the United States Supreme Court have "'"made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility."' [Citations.]" (*Richardson v. Superior* Court (2008) 43 Cal.4th 1040, 1050; accord, *Strickland, supra*, 466 U.S. at p. 693.)

In making this showing, this Court has held that a defendant's subjective statement that he would have accepted the plea bargain had he received competent advice is relevant, though not enough in and of itself to prove *Strickland's* second prong. (*In re Alvernaz, supra*, 2 Cal.4th at p. 938.) The statement must be "corroborated independently by objective evidence." (*Ibid*.) The factors a court should consider in determining whether there exists objective evidence include "whether counsel actually and accurately

communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*Ibid.*) Another factor is the defendant's stance at trial: a defendant's protestations of innocence at trial may detract from the credibility of his claim that he would have taken the plea bargain offer while a defense that concedes guilt or responsibility for some of the charges may corroborate it. (*Id.* at p. 940.) "Objective" factors also focus on what a reasonable person in the defendant's position would have done. (See *Padilla v. Kentucky, supra*, 559 U.S. at p. 372 [to establish prejudice from claim of deficient performance leading to acceptance of plea bargain offer, defendant must show that it would have been rational to reject the bargain under the circumstances]; *Riggs v. Fairman* (9th Cir. 2005) 399 F.3d 1179, 1183 [applying reasonable person standard to question of whether defendant would have accepted the plea bargain].) For instance, a reasonable person is more likely to accept a plea bargain where: (1) the state's case for guilt is strong (see, e.g., *Riggs v. Fairman, supra,* at p. 1183; *United States v. Rodriguez* (2nd Cir. 2013) 725 F.3d 271, 277; compare *Jones v. Wood* (9th Cir. 1997) 114 F.3d 1002, 1012 [not reasonably probable defendant would have accepted plea bargain where government's case was weak and defendant steadfastly maintained his innocence throughout trial]; and (2) there is a great disparity between the maximum sentence exposure faced at trial and the sentence under the terms of the bargain (see, e.g., *Pham v. United States* (2nd Cir. 2003) 317 F.3d 178, 182-183, and authorities cited therein; *Smith v. United States* (6th Cir. 2003) 348 F.3d 545, 552; *Riggs v. Fairman, supra,* at p. 1183)

4. In Hearing and Resolving Mr. Morales's Ineffective Assistance of Counsel Claim, The Trial Court Abused Its Discretion and Violated Mr. Morales's Right to a Full and Fair Hearing by Misapplying the *Strickland* Test, Improperly Resolving Factual Issues Based on Speculation, and Denying Mr. Morales the Opportunity to Present Evidence in Place of Speculation

Here, as set forth in Part 1, *ante*, the trial court did exercise its discretion to hear and rule on the merits of Mr. Morales's motion. In so doing, it took and considered evidence and made factual findings. Applying the two-pronged *Strickland* test, the court determined not to resolve its first prong. Instead, the court purported to assume that Mr. Rozenberg performed deficiently and focused instead solely on whether Mr. Morales could carry his burden of proving prejudice. Reasoning that Mr. Morales could not conceivably prove prejudice from Mr. Rozenberg's assumed deficient performance, the court refused to hear the testimony of Messrs. Rozenberg and Morales concerning Mr. Rozenberg's actual performance on the ground that it was relevant only to the performance prong which it did not need to resolve. (14RT 3248, 3250-3251, 3255, 3270, 3272.)

While the trial court was correct in theory that a court may resolve an ineffective assistance of counsel claim based solely on a determination that the defendant was not prejudiced under *Strickland*'s second prong (see, e.g., *In re Alvernaz, supra,* 2 Cal.4th at p. 945), the court misapplied that test in this case. In addition, the court resolved factual issues based on speculation as opposed to actual evidence and denied Mr. Morales the opportunity to present relevant evidence bearing directly on those issues.

Specifically, the trial court refused to hear testimony from Mr. Rozenberg – or Mr. Morales for that matter – concerning Mr. Rozenberg's actual performance and advice on the ground that it was relevant *only* to the deficient performance prong of the test and not to the prejudice prong of the

test. Because the court would assume arguendo that *Strickland's* first prong was satisfied and resolve only the prejudice prong, the court reasoned that testimony regarding the actual advice Mr. Rozenberg provided was irrelevant and unnecessary. The court's understanding of the legal test was incorrect. While a court does not need to *resolve* whether an attorney's performance was objectively unreasonable if it can dispose of an ineffective assistance of counsel claim based solely on a lack of prejudice, that does not mean that *evidence* of the attorney's actual performance and advice is irrelevant to the prejudice prong. To the contrary, this Court has made clear that proper application of *Strickland*'s prejudice prong to a claim that the defendant rejected a plea bargain offer due to ineffective assistance of counsel requires the court to consider *evidence* of the attorney's actual performance and advice. (*In re Alvernaz, supra,* 2 Cal.4th at p. 938; accord, *Lafler v. Cooper, supra,* 566 U.S. at pp. 163-164.) Indeed, that is the very heart of the inquiry: whether it is reasonably probable that the defendant would have accepted the plea bargain offer "but for the ineffective advice." (*Lafler v. Cooper, supra,* 566 U.S. at pp. 163-164; accord, *In re Alvernaz, supra,* 2 Cal.4th at pp. 945-946 [considering evidence of counsel's actual advice, without resolving whether it was objectively unreasonable, in concluding that it was not reasonably probable that defendant would have accepted the plea bargain offer had he received different, competent advice].) It is only by considering the advice given or not given that the court can determine its impact on the defendant, both subjectively and objectively, and whether it is reasonably probable that the defendant would have taken the offer had he received different, competent advice. Hence, the trial court erred by refusing to hear relevant evidence concerning the actual advice Mr. Rozenberg gave on the legally incorrect ground that it was irrelevant to the prejudice prong of the *Strickland* test.

Furthermore, although the court's abstract analysis purported to assume deficient performance, its actual analysis assumed reasonable performance as the basis for finding that Mr. Morales could not conceivably prove that he would have taken the plea bargain offer had he been represented by competent counsel. As set forth in detail in Part 1, *ante*, the court commented at length that Mr. Rozenberg explained "the strengths [and] and the weaknesses of the case" against Mr. Morales and informed him that the consequences of rejecting the offer was a potential death sentence. (14RT 3257-3258; see also 14RT 3269-3260, 3264-3269.) Indeed, the court went on, "Mr. Morales was given competent counsel in the sense that Mr. Rozenberg told him, and made it very specific in his declaration, and by other evidence that these are the risks these are the consequences." (14RT 3257-3259.) Thus, the court concluded, Mr. Morales made "a conscious intelligent decision both explained to him by an attorney and by a judge." (14RT 3270.) In other words, in finding that Mr. Morales could not conceivably prove prejudice from Mr. Rozenberg's assumed deficient performance, the court in fact "found" that Mr. Rozenberg's performance was not deficient at all. The problem with the court's analysis is two-fold.

First, there was no actual *evidence* that Mr. Rozenberg explained "the strengths and the weaknesses" of *either* the case for guilt or for death. The only direct evidence concerning his actual advice was his statement on the record of the plea bargaining proceedings that he told Mr. Morales that "in all likelihood Mr. Morales would be *convicted*." (2RT 139, italics added.) There was also direct evidence from Mr. Rozenberg's declaration that Mr. Morales asked to review the "pretext" call recording and from investigator Vasquez that – 15 months into Mr. Rozenberg's tenure – Mr. Vasquez took the recording to the jail for his review. (29CT 8245-8246; 987.2CT 11.) But, as set forth in Part D-2-b, *ante*, there was no evidence of Mr. Rozenberg's actual advice and counsel

to Mr. Morales concerning the recording's contents. Nor was there any evidence that Mr. Rozenberg explained "the strengths and the weaknesses of this case" as the foundation for his opinion that Mr. Morales would likely be convicted. (14RT 3257.) To the contrary, as the trial judge herself observed in the earlier proceedings, the actual evidence before the court concerning Mr. Rozenberg's trial preparation indicated that "Mr. Rozenberg made very little effort in representing Mr. Morales and trying to have some type of relationship or rapport so that he could actually sit down and try to convey the importance of perhaps Mr. Morales accepting the plea bargain agreement." (13RT 2791; see also 13RT 2824-2826.) The evidence before the court also indicated that "Mr. Rozenberg spent little or no time with Mr. Morales. He never even showed up to court 90 percent of the time . . . ." (13RT 2793-2794; see also 13RT 2824-2826.) The evidence revealed to the court "the fact that [Mr. Rozenberg] went one time to the jail facility to meet with Mr. Morales in the very beginning of the relationship and the fact that there was never any investigation." (13RT 2812; see also 13RT 2824-2826.) The evidence as a whole indicated that Mr. Rozenberg "treated [this case] very lightly." (13RT 2824-2825.) On this record, the court simply could not *assume,* in the absence of direct evidence, that Mr. Rozenberg explained "the strengths and the weaknesses of this case" based on the facts and the law in such a way that Mr. Morales made an "intelligent choice" to reject the plea bargain offer.

Furthermore, as previously discussed, although Mr. Rozenberg did state on the record that he had advised Mr. Morales that "in all likelihood Mr. Morales would be *convicted*" at trial (2RT 139, italics added), there was absolutely no evidence that he advised him about the likelihood of receiving a *death sentence.* As previously discussed, the heart of the decision Mr. Morales had to make turned not on the chances of conviction on the substantive charges but rather on the *consequences* of those convictions. Mr. Morales's full

understanding about the realistic likelihood of receiving a death sentence was key to making an informed decision to reject the plea bargain offer. It is true, as the court repeatedly emphasized, that there was direct evidence that Mr. Morales was informed that he faced a potential death sentence if he rejected the offer and went to trial. But as previously discussed, knowledge of the maximum sentence exposure is "but one factor" to consider in determining whether the defendant was deprived of the effective assistance of counsel in accepting or rejecting a plea bargain offer. (*In re Vargas, supra*, 83 Cal.App.4th at pp. 1139-1140.) There was absolutely no direct or circumstantial evidence from which any reasonable finder of fact could find that Mr. Rozenberg explained "the strengths and weaknesses" of a case *for death*, from which Mr. Morales could intelligently assess the risks of rejecting the plea bargain offer. To the contrary, as the trial judge herself observed in earlier proceedings, Mr. Rozenberg was admittedly unqualified to offer any advice concerning the risks or likely outcome of a *capital* murder trial and conducted no preparations that would have enabled him to provide such advice.

Likewise, there was no evidence that the court presiding over the plea bargain proceeding "explained about the strengths [and] weaknesses of the case" to Mr. Morales (14RT 3257; see also 13RT 3258) and certainly none that the court explained the probable outcome of a capital murder trial. The only record evidence of the court's participation in the proceeding was its admonishment that death was a potential consequence of rejecting the offer and its encouragement to accept the offer. (2RT 141-143.) As discussed in Part C-3, *ante,* a court's admonition regarding the maximum penalty that a defendant *could* receive is no substitute for counsel's own advice and opinion concerning the realistic likelihood that the defendant will actually receive that sentence based on his or her investigation of the facts and expert knowledge of the law. (See *In re Resendiz, supra,* 25 Cal.4th at p. 240.) To paraphrase the trial court,

Mr. Morales was entitled to the assistance of counsel in understanding the practical reality and likely outcome of enduring a capital murder trial based on "the strengths [and] weaknesses" of the prosecution's case for guilt and death in light of the evidence that would likely be introduced and the law that would apply at that unitary proceeding. The superior court's admonition that refusing the offer exposed Mr. Morales to a potential death sentence in no way supported the trial court's finding that Mr. Morales received the assistance to which he was entitled and thus could not conceivably prove prejudice.

The question of prejudice in this context turns on whether it is reasonably probable, or there is a "reasonable chance," that the defendant would have taken the plea bargain offer absent counsel's advice or had he received different, competent advice. (*In re Alvernaz, supra,* 2 Cal.4th at p. 938; *Lafler v. Cooper, supra,* 566 U.S. at pp. 163-164.) There was no direct evidence of the actual advice Mr. Rozenberg gave Mr. Morales apart from his remark on the record that "in all likelihood Mr. Morales would be convicted." (2RT 139.) At the same time, the evidence the court did receive and accept without question tended circumstantially to show that Mr. Rozenberg simply could not explain the "risks and probable outcome" of the *capital* murder trial to which Mr. Morales would be exposed by rejecting the offer. (*In re Alvernaz, supra,* 2 Cal.4th at p. 933; see also Part B, subparts 4-5, *ante,* and authorities cited therein.) On this record, there was no factual basis from which the court could determine that there was no reasonable probability, or no "reasonable chance," that Mr. Morales would have taken the offer in the absence of Mr. Rozenberg's advice, or had he received different, competent advice, without hearing evidence of the advice Mr. Rozenberg actually provided.

Messrs. Rozenberg and Morales stood ready to testify regarding Mr. Rozenberg's actual performance and advice. By offering to testify that he would have taken the offer had he received competent advice, Mr. Morales

necessarily would have testified to the advice actually given or not given. (See 14RT 3255.) For his part, Mr. Rozenberg stood ready to testify "in regards to the type of relationship that he had with Mr. Morales, in terms of conversations he had with Mr. Morales, in regards to any offers, any suggestions, any advice in regards to any plea bargain agreement," which had not been addressed in the declaration the prosecution proffered. (14RT 3248.) As previously stated, the court's abstract reason for refusing to hear their testimony on the ground that evidence of Mr. Rozenberg's actual performance and advice was irrelevant to the prejudice prong of the *Strickland* test was erroneous. Under the law and as the court's *actual* analysis illustrates, Mr. Rozenberg's actual performance and advice bore directly on the issues the court had to resolve and did resolve concerning prejudice. The court's reliance on speculation concerning the advice Mr. Rozenberg gave and its refusal to hear actual evidence thereof was improper and unfair.

Finally, the other factors that support a determination of prejudice were satisfied here. Given that the court presiding over the plea bargain proceedings actively encouraged Mr. Morales to accept the offer, it is more than reasonably probable that the court would have approved the terms of that offer if Mr. Morales had accepted it. (See 2RT 141-143; see, e.g., *In re Alvernaz, supra,* 2 Cal.4th at pp. 940-941; *Missouri v. Frye, supra,* 566 U.S. at pp. 147-148; *Lafler v. Cooper, supra,* 566 U.S. at p. 164.) Moreover, by the time the trial court ruled on the merits of Mr. Morales's claim after the penalty phase, Mr. Morales had been sentenced to death. The 50-year-to-life term that he would have received under the terms for the bargain was much more favorable than the death sentence to which he was exposed by exercising his right to trial. (See *Lafler v. Cooper, supra,* 566 U.S. at p. 166.)

Mr. Morales did not maintain his innocence at trial or face a weak prosecution case for guilt. (Compare *In re Alvernaz, supra,* 2 Cal.4th at p. 940;

Jones v. Wood, supra, 114 F.3d at p. 1012.) To the contrary, given his tape-recorded admissions to his mother about participating in the underlying robberies and burglaries that resulted in the victim's death, the DPDs did not seriously contest Mr. Morales's liability for the underlying felonies or for the first degree murder under the extant strict liability principles of the felony murder rule. (See 12RT 2722-2723.) Instead, Mr. Morales's defense centered on raising reasonable doubt that he was the actual killer – an issue relevant only to his liability for the special circumstance and personal gun use allegations, as well as death-worthiness. (12RT 2682-2685, 2693-2694, 2721-2727; see also 12RT 2564.) Thus, considering the defense offered at trial, Mr. Morales could not hope for an acquittal or conviction of a charge less than first degree murder, which alone carried a 25-year-to-life term. For the undisputed Gutierrez robbery with gun use alone, he faced another maximum 19 years or minimum of 6 years. The undisputed burglary of the Lopez/Gutierrez home, which involved other victims and personal gun use, along with the burglary of the Torres-Lopez home, which also involved multiple victims, exposed him to another 4 years at one-third the middle term for those crimes. (See §§ 211, 459, 461, 12022.5, subd. (a), 1170; see also *People v, Miller* 18 Cal.3d 873, 886 & fn. 11 [Penal Code section 654's prohibition against multiple punishment is inapplicable when each violent crime involves at least one different victim]; *People v. King* (1993) 5 Cal.4th 59, 78-79 [prohibition against multiple punishment is inapplicable to gun use enhancement allegations that involve crimes of violence against more than one victim].) There was no reason to think that the sentencing judge would order the terms to run concurrent to each other or exercise her discretion to impose the lowest terms possible for the other crimes. To the contrary, given the number of victims and the presumption for the middle term, the most likely sentence for convictions on the undisputed crimes and allegations was 25 years to life plus 14 years for a

total of 39 years to life. Realistically, given his defense, this was the minimum sentence Mr. Morales could hope to receive if he went to trial and his defense was successful.

At the same time, even if the jurors did have reasonable doubt that Mr. Morales was the actual killer, he *still* faced a potential life without parole term and death sentence as an aider and abettor if the jurors found that he was a "major participant" who acted with "reckless indifference to human life." (§ 190.2, subd. (d).) If his defense were rejected and the jury found that he was the actual killer – as it ultimately did – the special circumstance allegations were automatically true; thus exposing him to either a *minimum* life without parole sentence or a potential death sentence. Given the facts that no one else was ever identified as the actual killer, Mr. Morales admitted to being present when the victim was killed, and he was the only participant who was charged and tried for the victim's murder, there was a very realistic possibility that the jurors would reject his defense.

In sum, the best Mr. Morales could have hoped for if his defense were successful was a maximum term of life – the same maximum term under the plea bargain offer. The minimum realistic term he faced if his defense were successful was only a handful of years shorter than that offered under the bargain – 39 versus 50. In reality, the difference between the minimum term was negligible given the infrequency with which convicted murders serving indeterminate life sentences are actually released on parole. (See, e.g., *In re Rozenkrantz* (2002) 29 Cal.4th 616, 685; *id.* at p. 691, dis. opn. of Chin, J.; *In re Smith* (2003) 114 Cal.App.4th 343, 359.) Thus, Mr. Morales had little, if anything, to gain by going to trial even if the jurors accepted his defense.

His risk in going to trial, on the other hand, was enormous. Again, even if the jurors had reasonable doubt that he was the actual killer, liability for the death-eligibility special circumstance allegation was still a possibility. And if

his defense were not successful, he was *automatically* death-eligible. (See, e.g., *Pham v. United States, supra,* 317 F.3d at pp. 182-183, and authorities cited therein [great disparity between maximum sentence exposure and sentence under terms of bargain is objective factor militating in favor of reasonable probability that the defendant would have accepted the bargain]; accord, *Smith v. United States, supra,* 348 F.3d at p. 552; *Riggs v. Fairman, supra,* 399 F.3d at p. 1183.) Given the extraordinarily broad discretion jurors have to impose death, the range of aggravating evidence jurors can consider, the absence of rules requiring the jurors to find aggravating factors unanimously or by any standard of proof, and the absence of rules requiring them to determine the appropriateness of death by any standard of proof (see Arguments VI & VIII, *post*), receiving a death sentence was a very realistic possibility. Certainly, no competent capital defense counsel could advise Mr. Morales with any assurance that a jury would *not* sentence him to death. Under the circumstances, it can fairly be said that any rational person in Mr. Morales's position who was actually given an opportunity to make a fully informed choice between accepting the plea bargain and going to trial would have appreciated that the risks of the latter course far outweighed any possible reward and accepted the offer.

As this Court has recognized, another factor for a court to consider in assessing a claim that a defendant rejected a plea bargain offer due to ineffective assistance of counsel is whether the defendant indicated his amenability to bargaining. (*In re Alvernaz, supra,* 2 Cal.4th at p. 938.) Here, according to Mr. Rozenberg's declaration, Mr. Morales did indicate that he was amenable to plea bargaining. (29CT 8245-8246.) Indeed, Mr. Rozenberg's *only* "representation" centered on attempting to negotiate a plea disposition. (*Ibid.*) According to Mr. Rozenberg, Mr. Morales even indicated that he would agree to the plea disposition offered if the recording of the "pretext" call

between him and his mother "contained what was represented to him that it contained . . . ." (29CT 8245-8246.) As previously discussed, conspicuously absent from Mr. Rozenberg's declaration was an explanation of "what was represented to" Mr. Morales concerning the contents of the recording or of Mr. Rozenberg's own response to Mr. Morales's conditional willingness to accept the plea bargain. What the declaration does demonstrate is that Mr. Morales's amenability to the plea was based on the strength of the prosecution's case. Again, Mr. Rozenberg's actual counsel and advice was directly relevant to Mr. Morales's understanding in this regard. Again, on this record, there was no basis on which to find that Mr. Morales would not have been amenable to the plea even if he had received competent counsel without hearing testimony from Messrs. Morales and Rozenberg concerning the counsel actually provided.

For instance, Mr. Morales may have testified that he rejected the plea bargain offer because he did not trust Mr. Rozenberg's advice at all given that he had effectively abandoned Mr. Morales throughout the pretrial proceedings, never litigated anything on his behalf, did not conduct reasonable investigation into the law or the facts, did not consult with him about the significance of the tape recording in the context of the evidence as a whole and the applicable law, and never consulted with him about the strengths and the weaknesses of the case for guilt or death. He may have testified that he rejected the plea bargain offer because he did not appreciate that a death sentence was a realistic possibility since Rozenberg gave him no advice by which to assess its likelihood. Mr. Rozenberg himself may well have confirmed that he was unable to give Mr. Morales any advice concerning the risks of receiving a death sentence because he did not know or understand death penalty law and did not investigate potential mitigating or aggravating evidence. If Mr. Morales testified that he would have accepted the plea bargain offer had he been represented by counsel whom he could trust and who competently advised him

that the realistic risks of receiving a death sentence at trial outweighed any negligible benefit a successful trial defense could achieve, he was entitled to have the court consider his demeanor and the corroborative objective evidence set forth above in determining whether his testimony was credible and satisfied his burden of proof. At bottom, on this record, the court simply could not foreclose the reasonable probability that Mr. Morales would have accepted the plea bargain offer had he received competent counsel and advice without hearing and considering his and Mr. Rozenberg's testimony.

For all of the foregoing reasons, the trial court erred in refusing to hear the testimony of Messrs. Rozenberg and Morales on the ground that it was irrelevant to the prejudice prong of the *Strickland* test and in making speculative factual findings to which their testimony was directly relevant. This matter must be remanded to the superior court to conduct a new hearing into Mr. Morales's claim that he was deprived of the effective assistance of counsel at the critical plea bargain stage. In conducting that hearing, the court must be directed to limit its factual findings to the actual evidence presented, to allow Mr. Morales a reasonable opportunity to present relevant evidence to satisfy the *Strickland* test, and to consider the objective evidence bearing on his claim as detailed above and articulated by this Court in *In re Alvernaz, supra*, 2 Cal.4th at pp. 938, 940.)

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II.

THE DEATH JUDGMENT MUST BE VACATED BECAUSE THE PROSECUTION'S 11TH HOUR DECISION TO SEEK DEATH WAS ACTUALLY VINDICTIVE IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS; AT THE VERY LEAST, REVERSAL IS REQUIRED BECAUSE MR. MORALES RAISED A PRESUMPTION OF VINDICTIVENESS, WHICH THE PROSECUTION FAILED TO REBUT

A. Introduction

Penalizing a criminal defendant for asserting his constitutional or statutory rights is "patently unconstitutional." (*United States v. Jackson* (1968) 390 U.S. 570, 581.) "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363 [hereafter "*Bordenkircher*"].)[31] Accordingly, the high court and this Court have long recognized that the due process clauses of the state and federal Constitutions prohibit prosecutors from increasing the charges or penalty because a criminal defendant has exercised his constitutional or statutory rights.

As set forth below, Mr. Morales moved to prohibit the prosecution from proceeding to a penalty phase and seeking the death penalty in this case based on prosecutorial vindictiveness. On its face, the prosecution's 11th hour decision to seek death rather than life without parole was made because Mr. Morales insisted on invoking his trial rights rather than surrendering them by

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[31] Courts and commentators variously refer to the *Bordenkircher v. Hayes* decision as "*Bordenkircher*" or "*Hayes*." For purposes of clarity, Mr. Morales takes his cue from this Court and refers to that decision in the shorthand as "*Bordenkircher*." (See, e.g., *People v. Collins* (2001) 26 Cal.4th 297, 306.)

pleading guilty. The prosecutor was fully aware at the time that Mr. Morales made the decision to exercise his trial rights unaided by counsel competent to advise him concerning the life and death consequences of that decision.

In addition, the prosecution's explicit promise to exercise its discretion to seek death only if he refused to surrender his constitutional trial rights was made only after Mr. Morales finally invoked his right to a speedy trial – more than two years after he was arraigned on the first complaint, nearly a year and a half after he was held to answer to the charges and special circumstance allegations, but only four months after his prosecution was reassigned to a new trial prosecutor. The prosecutor was fully aware that certifying this case for death only one month before the last day by which Mr. Morales was entitled to be tried would have the effects of subverting Mr. Morales's speedy trial rights and bestowing on the prosecutor a litigation advantage.

Under the unique circumstances of this case, and as the Public Defender argued below, the prosecution's 11th hour decision to seek the death penalty because Mr. Morales invoked his constitutionally guaranteed trial rights was actually vindictive, in violation of the due process clauses of the state and federal Constitutions. At the very least, the totality of the circumstances gave rise to a presumption of vindictiveness that the prosecution bore the burden of rebutting.

The trial court disagreed on the ground that a defendant categorically cannot establish prosecutorial vindictiveness based on a prosecutor's actions before trial and after failed plea negotiations. As set forth below, the court's ruling was erroneous. The judgment must be modified to vacate the death sentence and reduce the penalty to life in prison without the possibility of parole. Alternatively, the case must be remanded to the trial court with directions to: (1) hold a hearing in which the prosecution must bear the burden

of rebutting the presumption of vindictiveness; and (2) modify and vacate the death judgment if the prosecution fails to carry that burden.

B. The Relevant Facts

1. The Prosecution Did Not Apply for Death Penalty Evaluation and Approval for the First Two-Plus Years of the Prosecution, During which Time Mr. Morales Waived His Speedy Trial Rights 20 Times Before Finally Invoking Them

As discussed in Argument I, *ante*, Mr. Morales was arraigned on August 6, 2001, on the initial complaint alleging one count of murder and two counts each of robbery and burglary, but without special circumstances allegations. (3CT 612, 617.) The court having failed to appoint the Public Defender in the erroneous belief his office was unavailable due to a conflict, Mr. Morales retained private counsel, Earl Carter, to represent him on or around August 14, 2001. (1RT 1; 28CT 7922; 2SCT 318.) Mr. Morales waived his statutory rights to a speedy preliminary hearing and trial on seven separate occasions during Mr. Carter's seven-month tenure. (1RT 2, 6, 8, 10, 12, 14, 17.)

On December 10, 2001, the prosecution filed an amended complaint adding three special circumstance allegations, prompting Mr. Carter to withdraw in March of 2002. (3CT 630-645; 1RT 19-22; 15RT 3356; 1 SCT 318.) On April 11, 2002, appointed counsel Wayne Rozenberg made his first appearance on Mr. Morales's behalf. (3CT 651.) As discussed in detail in Argument I, *ante*, the court's appointment of Mr. Rozenberg was erroneous because, inter alia, he was not qualified for appointment to death-eligible cases.

After Mr. Rozenberg was appointed, Mr. Morales twice waived his statutory rights to a speedy trial and preliminary hearing. (1RT 29, 31.) On June 20, 2002, Mr. Morales was held to answer to all of the charges and allegations following a short preliminary hearing. (3CT 661.)

As discussed in Argument I, *ante*, the filing of special circumstance allegations exposes a defendant to a potential death penalty under California law unless and until the prosecution exercises its discretion not to seek that penalty. (See, e.g., *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1007-1014.) However, the San Bernardino County District Attorney imposes an additional procedural hurdle before the prosecution can exercise its discretion to seek death for death-eligible offenses: the District Attorney's internal "Death Penalty Review Board" (2RT 136), or "Death Penalty Review Committee" (13RT 2803), must evaluate the case for death and approve seeking that penalty. (See also 2RT 136-145; 13RT 2792-2793, 2806, 2829.)

It was undisputed below that the San Bernardino County District Attorney's standard practice at the time of trial was to make the death penalty decision before or no later than shortly after the preliminary hearing. (13RT 2792, 2808, 2811, 2813, 2826; 28CT 7948-7949.) The Board's evaluation and approval to seek death is not binding; it simply reflects the District Attorney's evaluation and discretionary determination that the death penalty would be an appropriate penalty for the offense and offender. The prosecutor remains free to engage in plea negotiations with qualified defense counsel for a disposition wherein the death penalty will not be sought. (See 13RT 2792, 2808, 2811, 2816.)

Although Mr. Morales was charged with a death-eligible offense, the prosecution did not apply for internal death penalty evaluation and approval until October of 2003, over two years after Mr. Morales's arraignment on the first complaint and 16 months after he was held to answer to the charges and allegations. During the interim, Mr. Morales was represented by appointed counsel who was not qualified as a matter of law (i.e., under California law and San Bernardino County rules) or as a matter of fact to represent a defendant facing a potential death penalty. The matter proceeded from arraignment in the

Fontana courthouse -- a locale not equipped to try death penalty cases – and was assigned to a trial judge not authorized to try death penalty cases under local court practice. (2RT 149-150; 13RT 2812-2813.) The trial court later observed that the preliminary hearing proceeded in a way that made it clear that neither the prosecution nor defense counsel contemplated a potential death sentence. (RT 2829-2830.) The original trial prosecutor, Richard Young, announced ready to try the case in the noncapital courthouse in October of 2002. (2RT 92-93.) As the trial court later agreed, the estimate he gave for the length of the trial was consistent with a noncapital trial, not a capital trial. (2RT 104; 13RT 2810.) The prosecutor never sought internal approval to seek the death penalty before announcing ready. (2RT 138.)

Also during the interim between Mr. Morales's August 2001 arraignment and the prosecution's decision to seek the death penalty over two years later, Mr. Morales waived his right to speedy trial at the request of his counsel – or, more accurately, at the request of the various attorneys his appointed counsel sent to the court to stand in – 20 times. (1RT 2, 6, 8, 10, 12, 14, 17, 25, 29, 31; 2RT 88-89, 91, 95, 100-101, 102-103, 105, 111, 116, 123, 127-128.)

On June 20, 2003 – after the prosecution had been pending for nearly two years and eight months after Mr. Young had announced ready to try the case-- prosecutor Mazurek made his first appearance as the newly assigned prosecutor, replacing Mr. Young. (2RT 114; 29CT 8249.) Mr. Mazurek noted that he had only just "read a little bit of it [but] I'm not fully up to speed on" the case. (2RT 114-115.) Mr. Rozenberg was absent but conveyed through stand-in counsel that he was still not ready to try the case. On that and the next three court sessions, Mr. Rozenberg – through stand-in counsel – obtained additional continuances and Mr. Morales's speedy trial waivers. (2RT 114-125, 127-128.) On September 2, 2003, Mr. Rozenberg finally made his first appearance

since Mr. Mazurek's June assignment. (2RT 126.) The matter was again continued for Mr. Mazurek to discuss a possible resolution of the case with his superiors; Mr. Morales again waived his right to be tried within 60 days of September 12, or by November 11, 2003. (2RT 126-128.)

2. Days Before the Last Day on Which Trial was Scheduled to Commence, the Prosecutor Made an "Exploding" Plea Offer that Gave Mr. Morales the Choice Between Waiving his Trial Rights and Accepting a Sentence of 50 Years to Life or Exercising his Trial Rights and Facing the Death Penalty

Ten days later, on September 12, 2003, Mr. Rozenberg again sent in stand-in counsel to appear for him. (2RT 129.) The prosecutor represented that the parties were having "ongoing discussions" about the case and that he needed to speak to his supervisors about a possible resolution. The prosecutor explained that the discussions would require Mr. Morales to again waive the statutory time period to be tried, but represented that Mr. Morales was no longer willing to waive time. (2RT 130-131.) Stand-in counsel confirmed that Mr. Morales wished to invoke his speedy trial rights. The court then told stand-in counsel: "Well, okay, your client wants these conversations [i.e., plea negotiations] to be pursued. Your client wants to be represented by Mr. Rozenberg for these discussions. We can either make it happen or he can waive time. It's his choice." (2RT 131.) The court then addressed Mr. Morales, asking him if he wished to waive any more time. Mr. Morales responded, "I want to go to trial. I do not want to waive any more time." (2RT 131.) Hence, upon Mr. Morales's invocation of his speedy trial rights, the last day by which he was entitled to be tried was November 11, 2003. (2RT 127-128, 130-131, 148-149, 153.) The court directed Mr. Rozenberg, through stand-in counsel, to appear on October 3 and be ready either to resolve or try the case. (2RT 129-132.) As set forth in Argument I, *ante*, Mr. Rozenberg did

not appear again until the afternoon session of October 7, 2003. (2RT 133-135.)

On that afternoon, and as discussed in detail in Argument I, *ante*, the prosecution made its "exploding" plea offer. (2RT 135-145.) By the explicit terms of the offer, Mr. Morales was given a choice between waiving his trial rights and accepting a 50-year-to-life sentence versus invoking his trial rights, in which case the prosecutor would submit the case for the first time to the committee for death penalty evaluation and approval. The anticipated result was that the committee would approve it, in which case the prosecutor would in fact seek the death penalty. (2RT 135-139.) The choice had to be made immediately, by the end of that afternoon's session; if rejected, the plea negotiations would terminate forever. (RT 136-137, 139-141.)

As further discussed in Argument I, *ante*, both before and immediately after communicating the prosecution's offer to Mr. Morales, Mr. Rozenberg advised the court, the prosecutor, and Mr. Morales that he was not qualified to defend Mr. Morales against a potential death sentence. Therefore, Mr. Rozenberg represented that he would have to withdraw and qualified counsel would have to be substituted if Mr. Morales insisted on exercising his trial rights and the prosecution sought the death penalty. (2RT 137-139, 144.) Significantly, the *prosecutor agreed* that Mr. Rozenberg was incapable of representing Mr. Morales against a potential death penalty, as evidenced by his subsequent actions effectively joining in Mr. Rozenberg's motion to withdraw and offering the Public Defender as substitute, qualified counsel. (2RT 146-148.) Nevertheless, the plea bargain proceedings continued without interruption. (2RT 138-145.) The judge gave Mr. Morales 30 minutes to consult with Mr. Rozenberg, after which Mr. Morales decided to reject the offer and invoke his trial rights – under which he was entitled to be tried no later than November 11, 2003. (2RT 140-143; see also 2RT 148-149, 153.)

3. The Prosecution Openly Declared that It Decided to Seek the Death Penalty Because Mr. Morales Insisted on Invoking His Trial Rights, Which Also Had the Effect of Subverting Mr. Morales's Invocation of his Speedy Trial Rights

As threatened, the prosecution sought and obtained internal approval to seek the death penalty and acted on that permissive determination because Mr. Morales insisted on exercising his trial rights. (2RT 146-148.) The prosecutor understood that certifying the case for death would have the additional legal consequence of subverting Mr. Morales's invocation of his speedy trial rights. That is, the prosecutor did not thrust upon Mr. Morales the take-it-or-leave-it choice until after Mr. Morales had finally invoked his speedy trial right to be tried no later than November 11, 2003. The prosecutor notified the court and counsel that his office had approved the case for death on October 16, 2003, only 33 days before that last date for trial. (2RT 147-148.) As the prosecutor acknowledged, he knew that certifying the case for death would result in the substitution of qualified counsel to represent Mr. Morales, which, in turn, would force Mr. Morales to waive his speedy trial right in order to invoke his right to representation by competent, prepared substitute counsel. At the proceedings in which the prosecutor announced his decision to seek death and facilitated Mr. Rozenberg's withdrawal and the Public Defender's substitution, the prosecutor openly acknowledged that "obviously I understand that the defense wouldn't" be prepared to commence trial by November 11. (2RT 148.) The prosecutor was also aware that certifying the case for death would require transferring the trial to a different judge and a different courthouse; thus requiring a last minute scheduling accommodation which would further ensure that Mr. Morales's speedy trial invocation would be subverted. (2RT 148-150; 152-154.) In fact, Mr. Morales was forced to surrender his speedy trial invocation in order to exercise his right to prepared, qualified counsel, as well

as to accommodate the newly assigned trial court's own schedule. (2RT 155-167.)

4. Substitute Defense Counsel's Motion to Preclude the Death Penalty as Impermissibly Vindictive and the Trial Court's Ruling Thereon

After the guilt phase of the trial but before the penalty phase commenced, substitute defense counsel filed a motion to preclude the prosecution from proceeding to the penalty phase and seeking a death sentence. (28CT 7920-7953.) Part of this omnibus motion was directed to the errors in the appointment of Mr. Rozenberg and the adequacy of his performance, as discussed in detail in Argument I, *ante*. In addition, Mr. Morales argued that the death penalty should be precluded because the prosecution used it as a "bargaining chip" and decided to seek it to "punish Mr. Morales for exercising his constitutional right to trial," as well as his right to a speedy trial. (28CT 7948-7950.) It was only after Mr. Morales finally invoked his speedy trial rights that the prosecutor conveyed to him, through Mr. Rozenberg, that the case would be submitted to committee for evaluation and approval to seek the death penalty if he refused to surrender his trial rights by pleading guilty. The prosecutor ultimately submitted the case and obtained permission to seek the death penalty, and decided to act on that permissive determination, because Mr. Morales insisted on invoking his constitutional trial rights. (28CT 7948-7951.)

Mr. Morales further argued that it was particularly unfair to punish him for invoking those rights because the state's appointment errors had deprived him of the guidance of counsel competent to convey meaningfully the life-and-death consequences of his decision. (28CT 7948-7953.) The timing and circumstances of the offer, which required Mr. Morales's immediate decision after a half-hour consultation with unqualified counsel, left Mr. Morales unequipped to understand "about the full ramifications" of invoking his trial

rights and facing the death penalty. (28CT 7949-7950.) The prosecution's decision to seek death under the totality of these circumstances "smacks of arbitrariness . . . . The prosecution is not supposed to punish an accused from [sic] asserting a constitutional right, nor are the courts to punish a client for exercising his right to trial." (28CT 7949.)

Citing the Supreme Court's decisions in *Blackledge v. Perry* (1974) 417 U.S. 21, 28-29 and *North Carolina v. Pearce* (1969) 395 U.S. 711, 725, as well as this Court's decision in *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368-375 ("*Twiggs*"), Mr. Morales argued that the prosecutor's decision to seek death under these circumstances was impermissibly vindictive in violation of the due process clauses of the state and federal Constitutions. (28CT 7983-7986.) Consequently, he moved to preclude the prosecution from proceeding to the penalty phase and seeking death. (28CT 7952-7953, 7983-7986.) At the very least, he argued that he had established the requisite prima facie showing of prosecutorial vindictiveness to trigger a presumption of vindictiveness that required the prosecution to bear the burden of rebutting it. (28CT 7983-7986.) The prosecution filed no written opposition to the motion.

The trial court addressed Mr. Morales's motion over the course of three court sessions. (13RT 2790.) As discussed in Argument I, *ante*, the court expressed a number of concerns about all aspects of the pretrial proceedings, including the Fontana division of the superior court's appointment errors, Mr. Rozenberg's lack of qualifications to handle a capital case, and the quality of his representation throughout the pretrial proceedings. (13RT 2791-2793, 2797.) Defense counsel reminded the court that the trial prosecutor obviously knew that the Public Defender should have been appointed and Mr. Rozenberg should not, as evidenced by the fact that it was the trial prosecutor who contacted the Public Defender's office to appear for the purposes of accepting

appointment as substitute, qualified counsel when the decision to seek death was made. (13RT 2795.)

Compounding its concerns over Mr. Rozenberg's appointment and representation, the court expressed its concern that the prosecution's decision to seek death was an unusually delayed one that appeared to depend entirely on Mr. Morales's exercise of his constitutional rights:

> [B]ased on my knowledge and experience in handling death penalty matters in the past, normally that decision is made very quickly after the preliminary hearing or shortly thereafter, and I have never seen a situation where the prosecution waited two and a half years and only after Mr. Morales refused to accept the offer and decided he wanted to have his trial.

(13RT 2792; see also 13RT 2808, 2811, 2813.) Indeed, the court noted that this case was also unusual since it had always agreed with the prosecution's previous determinations that particular cases were death-worthy; it had its "doubts" in this case given, inter alia, the absence of aggravating evidence apart from the circumstances of the crimes and the insufficiency of the evidence to support the attempted rape felony-murder special circumstance allegation. (RT 2832-2835.)

Mr. Mazurek stated that the unusual delay in submitting the case for death penalty evaluation and approval was due to ongoing plea negotiations between Mr. Young and Mr. Rozenberg. The prosecution insisted that it had simply "held off" on deciding whether or not to submit the case for death penalty evaluation and approval until it could determine whether or not Mr. Morales would be willing to surrender his trial rights and plead guilty. (13RT 2803-2807; 2809-2810, 2850-2852.)

The Public Defender initially argued that by all outward appearances, Mr. Young must have decided not to seek the death penalty as evidenced by, inter alia, his announcement that he was ready to try the case while it was assigned to a noncapital courthouse, his trial estimate that was inconsistent with

a capital case, and the omission of discussion about death-qualifying the jurors. (13RT 2810-2811, 2815, 2828.) In any event, whatever the abstract *possibilities* were before Mr. Mazurek made the plea offer, the prosecution did not invoke its internal procedure for discretionary evaluation and approval to actually seek the death penalty until and *because* Mr. Morales insisted on invoking his trial rights, including his right to a speedy trial. (13RT 2809-2810.)

The court responded that it was particularly concerned about the interplay between the prosecution's exercise of discretion to seek death based on Mr. Morales's decision to invoke his trial rights and Mr. Morales's ability to fully understand the lethal consequences of that decision in light of the assistance he received. As the court lamented:

> . . . . I have to look at the entire situation at hand, and I don't see much relationship between Mr. Rozenberg and the defendant in this case. I do have problems with the fact that I don't even know how these attorneys get appointed. And rules and procedures that are in the code and the policies of the county were all violated. . . . I'm not so sure that Mr. Rozenberg spent any time or effort on this case, quite frankly. Maybe he felt he didn't have to. Maybe he felt that because there was a confession on tape. But *he treated it very lightly*. And he goes to the jail facility one time. He comes to court merely to continue it. He sends Mr. Khanjan in more than half the time to the point where a judicial officer says, you know what, we want to see you come to court. If you are not going to come to court, we are going to hold you in contempt. And then we have a final ending, where it was called for or not, additional time or not, Mr. Morales who has probably not much of a relationship with Mr. Rozenberg because he never shows up half the time, gets a half hour to discuss his fate. And all those things bother me. I have been losing sleep over that in the sense this is not the typical situation I have seen in death penalty cases. This is not how it is normally handled. I have never seen a district attorney's office wait for – whether it is because of the attorney saying put it off . . . . But the fact of waiting two and a half years before making that decision when in every other situation it is right after prelim.

(13RT 2824-2826, italics added.)

With regard to the assistance Mr. Morales received, the prosecutor represented – based on hearsay – that Mr. Rozenberg has "done numerous murder trials" and therefore was qualified to "handle a murder case." (13RT 2817-2818.) The court stopped him in his tracks, emphasizing that the critical issue was Mr. Rozenberg's qualifications to handle a *capital* murder case; in that regard, Mr. Rozenberg not only was not on the special circumstances panel, but he also declared that he would have to be relieved if the prosecution sought the death penalty. (13RT 2817.) The prosecutor agreed that Mr. Rozenberg was not qualified to defend Mr. Morales against a potential death penalty, but contended that it was irrelevant for the purposes of the plea negotiations. (13RT 2817-2818.)

The court remarked: "I think in all fairness perhaps we should just end it now and he has been convicted and the special circumstances have been found true and go forward from there. But that is up to the prosecution." (13RT 2793; see also 13RT 2831.) As discussed in Argument I-E, *ante,* the trial court called upon the District Attorney to reconsider its decision to seek death in light of the many pretrial irregularities bearing on that decision. (13RT 2791-2794, 2792-2798, 2831.) The District Attorney having declined to do so, the trial court determined that it would be necessary to hold an evidentiary hearing into Mr. Morales's claims. (13RT 2831, 2835, 2841.)

On October 25, 2004, however, the court changed course. (13RT 2843.) Without holding an evidentiary hearing or receiving any pleading or evidence from the prosecution addressing the question of vindictiveness, the court denied Mr. Morales's claim. The court ruled that because the prosecutor sought the death penalty pretrial, before jeopardy had attached, Mr. Morales categorically could not advance a vindictive prosecution claim. In support of its ruling, the court cited this Court's decision in *People v. Edwards* (1991) 54

Cal.3d 787, as well as the Supreme Court's decision in *United States v. Goodwin* (1982) 457 U.S. 368. (13RT 2843-2846.) In addition, the court cited the Supreme Court's decision in *Bordenkircher*, *supra*, 434 U.S. 357 for the blanket proposition that increasing the charges or sentence exposure in the plea bargaining context does not offend the due process clauses of the state or federal Constitutions. (13RT 2845.)

The court also rejected the Public Defender's initial position that Mr. Young must have decided not to seek the death penalty. In the absence of an affirmative promise or exercise of discretion *not* to seek that penalty, the court ruled that the death penalty was always a possibility after the filing of the death-eligibility special circumstances. (See also *Gardner v. Superior Court*, *supra*,185 Cal.App.4th at pp. 1007-1014.) The court agreed with the prosecutor that the delay in submitting the case for death penalty evaluation and approval was attributable to the ongoing plea negotiations between Mr. Rozenberg and the prosecution. As the court found, the prosecution was simply "holding back the death evaluation, the death penalty evaluation until the Defendant chose whether to take the plea agreement or not." (13RT 2845-2846; see also 14RT 3262-3264, 3267-3268.) The court reasoned that the ongoing plea negotiations distinguished the facts of this case from this Court's decision in *Twiggs*. (13RT 2845-2846.)

In making its ruling, the court did not address the specific allegations concerning Mr. Rozenberg's lapses in representation in the context of the vindictive prosecution claim. Despite its previous remarks appreciating the link between the quality of his representation and the propriety of the prosecution's exercise of discretion to seek death based on Mr. Morales's decision to reject the plea offer and exercise his trial rights, the trial court now reasoned that the prosecution could not be faulted for the problems with Mr. Rozenberg's representation; problems which stemmed from his erroneous appointment.

(13RT 2846, 2950.) Therefore, the court concluded that they had no bearing on whether the prosecution's death decision was vindictive. (13RT 2850-2852.)

As discussed in Argument I-E, *ante*, the court separately resolved Mr. Morales's claim that he had been deprived of the effective assistance of counsel during the pretrial and plea-bargaining stages. The court did *not* resolve whether Mr. Rozenberg's performance – over which it had expressed such profound concerns in the earlier proceedings – was objectively unreasonable. Instead, as discussed in Argument I-E, the court resolved Mr. Morales's claim on the ground that he could not conceivably prove that he would have taken the plea bargain offer, no matter how deficient Mr. Rozenberg's advice and performance.

For the reasons set forth below, the trial court's ruling was erroneous. The prosecutor's own statements established that his 11th hour decision to seek death was actually vindictive, in violation of the due process clauses of the state and federal Constitutions. At the very least, Mr. Morales raised a presumption of vindictiveness that the prosecution did not and could not rebut.

C. The Due Process Clauses of the Federal and California Constitutions Prohibit a Prosecutor from Increasing Charges or Punishments in Response to a Defendant Exercising His Rights

Taken together, the Fifth and Sixth Amendments to the United States Constitution, and Article I, sections 15 and 16 of the California Constitution, provide criminal defendants with the right to a jury trial, the right to confront witnesses against them, the right to present a defense and a privilege against self-incrimination. Each of these rights is fundamental to our criminal justice system.

"'Prosecutorial vindictiveness' is a term of art with a precise legal meaning. The term refers to a situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or

statutory rights." (*United States v. Meyer* (D.C. Cir. 1987) 810 F.2d 1242, 1245, citing *United States v. Goodwin, supra,* 457 U.S. 368, 372, reh. en banc granted, opinion vacated (D.C. Cir. 1987) 816 F.2d 695, and opinion reinstated on reconsideration sub nom. *Bartlett on Behalf of Neuman v. Bowen* (D.C. Cir. 1987) 824 F.2d 1240.) In this regard, both the United States Supreme Court and this Court have repeatedly emphasized that the due process clauses of the state and federal Constitutions prohibit the state – whether the court or the prosecution – from punishing a defendant for exercising a legal right. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional." (*Bordenkircher, supra,* 434 U.S. at p. 363; accord, *United States v. Jackson, supra,* 390 U.S. at pp. 580-582.) As this Court has similarly put it, "the due process clauses of the federal and state Constitutions [citations] forbid the prosecution from taking certain actions against a criminal defendant, such as increasing the charges, in retaliation for the defendant's exercise of constitutional rights." (*People v. Jurado* (2006) 38 Cal.4th 72, 98; accord, *People v. Collins* (2001) 26 Cal.4th 297, 306; *Twiggs, supra,* 34 Cal.3d at pp. 368-369.)

A defendant may demonstrate prosecutorial vindictiveness in two ways. (See, e.g., *United States v. Lampley* (10th Cir. 1997) 127 F.3d 1231, 1245.) First, he or she may prove "actual vindictiveness" with objective or direct evidence that the prosecutor increased the charges or the maximum penalty the defendant faced because the defendant invoked his or her rights. (*United States v. Goodwin, supra,* 457 U.S. at pp. 368, 380-381 & fns. 12-13, 384 & fn. 19 [hereafter "*Goodwin*"].) Such evidence typically consists of the prosecutor's direct statements. (See, e.g., *United States v. Johnson* (2d Cir. 1999) 171 F.3d 139, 140-141.)

Second, and in the absence of proof of actual vindictiveness, the totality of the circumstances may give rise to a "presumption of vindictiveness," "a legal presumption which arises when the prosecutor increases the criminal charge against a defendant under circumstances [that] are deemed to present a 'reasonable likelihood of vindictiveness.'" (*In re Bower* (1985) 38 Cal.3d 865, 879; accord, e.g., *Goodwin, supra*, 457 U.S. at pp. 372-373; *Blackledge v. Perry, supra*, 417 U.S. at pp. 27-29, fn. 7; *Twiggs, supra*, 34 Cal.3d at p. 371 ["appearance of vindictiveness" gives rise to presumption].) Ordinarily, "[w]here the defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness" that gives rise to the presumption. (*Twiggs, supra*, at p. 371.) In order to rebut the presumption, "the prosecution must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge." (*In re Bower, supra*, at p. 879.) If the prosecution fails to carry its burden, the judgment must be modified to reduce the conviction or sentence to that the defendant originally faced. (See, e.g., *id.* at p. 880.)

Prohibited "vindictiveness" may arise in a variety of contexts. For example, imposing a higher sentence on retrial because the defendant successfully exercised his right to appeal is impermissibly vindictive. (*North Carolina v. Pearce, supra*, 395 U.S. at p. 725.) Similarly, increasing a misdemeanor charge to a felony because the defendant successfully exercised his statutory right to trial de novo is unfairly vindictive in violation of Due Process. (*Blackledge v. Perry, supra*, 417 U.S. at pp. 28-29.) Also prohibited is the prosecution's increase in the severity of a charge on retrial because the

defendant exercised her right to a mistrial due to prosecutorial error. (*In re Bower*, *supra*, 38 Cal.3d at pp. 877-880.)

Increasing charges or penalty because a defendant elects to exercise his or her trial rights rather than surrender them by pleading guilty also violates the due process clauses of the state and federal Constitutions. (See, e.g., *United States v. Jackson*, *supra*, 390 U.S. at pp. 572, 580-583; *In re Lewallen* (1979) 23 Cal.3d 274, 278-281; *Twiggs*, *supra*, 34 Cal.3d at pp. 364-365, 369-371; *United States v. Meyer*, *supra*, 810 F.2d at pp. 1246, 1248-1249.) Two cases are particularly instructive of this type of vindictiveness.

In *United States v. Jackson*, *supra*, 390 U.S. 570, the Supreme Court considered a federal kidnapping statute, which provided that a defendant could receive a death sentence if convicted by a jury. If, however, the defendant was convicted following a guilty plea, or waived jury trial and was tried by the court, the maximum sentence he could receive was life in prison. The Court recognized that penalizing a criminal defendant for asserting his constitutional or statutory rights is "patently unconstitutional." (*United States v. Jackson*, *supra*, 390 U.S. at p. 581.) Applying that basic principle to the statute before it, the Court observed: "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." (*Id.* at p. 580.) The Court recognized that Congress's goal in limiting death to cases recommended by the jury was to "avoid[] the more drastic alternative of mandatory capital punishment in every case." (*Id*. at pp. 581-582.) But despite this laudable goal, the Court pointed out that Congress's chosen method of obtaining it "needlessly chill[ed] the exercise of basic constitutional rights." (*Id*. at pp. 582-583; see also *id*. at p. 572.) As the Court succinctly stated, the constitutional vice in the statute was that "the defendant's assertion of the right to jury trial

may cost him his life . . . ." (*Id.* at p. 572.) Hence, the Court invalidated that part of the statute allowing for a death sentence if the defendant exercised his right to a jury trial as violative of Due Process. (*Id.* at pp. 572, 583.)[32]

In *In re Lewallen, supra*, 23 Cal.3d 274, this Court reached a similar result, holding it unconstitutional for the state to impose harsher punishment on a defendant simply because he elected to go to trial rather than plead guilty. There, defendant refused to plead guilty to a particular count prior to trial, went to trial, and was convicted of several charges. At sentencing, the trial court expressly imposed a harsher punishment because defendant had refused to plead guilty. Citing *United States v. Jackson, supra*, this Court vacated the harsher sentence, concluding that the state essentially had punished the defendant for the exercise of his right to trial. (*In re Lewallan, supra,* 23 Cal.3d at pp. 279-281.) At bottom, "[v]indictiveness against a defendant for having" asserted his constitutional rights "must play no part" in the convictions or sentence the defendant ultimately receives. (*North Carolina v. Pearce, supra,* 395 U.S. at p. 725,.)

1. The *Bordenkircher* Exception to the Vindictiveness Doctrine In Certain Plea Bargaining Contexts And the Policy Considerations Against Applying an Inflexible Presumption of Vindictiveness in the Early Pretrial Setting

In *Bordenkircher, supra*, 434 U.S. 357, the United States Supreme Court considered application of the foregoing principles in the context of

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[32] The Court's focus on the impermissibly vindictive nature of penalizing defendants for exercising their trial rights did not lead it to invalidate that part of the statute providing for a sentence less than death upon a guilty plea. Thus, it did not hold that defendants whose fear of a death sentence might have deterred them from exercising their trial rights and induced them to plead guilty were entitled to withdraw their pleas. (See *Brady v. United States* (1970) 397 U.S. 742, 745-746.)

noncapital plea bargaining. In that case, following the defendant's arraignment the prosecution offered to recommend a sentence of five years if the defendant would plead guilty to the indictment; the prosecutor also notified the defendant, through counsel, that if he did not plead guilty and insisted on exercising his trial rights, the prosecution would increase the maximum potential penalty he would face to life by charging him under the Kentucky Habitual Offender Act. (*Id.* at pp. 358-359, 360, 363.) After the defendant refused the offer, the prosecution carried out its threat and the defendant was convicted and sentenced under the Habitual Offender Act. On appeal, the defendant challenged his enhanced sentence as impermissibly vindictive, imposed in retaliation for the exercise of his trial rights. The prosecutor "conceded that the indictment was influenced by his desire to induce a guilty plea" and therefore to penalize the defendant for refusing to surrender his trial rights and plead guilty. (*Id.* at p. 361.) Hence, the only question was whether the ordinary rules against vindictiveness applied in this context. A five-justice majority of the Supreme Court held that they do not.

Central to the Supreme Court's decision was the essential role of plea bargaining to the effective functioning of the criminal justice system: "'whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.'" (*Bordenkircher, supra,* 434 U.S. at pp. 361-362, quoting *Blackledge v. Allison* (1977) 431 U.S. 63, 71.) While the prosecutor's conduct would have been vindictive outside of the noncapital plea bargaining context, the Court effectively created an exception to the ordinary principles of vindictiveness under the circumstances of the case in order to accommodate the plea bargaining process. The Court recognized that in *North Carolina v. Pearce* and *Blackledge v. Perry*, it had held that punishing a defendant for the exercise of his fundamental rights "'must play no part in'" the

sentence or conviction the defendant receives after exercising those rights. (*Id.* at p. 362, quoting from *North Carolina v. Pearce, supra,* 395 U.S. at p. 725.) The principle remains true in other contexts; but to apply it to hold that a prosecutor's desire to induce a guilty plea or to punish a defendant for not surrendering his rights by pleading guilty "may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." (*Bordenkircher, supra,* at pp. 364-365.) In other words, what might otherwise be impermissibly vindictive in other contexts is tolerated as a necessary evil in the noncapital plea bargaining context in order for plea bargaining to function. As the Court explained, "'imposition of these difficult choices'" – between surrendering one's rights by pleading guilty versus invoking one's rights and facing the consequences of that decision – is "'an inevitable' – and permissible 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' [Citation]. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." (*Id*. at p. 364.)

Equally important to the *Bordenkircher* decision was the defendant's ability to make an informed and intelligent choice to face the consequences of invoking his trial rights. At the outset of its decision, the Court emphasized the critical nature of the fact that the defendant was "*fully informed* of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations relating only to the original indictment had ended with the defendant's insistence on not pleading guilty." (*Bordenkircher, supra,* 434 U.S. at p. 360, italics added.) Essential to permissible charging decisions in the noncapital plea bargaining context is the

underlying premise that in the plea bargaining process, the defendant and the prosecution enjoy positions of "mutual advantage." (*Id*. at p. 363.) "Mutuality of advantage," in turn, depends on the notion that "[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice . . . ." (*Ibid*.) In this regard, the majority reasoned that other situations in which an agent of the State pursues a "patently unconstitutional" "course of action whose object is to penalize a person's reliance on his legal rights," are "'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" (*Id.* at pp. 362-363, quoting *Parker v. North Carolina* (1970) 397 U.S. 790, 809.) "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation" – or, perhaps more accurately, the retaliatory element will be overlooked – "so long as the accused is free to accept or reject the prosecution's offer." (*Id*. at p. 363.) The majority made the limited reach of its decision clear by concluding: "We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment." (*Id.* at p. 365.)[33]

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[33] Four of the justices dissented on the ground that the prosecutor's admission that he increased the maximum penalty the defendant faced because he refused to surrender his fundamental trial rights was the essence of vindictiveness under the Court's precedents in *Pearce* and *Blackledge*, for which there should be no exception in the plea bargaining context. (*Bordenkircher v. Hayes*, *supra*, 434 U.S. at pp. 365-368 (dis. opn. of Blackman, J., joined by Brennan and Marshall, JJ.) & *id.* at pp. 268-273 (dis. opn of Powell, J.).

As *Bordenkircher* has become understood, it effectively "carved an exception to the *Pearce/Perry* doctrine because of the important policy of judicial economy which justifies the plea bargaining process." (*United States v. Velsicol Chemical Corp.* (D.D.C. 1980) 498 F.Supp. 1255, 1263; see also, e.g., *In re Bower*, *supra*, 38 Cal.3d at p. 876 [characterizing *Bordenkircher* as creating an "exception" to the rule against vindictiveness "for plea bargaining"]; Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in Bordenkircher v. Hayes* (1978) 6 Hastings Const.L.Q. 269, 291 ["courts should frankly view *Hayes* as an exception to *Perry* because of the strong policies supporting the practice of plea bargaining"]; Note, *Bordenkircher v. Hayes*: *Ignoring Prosecutorial Abuses In Plea Bargaining* (1978) 66 Calif.L.Rev. 875.) What ordinarily would not be tolerated in other contexts – the prosecution's increase in the severity or number of the charges because the defendant has invoked his constitutional rights – will be tolerated in the plea bargaining context at issue in *Bordenkircher* as a necessary evil to accommodate plea bargaining as an essential component of an effective criminal justice system.

Bordenkircher involved a claim of actual vindictiveness because the prosecutor candidly admitted that a motivation in bringing the greater charges was the defendant's refusal to surrender his rights. The Court recognized the prosecutor's admission of motive but simply held that it was acceptable in the context of that case. Otherwise, in the absence of proof of actual vindictiveness, the question becomes when and whether it is appropriate to presume vindictiveness when the prosecution increases charges in the early pretrial stages without giving notice of its intent to do so if plea negotiations fail. The Supreme Court was faced with this question in *United States v. Goodwin*, *supra*, 457 U.S. 368, in which it relied in part on the reasoning of *Bordenkircher* and elaborated on the practical realities underlying that decision.

According to the Supreme Court in *Goodwin, supra*, the *Bordenkircher* decision reflects the common reality that early in the pretrial stage, "the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." (457 U.S. at pp. 381-382.) As the Court explained:

> In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

(*Id.* at p. 381.) For these reasons, and given the frequency with which defendants invoke a wide panoply of statutory and constitutional procedural rights pretrial, the Court in *Goodwin* "cautioned" against "adopting an inflexible *presumption* of prosecutorial vindictiveness" based solely on the sequence of a prosecutor's decision to increase charges after a defendant exercises a procedural right in the early pretrial stages of a criminal proceeding (i.e., absent proof of actual vindictiveness). (*Ibid.*, italics added; accord, *People v. Edwards, supra*, 54 Cal.3d at pp. 826-828 [rejecting defendant's argument that filing of special circumstances 12 days after his arrest was an unconstitutionally vindictive response to his assertion of his right to counsel, refusal to speak to police, and refusal to waive extradition given that special circumstances were filed days after the defendant's arrest, prior to the

preliminary hearing, and over a year before trial, during which time evidence and charges are evolving].)

2. Neither *Bordenkircher* nor *Goodwin* Created a Categorical Exception to the Constitutional Prohibition Against Vindictiveness in Every Pretrial or Plea-Negotiation Setting

"The Supreme Court in *Goodwin* declined to adopt a per se rule applicable in the pretrial context that a presumption will lie whenever the prosecutor 'ups the ante' following a defendant's exercise of a legal right. [Citation.] But the Court also declined to adopt a *per se* rule that in the pretrial context no presumption of vindictiveness will ever lie." (*United States v. Meyer*, *supra*, 810 F.2d at p. 1246.) Similarly, this Court in "*Edwards* did not absolutely prohibit a court from presuming vindictiveness in a pretrial setting." (*People v. Michaels* (2002) 28 Cal.4th 486, 515, citing *People v. Edwards*, *supra*, 54 Cal.3d at p. 828.) Absent the kind of plea bargaining at issue in *Bordenkircher*, Due Process continues to prohibit prosecutors from increasing charges or the maximum penalty because the defendant has insisted pretrial on invoking his or her trial rights. (*Twiggs*, *supra*, 34 Cal.3d at pp. 364-365, 369-371; *United States v. Meyer*, *supra*, 810 F.2d at p. 1246, 1248-1249.) Proof of actual vindictiveness in this context, even pretrial, establishes a due process violation. (See *Goodwin*, *supra*, 457 U.S. at p. 384 [proof of actual, impermissible vindictiveness at any stage of the proceedings establishes due process violation]; accord, *People v. Michaels*, *supra*, at p. 515.) Even absent proof of actual vindictiveness, a prosecutor's increase in charges after the defendant has invoked his or her rights pretrial may, when combined with other factors, give rise to a presumption of vindictiveness. (See, e.g., *United States v. Meyer*, *supra*, 810 F.2d at pp. 1245-1249; *United States v. LaDeau* (6th Cir. 2013) 734 F.3d 561, 568 [presumption of vindictiveness pretrial where charges were increased following successful suppression motion and were not based on

new evidence]; *United States v. Groves* (9th Cir. 1978) 571 F.2d 450, 452-455 [presumption of vindictiveness pretrial where government brought more serious charges after defendant moved to dismiss an indictment based on a violation of his speedy trial rights]; *Simms v. United States* (D.C. 2012) 41 A.3d 482, 487-493 [presumption of prosecutorial vindictiveness pretrial where prosecution added new charge following defendant's requests for subpoena and additional discovery]; *State v. Tsosie* (Ariz. Ct. App. 1992) 832 P.2d 700, 704 [presumption of vindictiveness pretrial where prosecutors re-indicted defendant who successfully won without-prejudice dismissal of indictment based on violation of his speedy trial rights]; *Wynn v. United States* (D.C. 1978) 386 A.2d 695, 697-698 [presumption where prosecutor added new charges following successful motion to dismiss for speedy trial violation].)

a. The *Bordenkircher* exception depends on the defendant being "advised by competent counsel" and being "fully informed" about the increased charge or penalty as a consequence of failed plea negotiations

At the heart of the *Bordenkircher* holding is the premise that the defendant must be "fully informed" of the increased charges or sentence as a consequence of his or her insistence on invoking trial rights and refusing to surrender them by pleading guilty. (*Bordenkircher , supra*, 434 U.S. at p. 360.) The quality of the defendant's "choice" is paramount: if the prosecution fairly communicates the increased charge or penalty as a consequence of failed plea negotiations and the defendant is "advised by competent counsel and protected by other procedural safeguards," the defendant is "presumptively capable of intelligent choice" and the ordinary rules of vindictiveness will not apply, at least in the noncapital plea bargaining context. (*Id.* at p. 363.) In other words, the Supreme Court tolerates what would otherwise be an impermissibly vindictive charging decision in the plea bargain context when the defendant

chooses to accept those consequences with eyes wide open. When this critical element is lacking, however, the *Bordenkircher* exception to the ordinary rules against vindictiveness does not apply. Two decisions are illustrative.

In *Twiggs v. Superior Court*, *supra*, 34 Cal.3d 360, this Court considered and applied the rules against vindictiveness to a pretrial plea-bargaining process that differed in a critical respect from the plea bargaining approved in *Bordenkircher*. There, the trial court declared a mistrial sua sponte due to a hung jury. (*Id.* at p. 364.) The court's declaration of mistrial returned the parties to the pretrial setting in anticipation of the retrial. In that setting, the prosecution offered the defendant a plea bargain offer that he refused, insisting instead on exercising his trial rights. (*Ibid*.) Unlike *Bordenkircher*, the plea bargain offer did not include notice that the prosecution would increase the charges or penalty if the defendant chose to invoke his trial rights. Two to three days after the defendant refused the offer, the prosecution moved to amend the information with five additional prior conviction enhancement allegations under Penal Code section 667.5, which increased the maximum penalty the defendant faced if he went to trial. (*Ibid.)* The defendant opposed the motion, claiming that the prosecution had been aware of the factual bases for the amendment since the original trial and its late amendment shortly after the defendant insisted on invoking his constitutional right to trial raised a presumption of vindictiveness. (*Ibid*.) The trial court expressed some concern about the appearance of vindictiveness, but accepted the prosecutor's explanation that, although aware of the priors, she had not been able to determine whether they qualified under Penal Code section 667.5 until she received records from the DOC just before moving to amend. (*Id*. at pp. 364-365.) However, the record indicated that the prosecutor had not investigated the priors before the first trial and only became aware that they could be charged as enhancements when a different prosecutor showed her the DOC

records at a pretrial conference. (*Id*. at p. 365.) The defendant sought relief on mandamus and this Court granted it.

On mandamus review, this Court had to resolve two related questions. First, if the prosecution had, in fact, increased the charges and penalty because the defendant insisted on exercising his trial rights rather than surrendering them, would that conduct offend due process under the state and federal Constitutions? In answering yes to this question, the Court first examined the high court's decision in *Blackledge v. Perry*, *supra*, 417 U.S. at pp. 28-29, in which it held that a prosecutor's decision to increase charges because the defendant successfully invoked a procedural right to trial de novo would be impermissibly vindictive. This Court concluded that retaliating against a defendant for successfully exercising his right to trial de novo is no different from retaliating against a defendant for exercising his trial rights:

> [T]he same considerations that led the high court to condemn such prosecutorial conduct in the context of a postconviction appeal are applicable when the defendant asserts his right to a retrial after a mistrial. . . . Here, the defendant has endured a trial and a mistrial due to a hung jury, and when he asserts his right to a jury retrial rather than plead guilty and accept a prison term, he is faced with the possibility of greater punishment than he could have received if the prosecution had secured a conviction, apparently as a result of pursuing his right to be tried by a jury on retrial.

(*Twiggs, supra*, 34 Cal.3d at pp. 369-370.)

The Court next considered whether the case would fall within the *Bordenkircher* plea bargaining exception to the vindictive prosecution prohibition. The Court concluded that it did not, on the ground that the prosecutor in *Bordenkircher* told the defendant during plea negotiations, and while the defendant was represented by competent counsel, that the charges would be increased if he refused the plea bargain offer. This Court recognized that central to the *Bordenkircher* holding was the notion "that in the 'give-and-

take' of plea bargaining, which flows from the 'mutuality of advantage' to both defendants and prosecutors, there is no element of retaliation 'so long as the accused is free to accept or reject the prosecution's offer.' [*Bordenkircher, supra,* 434 U.S. at p. 363.]" (*Twiggs, supra,* 34 Cal.3d at p. 370.) Given the facts and reasoning of the *Bordenkircher* decision, this Court concluded that *Bordenkircher* "did not decide the issue of vindictiveness presented in a case such as this, where the record suggests that the more serious charges were not part of the 'give-and-take of plea negotiations" because the increased charges were not a component of the offer. (*Id.* at p. 371.) In other words, unlike the *Bordenkircher* exception, the defendant in *Twiggs* did not make a "fully informed" choice to face the increased charges as a consequence of invoking his trial rights with eyes wide open.

Having concluded that the prosecutor was prohibited from increasing the charges and/or penalty because the defendant insisted on exercising his trial rights, the next question for this Court to resolve was whether it was appropriate to *presume* vindictiveness in the pretrial setting given the absence of the kind of direct proof of motive or actual vindictiveness that existed in *Bordenkircher*. The Court also answered yes to this question. (*Twiggs, supra,* 34 Cal.3d at p. 372.)

In reaching this conclusion, this Court rejected the arguments of the state and amici curia that the Supreme Court in *Goodwin, supra*, 457 U.S. 368, created a categorical bar against presuming vindictiveness in the pretrial setting. The Court recognized *Goodwin's* observation that as a general matter a prosecutor's decision to increase charges in the early pretrial stages is more likely to be motivated by permissible considerations relating to the evolution of the discovery or assessment of evidence than it is to be motivated by the defendant's exercise of any number of rights that are commonly invoked pretrial. (*Twiggs, supra,* 34 Cal.3d at pp. 373-374.) The Court distinguished

Goodwin on this ground, however, emphasizing that in the case before it, the increase did not occur during the traditional pretrial stage but rather occurred after a first trial was held and therefore at a point in time after which the prosecution has ordinarily completed its investigation and assessment of the evidence. (*Id.* at pp. 373-374; see also, e.g., *Simms v. United States*, *supra*, 41 A.3d at pp. 487-493 ["rebuttable presumption of vindictiveness" was raised where, after announcing ready for trial, the prosecution increased charges following the defendant's requests for subpoena and discovery of additional evidence; although these events occurred pretrial, by "announcing that it was ready to go to trial, the government communicated that this fluid pretrial period was over"].) Indeed, the Court emphasized, although there was no question that the prior convictions qualified for enhanced penalty under Penal Code section 667.5, the prosecutor had been aware of the defendant's prior convictions since the first trial but had expressed no interest in charging them until almost immediately after the defendant insisted on exercising his trial rights rather than surrendering them. (*Twiggs*, *supra*, at p. 372.) Under the totality of these circumstances, the Court held, the "situation calls for invoking the prophylactic rule enunciated in *Perry* to protect against both the possibility that defendant will be deterred from exercising a legal right, as well as the danger that the state might be retaliating against the defendant for maintaining his innocence and facing a retrial." (*Id*. at pp. 369-370.) Because the circumstances gave rise to a presumption of prejudice that the prosecution had not rebutted, the Court remanded the matter back to the trial court to hold a hearing at which the prosecution would bear the "heavy burden" of rebutting it. (*Id*. at pp. 371, 375.)

The Court of Appeals for the District of Columbia reached a similar conclusion in *United States v. Meyer*, *supra*, 810 F.2d 1242. In that case, 200 demonstrators were arrested and given a citation for a single charge, which

directed that they could either forfeit $50 in full satisfaction of the charge or go to trial. (*Id.* at pp. 1243-1244.) The maximum penalty on the specified charge was six month's imprisonment and a $500 fine. (*Id.* at p. 1244.) Although most of the demonstrators chose to forfeit $50 and surrender their rights to trial, some elected to proceed to trial. At their arraignment, those defendants learned that the prosecution had filed two-count indictments against them, which added a second charge that carried another maximum penalty of six months' imprisonment and a $500 fine. Those defendants had not been given notice that any additional charge or penalty would be sought if they chose to exercise their trial rights. The prosecution offered a plea deal to some of the defendants, under which it would dismiss the additional charge and recommend six months' unsupervised probation on the original charge in exchange for their guilty pleas. While some took the deal, 36 elected to exercise their rights to trial. (*Ibid.*) Those defendants moved to dismiss the informations on the ground of vindictive prosecution; they also moved to invoke their right to jury trial, which was triggered by the filing of the second charge and enhanced potential punishment. The trial court agreed that the defendants had raised a prima facie showing of vindictive prosecution and set a hearing on the motions for the prosecution to rebut the presumption of vindictiveness. At the hearing, the court found that the prosecutor had added the count to the informations solely because the defendants had exercised their right to trial, which constituted impermissible vindictive prosecution. (*Ibid.*) On the government's appeal, the Court of Appeals upheld the ruling. (*Id.* at p. 1245.)

Like this Court in *Twiggs*, the Court of Appeals first recognized that due process prohibited the prosecution from increasing the charges and penalty because the defendants invoked their trial rights. (*United States v. Meyer*, *supra*, 810 F.2d at pp. 1248-1249.) Like this Court in *Twiggs*, the Court of Appeals distinguished the Supreme Court's decision in *Bordenkircher* on the

ground that *Bordenkircher* depended on the fact that the defendant made a knowing and fully informed choice to face the consequences of increased charges for exercising his trial rights. (*Id*. at p. 1248.) In contrast, the defendants in *Meyer* were not given the opportunity to make the same kind of fully informed choice before the charges were increased. (*Id*. at pp. 1246, 1248.)

The Court of Appeals next held that, in the absence of proof of actual vindictiveness, it was appropriate to apply a presumption of vindictiveness based on the totality of circumstances notwithstanding the fact that the additional charges were filed pretrial. (*United States v. Meyer, supra,* 810 F.2d at pp. 1246-1247.) Like this Court in *Twiggs*, the Court of Appeals rejected the government's argument that the *Goodwin* decision created a categorical bar to presuming vindictiveness in the pretrial setting. (*United States v. Meyer, supra,* 810 F.2d at pp. 1245-1246.) Instead, the Court of Appeals reasoned, *Goodwin* simply held that the sequence of events wherein the prosecution increases charges after a defendant has exercised a legal right does not, by itself, present a "realistic likelihood of vindictiveness" to raise a presumption of vindictiveness. "But when additional facts combine with this sequence of events to create such a realistic likelihood, a presumption will lie in the pretrial contexts." (*Id.* at p. 1246, citing in accord *United States v. Krezdorn* (5th Cir. 1983) 718 F.2d 1360, 1364-1365 and *United States v. Gallegos-Curiel* (9th Cir. 1982) 681 F.2d 1164,1168-1169.) Furthermore, like this Court in *Twiggs*, the Court of Appeals acknowledged the practical considerations the *Goodwin* Court emphasized existed pretrial but distinguished them. The Court reasoned that the case at issue there was a simple and straightforward one that did not entail the kind of evolving investigation and discovery of new evidence, or reassessment of the evidence, with which the Court in *Goodwin* was concerned. Thus, when the circumstances do *not* suggest the possibility that the charges

increased after further investigation or analysis, "the suspicion grows" that the charges were increased "because the defendants chose to exercise their constitutional right to trial." (*Id.* at pp. 1246-1247.)

Moreover, the prosecution in that case openly increased the charges *only* for the defendants who insisted on invoking their trial rights, which raised a greater appearance of vindictiveness than the mere fortuity of increasing charges sometime after the exercise of one of the panoply of pretrial rights most defendants typically invoke. (*United States v. Meyer, supra*, 810 F.2d at p. 1246.) The Court also considered the prosecution's conduct in subverting other trial rights with its charging practices in finding that the totality of circumstances created an appearance of vindictiveness. (*Id.* at p. 1247.) Specifically, the prosecution's addition of the second charge triggered the defendants' jury trial right, which they invoked in addition to the trial rights they enjoyed on the first charge. When the defendants moved to dismiss the informations on vindictive prosecution grounds, the prosecution dismissed the second charge, which had the effect of subverting the defendants' invocation of their jury trial rights. The prosecutor's conduct in this regard showed a willingness "to toy" with the defendants' exercise of their fundamental trial rights which, together with the totality of the all of the circumstances, gave rise to a presumption of vindictiveness. (*Ibid.*)

The *Twiggs* and *Meyer* decisions thus reflect two important principles. First, when the element of a "fully informed" choice – critical to the *Bordenkircher* decision – is lacking, the *Bordenkircher* exception does not apply and the ordinary rules against vindictiveness prohibit a prosecutor from increasing the charges or maximum penalty because the defendant has insisted on invoking, rather than surrendering, his trial rights. (See also, e.g., *United States v. Velsicol Chemical Corp.* (D.D.C. 1980) 498 F.Supp. 1255, 1262-1263 [*Bordenkircher* exception inapplicable where the element of "an informed

choice" was absent].) In the face of proof of actual vindictiveness, such as the prosecution's admission that it increased the charges for that reason, no further inquiry is required. Due process demands that the increased sentence or additional charge be set aside.

Second, even in the absence of proof of actual vindictiveness, a presumption of vindictiveness may arise pretrial notwithstanding *Goodwin* so long as the presumption is based on more than the sequence of the defendant's exercise of a legal right followed by increased charges. The presumption is particularly appropriate when the proceedings are not in the early, fluid pretrial stages in which the discovery and evaluation of evidence is evolving but rather at a later point, such as after the prosecution announces ready for trial and thus "communicate[s] that this fluid pretrial period [is] over." (*Simms v. United States, supra,* 41 A.3d at pp. 487-493.)

b. The *Bordenkircher* exception depends on the noncapital nature of increased charges or sentence as the consequential penalty for the defendant's insistence on invoking his trial rights

Another critical factor underlying the *Bordenkircher* decision (and its progeny) is that it involved *noncapital* plea bargaining. In that context, the Court reasoned that that there is no meaningful difference between a plea bargain that offers to reduce existing charges and one that threatens to increase or add new charges. In both cases, a defendant is aware that the consequence of exercising his or her trial rights is to face a greater charge or penalty than he or she would suffer or face if he or she waived those rights by pleading guilty, and the defendant is able to make a free choice between the alternatives. (*Bordenkircher, supra*, 434 U.S. at pp. 360-361, 363, 365.)

Of course, the same element of a knowing choice exists in the face of a *statute* that puts defendants on notice that they can face a more severe sentence

if they invoke their fundamental trial rights than they would by pleading guilty. In both instances, a defendant represented by competent counsel who is on notice of the consequences of exercising his or her trial rights rather than pleading guilty is free to accept or reject those consequences. The United States Supreme Court recognized as much in *Corbitt v. New Jersey* (1978) 439 U.S. 212, in which it was confronted with a statute that provided for mandatory noncapital sentences for a conviction following a jury trial but allowed for a lesser sentence for a conviction following a guilty plea. (*Id.* at pp. 214-215.) Concluding that "[t]here is no difference of constitutional significance between *Bordenkircher* and this case," the Supreme Court held that the statute did not violate due process based on the principles of *Bordenkircher*. (*Id.* at pp. 220-223.)

Importantly, however, in the *capital* context, the Supreme Court in *United States v. Jackson, supra,* struck down a statute providing that the *death penalty* could only be imposed for defendants convicted after exercising their jury trial rights and not for those convicted upon a guilty plea or after a court trial. (390 U.S. at pp. 572, 580-583.) In that context, as in *Bordenkircher* and *Corbitt*, it can also be said that a defendant represented by competent counsel who is on notice that he or she could face a greater penalty for exercising his or her trial rights is free to accept or reject those consequences. While that element of free choice saves the increased noncapital penalty from the due process prohibition against vindictiveness, it does *not* save an increased penalty of *death* from that due process protection. In *Corbitt,* the Supreme Court reconciled its holding with its decision in *Jackson* on the explicit ground that the latter decision depended on the capital nature of the increased penalty. (*Corbitt v. New Jersey, supra,* 439 U.S. at p. 217.) Given the uniqueness of the death penalty, the Court emphasized, the constitution simply would not tolerate in the capital context what it would otherwise tolerate in the

noncapital context. (*Ibid.*, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 187.) As the Court unequivocally held in *United States v. Jackson, supra*, 390 U.S. at pp. 581-583, "[w]hatever the power of Congress to impose a death penalty for violation of [a statute], Congress cannot impose *such a penalty* in a manner that needlessly penalizes the assertion of a constitutional right" – i.e., the fundamental constitutional trial rights. (Italics added.)

Just as "[t]here is no difference of constitutional significance between" the statute at issue in *Corbitt* and the noncapital plea bargaining context at issue in *Bordenkircher*, "there is no difference of constitutional significance between" the statute at issue in *Jackson* and the *capital* plea bargaining context. (*Corbitt v. New Jersey*, *supra,* 439 U.S. at p. 221.) Thus, just as it logically followed from *Bordenkircher* that the statute at issue in *Corbitt* did not offend due process, it logically follows from *Jackson* that "whatever the power of" the prosecution to exercise its discretion to seek death, the prosecution cannot exercise that power "in a manner that needlessly penalizes the assertion of a [defendant's] constitutional [trial] right[s]." (*United States v. Jackson, supra*, 390 U.S. at pp. 582-583.) Indeed, this Court has repeatedly recognized that the prosecution's broad discretion to decide to seek the death penalty in a particular case is not completely unbridled or unfettered inasmuch as it cannot be motivated by vindictiveness. (*People v. Viera* (2005) 35 Cal.4th 264, 304, and authorities cited therein; *People v. Lucas* (1995) 12 Cal.4th 415, 477.)

At bottom, it is one thing for a noncapital charge or sentence to be motived in part by penalizing the defendant for exercising rather than surrendering his or her trial rights as a necessary evil to accommodate plea bargaining in the interests of judicial economy and expediency, as the Court in

Bordenkircher recognized. It is quite another for a *death sentence* to be motivated in part on such considerations, as the Court in *Jackson* made clear. [34]

To be clear, Mr. Morales does not contend that the death penalty can never be a factor in plea negotiations. The state may encourage a guilty plea by offering substantial *benefits* in return for the plea. When the prosecution evaluates a case and exercises its discretion to seek the death penalty *before* entering plea negotiations, it may be presumed by all interested participants that the death penalty decision was based on appropriate factors relating to the offense and offender, divorced from any punitive motive. An offer to decline to act on that determination in exchange for a guilty plea is permissible as an appropriate reward or advantage conferred on a defendant who had otherwise been deemed death-worthy. But the converse situation, wherein the prosecution evaluates the case and determines that it is appropriate to seek death after and *because* the defendant has insisted on invoking his fundamental trial rights, is markedly different. While this punitive element may be tolerated for noncapital charging decisions, it is simply intolerable for a decision to seek the death penalty to be based in any part on a penalty for exercising a fundamental constitutional right.

At the very least, the *Jackson* and *Corbitt* decisions stand for the proposition that the *Bordenkircher* exception cannot unblinkingly be applied in

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[34] The executive branch of the federal government has recognized the risks to due process posed by plea bargaining with death. Consequently, the United States Department of Justice expressly prohibits its prosecutors from using death as a bargaining chip in plea negotiations, directly contrary to the prosecution's conduct here. (See U.S. Dept. of Justice, United States Attorneys' Manual (2014) § 9-10.120 <https://www.justice.gov/usam/usam-9-10000-capital-crimes#9-10.120> ["The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position"].)

the capital plea bargaining context. While the state's interests in the plea bargaining process is indeed weighty, it does not invariably outweigh the strong *collective* interest of capital defendants, the state, and society as a whole in highly reliable death verdicts based on the particular offense and the individual offender and not on retaliation for exercising one's fundamental rights. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1300, and authorities cited therein [emphasizing state's independent interest in reliable death judgments based on offense and offender]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 ["It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason[,] rather than caprice . . . ."].)

Certainly, pursuant to all of the foregoing authorities, the *Bordenkircher* exception cannot apply where, as here: (1) the prosecution carries out a threat to seek *the death penalty* because the defendant chooses to exercise his fundamental trial rights protected by the federal Constitution and state law; and (2) the prosecutor *knows* that the defendant does not enjoy a position of mutual advantage in the plea bargaining process because the defendant is not represented by competent counsel – as measured under prevailing professional norms in capital cases – and thus cannot make a fully informed and intelligent choice to face the death penalty as the consequence of invoking his trial rights. Instead, the prosecution's decision to seek death under these circumstances is actually, or at the very least presumptively, vindictive.

D. The Prosecution's Decision to Seek the Death Penalty Because Mr. Morales Insisted on Invoking his Trial Rights Was Actually Vindictive in Violation of the Due Process Clauses of the State and Federal Constitutions; Alternatively, the Totality of the Circumstances Raised a Presumption of Vindictiveness that the Prosecution Failed to Rebut

This Court reviews de novo Mr. Morales's vindictive-prosecution claim because it presents a mixed question of law and fact that implicates Mr. Morales's rights under the federal Constitution. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901; accord *Simms v. United States, supra,* 41 A.3d at p. 487 [reviewing prosecutorial vindictiveness claim de novo and collecting cases from five federal circuits so holding].) The prosecutor's explicit statement that he did seek and obtain approval to actually seek the death penalty because Mr. Morales insisted on invoking, rather than surrendering, his trial rights constitutes direct, objective evidence of actual vindictiveness. Hence, the only question to resolve is whether the *Bordenkircher* exception applied. This case does not fall within the *Bordenkircher* exception for several reasons.

First, unlike *Bordenkircher,* the increased sentence to which Mr. Morales was actually exposed was death. Under *Jackson and Corbitt, supra,* the distinction is critical.

Second, unlike *Bordenkircher* but as in *Twiggs* and *Meyer,* the plea bargain process in this case did not involve Mr. Morales's free, informed and intelligent choice to face the death penalty as a consequence of invoking his fundamental, constitutionally-protected trial rights. The mere fact that the prosecutor informed Mr. Morales, through counsel, that seeking the death penalty was a consequence of invoking his trial rights and refusing to plead guilty did not insulate the decision to seek that penalty from the due process prohibition against vindictiveness.

As previously discussed, the *prosecutor knew and agreed* that Mr. Morales was not being represented by counsel qualified to meaningfully advise him regarding all the factors that would be at issue if he invoked his trial rights and the prosecution sought death. Indeed, on the face of the plea offer proceedings, Mr. Rozenberg made clear that his advice to accept the offer was based on his opinion that the *guilt phase* would likely result in conviction. (2RT 138-139.) But the critical question for vindictive prosecution purposes was whether Mr. Morales was "fully informed" about the *increased potential penalty* consequence of invoking his trial rights. By Mr. Rozenberg's own tacit admission, he could not competently advise Mr. Morales about those consequences. And the prosecutor knew as much when he made the threat to seek the death penalty if Mr. Morales insisted on invoking his trial rights. As demonstrated by his subsequent conduct and his own admission to the trial court in his arguments on the vindictive prosecution claim, he *agreed* that Mr. Rozenberg was not competent to represent Mr. Morales against a potential death sentence. While he fleetingly averred that Mr. Rozenberg's incompetence in this regard was irrelevant to the plea bargain proceedings, he could not have been more wrong. As discussed at length in Argument I, *ante,* if – as the prosecutor agreed – Mr. Rozenberg was not competent to defend Mr. Morales against a potential death sentence at trial, he was *necessarily* incompetent to advise Mr. Morales about the consequence of facing a potential death penalty for invoking his trial rights. Furthermore, Mr. Morales was given only 30 minutes to consult with an attorney who had all but admitted that he could not competently advise him about the consequences of rejecting the offer and facing a capital murder trial and potential death sentence.

One of the crucial roles played by defense counsel is that of serving as a "medium through which the demands and commitments of the sovereign are communicated to the citizen." (*Brewer v. Williams* (1977) 430 U.S. 387, 415

(conc. opn. of Stevens, J.); accord, *Maine v. Moulton, supra*, 474 U.S. at p. 176 ["The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State"].) Here, the prosecutor was fully aware that the medium or conduit through which he communicated to Mr. Morales the consequences of exercising his trial rights was broken. Analytically, conveying the abstract consequence of increasing the potential penalty to death if Mr. Morales insisted on invoking his trial rights, through an attorney whom the prosecutor knew was unequipped to understand and explain the true meaning of that consequence to Mr. Morales, was the same as not conveying that consequence at all. (See *Twiggs, supra*, 34 Cal.3d at pp. 370-371; *United States v. Meyer, supra*, 810 F.2d at pp. 1246, 1248.) The prosecutor simply did not engage in the kind of "give-and-take negotiation common in plea bargaining" wherein both parties "arguably possess relatively equal bargaining power" and the defendant makes a "fully informed" decision to face the consequences of rejecting the offer upon the advice of "competent counsel," as envisioned by *Bordenkircher*. (*Bordenkircher, supra*, 434 U.S. at p. 358.) As this Court recognized in *Twiggs*, without the critical *Bordenkircher* element of informed choice, there is no meaningful distinction between the state's decision to seek the ultimate punishment of death against Mr. Morales because he invoked his trial rights and the state's decision to increase charges or sentence exposure because the defendant has invoked any other constitutional or procedural right. (*Twiggs, supra*, at pp. 369-371; see *Blackledge v. Perry*, *supra*, 417 U.S. at pp. 28-29; *North Carolina v. Pearce*, *supra*, 395 U.S. at p. 725.)

Unlike *Twiggs* and *Meyer*, however, there is no need to determine whether vindictiveness can or should be *presumed* here because the prosecutor explicitly stated that he was exercising his discretion to seek the death penalty because Mr. Morales insisted on invoking his trial rights and would not have

sought that penalty – indeed, would not even have sought life without parole – if Mr. Morales had surrendered them. Thus, in the absence of the *Bordenkircher* exception, penalizing Mr. Morales's exercise of his trial rights by seeking the death penalty violated the fundamental tenet that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" (*United States v. Goodwin*, *supra*, 457 U.S. at p. 372, quoting *Bordenkircher, supra*, 434 U.S. at p. 363.)

Even absent proof of actual vindictiveness, it is appropriate to presume vindictiveness under the circumstances of this case. The Supreme Court in *Goodwin* cautioned against presuming vindictiveness in the early pretrial setting wherein the initial charges are often brought before the prosecutor's discovery of evidence is complete and assessment of the case has "crystalized." (*United States v. Goodwin, supra,* 457 U.S. at pp. 381-382.) But, like the cases in *Twiggs* and *Meyer*, those considerations are absent here. The prosecution's decision to seek death was made *more than two years* after Mr. Morales's first arraignment and nearly a year and a half after he had been held to answer to all of the charges and allegations. As the trial court repeatedly emphasized, "based on my knowledge and experience in handling death penalty matters in the past, normally that [death penalty] decision is made very quickly after the preliminary hearing or shortly thereafter, and I have never seen a situation where the prosecution waited two and a half years and only after Mr. Morales refused to accept the offer and decided he wanted to have his trial." (13RT 2792; see also 13RT 2808, 2811, 2813, 2826.)

Indeed, the prosecution had announced ready to try the case a full *year* before it submitted the case for death penalty evaluation and approval. (2RT 92-93.) By announcing ready to try the case, the prosecution "communicated that th[e] fluid pretrial period" addressed in *Goodwin* and *Edwards* "was over." (*Simms v. United States*, *supra*, 41 A.3d at pp. 487-493.)

Moreover, prosecutor Mazurek addressed at length the reasons for the unusual delay in applying to the Death Penalty Review Board for death penalty evaluation and approval and never suggested that it was based on any new evidence. (See 13RT 2800-2806, 2809-2810, 2814, 2819, 2850-2852.) To the contrary, at the time the prosecutor made the exploding offer in October 2003, he noted that his "memo" submitting the case for death penalty evaluation and approval simply cited the existence of the three special circumstance allegations "any one of which could support proceeding with this case as a death penalty case." (2RT 136; see also 28CT 7947, fn. 36.) Of course, the special circumstance allegations had been in existence since the complaint was amended nearly two years earlier, in December of 2001, and Mr. Morales had been held to answer to all of them nearly a year and a half earlier, in June of 2002. (3CT 630-645, 661.)

Nor did the prosecutor claim that he had reassessed the evidence or reevaluated his predecessor's decision not to seek the death penalty. (Compare *People v. Grimes* (2016) 1 Cal.5th 698, 734, 736-737, discussed *post*.) To the contrary, Mr. Mazurek insisted that even during Mr. Young's tenure, the death penalty was *always* a possibility; the People had been "holding off making a decision whether or not this is going to be a death case" until they could determine whether or not Mr. Morales would surrender his trial rights and plead guilty pursuant to a plea deal. (13RT 2850-2852; see also 13RT 2803-2807, 2809-2810.) The trial court ruled that this representation was accurate. (13RT 2845-2846; 14RT 3262-3264, 3267-3268.) On its face, then, the only "new" consideration impelling the prosecution's decision to seek death was Mr. Morales's refusal to surrender his trial rights after a half-hour consultation with an attorney whom the prosecution knew was unqualified and incompetent to advise him about facing the dire and irrevocable penalty consequences of that decision.

The next circumstance that removes this case from the *Bordenkircher* exception is that the prosecution's 11th hour threat and decision to seek death was made almost immediately after Mr. Morales finally invoked his right to a speedy trial – four months after the case was reassigned to a new prosecutor who needed to familiarize himself with the case and "get up to speed." (2RT 114-115.) The prosecutor knew that once the prosecution exercised its discretion to seek death, it would be necessary to appoint qualified counsel and to continue the trial beyond the last date by which Mr. Morales was entitled to be tried, in order for substitute counsel to prepare. (2RT 137-139, 144, 146-148.) When the prosecutor announced his decision to seek death, effectively joined in Mr. Rozenberg's motion to withdraw, and offered the Public Defender as substitute counsel on October 16, 2003, both he and the court recognized the tension that the situation created between the invocation of Mr. Morales's speedy trial right to be tried no later than November 11 and Mr. Morales's right to representation by prepared, effective counsel. (2RT 148.) The People blithely remarked, "The People would be prepared to go forward before that time, but obviously I understand that the defense wouldn't . . . ." (RT 148.)

While the prosecutor may indeed have been able to try the case by November 11, 2003, inasmuch as the investigation was complete, there is no question that he reaped a considerable litigation advantage by obtaining additional time to "get up to speed" and prepare to try the case. The trial prosecutor had only been assigned to this special circumstances murder prosecution a little more than four months earlier. (2RT 114-115.) It had taken his predecessor 14 months of preparation before he announced ready for trial. (2RT 92-93.) The trial prosecutor also had a week's leave scheduled between the decision to seek death and November 11 (2RT 150) and was assigned to other prosecutions (2RT 160). Indeed, the prosecutor had not even filed a

notice of aggravating evidence when he announced that his office was exercising its discretion to seek death despite the firm trial date. (§ 190.3 [notice of aggravation must be given within a "reasonable period of time . . . prior to trial"]; *People v. Daniel*s (1991) 52 Cal.3d 815, 879.) In fact, he did not file that notice until *nine months later* – on the day trial actually commenced on July 12, 2004 -- thus reflecting that he took full advantage of the additional time to prepare for trial. (SCTII 1-4; see also 28CT 7853; SCT2 196.) In short, the prosecutor knew and agreed that certifying the case for death would subvert Mr. Morales's invocation of his speedy trial rights, which afforded him a litigation advantage by extending the time by which he could "get up to speed" and try the case. The appearance of vindictiveness therefrom adds an element of retaliation that is not present in the ordinary noncapital plea bargaining context. (See *United States v. Meyer*, *supra*, 810 F.2d at p. 1247 [appearance of vindictive charging decision to subvert defendants' jury trial right, in addition to initial decision to increase charges for defendants who invoked their trial rights, combined to raise presumption of vindictiveness].)

In all of the above regards, the circumstances of this case can be readily distinguished from this Court's decision in *People v. Grimes, supra,* 1 Cal.5th 698, in which it upheld a prosecutor's decision to seek death after failed plea negotiations. In that case, after the elected district attorney told the defendant he would not seek the death penalty, a new district attorney was elected who undertook a "thorough review of the case," reconsidered his predecessor's decision, and determined that the offense and offender were death-worthy. (*Id.* at pp. 734, 736-737.) Having *first* determined that the case was appropriate for death, the prosecutor gave the defendant three weeks, while represented by qualified counsel, to choose between pleading guilty or facing the death penalty. The record bore no indication that counsel was not qualified or competent to advise the defendant about facing the death penalty. (*Id.* at pp.

734-735.) And counsel was satisfied that he could do so within the three-week period given; the record established that he agreed to the deadline and that the prosecutor would have extended it had counsel so requested. (*Ibid*.) Because: (1) the prosecution's determination that death was appropriate was made *before* the plea bargain offer was extended and based on considerations entirely divorced from punitive motive; (2) the defendant was given as much time as he requested to consult with presumably competent counsel about the consequences of rejecting the offer and facing the death penalty; and (3) there was no indication that counsel could not competently advise the defendant about those consequences, this Court held that the prosecution's decision to seek death was not an impermissibly vindictive penalty against the defendant for exercising his trial rights. (*Id.* at pp. 734-737; accord, e.g., *In re Bower*, *supra,* 38 Cal.3d at p. 879 [increased charges appropriate where "justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process"].) The unique facts of this case, detailed above, stand in stark contrast to those in *Grimes*.

For all of the foregoing reasons, the unique facts of this case remove it from the *Bordenkircher* exception. The prosecutor's explicit statement that he applied for approval to seek the death penalty because Mr. Morales insisted on invoking his trial rights, and would not have certified the case to seek the death penalty had Mr. Morales surrendered those rights, constitutes proof of actual vindictiveness. Hence, the prosecutor's exercise of discretion actually to seek the death penalty in this case was impermissibly vindictive in violation of the due process clause. The judgment must be modified to vacate the death sentence and reduce the penalty to life in prison without the possibility of parole. (See *In re Bower, supra*, 38 Cal.3d at p. 880.)

Even absent proof of actual vindictiveness, "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness and

therefore give rise to a presumption." (*United States v. Meyer*, *supra*, 810 F.2d at p. 1246.) Because the prosecution did not and could not rebut that presumption, the death judgment must be vacated. (See *In re Bower*, *supra*, 38 Cal.3d at p. 880.) At the very least, the case must be remanded for the trial court to hold an evidentiary hearing on the question of vindictiveness. (*Twiggs*, *supra*, 34 Cal.3d at pp. 374-375; accord, e.g., *United States v. Lanoue* (1st Cir. 1998) 137 F.3d 656, 665; *United States v. Adams* (6th Cir. 1989) 870 F.2d 1140, 1146; *United States v. Napue* (7th Cir. 1987) 834 F.2d 1311, 1329.) If the prosecution is unable to rebut the presumption at that hearing, the death judgment must be vacated with prejudice.

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ERRORS UNDERLYING THE PRESENTATION OF EVIDENCE AND ARGUMENT AT THE GUILT AND PENALTY PHASES

III.

IRRELEVANT, UNFOUNDED, AND INFLAMMATORY ACCUSATIONS THAT MR. MORALES COMMITTED UNCHARGED SEXUAL CRIMES AGAINST THE HOMICIDE VICTIM PERMEATED THE GUILT PHASE FROM BEGINNING TO END AND RESULTED IN A MISCARRIAGE OF JUSTICE UNDER STATE LAW AS WELL AS A DEPRIVATION OF MR. MORALES'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR TRIAL ON THE TRUTH OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS AND HIGHLY RELIABLE DEATH-ELIGIBILITY VERDICTS

A. Introduction

The prosecution did not charge Mr. Morales with any sexual crimes apart from a felony-murder special circumstance allegation that he murdered the victim while attempting to rape her. Before trial, the trial court dismissed that allegation because the preliminary hearing evidence was insufficient to support a holding order. Nevertheless, with false offers of additional proof and a false promise to submit an attempted rape felony-murder theory of first degree murder to the jury, the prosecutor misled the court into making a critical evidentiary ruling admitting sexual assault evidence solely for the purpose of proving that theory – evidence that it otherwise would have excluded as irrelevant and unduly prejudicial to the properly charged offenses and allegations.

The prosecutor was permitted to proceed upon the attempted rape felony-murder theory throughout his case-in-chief, even though the evidence actually presented contradicted his pretrial offers of proof. Consistent with the

trial court's dismissal of the special circumstance allegation, and contrary to the prosecutor's pretrial offers of additional proof, the evidence presented did not support any theory of Mr. Morales's felony murder liability premised on attempted rape or any other uncharged sexual crime. However, the prosecutor waited until the close of his case-in-chief to abandon his spurious claims.

At the close of his case-in-chief, the prosecutor notified the court and counsel that he would not – contrary to the pretrial promise on which the court based its evidentiary ruling – be submitting an attempted rape felony-murder theory to the jury. He also conceded that the question of whether Mr. Morales committed an uncharged attempted rape on the victim, and evidence he had introduced for the ostensible purpose of proving it, was in fact irrelevant to and could not be considered for any purpose in the guilt phase. Likewise, the trial court ruled that, absent that theory, evidence suggestive of any other sexual crime was irrelevant and more prejudicial than probative of any legitimate issue concerning Mr. Morales's guilt of the charged crimes and allegations.

However, the truth was revealed too late: the jurors had already been exposed – repeatedly – to inadmissible evidence and insinuations that Mr. Morales had attempted to rape the victim before she was killed. Furthermore, the prosecutor urged the jurors in his guilt phase summation to infer that Mr. Morales attempted to rape the victim. That argument was made in patent disregard of his assurances to the court and counsel, as well as the trial court's rulings and the law that any putative attempted rape or other sexual assault against the victim was irrelevant. The argument was more prejudicial than probative, and hence not a proper subject for the jurors' consideration, Precisely *because* the court and the parties acknowledged that it was irrelevant to any legitimate guilt phase issue, the jurors never received any instructions concerning their consideration of the sexual assault evidence the prosecutor had deceived the court into admitting and improperly utilized in his summation.

Indeed, as set forth in Argument IV, *post*, the prosecutor's deceptive litigation tactics allowed him to reap the considerable aggravating benefits of that erroneously admitted guilt phase evidence at penalty without having to shoulder any burden of proving that Mr. Morales was directly or vicariously liable for any uncharged, unadjudicated sexual crime by any standard of proof.

The prosecutor's misconduct was compounded by errors on the part of the trial court and Mr. Morales's own counsel. The result was that the jurors were encouraged to speculate that Mr. Morales was responsible for extraordinarily inflammatory and irrelevant uncharged sexual crimes against the victim before she was killed and believe that such responsibility should influence their determination of his guilt and – more importantly – his death-eligibility.

The critical guilt phase issue was Mr. Morales's felony murder death-eligibility. The prosecution's case in this regard rested entirely on its disputed theory that Mr. Morales was the actual killer. The jurors unanimously found that Mr. Morales was the actual killer, as reflected by their true findings on the Penal Code section 12022.53, subdivision (d), allegations that Mr. Morales personally discharged a firearm and caused the victim's death, and consequently found true both death-eligibility felony-murder special circumstance allegations based on that finding. (27CT 7756-7773, 7784-7785.)

The errors in admitting irrelevant and inflammatory sexual assault evidence and arguing that Mr. Morales had attempted to rape the victim before she was killed cut straight to the heart of the critical dispute over Mr. Morales's identity as the actual killer. As Mr. Morales will demonstrate below, the cumulative effect of the errors thereby deprived him of his Sixth, Eighth and Fourteenth Amendment rights to the effective assistance of counsel, a fundamentally fair death-eligibility trial, and highly reliable death-eligibility verdicts and resulted in a miscarriage of justice in violation of the California

Constitution. The special circumstances (as well as the personal gun use enhancements) must be set aside and the death judgment reversed.

B. Procedural History

1. The Trial Court's Dismissal of the Attempted Rape Special Circumstance Allegation Pursuant to Penal Code Section 995 Due to Insufficient Preliminary Hearing Evidence to Support It

In its amended complaint, the prosecution alleged that Mr. Morales committed two counts of burglary, two counts of robbery, a single count of murder in violation of Penal Code section 187, and two felony-murder special circumstances that the killing occurred during the commission of the charged burglary and robbery of the victim within the meaning of section 190.2, subdivisions (a)(17)(A) and (a)(17)(G). (3CT 639-694.) In addition, the prosecution alleged a felony-murder special circumstance that the killing occurred in the commission of an attempted rape within the meaning of section 190.2, subdivision (a)(17)(c). However, in contrast to the underlying felonies of burglary and robbery on which the other felony-murder special circumstance allegations were premised, the prosecution did not separately allege or charge attempted rape or any other kind of sexual assault. (3CT 639-694.)

While there was preliminary hearing evidence that a group of men burgled the victim's home and robbed her, that she was killed in the commission of those felonies, and even that Mr. Morales was the perpetrator who actually shot and killed her, the only preliminary hearing evidence offered in support of the attempted rape felony-murder special circumstance allegation was Detective Brad Toms's testimony that the victim was not wearing her shorts or underpants when her body was discovered. (3CT 712-714.) At the close of the preliminary hearing, the superior court held Mr. Morales to answer to all of the allegations, including the attempted rape felony-murder special

circumstance allegation, without objection or argument from appointed counsel Rozenberg. (3CT 722; see also Argument I-D-2-d, *ante*.)

The subsequently appointed Public Defender later moved to dismiss the attempted rape felony-murder special circumstance allegation pursuant to section 995 on the ground that the preliminary hearing evidence was insufficient to hold Mr. Morales to answer. (26CT 7514-7520; 7RT 1326-1335.) On August 25, 2004, the trial court heard and granted the motion..

The court pointed out that the only evidence offered in support of the allegation was the fact that the victim's body was partially undressed when it was found. There was no evidence of semen, DNA, or injury to the victim apart from that caused by the single gunshot that killed her. Nor was there anything in Mr. Morales's admissions to the charged crimes to indicate that he attempted to rape the victim (or committed some other sexual assault upon her). (7RT 1327, 1332, 1335.) Similarly, there was no evidence of the circumstances under which the victim's clothing was disturbed to support an inference that she was even alive at the time. (7RT 1327.) The court determined that the state of the victim's partial undress alone was insufficient to prove an attempted rape – or, for that matter, any particular sexual offense. (7RT 1326-1327, 1332; see, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 39-42, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879, and authorities cited therein [victim's unclothed or partly unclothed body insufficient to prove attempted rape or rape felony murder]; *People v. Craig* (1957) 49 Cal.2d 313, 318–319 [evidence that murder victim with multiple contusions was found partially clothed with clothing ripped open exposing front of her body, lying on her back with legs spread apart, was insufficient to establish defendant harbored intent to commit rape, particularly given other evidence that victim had been dragged which could have accounted for condition of body]; *People v. Anderson* (1968) 70 Cal.2d 15, 34-36

[insufficient evidence of intent to commit lewd act under § 288]; see also *People v. Holloway* (2004) 33 Cal.4th 96, 139 [ordinarily, "'the victim's lack of clothing'" alone – without evidence of "semen, wounds to the victim's genital area or both" – "'is insufficient to establish specific sexual intent'"].)

The court also emphasized that even if the condition of the victim's clothing were sufficient to support an inference that *someone* attempted to commit a sexual crime against her, there were several male perpetrators in the house involved in the burglary and robbery. (7RT 1327-1328, 1333; see also 7RT 1322-1323.) There was "absolutely no evidence" that it was Mr. Morales who removed, or in any way aided in the removal of, the victim's clothing. (7RT 1333-1335; see also 7RT 1322-1323, 1328.) The court acknowledged that the victim's shorts and underwear were found on the kitchen floor near her feet when her body was found and that there was evidence that Mr. Morales was the person who had shot her in that room. However, the court emphasized that there was no evidence about the timing or circumstances from which it could be inferred that Mr. Morales was alone with the victim when her clothing was removed. Even if it could be inferred that he was present and witnessed the removal of her shorts, there was no evidence from which it could be inferred he intended to aid and abet that act, much less that he intended to aid it for the purpose of committing, facilitating or aiding in her rape. (7RT 1327, 1333-1335; see also 7RT 1323-1324.) Thus, concluding that the prosecution had failed to present sufficient evidence that an attempted rape was even committed, much less that Mr. Morales was directly or vicariously liable for it, the trial court dismissed the special circumstance allegation under section 995. (7RT 1335.)

2. The Prosecutor's Offers of Additional Evidence he Could Present to Prove Attempted Rape and Preliminary Theories of Relevance

In response to the court's ruling, the prosecutor represented that he was prepared to present additional evidence at trial to support the attempted rape felony-murder special circumstance allegation. (7RT 1335-1336.) By way of an offer of proof, the prosecutor asserted: (1) "There's going to be testimony that in the bedroom when the children were present, one of the people grabbed mom's shirt, pulled it down [and t]he Defendant walked up and grabbed the victim's breasts . . . ."; and (2) "There's also a statement made to Jorge Morales that the Defendant supposedly makes where the victim – where the defendant related that the victim said, 'Johnny, why are you raping me,' before he shot her." (7RT 1336.) That evidence, "coupled with the clothing," the prosecutor argued, would answer the court's concerns and be sufficient for the jury to find that Mr. Morales killed the victim in the course of attempting to rape her. (7RT 1336.)

Initially, the prosecutor moved to present that evidence so that he could cure the deficiencies in the preliminary hearing evidence and amend the information at the close of his case-in-chief to conform to that proof. (7RT 1335-1336.) The court observed that if such proof existed, the prosecution should have presented it at the preliminary hearing. Even assuming the proposed procedure were permissible, the court stated, "It's going to be a very rough road for the prosecution to do that," but suggested that "we'll cross that bridge when we get there . . . ." (7RT 1337.)

Defense counsel objected to the proposal. Because there was no charge or allegation of attempted rape – or any other sexual offense for that matter – any evidence or argument the prosecution attempted to present in order to prove that uncharged offense would be irrelevant to the actual charges and

allegations. Therefore, defense counsel notified the court that she would object on relevance grounds "at any point that he [the prosecutor] tries to go down that road . . . ." (7RT 1337.) For the same reasons, defense counsel objected to the prosecutor making any mention of an attempted rape or sexual assault in his opening statement. (*Ibid.*)

Based on defense counsel's objections, the trial court agreed that before the prosecutor presented any such evidence or argument, it had to first research and rule in limine on the validity of his proposed procedure. (7RT 1337-1338.) Until the court could determine its validity, the court sustained defense counsel's objection and prohibited the prosecutor from making any mention of the evidence in his proffer or referring to an attempted rape in his opening statement. (7RT 1337.)

In response, the prosecutor offered another theory of relevance and admissibility of evidence at trial to prove the putative uncharged attempted rape: the prosecutor represented that because *all* of the children – or "the kids" – would testify that the intruders "were doing sexual things to my mom in the bedroom," evidence to prove the truth of those accounts would be relevant to corroborate their overall credibility concerning the charged crimes and allegations. (7RT 1338.) The court likewise viewed this theory of relevance with skepticism. Even if relevant for that purpose, the court warned that it was not inclined to permit proof of an uncharged sexual act for such a marginally relevant purpose. (7RT 1338-1339; see also 12RT 2563-2564.) The court directed that unless the prosecutor offered a more substantial theory of relevance to Mr. Morales's guilt of the charged crimes and allegations, it was not inclined to admit any evidence or argument for the purpose of proving an uncharged attempted rape or other sex crime. (7RT 1339.)

3. The Trial Court Enters an In Limine Ruling Admitting Evidence For The Purpose Of Proving Attempted Rape Felony Murder as a Theory of First Degree Murder Based on the Prosecutor's Promises to Present Evidence in Conformity with His Proffer and Present That Theory of Liability to the Jurors

In response to the trial court's rejection of his proffered theories of relevance, the prosecutor finally seized on a theory that worked. Based on the same offers of evidence, the prosecutor argued that he would submit to the jury a factually supported attempted rape felony-murder theory of first-degree murder and therefore was entitled to present that evidence to support it. (7RT 1339-1340; see § 189 [codifying felony murder rule for purposes of first-degree murder liability].)

Based on this Court's decision in *People v. Davis* (1995) 10 Cal.4th 463, 512-514, the trial court agreed that the prosecutor's legal premise was correct: the court's dismissal of the attempted rape felony-murder special circumstance allegation did not prevent the prosecutor from relying on the same felony murder as a theory of first-degree murder liability based on additional evidence, not presented at the preliminary hearing, sufficient to support a juror finding thereon beyond a reasonable doubt. (7RT 1340-1341; see also 7RT 1401-1403.) The court further ruled that the described offers of additional evidence that the prosecutor was prepared to present at trial would be sufficient to support juror findings beyond a reasonable doubt that Mr. Morales killed the victim in the course of attempting to rape her and hence support an attempted rape felony-murder theory of first degree murder. Hence, based on the prosecutor's assurances that he would both present the evidence he described and submit a valid attempted rape felony-murder theory to the jurors through instructions, the trial court ruled that the evidence was relevant and admissible to support that theory. (7RT 1340-1341.) That critical ruling was

made on August 25, 2004, immediately after the court's dismissal of the attempted rape felony-murder special circumstance allegation.

4. Subsequent In Limine Discussions Which Bore Directly on the Veracity of the Prosecutor's Offers of Proof on Which the Court Based Its Evidentiary Ruling

On August 26, 2004, the day after the court's evidentiary ruling based on the prosecutor's offers of proof, defense counsel moved under Evidence Code section 352 to exclude the testimony of the victim's youngest child, Joe, who was seven years old at the time of the crimes. (7RT 1373.) Defense counsel argued that Joe's testimony was unnecessary and bore little probative value because he had never identified Mr. Morales, or anyone else, as one of the burglars and his testimony would be cumulative of his sisters' concerning the undisputed facts that the victim was killed during a burglary and robbery. Defense counsel also asserted that the child should not be put through the ordeal of testifying and reliving the crimes in front of the jurors when it was unnecessary and that the minimal probative value of his testimony was outweighed by its danger of undue prejudice because it would exacerbate the reality that "there is going to be a great, great, great sympathy factor for these kids," which is an inappropriate and inflammatory consideration at the guilt phase. (*Ibid.*)

The prosecutor responded that Joe's testimony would not be cumulative because he saw something the other children and witnesses did *not:* Mr. Morales "groped" the victim's "chest" in the bedroom. (7RT 1374.) That evidence, he argued, was not only relevant but critical to supporting the purported attempted rape felony-murder theory. (*Ibid.*)

The prosecutor's representation in this regard reflected his offer of the previous day that "[t]here's going to be testimony that in the bedroom when the children were present, one of the people grabbed mom's shirt, pulled it down

[and t]he Defendant walked up and grabbed the victim's breasts" and identified the source of that "testimony" as Joe alone. (See 7RT 1336.) However, it was directly contrary to his representation the day before that all of "*the kids*" had reported that the intruders "were doing sexual things to my mom in the bedroom." (7RT 1338, italics added.) But neither the court nor the parties acknowledged this inconsistency, much less the bearing it had on the court's critical evidentiary ruling the day before based on that offer.

With respect to the prosecutor's identification of Joe as the source of his supposed evidence that it was Mr. Morales who "grabbed" the victim's "breasts" (7RT 1336) or "chest (7RT 1374), the trial court itself questioned its veracity "*because on prior occasions he* [Joe] *did not*" identify Mr. Morales as any of the men in the house that night, much less as the man who grabbed the victim's breasts in the bedroom. (7RT 1374, italics added.) The prosecutor replied that although Joe had been unable to identify Mr. Morales from a photo six-pack, he did identify Mr. Morales from a video of a baby shower in which he appeared. (*Ibid*.)

Defense counsel objected that the prosecutor's representation was simply untrue. Consistent with the court's own understanding of the actual evidence, Joe had never identified Mr. Morales at all as one of the perpetrators, much less identified him as having done anything specific. (7RT 1374-1375.)

The trial court did not resolve the dispute. Nor did the court or the parties acknowledge the bearing of this dispute on the trial court's critical evidentiary ruling the day before – despite the prosecutor's open representation that the proposed testimony from Joe he described was essential to supporting his attempted rape felony-murder theory. Instead, the court simply ruled that defense counsel was free to request a section 402 hearing regarding Joe's identification (if any) of Mr. Morales immediately before Joe testified. (7RT 1375.)

In the next court session held on August 30, 2004, still before the evidentiary phase commenced, there was another dispute over the prosecution's representations about evidence that Mr. Morales committed the sexual battery that Joe described in the bedroom. Defense counsel moved to exclude two photographs of the victim – one taken at the crime scene depicting hands in white gloves holding the victim's blouse open and exposing her bare breast (Exhibit 25) and one graphically depicting in close-up her exposed genitals and the floor beneath her bare buttocks and legs covered in blood (Exhibit 24) – on the grounds previously raised, as well as those in their written motion filed on the same date (described below). (7RT 1390-1391.)

The trial court pointed out that the prosecutor would be relying on an attempted rape felony-murder theory and referred to his August 25 offer of proof in support of that theory that "one of the witnesses" [i.e., Joe] would testify that Mr. Morales groped the victim's "breast." (7RT 1391.) Contrary to the prosecutor's representation in the immediately preceding session that *only* Joe saw that incident, the prosecutor responded that there was "at least one" witness who saw that incident and would identify Mr. Morales as the perpetrator. (7RT 1391.)

Defense counsel interjected that "the only information I have is through one report that *one of the children* [Joe] says a man pulled his mother's shirt up, another man came and grabbed her *chest*, and her mother – his mother pulled her shirt down." (7RT 1391, italics added.) In other words – contrary to the trial court's summary of the prosecutor's offer of proof the day before and the prosecutor's implication in this session that more than one witness would testify to it – no one had reported anything about grabbing the victim's "breasts," Joe had reported only that the victim's "chest" was grabbed by a "man," and Joe had never identified Mr. Morales as that (or any other) man.

The trial court asked the prosecutor directly what the "relevancy" of Exhibit 25 was. (7RT 1392.) In response, the prosecutor did not address his offer of proof that "at least" Joe would testify that Mr. Morales had "grabbed" the victim's "breasts" or – more importantly – defense counsel's assertion that it was inconsistent with the discovery they had been provided.

Instead, the prosecutor responded that Mayra Lopez would testify that when she found the victim's body, her shirt was up and her bra was disturbed, leaving her breast exposed. (7RT 1392.) The exposure of the victim's breast, like the removal of her shorts and underwear, was "relevant to intent and to attempted rape." (*Ibid.*) Defense counsel countered that Ms. Lopez had in fact reported to police that when she found the victim's body, her shirt was on and covering both breasts. (7RT 1391-1392.) The prosecutor did not dispute defense counsel's understanding or represent that he had any reason to believe that Ms. Lopez would testify differently at trial. Instead, he responded that he had just spoken to Detective Toms, who told him that he "thought" one of the medical examiners said that the victim's shirt was already open and her breast exposed when they did the "body roll." (7RT 1392.)

The court recognized that there was a valid dispute over whether Exhibit 25 depicted something coroner's personnel had done at the scene or whether it depicted the victim's body as it was found. Therefore, the court reserved ruling on the admissibility of that photograph until the foundation could be laid. (7RT 1391, 1393.)

The court did not, however, recognize that there was a significant dispute over the veracity of the prosecutor's offer of proof that Joe – or anyone else – had reported or would testify that "the Defendant walked up and grabbed the victim's breasts . . . ." (7RT 1336, 1371.) Nor, inexplicably, did anyone acknowledge the bearing of that dispute on the trial court's ruling permitting the prosecution to proceed on the attempted rape felony-murder theory that had

been based on that offer. Instead, the court simply admitted Exhibit 24 – the graphic photograph of the victim's exposed genitals – on the ground it was relevant to support the putative purported attempted rape felony-murder theory. (7RT 1393.)

There were similar discussions bearing on the prosecutor's second offer of evidence, on which the court based its critical August 25 evidentiary ruling, that "[t]here's also a statement made to Jorge Morales that the Defendant supposedly makes where the victim – where the defendant related that the victim said, 'Johnny, why are you raping me,' before he shot her." (7RT 1336.) In the same August 25 session, shortly after the court's evidentiary ruling, the court and the parties discussed the discovery defense counsel had received regarding the substance of the testimony they could expect from Jorge Morales.

Defense counsel explained that she had only received one report in discovery that Mr. Morales's mother had told police that Angel Ivan told her that Jorge Morales told him about statements allegedly made at the crime scene (referring to the victim's alleged statement at the scene asking, "Johnny, why are you raping me?"). (7RT 1360-1361.) It was unclear from the report whether Jorge was at the scene and heard the statements himself, in which case he would be an accomplice, or whether Mr. Morales purportedly relayed those statement to Jorge, who purportedly relayed them Angel Ivan, who purportedly relayed them to Mr. Morales's mother, who relayed them to police. (*Ibid.*) Because this discovery concerning Jorge's alleged statements was "hearsay on hearsay," defense counsel explained that "I don't know what Jorge is going to say" if called as a witness. (7RT 1360-1361.)

The prosecutor agreed that the evidence he and counsel had regarding the possible evidence Jorge possessed constituted "hearsay" statements Jorge supposedly made to Mr. Morales's brother, Angel Ivan, which purported to

recount statements Mr. Morales had supposedly made to Jorge about the crimes. (7RT 1361.) In other words, the prosecutor had no direct statements from Jorge to any member of the prosecution team concerning the crimes (which he would have had to provide in discovery) from which he could reasonably anticipate the admission of competent evidence concerning statements Mr. Morales allegedly made to Jorge. Therefore, the prosecutor explained, he intended to call Jorge and simply ask him directly if Mr. Morales had made any statements to him concerning the crimes and, if so, what. (7RT 1361.)

This discussion over the "hearsay on hearsay" nature of possible evidence Jorge might or might not possess, and the uncertainty over what testimony or other evidence from Jorge would be offered and admitted at trial, bore directly on the prosecutor's offer to prove that Mr. Morales had actually told Jorge that the victim accused him of raping her during the crimes and the court's evidentiary ruling based on that offer. (7RT 1336, 1340-1341.) Yet again, however, neither the court nor the parties acknowledged as much.

5. The Trial Court's Denial of Defense Counsel's Renewed Motion to Prevent the Prosecution From Presenting Uncharged Sexual Assault Evidence and Relying On an Attempted Rape Felony-Murder Theory of First Degree Murder

On August 30, 2004, prior to opening statements, defense counsel filed a written motion asking the court to reconsider and vacate its August 25 evidentiary ruling. (27CT 7610-7613.) Counsel acknowledged that this Court's decision in *People v. Davis, supra,* 10 Cal.4th at pp. 512-514, supported the legal proposition that the trial court's dismissal of a felony-murder special circumstance allegation under section 995 does not preclude the prosecutor from proceeding at trial on the same underlying felony murder as a theory of first degree felony murder, so long as the prosecution presents

sufficient evidence to support it. (27CT 7610-7611; § 189.) Nevertheless, counsel argued that the prosecution should be precluded from doing so in this case, as the admission of any evidence suggestive of an uncharged attempted rape would result in a fundamentally unfair trial in violation of the due process clause. (27CT 7611-7612.) On the same date, following the discussions detailed in Part 4, *ante*, bearing on the prosecutor's offers of proof on which the court's August 25 ruling was based, the trial court denied the motion. (7RT 1401-1403.) The evidentiary phase then commenced with the prosecutor's opening statement to the jurors. (7RT 1414.)

6. The Prosecutor's Failure to Satisfy, And His Later Admissions And Affirmative Evidence Contrary To, His In Limine Offers of Proof

The prosecutor not only failed to satisfy the critical in limine offers of proof on which the trial court based its ruling permitting him to introduce otherwise irrelevant and inadmissible sexual assault evidence. The affirmative evidence he did present contradicted those offers and was consistent with defense counsel's in limine objections, described in Part 4, *ante.*

a. The prosecutor's failure to present his promised evidence that Joe (or anyone else) claimed to have seen Mr. Morales grab the victim's breast and its affirmative evidence to the contrary

The prosecutor did present Joe's trial testimony, as well as testamentary and documentary evidence of his prior out-of-court statements, that three or four men were in the bedroom with the family when one of them pulled his mother's shirt down, another grabbed her "chest," and the first man then dragged her out of the bedroom. (8RT 1647-1648; 9RT 1693-1695 [Joe's testimony]; 9RT 1923, 1927-1928, 1938 [Children's Assessment Center interviewer's testimony concerning Joe's description of offenses and

offenders]; 3SCT 721-722 [Exhibit 118 – written summary of interview].) However, contrary to the prosecutor's pretrial offer of proof, and consistent with defense counsel's pretrial objections, neither Joe nor any other witness testified that *Mr. Morales* "walked up and grabbed the victim's *breasts*" or otherwise participated in any sexual battery in the bedroom. (7RT 1335-1336, italics added; see also 7RT 1338, 1374-1375, 1391-1393.)

First, Joe testified that when the perpetrators had the family in the bedroom, one man held his mother and pulled her shirt *down* and another one "touch[ed]" her "*chest*" (8RT 1647-1648) or "grabbed her *chest*" (9RT 1693-1695). At the same time, he testified that one of the men removed his mother's necklace (8RT 1647) – a non-sexual, innocent explanation for "grabbing" her "*chest.*" Joe similarly described someone "grabbing" the victim's "chest" – not breasts or a child's equivalent term – in his only prior statement about that particular incident. (9RT 1923, 1927-1928, 1938; 3SCT 721-722.)

Second, when the prosecutor asked Joe in the presence of the jury if he recognized anyone in the courtroom as one of the burglars and Joe responded that he did, defense counsel objected. (8RT 1656.) Outside of the jurors' presence, the prosecutor admitted to the court, "I didn't know if he was going to say yes or no" and "I don't know" which of the perpetrators Joe might be prepared to identify as Mr. Morales because Joe had never identified him on previous occasions. (8RT 1656, 1658.) This admission was, of course, in direct contradiction to his in limine representations that Joe had previously identified Mr. Morales as the man who "grabbed" the victim's breasts and entirely consistent with defense counsel's in limine objections that he had not. (7RT 1373-1375; Part 4, *ante*.) Indeed, as set forth in Part 4, *ante*, even when the trial court pressed the prosecutor on August 26 about whether Joe would, in fact, testify that Mr. Morales was the man who grabbed the victim based on the court's own understanding of the truth that "on prior occasions he did not"

identify Mr. Morales at all, the prosecutor persisted in his deception by insisting that the court's understanding was incorrect. (7RT 1374.)

During the same midtrial discussion outside of the jury's presence, the trial judge recognized that Joe never identified Mr. Morales as the man who "grabbed" his mother. In addition, the prosecutor's own evidence affirmatively indicated that Mr. Morales could *not* have been that man. (8RT 1656-1657.) The prosecution introduced video stills from Mr. Morales's baby shower depicting him with very short hair only days before the crimes, which the prosecution used both before and during trial for witness identification purposes. (8RT 1656-1657; see 3SCT 691-694 [Exs. 94 & 95]; 7RT 1389-1390; 11RT 2247, 2273, 2280-2281.) Indeed, Carlos Gutierrez – the prosecution's star identification witness – testified that Mr. Morales's appearance in those stills reflected his appearance on the night of the crimes. (8RT 1469.) Yet, in both his trial testimony and prior statements, Joe consistently described the man who grabbed his mother as having long curly hair that he wore in a ponytail. (8RT 1647-1648; 9RT 1693-1695, 1923; 3SCT 721-722.)[35] Thus, the prosecution's own evidence affirmatively established that it was physically impossible for Mr. Morales to have been that man. (8RT 1656-1657.)

Similarly, although Joe had described the man who pulled down his mother's shirt and dragged her out of the bedroom as bald and wearing black, he never identified Mr. Morales as that man (or as any of the men he saw in the

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[35] Like Joe, his sisters, Carlos Gutierrez, and Mayra Lopez, also described one of the burglars as wearing a ponytail. (8RT 1439-1440; 9RT 1789, 1791, 1858.) While Jennifer never identified Mr. Morales as one of the burglars, Brianda, Mr. Gutierrez, and Ms. Lopez described and identified Mr. Morales as a different burglar from the man in the ponytail. (8RT 1439-1441, 1469; 9RT 1791-1793, 1795-1796, 1860, 1863; 10RT 1974; 11RT 2432, 2451-2452.)

house that night) despite having been given at least two opportunities to do so before trial. (3SCT 721-722 [Ex. 118]; 7RT 1374-1375; 8RT 1654-1658; 12RT 2434-2435, 2450-2451.) In fact, upon further questioning of Joe in an Evidence Code section 402 hearing held outside of the jury's presence on the substance and reliability of his proposed courtroom identification of Mr. Morales, Joe was prepared only to identify him as the burglar wearing "the beanie" – *not* one of the men he had described as having participated in the "grabbing" incident in the bedroom. (8RT 1664-1665.)

Also contrary to the prosecutor's August 25 and 30 representations and consistent with defense counsel's August 30 statements, the other children had never reported and did not testify that anyone grabbed the victim's "breasts" (7RT 1391) (or even "chest") or did any "sexual thing[]" to the victim in the bedroom (7RT 1338). (See also Part 4, *ante;* see generally 9RT 1706-1748 [Jennifer's testimony]; 9RT 1779-1882 [Brianda's testimony]; 3SCT 715-723 [Exhibit 118 – Children's Assessment Center's written summary of children's pretrial statements during forensic interviews]; 9RT 1928, 1938 [forensic interviewer's testimony that only Joe described "chest" grabbing incident].)[36]

The prosecutor therefore never had any basis on which first to offer (Part 2, *ante*) and later to *insist* in the face of the court's questioning and defense counsel's objections in limine (Part 4, *ante*) that Joe (or anyone else)

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[36] Furthermore, contrary to the prosecutor's later representations – set forth in Part 4, *ante* – that Exhibit 25 depicted the victim's body as it was found, with an exposed breast, and consistent with defense counsel's protestations (7RT 1391-1393), Mayra Lopez testified that the victim's shirt was on and her breasts covered when her body was found (8RT 1553, 1603). Likewise, Detective Toms testified that the victim was on her back with her shirt on and covering both breasts when her body was first discovered and that it was medical personnel who lifted her shirt and exposed her breast, as depicted in Exhibit 25. (9RT 1762, 1882-1883.)

had reported that Mr. Morales had "grabbed the victim's breasts" and would so testify at trial.

b. The prosecutor's failure to present evidence that Mr. Morales told Jorge Morales (or anyone else) that the victim had cried out, "Johnny, why are you raping me?"

While the prosecutor did elicit from Detective Toms that Mr. Morales's mother relayed to him some unspecified statements that Angel Ivan had relayed to her about some unspecified statements Jorge had allegedly made to Angel Ivan (11RT 2354-2355), the prosecutor did not call Jorge Morales to testify. Thus, contrary to the other offer of proof on which the court based its August 25 ruling (and consistent with the in limine discussions concerning the absence of discovery concerning such evidence), the prosecution presented no evidence that Mr. Morales told Jorge – or anyone else for that matter – that "the victim said, 'Johnny, why are you raping me,' before he shot her." (7RT 1335-1336; see Parts 2 & 4, *ante*.)

At the same time, defense counsel did elicit on cross-examination of Detective Wolf that Angel Ivan relayed to him a hearsay statement that Jorge had allegedly made to him (Angel Ivan) that Mr. Morales told Jorge that the victim had said "Johnny, why are you *doing* this to me?" at some *unidentified* point during the charged burglary and robbery. (10RT 2214-2215.) On redirect examination of Wolf, the prosecutor confirmed that *this* was the (hearsay) statement from Jorge that Angel Ivan had reported. (11RT 2237.)

Thus, there was no direct evidence at all that the victim had cried out, "Johnny, why are you *raping* me?" as the prosecutor represented in limine. Even as to Jorge's hearsay statement that Mr. Morales told him the victim asked, "Johnny, why are you *doing* this to me," the prosecutor presented no evidence concerning the circumstances under which she made that alleged statement from which any reasonable inference could be drawn that she was

referring to an uncharged "rape" or attempted rape, as opposed to the charged – and undisputed – armed burglary and robbery.

7. The Prosecutor Fails to Submit an Attempted Rape Felony-Murder Theory Of First Degree Murder and Concedes That Mr. Morales's Putative Commission Of That Uncharged Felony, And The Evidence That He Had Persuaded the Court to Admit For The Ostensible Purpose of Proving it, Was Irrelevant to any Legitimate Issue Concerning the Charged Offenses

The prosecutor not only failed to satisfy his in limine proffers of evidence and presented affirmative evidence to contradict them. At the close of his case-in-chief, he also reneged on his in limine promise to submit to the jury an attempted rape felony-murder theory of first-degree murder.

The prosecutor notified the court that he would not attempt to prove that theory to the jury and accordingly requested that the jury receive no instructions thereon; a request the trial court granted. (12RT 2529-2531.) Thus, the two conditions on which the trial court based it's in limine ruling permitting the prosecution to present uncharged sexual assault evidence were false.

Because that purpose was no longer in issue, the uncharged sexual assault evidence was no longer relevant to any legitimate issue in the case. On that basis, defense counsel renewed their in limine relevance objections to Exhibit 25 (the photograph of the victim's exposed breast to corroborate Joe's account of the chest-grabbing incident, on which the trial court had reserved ruling) and Exhibit 24 (the graphic, close-up photograph of the victim's naked genital area in a pool of blood that the court had already admitted to support the prosecution's sham felony-murder theory). (12RT 2530-2531, 2562.)

The prosecutor *agreed* with defense counsel that Mr. Morales's commission of an uncharged attempted rape was "now irrelevant." Because the evidence presented to prove it was therefore equally irrelevant, the

prosecutor also agreed to withdraw Exhibit 24 from the guilt phase evidence. (12RT 2530-2531.)[37]

As to Exhibit 25, however, the prosecutor argued that the photograph of the victim's exposed breast was relevant for a different purpose: essentially repeating the same theory of relevance that had failed to persuade the court in limine (see Part 2, *ante*), the prosecutor argued that the photograph was relevant to corroborate the credibility of Joe's testimony about the "grabbing" incident which, in turn, was relevant to corroborate his credibility concerning the charged crimes. (12RT 2562-2563.)

Defense counsel and the trial court agreed that the credibility of Joe's testimony and prior account was not in dispute inasmuch as it only tended to show the undisputed facts that a burglary, robbery, and murder occurred. On the other hand, to the extent that the photograph was sexually suggestive, it was irrelevant and more prejudicial than probative. (12RT 2563-2564.) The trial court specifically recognized that the critical disputed issue was whether Mr. Morales was the actual killer and that any sexual implication from the photograph made it more prejudicial as to the jurors' resolution of that issue than probative of the undisputed issue of Joe's credibility. Therefore, the court sustained defense counsel's objection to Exhibit 25 and excluded it. (*Ibid.*)[38]

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[37] Similarly, the trial court granted defense counsel's objection to Exhibit 62, which depicted the victim on a gurney also naked from the waist down on the ground that it was more prejudicial than probative. (12RT 2562.)

[38] In light of this ruling, neither the court nor the parties revisited the fundamental foundational dispute over Exhibit 25 – whether it even depicted the victim's body as found and not as later manipulated by coroner's personnel. As set forth in footnote 36, *ante*, the prosecutor's representations about the evidence he would present to prove the former, and hence the relevance of the photograph to prove any kind of sexual intent, were false.

The court's in limine ruling was that the prosecution could introduce sexual assault evidence and refer to it in opening statements *solely* for the purpose of proving the non-existent attempted rape felony-murder theory. (7RT 1336-1341; see Parts 2 & 3, *ante*.) That ruling, together with its rulings and the prosecutor's own concessions at the close of his case-in-chief, establishes that in the absence of the prosecutor's false representations, the trial court would have excluded any uncharged sexual assault evidence (and prohibited opening statements and questioning insinuating the commission of such uncharged crimes) as irrelevant and more prejudicial than probative.

But the prosecutor's admissions and the trial court's rulings at the close of the prosecution's case-in-chief came too late. As set forth in detail in Part G, *post*, based on the prosecutor's deception, the trial court had already permitted the prosecutor to refer to uncharged sexual crimes in his opening statement and allowed the prosecution to admit evidence and examine witnesses in a way that suggested the commission of such crimes. In short, the jurors had already heard irrelevant and inflammatory evidence and remarks concerning uncharged sexual crimes committed against the victim that they should never have heard and would never have heard absent the prosecutor's misrepresentation.

At the same time, before the presentation of the defense case and the closing arguments of counsel for both sides, the court and the parties understood that Mr. Morales's putative commission of attempted rape or other sexual assault was off-limits. Because the uncharged sexual crimes were no longer in issue or relevant and would not be submitted to the jurors, defense counsel had no reason to present any evidence in their own case to contradict or raise doubt concerning Mr. Morales's commission of any such crimes. To the contrary, they had every reason to avoid that irrelevant and inflammatory topic in their own case.

After both sides rested, however, the prosecutor violated his agreement and disregarded the trial court's rulings in his closing argument to the jurors.

8. The Prosecutor's Guilt Phase Argument to the Jurors That Mr. Morales Attempted to Rape the Victim Before She Was Killed

As set forth in detail in Part I, *post*, in his guilt phase summation, the prosecutor urged the jurors to infer from the improperly admitted evidence that Mr. Morales had attempted to rape the victim before killing her and to consider his commission of that uncharged crime in determining his guilt of the charged crimes and allegations. The prosecutor made this argument despite *conceding* to the court and counsel that this issue was not relevant to any legitimate issue concerning Mr. Morales's guilt of the charged crimes. Furthermore, in his argument, the prosecutor did not tie the relevance of Mr. Morales's putative attempted rape to any specific purpose, thus implicitly encouraging the jurors to follow their natural and inevitable instincts to consider it for purposes that seem all too obvious and "relevant" to laypersons but in fact are unduly prejudicial and prohibited as a matter of law: as proof of Mr. Morales's uniquely amoral and violent criminal character that made it more likely than not that he, and not one of his accomplices, was the person who actually killed the victim.

In the following sections, Mr. Morales will demonstrate that the prosecutor engaged in deceptive and unethical litigation tactics, and the trial court and defense counsel erred in failing to prevent or mitigate the effects thereof, in order to present highly inflammatory and irrelevant evidence and argument that Mr. Morales attempted to rape, or commit a similar violent uncharged sexual crime against, the victim before she was killed. The evidence and argument served no purpose other than to inflame the jurors' passions against Mr. Morales, appeal to the jurors' sympathies for the victim and her children, and thereby unfairly prejudice the jurors' consideration of the truth of

the special circumstance allegations making Mr. Morales eligible for the death penalty. The errors undermine confidence in the reliability of the resulting death-eligibility verdicts to a constitutionally intolerable degree, in violation of Mr. Morales's Sixth, Eighth, and Fourteenth Amendment rights, as well as state law.

C. General Principles Governing the Fundamental Fairness of Criminal Proceedings and the Heightened Reliability Demanded in All Phases of a Capital Trial, Particularly in the Death-Eligibility and Death Verdicts

Special circumstances rendering a defendant eligible for the death penalty operate as "'the functional equivalent of an element of a greater offense'." (*Ring v. Arizona* (2002) 536 U.S. 584, 609; accord *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, 494; see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111.) As such, the Fifth and Fourteenth Amendments demand that they be proved beyond a reasonable doubt and the Sixth Amendment demands that they be found true by the jury. (*Ring v. Arizona*, *supra*, at pp. 604, 609; *Apprendi v. New Jersey*, *supra*, at p. 478; see also § 190.4, subd. (a) [special circumstances must be proved beyond a reasonable doubt and found true by trier of fact].)

Furthermore, the Fifth and Fourteenth Amendments guarantee every criminal defendant a fundamentally "fair trial, understood as a trial resulting in a verdict worthy of confidence" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434 ("*Kyles*"), or one "whose result is reliable" (*Strickland v. Washington* (1984) 466 U.S. 668, 687-689 ("*Strickland*"). (Accord, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) A reliable verdict in a criminal case must be the product of a fair adversarial proceeding (*Strickland*, *supra*, at pp. 696, 700) and based solely on the state's lawful and relevant evidence proving all elements of the charged crimes – including any special circumstance allegations – beyond a

reasonable doubt. It should not be the product of extraneous considerations. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Beck v. Alabama* (1980) 447 U.S. 625, 642-643; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6.) "[A]n important element of a fair trial is that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence." (*Bruton v. United States, supra*, at p. 131, fn. 6.)

These rules apply with even greater force in capital cases. The death penalty is a different kind of punishment from any other. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability'" in all phases of a capital trial (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, citations omitted; accord, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), including "a greater degree of accuracy and fact-finding than would be true in a noncapital case" (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; accord, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Johnson v. Mississippi* (1978) 486 U.S. 578, 584-590). Thus, "[i]n a death penalty case," this Court "expect[s] the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*People v. Hernandez* (2003) 30 Cal.4th 835, 878.)

D. The Trial Court Must Subject to Heightened Scrutiny a Prosecution Offer to Present Otherwise Irrelevant and Inadmissible Evidence to Prove an Uncharged Felony as the Predicate of a Felony-Murder Theory that the Prosecution Tried And Failed to Support at the Preliminary Hearing

Under the precedents of this Court, when a defendant is properly charged with murder, it is not necessary for the prosecution to explicitly charge

felony murder, or even to separately charge the underlying felony, for the prosecution to proceed on a felony-murder theory of liability. (See, e.g., *People v. Davis, supra*, 10 Cal.4th at p. 514; *People v. Murtishaw* (1981) 29 Cal.3d 733, 751, fn. 11; *In re Walker* (1974) 10 Cal.3d 764, 781; § 189.) Importantly, however, the prosecution cannot simply "conjure[] up" a felony-murder theory predicated on an uncharged felony and thereby get before the jurors evidence suggesting the commission of an uncharged crime that would otherwise be irrelevant and inadmissible. (*People v. Guerrero* (1976) 16 Cal.3d 719, 727-730.) The trial court has a duty to "screen out" factually invalid theories of liability (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131), and analyze with "extreme caution" the admission of evidence to prove uncharged crimes (*People v. Guerrero, supra*, at p. 724). Moreover, when the predicate felony or felony-murder theory is not merely uncharged but uncharged *because* it has been dismissed due to insufficient preliminary hearing evidence to hold the defendant to answer to it, the trial court must view the prosecution's proffered theory with heightened scrutiny before permitting it to present evidence and argument in ostensible support thereof.

1. Uncharged Crimes Are Generally Inadmissible Due to their Inherent Danger of Undue Prejudice, Absent Specified Limited Circumstances That the Trial Court Must Subject To "Extremely Careful Analysis"

This Court has consistently recognized that "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314, disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260; accord, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 404; *People v. Alcala* (1984) 36 Cal.3d 604, 631.) The vice in the presentation of or reference to uncharged offenses is not that "such

evidence is never relevant; to the contrary, the evidence is excluded because it has too much probative value." (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; accord, e.g., *Michelin v. United States* (1948) 335 U.S. 469, 475-476.) The jurors' "'natural and inevitable tendency'" is to give "excessive weight" to the uncharged crime and allow it to bear too strongly on the charged crime as proof of the defendant's criminal disposition and bad character, or as a justification to convict the defendant of the charged crime regardless of his or her guilt. (*People v. Guerrero*, *supra*, at p. 725; accord, e.g., *People v. Thompson*, *supra*, at pp. 317-318; *Michelin v. United States*, *supra*, at pp. 475-476.)

This tendency increases with the degree of the inflammatory nature of the uncharged crime. Allegations of uncharged sex crimes are well-recognized as being highly inflammatory. (See, e.g., *People v. Alcala*, *supra*, 36 Cal.3d at pp. 632-636, superseded on another ground by statute as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Guerrero*, *supra*, 16 Cal.3d at p. 730; *People v. Fosselman*, *supra*, 33 Cal.3d at pp. 580-581; *People v. Harris* (1998) 60 Cal.App.4th 727, 738-741.)

The risk of undue prejudice is increased even more when an uncharged crime of violence – like a sexual offense – is alleged to have been committed against the victim of the charged crimes, which tends to invoke feelings of sympathy for the victim. Like evidence of the defendant's bad character or criminal disposition, it is well-settled that appeals to the jurors' sympathy for the victim "is out of place during an objective determination of guilt" (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318) and risks "divert[ing] the jury's attention from its proper role" (*People v. Lewis* (1990) 50 Cal.3d 262, 284).

For all of these reasons, the use of uncharged crimes evidence creates a substantial risk of injecting an intolerable degree of unfairness into the

proceedings and diluting the presumption of innocence in violation of state law and the federal Constitution. Given these risks, evidence of uncharged crimes is inadmissible, and questions or remarks that allude to the defendant's commission of uncharged crimes are prohibited, absent carefully circumscribed exceptions. (See, e.g., *People v. Ewoldt, supra*, 7 Cal.4th at pp. 393-404; *People v. Thompson*, *supra*, 27 Cal.3d at pp. 317-318; *People v. Guerrero*, *supra*, 16 Cal.3d at p. 724.)

The most common exception is codified in Evidence Code section 1101, which provides that uncharged crimes evidence is not necessarily inadmissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [a defendant's] disposition to commit such act." Proof of an uncharged felony may also be relevant and admissible to prove the predicate uncharged felony for a felony-murder theory of liability. (See, e.g., *People v. Murtishaw*, *supra*, 29 Cal.3d at p. 751, fn. 11; *In re Walker* (1974) 10 Cal.3d 764, 781.)

However, "admission of [uncharged] crimes evidence cannot be justified merely by asserting an admissible purpose" in the abstract. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724.) The evidence must be logically relevant to a legitimate issue in dispute in the case. (*Id.* at pp. 724-728; accord, e.g., *People v. Thompson*, *supra*, 27 Cal.3d at pp. 314-319.) Further, "'since substantial prejudicial effect is inherent in such evidence, uncharged offenses are admissible only if they have *substantial* probative value' [Citation]" that outweighs their potential for undue prejudice. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, italics in original; accord, e.g., *People v. Kelly* (2007) 42 Cal.4th 763, 783; Evid. Code, § 352.)

The proponent bears the burden of persuading the trial court that uncharged crimes are admissible under these principles. (See, e.g., *People v.*

Soper (2009) 45 Cal.4th 759, 772-773; *People v. Bean* (1998) 46 Cal.3d. 919, 938.) The trial court must "scrutinize with great care" the proponent's proffer (*People v. Thompson*, *supra*, 27 Cal.3d at pp. 314-316), consider the relevance and probative value of the uncharged crimes with "extreme caution" (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724) and subject it to "extremely careful analysis" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404) for potential prejudice.

The proponent must demonstrate, inter alia, and the trial court must carefully determine, that the evidence is not only relevant but bears "substantial" probative value to a legitimate issue actually in dispute concerning the defendant's guilt of the charged crimes. (See, e.g., *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 405-406 [Evidence Code section 1101]; *People v. Guerrero*, *supra*, 16 Cal.3d at pp. 724, 727-730 [uncharged felony as predicate for felony-murder theory].) The proponent must also make a foundational showing that, and the trial court must carefully analyze whether, the proponent can prove both the commission of the uncharged crime and the defendant's connection to it by the degree of proof required to make it relevant and probative. (See, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 380-383; *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115, and authorities cited therein; *People v. Harris*, *supra*, 60 Cal.App.4th at pp. 738-741.) If the uncharged crime and the defendant's connection to it cannot be established by the requisite degree of proof, it "is irrelevant . . . ." (*People v. Garelick*, *supra*, at p. 1115; accord, e.g., *People v. Guerrero*, *supra*, 16 Cal.3d at pp. 724-730 [evidence to prove uncharged attempted rape as predicate for felony-murder theory was insufficient and therefore irrelevant].) "The trial court has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence [citations]." (*People v. Scheid* (1997) 16 Cal.4th 1, 14; see also *Bruton v. United States*, *supra*, 391 U.S. at p. 131, fn. 6.)

In light of these principles, the proponent's offers of evidence, as well as an explication of its probative value, are critical to the proper functioning of the court in exercising its discretion to determine the relevance and admissibility of uncharged crimes evidence. "To exercise that power all material facts in evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 875.) "An offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176; accord, e.g., *People v. Morrison* (2004) 34 Cal.4th 698, 723-724; *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 Cal.2d 157, 163.) And the proponent cannot mislead the court or opposing counsel with respect to the offer of evidence or the purpose for which it is offered. (See Part E-1, *post*.)

Pursuant to these principles, when the prosecution offers to prove the defendant's commission of an uncharged felony as the predicate for an otherwise uncharged felony-murder theory of liability, the trial court must "scrutinize with great care" whether that particular felony-murder theory will actually be a legitimate issue in dispute. Unlike the elements of charged crimes that are necessarily put in issue by a plea of not guilty (*People v. Balcom* (1994) 7 Cal.4th 414, 422), a general murder charge does not put every uncharged theory of murder liability into dispute. To the contrary, the trial court has a duty to "screen out" factually (or legally) invalid theories of liability. (*People v. Guiton, supra*, 4 Cal.4th at p. 1131.) The defendant's commission of an uncharged felony as the predicate of an otherwise uncharged felony-murder theory of liability is only legitimately in dispute if: (1) the prosecution can present sufficient, admissible evidence for a rational juror to find beyond a reasonable doubt that the defendant committed the uncharged

felony (and that the victim was killed in the commission thereof); and (2) the prosecution will actually submit that theory of liability to the jury, thereby placing it in dispute. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1262 [predicate felony for felony-murder theory must be proved beyond a reasonable doubt].) Absent both foundational requirements, the defendant's commission of the uncharged felony is irrelevant and evidence to prove it is inadmissible for that purpose. (See, e.g., *People v. Guerrero, supra*, 16 Cal.3d at pp. 724-730; *Armenta v. Churchill* (1954) 42 Cal.2d 448, 456-457 [evidence of other misconduct presented in support of a putative alternative theory of liability that is "removed from the case" becomes irrelevant to legitimate, material issue and is inadmissible].)

The court must subject to particularly heightened scrutiny the prosecution's offers concerning these foundational requirements as part of its analysis of potential prejudice when the offered evidence is irrelevant to any of the other properly charged crimes and theories of liability. If the prosecution ultimately fails to satisfy the requirements for a valid felony-murder theory *after* it has been permitted to present evidence in ostensible support of that unfounded theory, it creates an enormous and often intolerable risk of undue prejudice against the defendant. The jury has already heard evidence and remarks suggesting the defendant's commission of a violent felony (or felonies) against the victim for which he has not been charged, that the prosecution bears no burden of proving, and that is irrelevant to any legitimate issue in the case. Particularly when that irrelevant uncharged crime is an inherently inflammatory one – like a violent sexual crime – its "paramount function" becomes seemingly relevant but improper proof of the defendant's bad character and violent criminal disposition. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 222, 227-231 [admission of gang evidence to support unfounded gang enhancement allegation that was ultimately dismissed resulted

in admission of evidence that was irrelevant to any legitimate issue concerning the charged offenses and violated defendant's right to a fair trial]; *People v. Ramirez* (2016) 244 Cal.App.4th 800, 803, 820-823 [admission of gang evidence to support unfounded gang participation charges and enhancement allegations resulted in erroneous admission of inflammatory evidence that was irrelevant and prejudicial as to jury's determination of defendants' guilt on properly charged offenses and violated defendants' right to a fair trial]; *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157-1158, 1161-1162 [other misconduct evidence admitted to prove theory of liability that was "removed from the case" became irrelevant and was prejudicial given, inter alia, likelihood that jurors would consider it as improper proof of character or disposition]; see also *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385.)

Similarly, when lay jurors hear (or are encouraged to speculate) that the defendant committed an uncharged crime like a violent sexual offense against the victim of the charged crimes but do not hear how it is relevant to any legitimate issue in the case (precisely because it is *not* relevant), it provokes their "all too natural response" of empathizing with the victim's suffering and provoking an emotional bias against the defendant. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1206.)

If, after "extremely careful analysis" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404), "there is any doubt" that the prosecution can both present sufficient, admissible evidence to support a rational juror finding beyond a reasonable doubt that the defendant committed the uncharged felony and put that issue into legitimate dispute by submitting a valid felony-murder theory of liability to the jury, the risk of undue prejudice to the defendant is too great and "the evidence should be excluded." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318; accord, e.g., *People v. Hendrix* (2013) 214 Cal.App.4th 216, 244.) Moreover, as set

forth in the next sections, the risk of undue prejudice to the defendant becomes even greater, and the court's concomitant duty to carefully scrutinize the prosecution's proffer is heightened further, when the prosecution moves to proceed on a felony-murder theory of liability at trial after the trial court has dismissed a special circumstance allegation based on the same felony-murder theory, or dismissed a charge for the predicate felony under Penal Code section 995 due to insufficient preliminary hearing evidence to try the defendant thereon.

2. The Dismissal of a Felony-Murder Special Circumstance Allegation, or a Felony Charge, Does Not Necessarily Deprive the Court Of Jurisdiction to Try the Defendant for Murder Under The Same Felony-Murder Theory

Under the precedents of this Court, "malice murder" under Penal Code sections 187 or 189 and felony murder are not separate crimes; rather, the latter is a theory of liability of the former. (*People v. Morgan* (2007) 42 Cal.4th 593, 616-617, and authorities cited therein.) Therefore, "'it is not necessary to separately charge a defendant with either a felony-murder theory or the underlying felony'" in order to rely on a felony-murder theory in support of a general murder charge. (*People v. Davis*, *supra*, 10 Cal.4th at p. 514.)

At the same time, the defendant cannot be tried on a felony charge or a felony-murder special circumstance allegation that the trial court has dismissed from the information under Penal Code section 995 due to insufficient preliminary hearing evidence to hold him to answer. Nor can the prosecution present evidence at trial for purposes of curing the evidentiary deficiency and amending the information with the dismissed charge or allegation at the close of its case-in-chief. (See § 1009 [information cannot be amended with charge "not shown by the evidence taken at the preliminary examination"].) These rules of prohibition are both jurisdictional and prophylactic, intended to avoid

unfair prejudice to the defendant that might otherwise result from subjecting him to trial on an unfounded charge. (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 759-764, superseded on other grounds by amendments to Penal Code section 12022.1, and authorities cited therein ("*Mendella*"); *People v. Pitts* (1990) 223 Cal.App.3d 606, 903.)

In *People v. Davis*, *supra*, 10 Cal.4th 463, this Court resolved any tension between the former and the latter principles insofar as jurisdiction is concerned. The defendant in that case relied on the latter rules of prohibition in arguing that the trial court's dismissal of an attempted rape charge and a rape felony-murder special circumstance allegation under Penal Code section 995 divested the court of jurisdiction to "re-hear" those dismissed charges by trying him for first degree murder premised on the same attempted rape or rape felony-murder theory of liability. (*Id*. at pp. 513-514.)[39] This Court rejected that jurisdictional argument based on the former principles. The Court reasoned that because the defendant was tried on the murder charge and not on the dismissed felony charge or felony-murder special circumstance allegation, the question was whether the court had jurisdiction to try the defendant for murder. Since a defendant can be tried for a charged murder on a felony-murder theory without charging felony murder or the predicate felony, the Court held, the trial court's dismissal of the felony charge and felony-murder special circumstance allegation did not divest it of jurisdiction to try the

[39] For actual killers, as in *Davis*, first-degree murder liability and special circumstance liability under the felony-murder rule is effectively the same. Both require that the murder occur in the commission of the underlying felony. Special circumstance liability is inapplicable only if, based on the facts of the case, the murder was the killer's primary object and the felony was merely "incidental" to that object. (*People v. Green* (1980) 27 Cal.3d 1, 61-62.)

defendant for murder under that theory. (*Ibid.*)[40] To the extent that the attempted rape/rape felony-murder theory submitted to the jury was not legally invalid on those jurisdictional grounds, the defendant did not dispute that it was otherwise factually and legally valid based on the evidence in that case.

Thus, while the Court in *Davis* held that a trial court's dismissal of a felony-murder special circumstance allegation (or felony charge) does not necessarily prohibit the prosecution from relying on the same felony murder as a theory of first degree murder on *jurisdictional* grounds, it by no means held that a prosecutor is *always* entitled to rely on a felony-murder theory of first degree murder under these circumstances. To the contrary, the principles set forth in Part 1, *ante*, governing the admission of uncharged crimes evidence and the court's duty to screen out *factually* invalid theories of liability apply to a prosecution's motion to proceed on an otherwise uncharged felony-murder theory predicated on an uncharged felony. Further, as set forth below, under circumstances wherein the predicate felony or corresponding felony-murder special circumstance allegation is not merely uncharged but uncharged because it was dismissed due to insufficient preliminary hearing evidence to try the defendant for it, the trial court must subject the prosecution's proffer to even greater scrutiny, particularly in capital cases.

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[40] The Court also held that, based on the facts of that case, the defendant had sufficient notice for due process purposes that the prosecutor would be relying on that theory of first degree murder, notwithstanding the lower court's dismissal of the felony-murder special circumstance allegation. (*Id.* at pp. 512-514.)

3. While The Dismissal of a Felony-Murder Special Circumstance Allegation Under Section 995 Does Not Necessarily Prohibit the Prosecution from Submitting the Same Felony Murder to the Jury as a Theory Of First-Degree Murder Liability, When That Theory Contemplates the Admission Of Uncharged Crime Evidence That Would Otherwise be Irrelevant In a Capital Case, The Trial Court Must Subject it to Even Greater Caution and Scrutiny Than Ordinarily Required

The statutory scheme governing preliminary hearings, including Penal Code sections 995 and 1009, is concerned not only with jurisdiction – the issue confronted in *Davis*. The scheme is also intended to "weed out groundless or unsupported charges of grave offenses . . . ." (*Mendella, supra*, 33 Cal.3d at p. 759, and authorities cited therein.) That function is important not only to prevent unfounded prosecutions. "[I]t is of at least equal, and often far greater, importance that the defendant" – who will be prosecuted on properly charged offenses – "not be charged excessively" and have to shoulder the additional burden of facing unfounded charges, which has "various collateral effects." (*Id*. at pp. 759-760.)

One such collateral effect is the danger that "'the jury will accept evidence concerning allegations [or charges] that should have been "weeded out" by the magistrate or trial court in pretrial proceedings.' [Citation.]" (*Mendella, supra*, 33 Cal.3d at p. 761.) In other words, "the defendant may suffer prejudice from the introduction of evidence at trial" on the unfounded charge or allegation "when the evidence is irrelevant to his guilt" of, or would otherwise have been inadmissible to prove, the properly charged crimes. (*Id*. at p. 760.)

The decision in *People v. Ramirez*, *supra*, 244 Cal.App.4th 800 illustrates the reality of these concerns. In that case, the trial court erred in denying the defendants' section 995 motion to dismiss gang participation charges and enhancement allegations that were without adequate support in the

preliminary hearing evidence. (*Id*. at pp. 803, 820.) The defendants were therefore tried on those unfounded charges and allegations, along with the properly charged crimes of attempted murder and assault with a deadly weapon. The defendants were acquitted of the gang participation charges and enhancement allegations but convicted of the attempted murder and assault with a deadly weapon charges. Although acquitted of the particular charges and allegations that should have been dismissed under section 995, the acquittals did not cure the prejudice from forcing the defendants to stand trial on them. (*Id*. at pp. 803, 820-822.) To the contrary, the danger the Legislature intended to avoid and this Court recognized in cases like *Mendella*, *supra*, was realized: as a result of permitting the prosecution to proceed to trial on the unfounded gang charges and allegations rather than weeding them out, inflammatory other misconduct/gang evidence was admitted that was irrelevant to any legitimate issue concerning the defendants' guilt of the properly charged offenses. (*Id*. at p. 820.) The irrelevant and inflammatory nature of that erroneously admitted evidence was so likely to result in improper inferences of the defendants' bad character and criminal disposition and undue prejudice as to deprive the defendants of a fair trial on the properly charged offenses and demanded reversal. (*Id*. at pp. 820-822.)

It is in part to avoid these "collateral" dangers of unfair prejudice that when a charge has been dismissed under Penal Code section 995 because it was not shown by the preliminary hearing evidence, the prosecution is prohibited from presenting additional evidence at trial for the ostensible purpose of amending the information at the close of its case-in-chief with the dismissed charge. (§ 1009; *People v. Rogers* (2016) 245 Cal.App.4th 1353, 1361-1363.) A contrary rule would permit the prosecution to substitute the trial itself as the screening process the preliminary hearing is intended to serve, which poses an intolerable risk that the fact finder will hear irrelevant evidence to prove an

unfounded charge that is unduly prejudicial with respect to the properly charged offenses. Conceptually, in order to avoid this result, the Legislature effectively presumes that if the prosecution did not present sufficient evidence to hold the defendant to answer to a charge at the preliminary hearing, it will be unable to present such evidence at trial. (See § 1009.) If the prosecution believes it has additional evidence sufficient to try the defendant for the charge, it must re-allege the charge in a new complaint and present the additional evidence through the screening process that is a preliminary hearing. (See §§ 999, 1387.) In this way, the statutes "operate as a judicial check on the exercise of prosecutorial discretion." (*Mendella, supra*, 33 Cal.3d at p. 757.)

By the same reasoning underlying Penal Code section 1009, when the trial court has dismissed a felony-murder special circumstance allegation (or felony charge) due to insufficient preliminary hearing evidence, allowing the prosecutor to attempt to cure the evidentiary deficiencies at trial for the purpose of proving the same felony murder as a theory of first degree murder creates a significant risk that the jury will hear inflammatory and irrelevant evidence in support of an unfounded theory in determining the defendant's guilt on other, properly charged offenses or theories of liability. That is just the result the Legislature intended to avoid with its statutory scheme to "weed out" unfounded charges and allegations. While trial courts are not *necessarily* prohibited from permitting the prosecution to proceed on a felony-murder theory of first degree murder on jurisdictional grounds under these circumstances (*People v. Davis, supra*, 10 Cal.4th 463), they nevertheless must be especially vigilant to avoid the results the Legislature intended to prevent when the prosecution seeks to proceed under these circumstances.

The risk of unduly prejudicing the jurors' consideration of the issues properly before them by permitting the prosecution to proceed on an unfounded felony-murder theory under these circumstances is even greater in capital cases.

The same jurors who hear the guilt phase evidence decide the question of penalty and are explicitly instructed to consider all of the evidence presented in both phases of trial in deciding whether the defendant should live or die. (CALJIC Nos. 8.84.1 and 8.85.) As discussed in detail in Argument IV-D, *post*, the jurors' reception of guilt phase evidence suggesting the defendant's commission of uncharged crimes which the prosecution never proved and the jurors never resolved beyond a reasonable doubt, and which bear no relevance to the defendant's guilt of the charged crimes of conviction, can have a profound impact on their penalty phase deliberations that threatens the reliability of death judgments. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [evidentiary error that was harmless at guilt phase was prejudicial at penalty].) As previously discussed, the Eighth Amendment demands a heightened degree of reliability in all stages of a capital murder proceeding. (See, e.g., *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 340; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.) Accordingly, in ruling on motions that entail an assessment for potential prejudice in capital cases – such as motions to admit uncharged crimes evidence – the trial court must give "heightened scrutiny for potential prejudice." (See, e.g., *People v. Homick* (2012) 55 Cal.4th 816, 848, and authorities cited therein.)

For all of these reasons, just as the Legislature effectively presumes that a prosecutor who could not support a charge at the preliminary hearing will not be able to support it at trial, the trial court in a capital case should start from the presumption that a prosecutor who could not support a felony-murder special circumstance allegation at the preliminary hearing will not be able to support the same felony-murder theory at trial as the predicate for first degree murder liability. To overcome that presumption, the prosecution must make a good faith offer of specific, competent evidence it will present at trial sufficient to fill the evidentiary gaps left by the preliminary hearing, support jury findings on

every element of the felony-murder theory beyond a reasonable doubt, and actually submit that theory to the jury. (See, e.g., *People v. Rodrigues, supra*, 8 Cal.4th at p. 1176; see also Part 1, *ante*.)

It is incumbent on the court to view the prosecutor's offers with "extreme caution" (*People v. Guerrero, supra*, 16 Cal.3d at p. 724) and subject them to a heightened degree of scrutiny than otherwise demanded in admitting evidence of uncharged crimes and "screening out" factually unsupported theories of liability (*People v. Guiton, supra*, 4 Cal.4th at p. 1131). The trial court must hold the prosecution to the legal requirements for an adequate offer of proof: "[a]n offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited. [Citation.] '"The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue."' [Citation]." (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1176; accord, e.g., *People v. Schmies* (1996) 44 Cal.App.4th 38, 53; see also 3 Witkin, Cal. Evid. 5th, Presentation § 414 (2018), collecting cases [In ordinary cases, "[t]he judge may properly reject a general or vague offer that does not indicate with precision the evidence to be presented and the witnesses who are to give it"].) It must probe carefully into any vagaries, deficiencies, and inconsistencies apparent from the face of the offer and resolve any disputes or questions otherwise raised over its veracity, sufficiency, and source, as well as questions of law concerning the theory of liability. (See also Part E-1, *ante*, concerning prosecutor's false or misleading offers of proof and impact thereof on ruling.) This procedure also comports with this Court's demand that "the trial court and the attorneys . . . proceed with the utmost care and diligence and with the most

scrupulous regard for fair and correct procedure" in capital cases. (*People v. Hernandez*, *supra*, 30 Cal.4th at p. 878.)

This careful testing and screening finds further support in the trial court's independent "duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." (*Glasser v. United States* (1942) 315 U.S. 60, 71; accord, *United States v. Young* (1985) 470 U.S. 1, 10 [duty of trial court to keep trial within proper bounds]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 ["'the court has a duty to see that justice is done'"].) Consistent with this duty, section 1044 imposes on trial courts an affirmative duty to "control" the trial proceedings and "limit the introduction of evidence and argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of truth regarding the matters involved"]; see also *People v. McKenzie* (1983) 34 Cal.3d 616, 626-627, quoting ABA Standards for Criminal Justice – Special Functions of the Trial Judge, std. 6-1.1 ["The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial"]; accord, *People v. Carlussi* (1979) 23 Cal.3d 249, 256.)

In fact, the procedure the trial court actually followed in *Davis* was consistent with the foregoing principles. The defendant in that case was charged, inter alia, with murder in violation of Penal Code section 187, attempted rape, forcible sodomy, assault to commit rape and/or sodomy, as well as sodomy felony murder and rape felony-murder special circumstance allegations. (*People v. Davis*, *supra*, 10 Cal.4th at p. 487.) Ruling that the preliminary hearing evidence on the vaginal penetration or attempted vaginal penetration element was insufficient to support them, the trial court dismissed the attempted rape and assault with intent to commit rape charges and the rape

felony-murder special circumstance allegation under Penal Code section 995. (*Id*. at pp. 487-488, 512.) Nevertheless, before opening statements, the prosecutor moved to proceed on an attempted rape or rape felony-murder theory of first-degree murder liability. (*Id*. at pp. 487-488, 512-513; § 189.) The trial court did not simply accept the prosecution's proposal based on the general rule that the prosecution may rely on any theory of liability for a charged violation of Penal Code section 187, regardless of whether the theory is specifically charged. Nor did it simply accept the prosecution's general assertion that it would present evidence to support the theory and submit it to the jury.

Rather, the trial court focused specifically on the lack of the preliminary hearing evidence to support the necessary elements of vaginal penetration and attempted penetration, which resulted in dismissal of the attempted rape and rape-related charges and special circumstance allegation. Therefore, the court ruled that the prosecution could not proceed to the evidentiary phase on an attempted rape or rape felony-murder theory of liability without making an offer of specific, additional evidence it would present at trial to fill those evidentiary gaps. (*People v. Davis*, *supra*, 10 Cal.4th at p. 512.) In other words, consistent with the prophylactic function of the legislative scheme governing preliminary hearings, the trial court effectively presumed that – just as the prosecution had been unable to support the underlying felony charge and felony-murder theory as a special circumstance at the preliminary hearing – the prosecution would be unable to support the same felony murder as a theory of first degree murder at trial. The court therefore required the prosecution to overcome that presumption with a particularized offer of evidence that would fill the void at trial. In accord with that ruling, the prosecutor filed a written offer of additional, specific, competent evidence he had obtained and would present at trial to prove the element that was lacking at the preliminary hearing.

(*Ibid*.) Against this background, the trial court ruled that the prosecution could proceed on the theory. (*Ibid*.)[41] As a result of this procedure, the prosecution did present sufficient, competent evidence – as promised – to support a rape felony-murder theory of first degree murder and submitted that theory to the jury. (*Id*. at pp. 512-513.)

Having failed to follow such procedures in this case, as set forth in Part B, *ante*, and Parts F-H, *post*, the result here was starkly different and just what the Legislature and the precedents of this Court intended to avoid.

E. Legal Principles Governing the Prosecution's Conduct in Introducing and Using Uncharged Crimes Evidence

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power of, the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820, citation omitted; accord, *Berger v. United States* (1934) 295 U.S. 78, 88.) Hence, when the prosecutor is the proponent of uncharged crimes evidence, he or she is subject to a heightened duty of care and candor concerning both the introduction and the use of such evidence.

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[41] It should also be noted that the properly charged sodomy-related crimes and the evidence supporting them also supported other elements of an attempted rape or rape felony-murder theory. While not explicit in this Court's summary of the trial court's ruling, the existence of those appropriate charges and the evidence to support them minimized the potential for unfair prejudice if the prosecutor ultimately was unable to prove the attempted or actual vaginal penetration element of the attempted rape/rape felony-murder theory.

1. It Is Misconduct for the Prosecution to Mislead The Court And Opposing Counsel in Its Offer of Proof of the Foundational Evidentiary Facts Necessary to Introduce and Argue the Defendant's Commission of an Uncharged Crime

In making the offer of proof necessary to introduce uncharged crimes evidence, it is improper for the prosecution to misrepresent to the court the evidence it will present at trial. It is equally improper to misrepresent, or "conjure up," an issue or theory of liability to which the uncharged crimes evidence will be relevant. (*People v. Guerrero*, *supra*, 16 Cal.3d at pp. 727-728.) These rules are grounded in several important principles.

Initially, as officers of the court, all counsel have a duty of honesty and candor in his or her representations to the court. (See, e.g., Bus. & Prof. Code, § 6068, subd. (d) [attorney shall not mislead the judge by false statement of fact or law]; Rules of Prof. Conduct, Rule 5-200(B) [same]; *People v. Bolton* (1979) 23 Cal.3d 208, 213, fn. 2 ["'a lawyer shall not . . . state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence"]; *Paine v. State Bar* (1939) 14 Cal.2d 150, 154 ["'Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense"'].)

Particularly given the "'special role played by the American prosecutor in the search for truth in criminal trials,'" as the United States Supreme Court has "several times underscored," the duty not to mislead the court or the jury is heightened for a prosecutor. (*Banks v. Dretke* (2004) 540 U.S. 668, 696, and authorities cited therein; see also ABA Standards for Criminal Justice, the Prosecution Function, Std. 3-1.4, "The Prosecutor's Heightened Duty of Candor.") A prosecutor's misrepresentations to the court or jury to the defendant's detriment constitutes misconduct regardless of his or her good faith or bad faith: "'Injury to appellant is nonetheless an injury because it was

committed inadvertently rather than intentionally.'" (*People v. Bolton, supra*, 23 Cal.3d at pp. 213-214; accord, *People v. Hill, supra*, 17 Cal.4th at pp. 822-823.)[42] Whether by "negligence or design," a prosecutor's "deception of a court and[/or] jurors" through false representations of evidence is "'incompatible with "rudimentary demands of justice."' [Citation.]" (*Giglio v. United States* (1972) 405 U.S. 150, 153-154, and authorities cited therein.)[43]

Furthermore, if its offer of proof concerning the existence or relevance of uncharged crimes evidence is false or misleading, the prosecution deprives the court of its power and duty to make an "informed, intelligent and just decision" and exercise of discretion. (See, e.g., *Martin v. Alcoholic Beverage Control Appeals Board, supra*, 55 Cal.2d at p. 875.) "[S]uch discretion can only be truly exercised if there is no misconception by the trial court . . ." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) "Counsel should not forget that they are officers of the court" and it is their "imperative" duty "to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice." (*Furlong v. White* (1921) 51 Cal.App. 265, 271.)

If the court admits evidence based on a misleading offer of proof (whether intentional or not) and it results in the jury's receipt of evidence that

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[42] As this Court has explained, because a prosecutor's subjective good faith or bad faith is irrelevant to the violation of his duties in this and other regards, "the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1; accord, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 666.)

[43] Of course, when the prosecutor *knowingly* misrepresents the facts in order to obtain a ruling admitting uncharged crimes evidence that is otherwise inadmissible, he or she violates the further prohibition against intentionally eliciting inadmissible evidence. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 960.)

should never have been admitted, it is often too late to cure the error: the jury has already heard inadmissible and inflammatory evidence, it is impossible to unring the bell, and a mistrial or new trial is the only remedy. (See, e.g., *United States v. Luna* (9th Cir. 1994) 21 F.3d 874, 882-883; *United States v. Whimpy* (5th Cir. 1976) 531 F.2d 768, 771-772.) For instance, in *United States v. Luna*, *supra*, 21 F.3d 874, under the federal counterpart to Evidence Code section 1101, the trial court admitted two uncharged robberies to prove the defendants' identity as the perpetrators of the charged robberies based on the prosecutor's detailed offer of proof regarding the degree of similarities between the uncharged and charged crimes. (*Id*. at pp. 878-879.) After evidence of the charged robberies came in, the trial court expressed its concern sua sponte that they did not fit the same pattern the prosecutor had described in his offer of proof. (*Id*. at pp. 878-879.) The government did not concede the problems but rather represented that evidence would be forthcoming that would vindicate its offer. (*Id*. at p. 882.) Based thereon, the uncharged crimes evidence came in. (*Id*. at pp. 879, 882.) Although it became clear by that time that there were significant gaps between the evidence and the government's offer, the trial court left it to the jury to decide, instructing the jurors that they were limited to considering the uncharged crimes evidence to the issue of identity. (*Id*. at p. 879.) The prosecutor likewise told the jury that the uncharged crimes could only be considered for the purpose of proving identity. (*Ibid*.)

On appeal from their ensuing convictions, the defendants argued that the trial court erred in admitting the uncharged crimes evidence based on the prosecution's misleading offer of proof. The Ninth Circuit Court of Appeals agreed that the government's offer of proof was materially inaccurate and the uncharged crimes were too dissimilar, contrary to the offer of proof, to support an inference of identity. (*United States v. Luna*, *supra*, 21 F.3d at pp. 880-881.) Hence, the uncharged crimes were legally irrelevant to any of the legitimate

issues in the case and the trial court erred in admitting and permitting the jurors to consider them. (*Id*. at pp. 881-882.) Furthermore, because it was likely that the jurors utilized the uncharged crimes evidence to find the defendants' identities as the perpetrators of the charged crimes based not on the requisite degree of similarity to support that inference but rather based on improper inferences of criminal disposition, the error demanded a mistrial or new trial notwithstanding the sufficiency of the properly admitted evidence to prove the defendants' guilt. (*Id*. at pp. 882-883.)

In reaching this conclusion, the Court of Appeals took pains to emphasize:

> *We also feel constrained to point out that the government virtually forced the district court into error*. Before trial, the government furnished the district court with a misleading offer of proof—a list of 14 points of similarity, not all of which could be found in even the two [charged] robberies. When it turned out, after the evidence pertaining to those [charged] robberies had been presented, that the proof was not coming in as the government had said it would, the government did not concede that there were gaps between what had been promised and what had been presented; rather, the government insisted that the proof would ultimately vindicate it. It never did. . . . In short, the [trial] court was led into error by the government. There was no turning back. Mistrial became the only option.

(*United States v. Luna*, 21 F.3d at pp. 882-883, italics added; accord, *United States v. Whimpy*, *supra*, 531 F.2d at pp. 771-772; see also, e.g., *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 228-231 [admission of highly inflammatory gang evidence that was insufficient to support purposes for which it was offered resulted in erroneous and fundamentally unfair impact on the jurors and demanded mistrial as only remedy].)

2. It Is Misconduct for a Prosecutor to Refer to Uncharged Crimes Absent a Court Ruling that A Limited Exception For Admissibility Has Been Satisfied, Argue Such Crimes Beyond The Limited Scope For Which They Have Been Admitted, And/Or Invite the Jury to Substitute Speculation For Actual Proof of Them

Once the prosecutor persuades the court to admit uncharged crimes evidence for an identified, limited purpose, the law places strict limits on his or her use of the evidence. Juries "regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247; accord, e.g., *Berger v. United States, supra,* 295 U.S. at p. 88; *People v. Powell* (1967) 67 Cal.2d 32, 56-57.)

Thus, it is improper – or "prosecutorial error" (*People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1) – for a prosecutor to argue the relevance of evidence beyond the scope of the limited, permissible purpose for which the court admitted it. (*People v. Love* (1961) 56 Cal.2d 720, 731; *People v. Garcia* (2014) 229 Cal.App.4th 302, 312-314.) It is always improper (outside of Evidence Code section 1108) for a prosecutor to suggest the defendant's commission of uncharged crimes, admitted for a limited and permissible purpose, is relevant for the impermissible purpose of proving criminal disposition or propensity. (See, e.g., *People v. Craig* (1957) 49 Cal.2d 313, 320; *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 699-700, 704-705.) It is likewise improper to appeal to the jury's sympathies for the victim or prejudices in the guilt phase of a criminal trial and thus to utilize uncharged crimes or other misconduct to that effect. (See, e.g., *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1114-1116; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1206.) The "rules addressing character [and uncharged crimes] evidence implicitly recognize the fine yet vital distinction between the *risk of prejudice*

borne by evidence introduced for permissible reasons and the *clear prejudice* that results from an uncured and flagrantly improper use of that same evidence." (*Washington v. Hofbauer*, *supra*, 228 F.3d at p. 705, italics in original; see also Parts D & E, *ante*, and authorities cited therein.)

A prosecutor is also prohibited from making comments or asking questions which directly or indirectly suggest the defendant's commission of uncharged crimes that are unfounded or otherwise not properly in evidence. (See, e.g., *People v. Loker* (2008) 44 Cal.4th 691, 708; *People v. Bolton*, *supra*, 23 Cal.3d at p. 212.) For instance, in *People v. Fosselman*, *supra*, 33 Cal.3d 572, the defendant was prosecuted for a murder in which no sexual offense was charged and his commission of an uncharged sexual offense against the victim was neither supported by sufficient evidence nor relevant for a permissible purpose. Against that background, this Court held the prosecutor's comments that the defendant attempted or wanted to rape the murder victim were improper because, inter alia, they were irrelevant and necessarily implied the existence of facts not in evidence – and invited the jurors to speculate – that the defendant had committed the uncharged crime of attempted rape. (*Id*. at pp. 580-581; see also *People v. Bell* (1989) 49 Cal.3d 502, 548 [improper to remark on legally irrelevant matters].) Such comments can be "'"dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations]" (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213.)

Finally, when the trial court does admit evidence of an uncharged crime as relevant to a limited, permissible issue but that issue is later "removed from the case" – such as when it was admitted to prove an element of a charge, allegation, or theory of liability that is ultimately withdrawn from the jury's consideration – the general proscription against its use applies. (See, e.g., *Diaz v. Carcamo*, *supra*, 51 Cal.4th at pp. 1157-1158, 1161-1162; *Armenta v.*

Churchill, *supra*, 42 Cal.2d at pp. 456-457; see also *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 222, 227-231; *People v. Ramirez* (2016) 244 Cal.App.4th 800, 803, 820-823.) The uncharged crime again becomes presumptively irrelevant and may not be used or considered unless the prosecution offers a new theory of relevance and carries its burden of establishing its relevance and substantial probative value to a legitimate, limited issue in dispute. (See Part D-1, *ante*.) Otherwise, it is misconduct to refer to the uncharged crime evidence because it is irrelevant. (See, e.g., *People v. Bell*, *supra*, 49 Cal.3d at p. 548.) Reference to such evidence that is untethered to any legitimate, limited purpose also improperly implies its relevance as proof of criminal disposition. (See *People v. Albarran*, *supra*, at pp. 228-230; *Jammal v. Van de Kamp* (Cir.1991) 926 F.2d 918, 920; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385; *People v. Ramirez*, *supra*, 244 Cal.App.4th at pp. 820-822; see also *Diaz v. Carcamo*, *supra*, 51 Cal.4th at pp. 1161-1162.)

F. The Prosecutor's Offers of Evidence were False, Misleading, and Otherwise Inadequate and the Trial Court Erred in Permitting Him to Introduce Irrelevant and Highly Inflammatory Evidence for the Purpose of Proving a Sham Attempted Rape Felony-Murder Theory

As set forth in more detail in Part B, *ante*, which Mr. Morales incorporates here by this reference, after the trial court dismissed the attempted rape felony-murder special circumstance allegation under Penal Code section 995 due to insufficient preliminary hearing evidence that Mr. Morales (or anyone else) attempted to rape the victim, the prosecutor made offers of additional evidence to the court and, over defense counsel's relevance objections, moved to present it for the purpose of proving that Mr. Morales attempted to rape the victim. (7RT 1326-1328, 1332-1340; Parts B-1 & B-2,

ante.) After failing to persuade the court that the uncharged offense evidence would be relevant under different theories, the prosecutor finally seized upon one that worked: under this Court's decision in *People v. Davis*, *supra*, 10 Cal.4th 463, he was entitled to rely on an attempted rape felony-murder theory of first degree murder notwithstanding the trial court's dismissal of the special circumstance allegation. Consequently, he offered that he would submit that theory to the jury supported by the offers of additional evidence sufficient to prove the uncharged attempted rape beyond a reasonable doubt. (7RT 1335-1340; Parts B-2 & B-3, *ante*.) Based on the prosecutor's offers of evidence and promise to submit an attempted rape felony-murder theory to the jury, the trial court ruled that the prosecutor could proceed on that theory. (7RT 1335-1341, 1391-1393, 1401-1403; see also 7RT 1373-1375; Part B-3, *ante*.)

As detailed in Part B-6, *ante*, the evidence the prosecutor presented at trial not only failed to conform to his offers, it affirmatively contradicted them. As set forth in Part B-7, *ante*, the prosecutor waited until the close of his case-in-chief to notify the court and counsel that he would not, contrary to his other in limine promise, be submitting an attempted rape felony-murder theory to the jurors and therefore successfully requested that the trial court provide no instructions thereon. (12RT 2529-2531.) Defense counsel objected, and the prosecutor conceded, that in the absence of that theory, the question of whether Mr. Morales attempted to rape the victim and the evidence that had been offered to prove it was now irrelevant. (12RT 2530-2531.) But as discussed in detail in Part I, *post*, the truth was acknowledged too late: the jurors had already heard irrelevant, unfounded, inadmissible, and extraordinarily inflammatory evidence and innuendo that Mr. Morales was responsible for uncharged, violent sexual crimes against the victim before she was killed.

As set forth below, given the true evidence (or lack thereof) that the prosecutor *actually* possessed, the prosecutor's false in limine promises

amounted to a deliberate Trojan horse to put before the jurors inadmissible evidence and inflammatory remarks and thereby improperly influence their death-eligibility (and death) decisions. In any event, whether intentional or not, the prosecutor's misrepresentations to the court, on which the court relied in making a critical ruling to Mr. Morales's considerable detriment, were improper and amounted to serious misconduct pursuant to the authorities set forth in Part G, *ante*. (See, e.g., *United States v. Luna*, *supra*, 21 F.3d at pp. 882-883; *United States v. Whimpy*, *supra,* 531 F.2d at pp. 771-772.)

For its part, had the trial court done its duties pursuant to the authorities set forth in Part D, *ante*, it would have realized the prosecutor's deception before it was too late and nipped the problem in the bud before it had a chance to bloom into the guilt phase. Having dismissed the special circumstance allegation because the prosecution had failed to present sufficient evidence to try Mr. Morales for attempted rape felony murder and determined that evidence to prove an uncharged attempted rape (or other sexual crime) was otherwise irrelevant or more prejudicial than probative, the trial court should have started from the presumption that the prosecutor could not present sufficient, admissible evidence to try Mr. Morales for the same attempted rape felony-murder theory as a basis for first-degree murder liability. (Part D, *ante*, and authorities cited therein.) Otherwise, the "weeding out" function that the Legislature intended such dismissals to serve could be rendered a nullity. (*Mendella*, *supra*, 33 Cal.3d at pp. 759-761; accord, *People v. Ramirez*, *supra*, 244 Cal.App.4th at pp. 803, 820-822.) Whether that presumption could be rebutted required the trial court's "extremely careful analysis" and heightened scrutiny – beyond that ordinarily required in admitting uncharged crimes evidence – which entailed holding the prosecutor to the legal requirements of adequate offers of evidence, focused probing into any deficiencies or

inconsistencies in them, and resolving factual disputes bearing on their veracity.

As discussed below, on their face at the time they were made, the prosecutor's in limine representations did not comply with the law governing offers of evidence and therefore demanded probing to test whether they could satisfy the law. Even setting the original deficiencies in the offers aside, as set forth in Part B-4, *ante*, and discussed below, the in limine objections and discussions between the court's original ruling and its reaffirmation of that ruling only two court sessions later, and immediately before the evidentiary phase commenced, were more than enough to alert the court that there were serious factual disputes over the veracity of the prosecution's offers and thus the foundation of the court's ruling. But the trial court ignored them. In so doing, it violated its duties described in Part D, *ante*.

Furthermore, as Mr. Morales will discuss in Part I, *post*, his own counsel's failure to alert the court to the prosecutor's deception earlier and to act more clearly, forcefully, and effectively on the objections they did make fell below objective standards of reasonably competent assistance in a capital murder trial. (*Strickland*, *supra*, 466 U.S. at pp. 687-689.) To the extent that counsel's deficient performance contributed to the evidentiary error and failed to mitigate its harm once acknowledged, they share the blame for the result.

In this regard, although the prosecutor's deception was the pivot around which the end result was achieved, it is important to emphasize at the outset that this Court should not be overly concerned by apportioning particular degrees of blame to the prosecutor or the trial court or even Mr. Morales's own counsel. The result was that the jurors heard irrelevant and extraordinarily prejudicial evidence and argument they should never have heard and were encouraged to base their verdicts on improper considerations extraneous to the law and the prosecution's lawful, relevant evidence. (See Parts G & H, *post*.)

"The direction of a blow is less important than the wound inflicted . . . ." (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095.) As Mr. Morales will demonstrate in the following sections, the wound here was fatal, depriving Mr. Morales of his right to a fundamentally fair trial on the truth of the death-eligibility special circumstance allegations.

Fundamental fairness analysis does not demand neat allocations of blame on the part of one trial actor or another. Rather, the focus is on the *effect* of the evidence, arguments, and instructions or lack thereof, on the jurors and whether it undermines confidence that the verdict was based solely on the law and the state's lawful, relevant evidence proved beyond a reasonable doubt and not improper extraneous considerations. For instance, the combined effect of a trial court's instructional omission which is not itself erroneous and a prosecutor's argument which is not itself misconduct may nevertheless result in a fundamentally unfair trial in violation of the due process clause. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 484-490; see also *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 290, 302-303 & fn. 3 [based on record of entire trial, *effect* of state court's evidentiary rulings which did not alone violate either state law or the federal Constitution combined to deprive defendant of fundamentally fair trial]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 and fn.15 ["our concern is not with the ethics of the prosecutor or the performance of the defense, but with the impact . . . on the jury"]; *People v. Milner* (1988) 45 Cal.3d 227, 254-258.) Similarly, "even if a trial court's ruling on a motion to sever is correct at the time it was made" based on the record before the court at the time of the ruling, the *effect* of that ruling on the subsequent trial proceedings may nevertheless result in a fundamentally unfair trial. (*People v. Soper* (2009) 45 Cal.4th 759, 783, and authorities cited therein.) This principle is consistent with the focus on the "injury" that *results* from a prosecutor's misrepresentations and not their cause – i.e., whether they were intentional or

inadvertent. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823, and authorities cited therein.)

At bottom, "regardless of who was at fault . . . the defendant must be given a fair trial." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 548.) Because the record resists confidence that the jury's death-eligibility verdicts were not based in part on the irrelevant uncharged sexual crimes evidence and the improper, unduly prejudicial inferences or speculation derived therefrom, Mr. Morales was deprived of that basic right. (Part J, *post*.)

1. The Prosecutor Committed Misconduct By Falsely Representing "There's Going to Be Testimony" That Mr. Morales Committed a Sexual Battery on the Victim in Front Of Her Children by Grabbing Her Breasts and the Trial Court Erred By Accepting That Representation as the Basis of Its Evidentiary Ruling

As set forth in Parts B-2 & B-3, *ante*, the prosecutor's first offer of evidence to the court, on which it based its August 25 ruling, was that "[t]here's going to be testimony that in the bedroom when the children were present, one of the people grabbed mom's shirt, pulled it down [and t]he Defendant walked up and grabbed the victim's breasts . . . ." (7RT 1336.) The prosecutor did not identify the source of that "testimony" at that time.

However, as discussed in Part B-4, *ante*, on August 26, and in response to defense counsel's motion to exclude Joe's testimony under Evidence Code section 352, the prosecutor represented that Joe's testimony was essential to supporting his putative attempted rape felony-murder theory because he *alone* would testify that he had witnessed Mr. Morales grab the victim's "chest." (7RT 1373-1374.) The court itself immediately questioned the veracity of the prosecutor's representations, expressing its understanding that "on prior occasions [Joe] did not" identify Mr. Morales at all – much less identify him as the man who grabbed the victim's "chest" or "breasts" in the bedroom. (7RT

1374.) As set forth in Part B-6-a, *ante*, the trial judge's understanding of the true facts was correct. As the prosecutor eventually admitted during trial, Joe had never identified Mr. Morales as one of the burglars despite prior opportunities to do so and the prosecutor had no expectation that he would identify Mr. Morales for the first time at trial. (8RT 1656-1658.) Indeed, as the trial judge recognized (outside of the jury's presence) when the prosecutor finally admitted the truth mid-trial, the prosecution's own evidence affirmatively indicated that Mr. Morales could not have been the man Joe described who "grabbed" his mother. (8RT 1656-1657; see Part B-6-a, *ante*.)

However, in the face of the court's pretrial questioning on August 26, the prosecutor persisted in his deception, falsely representing that Joe had identified Mr. Morales from a video still of his baby shower as the man who grabbed the victim's breasts in the bedroom. (7RT 1374.) He still persisted when defense counsel objected that the prosecutor's representation was contrary to the discovery they were provided. (7RT 1374-1375.)

At the next session on August 30, the prosecutor's attempted rape felony-murder theory was raised again when defense counsel objected to photographic Exhibits 24 and 25. (7RT 1391.) The trial court repeated the prosecutor's original offer that "one of the witnesses" would testify that Mr. Morales groped the victim's "breast." (7RT 1391.) The prosecutor confirmed that offer, adding there was "at least one" witness who would so testify – contrary to his representation in the preceding session that Joe's testimony was essential because he *alone* witnessed that alleged incident. (*Ibid.*)

Defense counsel replied that "the only information I have is through one report that *one of the children* [Joe] says a man pulled his mother's shirt up, another man came and grabbed her *chest*, and her mother – his mother pulled her shirt down." (7RT 1391, italics added.) In other words, contrary to the prosecutor's offer of evidence made on August 25 and confirmed again in this

session that Mr. Morales "grabbed the victim's breasts" as well as to his implication that more than one witness would testify to it: (1) no one had reported that someone had "grabbed the victim's *breasts*;" (2) Joe and Joe alone had reported that a "man" had grabbed the victim's "*chest*;" and (3) and Joe had never identified Mr. Morales as that (or any other) man. Nevertheless, the court did not resolve the dispute. Had it done so, as set forth in Part B-6-a, *ante*, it would have discovered that defense counsel was correct and the prosecutor's offer was false.

The prosecutor's repeated misrepresentations in limine that Joe had reported that Mr. Morales committed a sexual battery on the victim by "grabbing" her "breasts" and would so testify at trial – made in the face of the trial court's inquiry and defense counsel's recitation of the true facts to the contrary – can be reconciled only with deliberate deception to mislead the court in order to put before the jury otherwise inadmissible evidence that was insufficient to prove that Mr. Morales attempted to rape the victim but sufficiently suggestive to invite speculation to that effect and draw prohibited, adverse inferences therefrom. Certainly, any doubt that the prosecutor intentionally deceived the court to gain an unfair litigation advantage is dispelled by his summation, as set forth in Part H, *post*. The prosecutor's "use of [these] deceptive [and] reprehensible methods to . . . persuade . . . the court" was improper (*People v. Hill*, *supra*, 17 Cal.4th at p. 818, internal quotation marks omitted, and authorities cited therein) and violated his duties as a "prosecutor in the search for truth in criminal trials" (*Banks v. Dretke*, *supra*, 540 U.S. at p. 696, and authorities cited therein). In any event, whether intentional or not, the prosecutor's false representations to persuade the court to allow him to proceed on an unfounded and inflammatory attempted rape felony-murder theory was error and "'incompatible with "rudimentary demands of justice."' [Citation.]" (*Giglio v. United States*, *supra*, 405 U.S. at

pp. 153-154; accord, *People v. Hill*, *supra*, 17 Cal.4th at pp. 822-823; see also Part E-1, *ante*, and authorities cited therein.) As in *United States v. Luna*, *supra*, 21 F.3d at pp. 882-883, the prosecutor's improper, "misleading offer of proof" "virtually forced the court to error." (Accord, *United States v. Whimpy*, *supra*, 531 F.2d at pp. 771-772; Part E-1, *ante*.)

For its part, the trial court's failure to discharge its own duties allowed the prosecutor's deception to go unchecked until it was too late. The prosecutor's original August 25 offer did not identify the source of the supposed "testimony that in the bedroom when the children were present, one of the people grabbed mom's shirt, pulled it down [and t]he Defendant walked up and grabbed the victim's breasts" (7RT 1336) or the basis on which he anticipated that he would be able to present admissible testimony to that effect. Therefore, the prosecutor's offer was impermissibly vague at the outset. (See Part D, subparts 1 & 3, *ante*, citing, inter alia, *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1176; *Stickel v. San Diego Elec. Ry. Co.*, *supra*, 32 Cal.2d at p. 163 ["mere general offer of proof" without identifying "the witness or stating the evidence whereby the fact in issue is to be proved . . . is not correct trial procedure"].) The trial court's acceptance of that deficient offer without demanding the requisite degree of specificity as a critical basis for its August 25 ruling was inconsistent with its duties set forth in Part D, *ante*. (7RT 1340-1341.)

The prosecutor's representations and the responses by the court and counsel on August 26 and 30, as set forth above, demonstrate what would have happened if specificity had been demanded and supplied before the court made its ruling. The prosecutor would have identified Joe (and Joe alone) as the source of that supposed testimony, which would have triggered the same skeptical response by the court and objections by defense counsel regarding the veracity of that offer. The trial court's duties delineated in Part D, *ante*, would

have demanded that it resolve the factual disputes over the truthfulness of the prosecutor's representations which, in turn, would have revealed that the prosecutor's offers were false and his putative attempted rape felony-murder theory a sham.

Although the prosecutor's deception should have been realized before the court made its original August 25 ruling, that ruling certainly was not set in stone. Defense counsel asked the court to reconsider and vacate it on August 30, before the evidentiary phase commenced. (27CT 7610-7613.) The court simply reaffirmed its ruling for the same reasons on which the ruling was originally based. (7RT 1401-1403.) But only moments earlier, the court had repeated the evidentiary basis of its original ruling, the prosecutor confirmed it, and defense counsel *accurately* refuted its substance. (7RT 1391-1393.) Had the court honored its duties to scrutinize and carefully analyze the prosecutor's offers to submit an attempted rape felony-murder theory to the jury based on otherwise irrelevant or unduly prejudicial uncharged sex crimes evidence, it would have been alerted that the bases of its ruling were in serious question and resolved that question before it was too late. Inexplicably, the court failed to recognize as much, left the dispute unresolved, and thereby paved the way for the prosecutor's deception to fatally infect the fairness of the trial.[44]

As set forth in Part D, *ante*, the trial court was duty-bound to ensure that the jurors were not exposed to irrelevant, highly inflammatory uncharged crimes evidence under the guise of supporting an unfounded felony-murder theory that it had already "weeded out" as a special circumstance allegation

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[44] As set forth in footnote 36, *ante*, the prosecutor made other representations in limine concerning Exhibit 25 as corroborative of Joe's account of the sexual battery that defense counsel accurately disputed as untrue, which should further have alerted the court that there were considerable reasons to question the prosecutor's veracity concerning his offers of evidence.

(*Mendella, supra*, 33 Cal.3d at p. 761) and that it had a duty to "screen out" as a theory of first-degree murder liability (*People v. Guiton, supra*, 4 Cal.4th at p. 1131). Even setting aside the court's erroneous acceptance of the prosecutor's impermissibly vague offer of evidence on August 25, those duties demanded that the court act on the questions raised the next day and on August 30 – only moments before it reaffirmed its ruling – resolve those questions, and reverse its ruling as having been based on false representations of fact. By the time the prosecutor's misrepresentations were finally acknowledged at the close of his case-in-chief, the damage was already done. (See Parts G & H, *post*; 3 Witkin, Cal. Evid. 5th Presentation, § 379 (2012), and authorities cited therein [purpose of bringing objections to evidence in limine is to obtain ruling excluding it before it is introduced and thereby "'avoid the obviously futile attempt to unring the bell in the event a motion to strike" would lie as well as "the prejudicial effect of questions asked or statements made in connection with the offer of objectionable evidence"].)[45]

2. The Prosecutor's Offer that he Would Present Evidence That Mr. Morales Told Jorge Morales That The Victim Cried Out, "Johnny, Why Are You Raping Me?" Was Misleading and Improperly Based On Multiple Levels of Incompetent Hearsay and The Trial Court Erred by Accepting It

The second part of the prosecutor's offer, that "[t]here's also a statement made to Jorge Morales that the Defendant supposedly makes where the victim

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[45] Based on this record and the objections defense counsel did make in limine, the trial court was adequately alerted to the problems with the prosecutor's offers of evidence to trigger its independent duties to carefully scrutinize them and ensure that its own ruling was not improperly based on a misconception of the facts. To the extent that defense counsel's own performance contributed to the error and result, Mr. Morales addresses it separately in Part I, *post*.

– where the defendant related that the victim said, 'Johnny, why are you raping me,' before he shot her" (7RT 1336) was also deficient on its face because it lacked specificity as to whether it was based on competent, admissible evidence and how the evidence would be presented at trial. (See Part D, subparts 1 & 3, citing, inter alia, *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1176; *People v. Schmies*, *supra*, 44 Cal.App.4th at p. 53 [offer of proof must set forth actual evidence to be produced].) The prosecutor did not identify the source of his alleged information about the "supposed[]" "statement to Jorge" – i.e., whether Jorge had reported the described statement to law enforcement or some other third party or whether someone overheard Mr. Morales make that statement to Jorge. (See, e.g., *People v. Carlin* (2007) 150 Cal.App.4th 322, 334 [offer of proof that named witness would provide testimony was inadequate in absence of witness statements to police or investigator to the same effect].) Nor did the prosecutor represent whether he anticipated that Jorge would testify to that statement or that it would otherwise be admissible without his testimony.

Despite these patent inadequacies and the importance of the prosecutor's offers to the trial court's critical determination over whether to allow him to proceed on the putative attempted rape felony-murder theory, the trial court made no demand for an offer of proof that conformed to the law. (7RT 1336-1340.) For the reasons discussed in Part 1, *ante*, the trial court's acceptance of the prosecutor's facially inadequate offer violated its duties as delineated in Part D, *ante.* Had the court conducted the required inquiry, it would have discovered that the prosecution could not offer "evidence" it did not possess or reasonably anticipate it could produce.

As discussed in Part B-4, *ante*, almost immediately after the court's ruling, the court and the parties discussed discovery the prosecutor had provided regarding what evidence Jorge might or might not possess. (7RT

1360-1361.) Both defense counsel and the prosecutor recognized the only indication that Jorge might possess evidence concerning statements made at the crime scene was "hearsay on hearsay" and therefore no one could anticipate whether or not Jorge would testify to those statements. Instead, the prosecutor explained that he intended to call Jorge simply to ask him directly if Mr. Morales had ever made any statements to him concerning the crime and, if so, what – but without any basis from which he could anticipate either that Jorge would testify to specific statements or, if not, that he could otherwise prove them. (7RT 1360-1362.)

In other words, Jorge himself had made no statements to law enforcement concerning statements at the crime scene from which the prosecutor could anticipate either that Jorge would testify in conformity with his offer or, if Jorge denied the statements, that the prosecution could present competent evidence thereof as a prior inconsistent statement conforming to his offer. (*People v. Carlin*, *supra*, 150 Cal.App.4th at p. 334; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1176; see also *People v. Perez* (1962) 58 Cal.2d 229, 241 [it is "'improper to ask questions which clearly suggest[] the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied'"]; *People v. Wagner* (1975) 13 Cal.3d 612, 616-619 [misconduct to ask questions which imply defendant's commission of uncharged crimes in absence of good faith offer of proof that witness will provide competent, affirmative response or independent evidence to substantiate implication].) It was also clear that the prosecution was not prepared to present any other competent evidence to conform to his offer given the "hearsay on hearsay" nature of his only "evidence." (7RT 1360-1362.)

Finally, the evidence presented at trial makes it equally clear that the prosecutor did not have any competent, admissible evidence to conform to his offer. As set forth in Part B-6-b, *ante*, the prosecutor ultimately never called Jorge at all. (See *People v. Ford* (1988) 45 Cal.3d 431, 442-443 [where party has power to call logical witness and fails to do so, reasonable inference is that testimony would not be favorable].) While the trial court did allow Detective Wolf to testify to hearsay statements attributed to Jorge Morales by Angel Ivan during Angel Ivan's own police interrogation, they were inconsistent with the prosecutor's offer. Detective Wolf testified that Angel Ivan told him (Wolf) that Jorge told Angel Ivan that, inter alia, Mr. Morales told Jorge that at *some unidentified point* during the robbery and burglary, the victim asked, "Johnny, why are you *doing* this to me?" (10RT 2214-2215; 11RT 2237, italics added.) Given the absence of any evidence that the victim made that statement under circumstances suggestive of a sexual crime and the undisputed fact that the victim was not "raped" at all (12RT 2487), that hearsay statement did not support any reasonable inference that the victim's reference to "doing" meant "*raping*." To the contrary, based on the actual *evidence*, the only reasonable, legitimate inference that could be drawn from that alleged hearsay statement was that "doing" referred to robbing her and burglarizing her, as charged, not to raping her. Thus, had the trial court demanded an offer of proof that conformed to the law in the face of the prosecutor's facially deficient offer, it would have discovered that the offer was misleading in that it was not based on competent, admissible evidence and therefore it was inadequate to support his putative attempted rape felony-murder theory before the court made its original ruling. (See *People v. Bolton*, *supra*, 23 Cal.3d at p. 213, fn. 2 ["'a lawyer shall not . . . state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence"].)

Even setting aside the facial deficiency of the offer at the time it was made, the discussion about "the hearsay on hearsay" nature of the prosecutor's information occurred only some minutes after the court made its evidentiary ruling based on the prosecutor's offer. Although that discussion bore directly on the adequacy of the offer and hence the propriety of the court's critical ruling, the court failed to recognize as much. For the reasons stated in Part 1, *ante*, this discussion should have alerted a court mindful of its duties that the prosecutor was not prepared to present competent evidence to conform to his offer, absent which its evidentiary ruling could not stand.

G. The Prosecutor's False and Misleading in Limine Offers of Proof and The Trial Court's Failure to Subject Them to the Required Scrutiny Resulted in the Jury's Erroneous Reception of Evidence and Remarks That Uncharged Sexual Crimes Had Been Committed Against the Victim, Which Was Irrelevant, Highly Inflammatory, and Could Not Be Subjected to Meaningful Adversarial Testing

As set forth in Part B-7, *ante*, the prosecutor waited until the close of his case-in-chief to finally admit that he would not, in fact, be submitting an attempted rape felony-murder theory to the jurors. (12RT 2529-2531.) In the absence of that theory, the prosecutor conceded that Mr. Morales's putative, uncharged attempted rape of the victim, and the evidence that had been introduced to prove that uncharged felony, was irrelevant. (*Ibid.*) In other words, based on the true facts and legitimate issues in the case, the uncharged sex crimes evidence that had been admitted for the purpose of proving that irrelevant uncharged felony was, in fact, inadmissible. (See, e.g., *People v. Ramirez, supra*, 244 Cal.App.4th at pp. 803, 820-823; Evid. Code, § 350;

Bruton v. United States, *supra*, 391 U.S. at p. 131, fn. 6; Parts D & E, *ante*, and authorities cited therein.)[46]

But the recognition that the prosecution's theory was a sham and evidence to prove it was irrelevant and inadmissible came too late. Because of the prosecutor's misrepresentation of both the evidence and the sham attempted rape felony-murder theory in limine, the jurors had already heard a considerable amount of inadmissible and inflammatory evidence (and remarks from the prosecutor) encouraging them to find that uncharged sexual crimes had been committed against the victim before she was killed and that Mr. Morales was responsible. (See, e.g., *People v. Guerrero*, *supra*, 16 Cal.3d at pp. 727-728 [improper for prosecutor to "conjure up" an invalid "attempted rape" felony-murder theory to get before the jurors otherwise inadmissible evidence and argument to support it]; *United States v. Luna*, *supra*, 21 F.3d at pp. 882-883 [prosecutor's misleading offer of proof led court to err in admitting irrelevant and intolerably prejudicial other crimes evidence]; *United States v, Whimpy*, *supra*, 531 F.2d at pp. 771-772.)

Furthermore, as mentioned in Part B-7, *ante*, because the prosecutor did not admit until the close of his case-in-chief that he had not produced sufficient evidence to support his attempted rape felon-murder theory of culpability—thus rendering the evidence irrelevant-- Mr. Morales was precluded from submitting it to adversarial testing through rebuttal in his own case or a meaningful closing argument. Counsel could not present rebuttal evidence or argument without themselves improperly presenting and arguing an irrelevant

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[46] While the parties were addressing the graphic photograph of the victim's exposed genital area, which had been admitted as Exhibit 24 to support the bogus attempted rape felony-murder theory, the prosecutor's concession it was no longer relevant applied equally to all evidence that had been admitted for that purpose. (12RT 2562-2563; see also 7RT 1338-1339.)

matter and seemingly endorsing in the eyes of the jurors the erroneous impression that Mr. Morales's commission of uncharged sexual crimes was a relevant issue in the case. (Cf. *Washington v. Hofbauer*, *supra*, 228 F.3d at p. 708 [counsel could not make reasonable tactical decision to withhold objection to prosecutor's improper argument in favor of making a responsive argument in rebuttal that would necessarily entail arguing the same improper matter].) Therefore, as a result of the prosecutor's tactics, the evidence he deceived the court into admitting stood unchallenged or undisputed by Mr. Morales in the eyes of the jurors.

Before addressing the evidence and argument the prosecution actually presented, it is important to describe the context in which it was presented. As set forth in more detail in Part I-1, *post*, because the trial court did not dismiss the attempted rape felony-murder special circumstance allegation *before* the jurors were subject to voir dire, selected and sworn, the jurors were exposed to that theory from the inception. (4RT 663; 5RT 702, 706-707, 715, 753, 872, 892-893; 6RT 1044-1045, 1118-1119, 1130, 1142-1144.) Its uniquely horrific nature became a focal point of the voir dire, in which it was acknowledged that "*just hearing* that, those words" that Mr. Morales was accused of "murder in the course of an attempted rape" was "disturbing" (4RT 633); it was emphasized as "the worst" of the charged crimes and allegations (5RT 702), a "horrendous" crime for which many of the potential jurors simply could not consider imposing a sentence less than death (see, e.g., 5RT 706-707, 892-894; 6RT 1130), and the kind of "egregious" crime for which even death-penalty-skeptics agreed that penalty should be available (6RT 1142-1144; 5RT 702).

It is true that immediately before the prosecutor commenced his opening statement, the trial court did instruct the jurors: "The *special circumstance* regarding murder during the commission of an attempted rape is no longer before you. Do not consider this fact for any purpose or speculate as to the

reason or reasons it is no longer before you. Further, do not conclude from the fact that this instruction has been given that I am expressing any opinion as to the facts or whether the defendant is guilty or not guilty of any other crime or special circumstances." (7RT 1412, italics added.) Of course, consistent with the trial court's ruling that the prosecution could proceed on an attempted rape felony-murder theory of first degree murder, the court's instruction did not prohibit the jurors from considering the prosecution's accusations and evidence that Mr. Morales attempted to rape the victim for reasons *other* than proving the "*special circumstance allegation*" that was "no longer before" them.

Thus, from the inception of the case, the "disturbing" seed was planted in the jurors' minds that Mr. Morales committed the "horrendous" crime of attempting to rape the victim before she was killed. It undoubtedly colored their perception of the evidence and arguments that followed, just as the prosecutor admittedly intended. (See 7RT 1335-1336, 1339-1340, 1371, 1391, 1393.)

Against this background and before conceding its irrelevance to the court and counsel at the close of his case-in-chief, the prosecutor had already elicited from Detective Wolf that Angel Ivan told him that Jorge Morales had told Angel Ivan that Mr. Morales told Jorge that he had been "involved in a robbery and *a rape* of a woman[.]" (10RT 2179, emphasis supplied.)[47] Since the prosecutor's tactics precluded Mr. Morales from disputing the veracity or

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[47] The prosecutor first elicited Detective Wolf's agreement that "one of the first things [Angel Ivan] told you was that his brother told him he was involved in a robbery and a rape of a woman[,]" but Detective Wolf explained that Angel Ivan "immediately" corrected himself and clarified that Jorge Morales had told him that Mr. Morales had made that statement to Jorge. (10RT 2179.) Detective Wolf then told Angel Ivan that he only wanted him to relay the statements Mr. Morales actually made to him; to that end, Detective Wolf had Angel Ivan "role-play" the conversation with him, during which there was no further mention of a "rape" or other sexual crime. (10RT 2180-2185, 2217, 2224.)

probative value of that hearsay statement to the jurors, it appeared in their eyes to be undisputed. (See Argument IV-D, *post* [addressing the probative value of this evidence to prove that Mr. Morales was directly or vicariously liable for any sexual crime].)

Moreover, the prosecution never missed an opportunity to emphasize the fact that the victim was partially disrobed when her body was found, from his opening statement through his examination of the witnesses. (8RT 1448-1450, 1463-1466, 1552-1553; 9RT 1699, 1723, 1743-1745, 1760-1762, 1769-1771, 1800-1803, 1900; 10RT 1977-1982; 12RT 2467.) The prosecutor had insisted to the court, in opposing Mr. Morales's section 995 motion, that the only reasonable inference from the condition of the victim's clothing was that Mr. Morales had attempted to rape her. (7RT 1330-1332.) Though the inference he urged to the court was unsuccessful as a matter of law, it was clearly the inference that the prosecutor intended for the lay jurors to draw from the evidence.

To graphically illustrate that evidence and the bogus inference of attempted rape, the prosecutor introduced, displayed "on the board," and utilized Exhibit 24 – the close-up crime scene photograph of the victim's exposed genital area in a pool of blood – in his examination of the witnesses. (See 7RT 1390-1393; 12RT 2530-2531.) For instance, he used it in eliciting Ms. Lopez's (guilt phase) testimony that she covered the victim's exposed genitals with a towel because "it was awful for the children to see her like that." (8RT 1553, 1563-1564, 1602.) Although the prosecutor ultimately conceded to the court and counsel that Exhibit 24 and its accompanying suggestion of sexual assault were irrelevant and inadmissible (12RT 2530-2531), the damage had already been done.

Based on the condition of the victim's clothing, the prosecutor had also elicited from Detective Toms that he ordered a "sexual assault kit," which

entails taking and analyzing swabs, fingernail clippings, and the like for physical evidence of a "sexual assault." (9RT 1900.) The prosecutor emphasized this testimony and the undeniable implications thereof in closing his examination of the detective by specifically eliciting that he had ordered the exam because the victim was "unclothed from the waist down [,] we believed possibly there was a sexual assault." (*Ibid.*) Significantly, the prosecutor did not ask him about the results or call the analyst who conducted the examination to testify to the results.

This approach could only serve to mislead the jurors. Without evidence of the results, the fact that a sexual assault kit had been performed was irrelevant. Its only purpose in this context was to emphasize the detective's otherwise irrelevant *belief* that the victim had been sexually assaulted based on the state of her clothing alone. And the only purpose of that legally irrelevant belief was to convey to the jurors that if the victim's state of partial undress alone was enough for experienced detectives to believe she had been sexually assaulted, the jurors should draw the same inference.

Much later, after the prosecutor's presentation of Detective Toms's misleading testimony in this regard, defense counsel did cross-examine the medical examiner who performed the autopsy on the victim on the subject of sexual assault. The medical examiner agreed that, "regarding any sexual assault, [he] didn't have any findings to confirm a sexual assault[.]" However, he qualified that "[t]he so-called sex kit examination was done, and *I don't do the testing on that*. That is sent to a lab." (12RT 2487, italics added.) Defense counsel did not ask him about the results; a reasonable decision because it would have called for hearsay. Instead, she responded, "But certainly you looked at the genitalia? The examiner replied that he had. "In fact I also – just to be sure, I took a few small sections of around [sic] the vagina and examined them under the microscope. And basically I didn't see anything. There was no

injury. There was nothing. It was normal." (*Ibid*.) The medical examiner further testified that there were no injuries of any kind, such as abrasions, cuts, or bruises, to any part of the victim's body apart from those caused by the gunshot wound. (12RT 2463-2465, 2469-2470, 2472-2474, 2477-2478, 2483-2485, 2492.)

But the medical examiner's testimony conveyed to the jurors that his own examination was not a substitute for the results of the sexual assault "kit." For instance, unlike his description of a sexual assault kit, the medical examiner did not testify that he took fingernail clippings, examined the victim's fingernails for foreign substances like skin, hair, or DNA, or examined the victim's body for the presence of semen or other bodily fluids.

In fact, the record as a whole leaves no room for *this Court* to doubt that the results of the sexual assault kit yielded no physical evidence of a sexual crime. If the results supported even the remote possibility of a sexual crime, there is no question that the prosecutor would have included them in his in limine offers of proof to the court or presented them to the jury in his case-in-chief to support his putative attempted rape felony-murder theory (or any other felony-murder theory the evidence could support, such as the commission or attempted commission of sodomy or penetration by foreign object).

The absence of physical evidence of an attempted rape – or any other sexual assault – that would normally be forthcoming under the circumstances was, in fact, "strong evidence" that no such crime had been committed despite the condition of the victim's clothing. (*People v. Rundle* (2008) 43 Cal.4th 76, 139; accord, *People v. Johnson*, *supra*, 6 Cal.4th at pp. 39-42; *People v. Craig*, *supra*, 49 Cal.2d at pp. 318-319; *People v. Anderson*, *supra*, 70 Cal.2d at pp. 34-36.) But the prosecutor's tactics ensured that the jurors would not understand as much for several reasons.

First, since the prosecutor had not called the analyst who tested the kit as a witness in his case-in-chief, the only avenue by which defense counsel could complete and correct the picture the prosecution painted for the jurors would have been to call the analyst as their own witness in their case and elicit his testimony about the negative results. But again, that avenue was blocked by the prosecutor's tactic of waiting until the close of his case-in-chief and before the defense case to alert the court and counsel that he would not submit the attempted rape felony-murder theory to the jury and concede that the question of Mr. Morales's commission of an uncharged attempted rape was therefore irrelevant. Defense counsel could not call a witness for the *now legally irrelevant* purpose of rebutting the implication from the prosecution's evidence that the condition of the victim's clothing was proof that Mr. Morales attempted to rape or otherwise sexually assaulted her. Similarly, because it was irrelevant, defense counsel could not request instructions or argue that the absence of physical evidence of a sexual crime under the facts of this case was in fact affirmative evidence that no such crime was committed. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 139, and authorities cited therein; see also § 1093, subd. (f) [Trial court must instruct jury "on any points of law pertinent to the issue if requested by either party. . . ."].)

Therefore, the prosecutor's presentation of irrelevant half-truths immune from correction by defense counsel conveyed to the jurors that the absence of physical evidence of a sexual assault was of no moment. What mattered was the evidence – reinforced through constant repetition and graphic illustration – that the victim's shorts and underwear were off. What mattered was that an experienced detective inferred from that fact alone that the victim had been sexually assaulted. What mattered was that Mr. Morales (allegedly) told Jorge Morales that he had been "involved in a robbery *and a rape*." What mattered was the prosecutor's position – to which the jurors were repeatedly

and emphatically exposed throughout voir dire –that Mr. Morales had *attempted* to rape the victim. (4RT 663; 5RT 702, 706-707, 715, 753, 872, 892-893; 6RT 1044-1045, 1118-1119, 1130, 1142-1144; 12RT 2487; see also Part I-1, *post*.) In the eyes of the lay jurors, unguided by instructions from the court and unassisted by argument from defense counsel, the prosecution's evidence and theory of an attempted, not completed, rape were not inconsistent with the absence of physical evidence to prove as much. To the contrary, from defense counsel's (forced) silence on the subject in the defense case and argument, it appeared that Mr. Morales himself was not disputing that the victim had been sexually assaulted.

Finally, before the prosecutor effectively admitted that the attempted rape felony-murder theory could not be proven, the jurors had heard young Joe's testimony, as well as testamentary and documentary evidence of his prior statement, that two of the perpetrators forcibly pulled down his mother's shirt and grabbed her chest before she was taken away and killed. (8RT 1647-1648; 9RT 1692-1695, 1920-1923; 3SCT 721-722.) It is no answer to say that the jurors would have disregarded this evidence as suggestive of Mr. Morales's commission of an uncharged sexual crime because Joe used the term "chest," not "breasts" (or child's equivalent of that word), or because he did not identify Mr. Morales as either of the men involved in the incident.

It seems obvious from the prosecutor's misleading representations to the court concerning Joe's account that he intended to smuggle in by speculation what he could not prove with actual evidence: Joe had witnessed Mr. Morales "walk[] up and grab[] the victim's breasts." (7RT 1336.) Reinforcing the implication, the prosecutor's opening statement referred to the victim having been "*groped* on the chest" in the bedroom before she was stripped "naked from the waist down" in the kitchen – "groping" in this context

obviously referring to forcibly fondling or grabbing the victim's breasts. (7RT 1417-1418, italics added.)

Similarly, as far as the lay jurors were concerned, the fact that Joe had not been *able* to identify Mr. Morales as one of the perpetrators of that putative sexual battery was still reconcilable with Mr. Morales's identity as one of those perpetrators. After all, Joe had not been able to identify him as a perpetrator of the burglary and robbery, either, even though there was no real dispute that Mr. Morales was a perpetrator of those crimes. The prosecutor signaled to the jurors that the "groping" evidence was important by alerting them to it in his opening statement (7RT 1417-1418), carefully and deliberately eliciting Joe's account with leading questions (8RT 1647-1648), and reinforcing it through repetition in the testimonial and documentary evidence of Joe's prior statement (9RT 1920-1923; 3SCT 721-722). That important evidence was admitted against Mr. Morales, who alone stood trial. The jurors naturally would have presumed that the putative sexual battery was relevant evidence of *Mr. Morales's* guilt and not that of some unidentified and uncharged other person. Indeed, the prosecutor *counted on* the jurors being so misled: he explicitly misrepresented in his penalty phase summation that Mr. Morales had "grope[d] the[children's] mother in front of them, drag[ged] her off screaming down the hallway to sexually assault her, [and] strip[ped] her naked from the waist down . . . ." (14RT 3145; see Argument IV-E, *post*.)

Once again, had Mr. Morales's liability for a putative sexual battery in the bedroom been properly in issue and thus subject to meaningful adversarial testing through, inter alia, closing argument, defense counsel could have directly addressed (and refuted) it. (See Argument IV [discussing the insufficiency of the evidence to demonstrate that Mr. Morales was liable for any kind of sexual assault in the bedroom].) Once again, because the prosecutor waited until the close of his case-in-chief and before the defense case to

abandon the attempted rape felony-murder theory and to concede the irrelevance of the evidence offered to prove it, defense counsel were effectively precluded from rebutting the inflammatory implications from that irrelevant evidence.

The prosecutor's tactics thus guaranteed that defense counsel could not effectively rebut or answer his evidence and innuendo that Mr. Morales attempted to rape or otherwise sexually assault the victim. They also ensured that the jurors would not receive instructions demanding that they scrutinize the accusations through the lens of the proof beyond a reasonable doubt standard or that they limit their consideration thereof to a permissible, limited purpose. (Compare, e.g., *People v. Hendrix* (2013) 214 Cal.App.4th 216, 247, and authorities cited therein [recognizing that prejudicial impact of erroneously admitted uncharged crimes evidence can be minimized by jury instructions limiting use and/or prohibiting consideration for impermissible purposes]; *People v. Harris* (2013) 57 Cal.4th 804, 842 [error in admitting and instructing jurors that they could consider other crimes evidence on issue of identity was harmless given weight of other evidence to prove identity].) It was precisely *because* the accusations were irrelevant to any legitimate issue that the jurors received no such instructions and therefore were free to follow their "natural and inevitable" inclination (*People v. Guerrero, supra*, 16 Cal.3d at p. 725) to consider Mr. Morales's putative uncharged sexual crimes against the victim for their obvious factual – though legally prohibited – relevance as proof of: (1) "excessive weight" (*ibid*.) that Mr. Morales was a person of uniquely abhorrent character, who had already committed a violent and heinous crime against the victim much more serious than burglary and robbery and therefore was much more likely than his confederates to have actually killed her, rendering him automatically eligible for the death penalty; and (2) the heightened trauma the victim and her family endured, which appealed to the jurors' passions and

provoked their animus against Mr. Morales. (See, e.g., *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 228-230; *People v. Ramirez*, *supra*, 244 Cal.App.4th at pp. 803, 820-823; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1385; *Diaz v. Carcamo*, *supra*, 51 Cal.4th at pp. 1157-1158, 1161-1162; Part D, *ante*.)

In sum, by misleading the court in limine and waiting until the close of his case-in-chief to admit that the attempted rape felony-murder theory was insupportable, the prosecutor was able to inject irrelevant insinuations that Mr. Morales was responsible for a heinous uncharged sexual crime or crimes against the victim that the prosecutor never had to prove or subject to meaningful adversarial testing. The "paramount function" of the prosecutor's tactics was to distract the jurors from the critical, legitimate issue they had to decide in determining Mr. Morales's death eligibility, and from the weaknesses in the prosecution's properly presented evidence to prove it, and encourage them to find Mr. Morales was death eligible based on irrelevant, improper, and highly inflammatory considerations. (See Parts D & E, *ante*, and authorities cited therein.) Any doubt over that function is surely resolved by the prosecutor's closing argument.

H. The Prosecutor Committed Gross Misconduct, and Exploited the Prejudicial Impact of the Evidentiary Error He had Created, in Arguing the Irrelevant, Unfounded, and Highly Prejudicial Inference that Mr. Morales Attempted to Rape the Victim Before She Was Killed

As the preceding section makes clear, going into closing arguments, the court and the parties understood that the question of whether Mr. Morales attempted to rape the victim or whether he (or anyone else) committed some other uncharged sexual crime against her was off limits and could not be considered by the jurors for any purpose. Defense counsel and the trial court

had every right to "assume that [Mr. Morales's] prosecutor[] would not stoop to improper litigation conduct to advance prospects for gaining a conviction" by arguing or suggesting that Mr. Morales committed any such uncharged crimes in contravention of his agreement with the court and defense counsel and the rulings of the court. (*Banks v. Dretke*, *supra*, 540 U.S. at p. 694, citing, inter alia, *Berger v. United States*, *supra*, 295 U.S. at p. 88; see, e.g., *People v. Crew*, (2003) 31 Cal.4th 822, 839 [misconduct to refer in closing argument to matter trial court ruled inadmissible]; *United States v. Whimpy*, *supra*, 531 F.2d at pp. 771-772 [misconduct for prosecutor to elicit or refer to matter "in disregard of understanding and agreements with opposing counsel and the court"]; *People v. Fosselman*, *supra*, 33 Cal.3d at pp. 578-581 [improper for prosecutor to make unfounded and irrelevant remarks that defendant planned to rape victim of non-sex related charged crimes].)

Unfortunately for Mr. Morales, they were wrong. In his summation to the jurors, the prosecutor relied on the erroneously admitted evidence and encouraged the jurors to infer therefrom that Mr. Morales "raped" or attempted to rape the victim in the kitchen before she was killed.

Specifically, the prosecutor pointed to Mr. Morales's alleged admission to Jorge (as reported by Angel Ivan to Detective Wolf) that he had been "involved in . . . *a rape* of a woman." (12RT 2650, italics added.) He highlighted that evidence in a PowerPoint presentation he played to the jurors during his summation. (3SCT 571.) The prosecutor argued that the truth of that admission was corroborated by other evidence the jurors had heard, including the partial removal of the victim's clothing and Mr. Morales's alleged statement to Jorge (also as reported by Angel Ivan) that she had cried out, "Johnny, why are you doing this to me?" As the prosecutor argued:

> The defendant said the victim said, "Johnny, why are you doing this to me?" *Doing what? Think about that for awhile. Think about how the victim ended up on the floor, her panties off, and*

put that in context of the statement, "Johnny, why are you doing this to me?" Put that in context.

(12RT 2651, italics added.)

Thus, the prosecutor urged the jurors to draw the very inference of attempted rape (or even "rape") that he explicitly agreed and the trial court had ruled was irrelevant to any legitimate issue in this case absent a valid attempted rape felony-murder theory. The prosecutor's argument presents a primer for misconduct.

Initially, it is grossly improper for a "government prosecutor[] to act in disregard of understanding and agreements with opposing counsel and the court . . . ." (*United States v. Whimpy*, *supra*, 531 F.2d at pp. 771-772.) Such conduct "create[s] an atmosphere of distrust which . . . impede[s] the criminal trial process and is fundamentally in conflict with the concept of our vaunted adversary system." (*Ibid*.) Further, the prosecutor improperly urged the jurors to return guilt and death-eligibility verdicts based on matters that he knew were legally irrelevant and should not influence their decision (*People v. Garcia* (2014) 229 Cal.App.4th 302, 312-314) and improperly disregarded the trial court's ruling that those matters were irrelevant and their consideration by the jury created an intolerable risk of unduly prejudicing their determination of the critical, disputed death-eligibility issue (*People v. Crew*, *supra*, 31 Cal.4th at p. 839).

Moreover, by explicitly declining to submit the attempted rape felony-murder theory to the jury in violation of his pretrial representations, the prosecutor implicitly recognized that the evidence he had presented was insufficient to prove beyond a reasonable doubt that Mr. Morales had committed that predicate uncharged felony. Hence, his argument necessarily encouraged the jurors to base their verdicts on speculation and assumptions about facts that were not in evidence, as opposed to the state's lawful evidence

proved beyond a reasonable doubt. (See, e.g., *People v. Fosselman, supra*, 33 Cal.3d at pp. 580-581 [prosecutor's comments that defendant attempted or wanted to rape murder victim were improper because, inter alia, they were irrelevant and necessarily implied existence of facts not in evidence – and invited jurors to speculate – that defendant attempted to rape victim]; *People v. Bolton, supra*, 23 Cal.3d at pp. 212-213; *Zapata v. Vasquez, supra*, 788 F.3d at pp. 1114-1115.)[48]

In addition to arguing the erroneously admitted evidence for irrelevant and prohibited purposes, the prosecutor improperly misstated the evidence. (See, e.g., *People v. Hill, supra*, 17 Cal.4th at p. 823 [misconduct to misstate evidence].) As discussed in Parts B-6 and F-2, *ante*, there was absolutely no evidence that the victim cried out, "Johnny, why are you doing this to me" while her clothing was being removed, as the prosecutor argued. (12RT 2651.) "There is no doubt that the prosecutor's statement constituted improper argument" because by misstating that evidence, he "was attempting to smuggle in by inference" the very *false* evidence he had represented to the court but did not possess and could not present: that the victim cried out, "Johnny, why are you raping me?" (*People v. Bolton, supra*, 23 Cal.3d at p. 212; 7RT 1336.)

Furthermore, the prosecutor knew that the putative attempted rape was irrelevant to any *legitimate* issue concerning Mr. Morales's guilt; he did not argue to the jurors that it was relevant for any purpose *other than* proof of his uniquely violent and abhorrent criminal disposition and the increased trauma inflicted on the victim. Hence, like the improper evidence and innuendo he injected into his case-in-chief, the prosecutor's argument was designed to

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[48] Mr. Morales addresses the sufficiency of the guilt phase evidence to prove that he attempted to rape or commit a similar sexual crime against the victim in Argument IV-D, *post*.

appeal to the jurors' "natural and inevitable" tendencies to consider that uncharged crime for just those prohibited purposes and give it "excessive weight" in deciding that he – not one of the six or more other men not on trial who committed the burglary and robbery with him – actually killed the victim. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 725; accord, e.g., *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 228-230; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1385; *People v. Ramirez*, *supra*, 244 Cal.App.4th at pp. 820-823.)

Similarly, his argument "shifted the jury's attention from the [relevant] evidence" and issues before it "to the all too natural response of empathizing with the victim's suffering and [her] family's resulting torment" and provoking an emotional bias against Mr. Morales. (*People v. Vance*, *supra*, 188 Cal.App.4th at p. 1206; accord, *Zapata v. Vasquez*, *supra*, 788 F.3d at pp. 1114-1115.) This was obviously the prosecutor's intention, as demonstrated by his penalty phase summation emphasizing, inter alia, the putative, unadjudicated sexual crimes and their traumatic impact on the victim and her children as highly relevant aggravating evidence. (See 14RT 3145, 3183-3186.)

It is true that defense counsel did not object to the prosecutor's argument. Nevertheless, this Court must consider the argument and its effect on the jurors and their resolution of Mr. Morales's death-eligibility for three reasons.

First, as set forth in Part I-4, *post*, defense counsel's failure to object to the prosecutor's argument fell below objective standards of reasonable competence which, together with other acts and omissions concerning the admission and use of the uncharged crimes evidence, deprived Mr. Morales of his right to the effective assistance of counsel. (Parts I-J, *post*.) Hence, the

propriety and effect of the prosecutor's argument must be considered as part of this claim.

Second, Mr. Morales's claim is that the combined effect of the acts and omissions of all of the trial actors concerning the admission and use of the uncharged sexual crimes evidence, including the prosecutor's argument, deprived him of a fundamentally fair death-eligibility trial and highly reliable death-eligibility verdicts. (See Part J, *post*.) As previously stated in Part F *ante*, regardless of whether the prosecutor's argument can be challenged as misconduct, its effect on the jury must be considered in determining whether Mr. Morales's trial was fundamentally unfair. (*People v. Milner*, *supra*, 45 Cal.3d at pp. 254-258 [prosecutor's misleading argument together with defense counsel's failure to challenge or mitigate it and the trial court's failure to provide instructions to correct it combined to "so affect[] 'the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"]; *Kentucky v. Whorton* (1979) 441 U.S. 786, 789 [fundamental fairness "must be evaluated in light of the totality of the circumstances – including . . . the arguments of counsel . . . ."]; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 484-490.)

Third, it is well-settled that a prosecutor's argument – though not independently challenged or determined to be misconduct – is part of the entire record that must be considered in assessing the prejudicial impact of an evidentiary or instructional error. (See, e.g., *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) It is equally well-settled that "[a] prosecutor's reference to evidence that should not have been presented to the jury increases the potential for prejudice flowing from the error." (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384; accord, e.g., *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 250-251, and authorities cited therein [prosecutor's argument utilizing erroneously admitted uncharged crimes evidence, as well as uncharged crimes court had

excluded, demonstrated prejudice from error]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance on erroneously admitted evidence demonstrated prejudice]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Quartermain* (1997) 16 Cal.4th 600, 622.) Hence, the Court must consider the prosecutor's argument as proof of prejudice from the evidentiary errors he induced.

I. Defense Counsel Failed to Perform in Accord with Objective Standards of Reasonable Assistance Demanded in a Capital Murder Trial with Respect to the Admission of Evidence and Prosecutor's Argument that Mr. Morales Attempted to Rape the Victim Before She Was Killed

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee criminal defendants the right to the effective assistance of counsel. (See, e.g., *Strickland v. Washington* (1984) 466 U.S. 668, 686; *People v. Nation* (1980) 26 Cal.3d 169, 178.) Ineffective assistance of counsel under both the state and federal Constitutions is established when: (1) counsel's representation fell below an "objective standard of reasonableness"; and (2) but for counsel's errors, there is a "reasonable probability" that the result of the proceeding would have been different. (*Strickland, supra,* 466 U.S. at pp. 693-694; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 217-219 [California employs same analysis as *Strickland*].)

With respect to the first prong of the *Strickland* analysis, the United States Supreme Court has "long referred to '[the ABA Guidelines] as 'guides to determining what is reasonable'" performance. (*Wiggins v. Smith* (2003) 539 U.S. 510, 524, citing *Strickland, supra,* 466 U.S. at pp. 688-689; accord *Rompilla v. Beard* (2005) 545 U.S. 374, 387 & fn. 7; *Williams v. Taylor* (2000) 529 U.S. 362, 396.) As this Court, other courts, and the ABA Guidelines all

recognize, since "'representation of an accused murderer is a mammoth responsibility' (*In re Hall* [1981] 30 Cal.3d [408], 434), the 'seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance.' (*Profitt v. Wainwright* (11th Cir. 1992) 685 F.2d 1227, 1247.)" (*In re Jones* (1996) 13 Cal.4th 552, 566.) The courts "are particularly vigilant in guarding this right [to the effective assistance of counsel] when a defendant faces a sentence of death. Our heightened attention parallels the heightened demands on counsel in a capital case. (See ABA Standards for Criminal Justice 4-1.2(c) (3d ed. 1993) ('Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.')" (*Smith v. Mullen* (10th Cir. 2004) 379 F.3d 919, 938-939.)

While ineffective assistance of counsel claims are often reviewed by way of habeas corpus, "when counsel's ineffectiveness is so apparent from the [appellate] record" that a Sixth Amendment violation may be demonstrated, it is appropriate to raise and consider the merits of the claim on direct appeal. (*Massaro v. United States* (2003) 538 U.S. 500, 508; accord, e.g., *People v. Pope* (1979) 23 Cal.3d 412, 426.) For instance, if no conceivable, *reasonable* trial tactic or strategy could justify counsel's acts or omissions, his or her deficient performance under *Strickland*'s first prong is established. (See, e.g., *People v. Pope*, *supra*, at p. 426; see also, e.g., *People v. Centeno*, *supra*, 60 Cal.4th at pp. 675-676 [no conceivable, reasonable strategy could justify failure to object to prosecutorial misconduct in summation by misstating the burden of proof]; *Zapata v. Vasquez* (9th Cir. 2015) 788 F.3d 1106, 1114-1116 [state appellate court's rejection of IAC claim on direct appeal was unreasonable because, inter alia, no conceivable, reasonable strategy could justify failure to object to prosecutor's "egregiously" improper and inflammatory closing

argument]; *People v. Nation, supra*, 26 Cal.3d at p. 179 [no conceivable strategy could justify failure to move to exclude suggestive in limine identification]; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1130-1131 [failure to object to inadmissible post-arrest statements to prove strike allegation]; *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 [inadmissible hearsay testimony that established time period necessary for conviction of continuous sexual abuse]; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1520-1524 [inadmissible impeachment evidence]; *People v. Donaldson* (2001) 93 Cal.App.4th 916, 927-932 [prosecutorial misconduct in expressing personal belief in witness's credibility]; *United States v. Villalpando* (8th Cir. 2001) 259 F.3d 934, 939 [counsel's elicitation of highly damaging testimony against client]; *People v. Torres* (1995) 33 Cal.App.4th 37, 49 [improper opinion as to definitions of charged crimes and implication defendant guilty]; *People v. Stratton* (1988) 205 Cal.App.3d 87, 93 [prejudicial, minimally relevant evidence]; *People v. Moreno* (1987) 188 Cal.App.3d 1179, 1191 [damaging hearsay evidence]; *People v. Jackson* (1986) 187 Cal.App.3d 499, 505-506 [prior convictions]; *People v. Guizar* (1986) 180 Cal.App.3d 487, 491-492, & fn. 3 [uncharged other crimes]; *People v. Ellers* (1980) 108 Cal.App.3d 943, 951 [suppression of "seriously damaging evidence"].) Where the record shows that counsel did object to evidence or argument on one ground, that is typically sufficient to demonstrate that he or she had no tactical reason not to make meritorious objections to the same evidence or argument. (See, e.g., *People v. Landau* (2016) 246 Cal.App.4th 850, 863; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1130-1131; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366; *People v. Farley* (1979) 90 Cal.App.3d 851, 866*;* cf. *In re Jones* (1996) 13 Cal.4th 552, 571-573 [there could be no tactical reason for objecting on the wrong grounds].)

Here, the objections defense counsel did make on the record in limine and at the close of the prosecution's case-in-chief, as set forth in Parts B-1 to B-3, *ante*, as well as those they made after the guilt verdicts and before the penalty phase commenced, during and after the prosecution's penalty phase summation, and in their motion for new trial, make clear that they wanted to exclude any evidence or argument suggesting that Mr. Morales committed or participated in an attempted rape or any other sexual assault against the victim. (26CT 7514-7520; 27CT 7610-7613; 28CT 7855-7856, 8108; 7RT 1326-1338, 1401-1403; 12RT 2530-2531, 2562-2561; 13RT 2868-2870; 14RT 3183-3184, 3186, 3188-3190; see also Argument IV, *post*.) As set forth below, the record is likewise sufficient for this Court to determine as a matter of law that no conceivable, reasonable strategy could justify defense counsel's guilt phase performance in any or all of the following ways: (1) pretrial counsel Rozenberg's failure to move to dismiss the attempted rape felony-murder special circumstance allegation at all and successor trial counsel's failure to press for a ruling on the motion they made before voir dire; (2) trial counsel's failure to make clear objections to the prosecutor's offers of evidence at the most appropriate time and place; and/or (3) their failure to move to strike the erroneously admitted evidence and admonish the jurors to disregard any evidence or suggestion of uncharged sexual crimes for any purpose after it became clear that the sexual assault evidence was irrelevant and should never have been admitted and the prosecutor commented upon it in summation and to object to the prosecutor's improper use of the evidence in argument.[49]

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[49] As set forth in Argument IV, *post*, counsel's performance in these regards also fell below objective standards of reasonably competent representation concerning the penalty phase of a capital case.

1. Defense Counsel's Failure to Obtain Dismissal of the Attempted Rape Felony-Murder Special Circumstance Allegation Before The Jury Was Selected Fell Below Objective Standards of Reasonably Competent Assistance in a Capital Murder Trial

As discussed in Argument I, *ante*, the superior court erred in failing to appoint the Public Defender and instead appointing unqualified counsel, Wayne Rozenberg, to represent Mr. Morales when the special circumstances were alleged. Mr. Rozenberg ultimately admitted, and was permitted to withdraw on the ground, that he was not qualified under the court's own rules and not qualified in fact to represent Mr. Morales against a potential death penalty. Consistent with his admission, which was credited by both the court and the prosecutor, Mr. Rozenberg never challenged the attempted rape special circumstance allegation. Mr. Rozenberg's failure to make a meritorious motion to dismiss the attempted rape felony-murder special circumstance allegation pursuant to Penal Code section 995 fell well below objective standards of reasonably competent assistance. (*Strickland*, *supra*, 466 U.S. at pp. 687-689.) For the reasons set forth in Argument I, *ante*, that deficient performance was directly attributable to the state's violations of its own appointment rules.

Although the superior court eventually appointed the Public Defender, and although the Public Defender eventually filed a motion to dismiss, it did not "cure" the harm from Mr. Rozenberg's failure to file the motion earlier. Among other things, absent his deficient performance, that inflammatory allegation would have been dismissed long before jury selection and the potential jurors would never have been exposed to it.

What happened instead is that the Public Defender had inadequate time to both prepare for jury selection and draft the motion to dismiss. This resulted in the jurors' repeated exposure to the prosecution's theory that Mr. Morales attempted to rape the victim before killing her. Specifically, before Mr. Rozenberg withdrew – more than two years after Mr. Morales had been taken

into custody, 16 months after he had been held to answer following the preliminary hearing, and after waiving his speedy trial rights on 20 occasions – Mr. Morales finally invoked his speedy trial rights and refused to waive any further time to be tried beyond November 11, 2003. (1RT 2, 6, 8, 10, 12, 14, 17, 25, 29, 31; 2RT 88-89, 91, 95, 100-101, 102-103, 105, 111, 116, 123, 127-128, 130-131, 148-149, 153.) Mr. Rozenberg was permitted to withdraw on October 16, 2003, only 33 days before that firm trial date. (2RT 147-148.) As discussed in detail in Argument I-D, *ante,* undisputed evidence later presented to the trial court revealed that Mr. Rozenberg did nothing in the way of preparing for a capital murder trial that he was clearly and admittedly unqualified to do.

Thus, although the case had lingered for over two years, when the Public Defender was belatedly appointed only a month before trial was scheduled to commence, the deputy public defenders were faced with the gargantuan task of preparing for a capital murder trial from the ground up. At the same time, they had a client who was understandably reluctant to surrender the speedy trial right he had invoked before their substitution.

The superior court and the prosecutor both acknowledged the tension that had been created between Mr. Morales's invocation of his speedy trial rights before Mr. Rozenberg's withdrawal and the Public Defender's 11th hour-substitution. (2RT 148-150, 153.) After the Public Defender was appointed and the case was transferred to the county's capital courthouse, the trial deputies represented to the newly assigned trial judge that they had persuaded Mr. Morales to agree to a limited waiver of his previously invoked right to be tried no later than November 11 in order to accommodate the lead deputy's trial in another matter that would take about three weeks, after which she would be able to devote all of her time to preparing for Mr. Morales's trial. (2RT 153-162.) Mr. Morales agreed to waive time from October 16 through

February 20, 2004, though he qualified his last waiver by emphasizing that it extended "up to" April 23, 2004. (2RT 161.)

On April 23, 2004, the trial court again attempted to elicit Mr. Morales's waiver of his speedy trial rights, this time to continue the pretrial date to June 18, 2004, with the last day for trial to commence no more than 60 days later, or by August 17, 2004. The court explained to Mr. Morales that his counsel needed that time to prepare, including time to file a Penal Code section 995 motion to challenge a charge from the preliminary hearing and other pretrial motions, as well as to prepare for jury selection and trial. (2RT 163-164.) In response to the court's first attempt to elicit his agreement to waive more time, Mr. Morales replied that he "told her" ("her," presumably being his female lead defense attorney) that he was willing to "go 60 days." (2RT 164.)

When the court again attempted to elicit his waiver of time to be tried no later than August 17, 2004 – or 60 days from June 18 – Mr. Morales replied, "I don't know how this works." (2RT 164.) The court explained, "How this is going to work, on June 18, we'll deal with a lot of motions filed on your behalf. . . . I have to make some rulings prior to trial – before we go to trial. After I make my rulings on those motions, we will go ahead and start the jury selection process, which is going to be sometime in July, but it takes the county 30 days to get the pool of jurors from the County of San Bernardino to get prepared for a death penalty case." (2RT 164.) Thereafter, the court again inquired if Mr. Morales was willing to start the case with pretrial motions on June 18 after which counsel would have up to 60 days to commence trial with jury selection proceedings. (2RT 164-165.) This time, Mr. Morales unequivocally replied – as he had before Mr. Rozenberg's withdrawal – "I don't want to waive any more time." (2RT 165.)

The court impressed upon Mr. Morales that his counsel's request for him to waive his speedy trial rights in order for them to litigate motions on June

18 and commence jury selection within 60 days of that date was in his "best interest" to give counsel adequate time to prepare for both. (2RT 165.) The court explained that if he did not "give up [his] right to a speedy trial," then defense counsel would not be "as prepared as they would if you had given an additional 60 days from June 18th. It would be in your best interest to waive time from the 18th of June and 60 days thereafter we'll start your trial." (2RT 165.) Mr. Morales replied, "what I meant is 60 days from now." (*Ibid.*) At that point, the court directed defense counsel to confer with Mr. Morales. (2RT 165-166.)

After conferring with Mr. Morales, lead defense counsel represented that Mr. Morales was invoking his right to be tried no later than July 12, 2004. (2RT 166.) With that understanding, the court elicited Mr. Morales's agreement to be tried within 10 days of July 12 in order to accommodate the court should any last minute issues in the court's schedule arise. (2RT 166.)

Hence, the process of jury selection had to commence earlier than the time counsel needed to prepare adequately to litigate pretrial motions and start the jury selection process. On June 4, 2004, the parties convened to discuss jury selection. (2RT 170-177.) The court memorialized for the record Mr. Morales's invocation of his right to be tried no later than July 12, 2004, which meant commencing trial by calling the pool of potential jurors and distributing questionnaires to them on that date. (2RT 176-177.) Mr. Morales also agreed to a two-week break after that July 12 start date in order to accommodate the judge's scheduled two-week vacation. (2RT 176-177; see also 2RT 166-167.)

Before defense counsel was able to file the section 995 motion to dismiss the special circumstance allegation, jury selection commenced on July 12, 2004 with the distribution of jury questionnaires. Consequently, the questionnaires included reference to the attempted rape felony-murder special

circumstance allegation, as did a court "script" read to the pool of potential jurors. (2RT 178-179, 231-232; 3RT 239, 247-248, 251, 253.)

On August 5, 2004, defense counsel filed the motion to dismiss, which the parties fully briefed before the next scheduled court date of August 16, 2004, when live voir dire was to commence. (26CT 7514-7520, 7523; SCTII 1-4.) On August 16, 2004, the court recognized that the motion was ready for argument and ruling, but elicited the parties' agreement to defer that ruling until after the jurors were selected. (4RT 516-517; see § 997 [court "must" rule on 995 motion at time it is made unless good cause exists to postpone].) Consequently, the jurors were subjected to extensive live voir dire on the subject of the prosecutor's accusation that Mr. Morales attempted to rape the victim before killing her. (4RT 663; 5RT 702, 706-707, 715, 753, 872, 892-893; 6RT 1044-1045, 1118-1119, 1130; 6RT 1142-1144.)[50]

The procedure actually followed obviously deviated from the procedure that would have been followed, as described by the court and requested by counsel on April 23, 2004, if Mr. Morales had agreed to waive his speedy trial rights. (See 2RT 164-165.) That is, contrary to the procedure that would have been followed had Mr. Morales waived his speedy trial rights, the section 995 motion was not filed, litigated or ruled upon before the jury selection process commenced or indeed even before the jury was selected. According to the record of the April 23, 2004 proceeding, had Mr. Morales waived his speedy trial right and thereby given counsel the time requested to prepare and follow that procedure, the special circumstance allegation would have been dismissed before the questionnaires were distributed and before the jurors would have been exposed to the allegation through live voir dire.

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[50] Several of the potential jurors were also questioned in private about that allegation. (4RT 534-535, 581, 583-584, 602-603, 663; 5RT 998.)

Certainly, the objections and motions defense counsel did make reveal a trial strategy to prevent the jurors from hearing any evidence or suggestion that Mr. Morales attempted to rape (or to otherwise sexually assault) the victim before she was killed. Their remarks on voir dire reflect their appreciation of the inherently inflammatory nature of the allegation.

At the outset of her voir dire of the death-qualified potential jurors, lead defense counsel emphasized: "they have charged [Mr. Morales] with murder in the course of an attempted rape. And that, *just hearing that, those words*, I know is disturbing. It is disturbing for women." (4RT 663, italics added.) Ultimately, women comprised half of the jury selected for both phases of trial. (7CT 1690; 8CT 1950; 9CT 2311; 10CT 2779; 13CT 3715; 20CT 5698.) In reciting the charges and allegations against Mr. Morales, lead defense counsel candidly acknowledged: "Let's just put it on the table there. *What is the worst crime*? *Probably attempted rape*, don't you think?" (5RT 702, italics added.) Her questions emphasized the attempted rape felony murder allegation above – and often to the exclusion – of the other allegations in probing the jurors' ability to decide the case impartially and in accord with the law and set aside any bias created by the "horrendous" nature of the allegation itself. (4RT 534-535, 581, 583-584, 613, 702, 706-707, 715; 5RT 872, 892-894; 6RT 998-999, 1044-1045, 1130.) Similarly, her voir dire into the potential jurors' impartiality in sentencing focused on whether they could consider a sentence *less than death* for someone who committed the "horrendous" and "egregious" crime of murder involving an attempted rape. (See, e.g., 5RT 706-707 [eliciting from potential juror in open court that he could not "honestly" impose life with parole and not death for someone convicted of "horrendous" crime of "murder in the course of an attempted rape"]; 5RT 892-894 [eliciting admission that murder in course of attempted rape should be punished by death and that mind would be closed to lesser penalty of life without parole]; 6RT 1130 [eliciting

agreement from potential juror that murder in the course of attempted rape is crime for which he "would just want to give him the death penalty from the outset" without considering other factors]; 4RT 613 [*Hovey* voir dire focusing on uniquely "gruesome crime" of murder in course of attempted rape and ability to punish it by less than death]; accord, 4RT 534-535, 581, 583-584, 602-603; 5RT 702, 715; 6RT 998-1101; see also 6RT 1142-1144 [prosecutor eliciting from Juror Number 1 that s/he believed death penalty should be reserved for "egregious" crimes and murder in course of attempted rape qualifies as such a crime].) Counsel's remarks reveal that they understood exposing the jurors to "just hearing that" Mr. Morales attempted to rape the victim, "those words," would be "disturbing" and created a risk of unduly biasing the jurors against Mr. Morales. Competent counsel in defense counsel's position would not expose the jurors to that allegation unnecessarily.

Furthermore, as is the practice in capital cases, the focus of the voir dire was not on probing the jurors' ability to impartially decide Mr. Morales's *guilt* and the truth of the special circumstance allegations. Rather, it focused on their "death-qualification," or ability to consider both penalties *based on the assumption that the attempted rape felony-murder special circumstance allegation was true*. Thus, the jurors were not only unnecessarily exposed to the inherently inflammatory nature of "just hearing" the "horrendous" and "egregious" accusation that the victim had been killed in the commission of Mr. Morales's attempt to rape her. (4RT 663; 5RT 706-707; 6RT 1142-1144.) In addition, the focus of voir dire and its repetitious prompting to assume that Mr. Morales killed the victim in the course of attempting to rape her lent the allegation a false aura of truth. Certainly, competent counsel in capital cases are aware of the danger that this method of voir dire tends to predispose jurors to assume that the court and the parties believe the defendant is guilty of the charges, that the defendant is in fact guilty, and that the principal issue before

them is not guilt but penalty. (See, e.g., *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 75, holding superseded by statute as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 713-714; *Lockhart v. McCree* (1986) 476 U.S. 162, 202-203 (dis. opn. of Marshall, J. joined by Brennan and Steven, J.J.) [citing studies in emphasizing that although this distorting effect alone may not rise to the level of a constitutional violation, it should be considered in "any inquiry into the effects of death qualification" voir dire]; Craig Haney, Aida Hurtado, and Luis Vega, *Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Hum. Behav. 619.)[51] Competent counsel who moves to dismiss an inherently inflammatory charge would therefore obtain a ruling on the motion *before* voir dire in order to eliminate any possibility that the jurors will give it credit.

Moreover, defense counsel's voir dire reveals that the potential jurors' responses to the attempted rape special circumstance allegation were critical to their jury selection strategy. Because the court did not rule on their motion to dismiss that allegation until after voir dire, counsel selected the jury based on irrelevant considerations and thereby diminished the effectiveness of their selection strategy. For this reason, as well, competent counsel under the circumstances would have moved to dismiss the special circumstance allegation before the jury was selected.

Indeed, the face of the record establishes that this counsel *would have* filed, litigated, and obtained the ruling on that motion before the jury selection

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[51] This distorting effect of death qualification is distinct from the claim that jurors who support the death penalty are more likely to side with the prosecution on the question of guilt and hence are more likely to convict than jurors who oppose that penalty. (See *Lockhart v. McCree, supra*, 476 U.S. at pp. 171-173 (maj opn.) [questioning validity of that blanket proposition but otherwise assuming that death qualified juries are "somewhat more conviction-prone than 'non-death qualified' juries].)

process commenced if they had had more time to prepare. (2RT 163-165.) Counsel's lack of preparedness in this regard and the resulting harm therefrom cannot be attributed to Mr. Morales's invocation of his speedy trial rights. Instead, it must be attributed to state error.

The starting point for this analysis is the fundamental proposition that it is "intolerable" to force a criminal defendant to surrender one constitutional right in order to assert another. (*Simmons v. United States* (1968) 390 U.S. 377, 394; accord, e.g., *People v. Coleman* (1975) 13 Cal.3d 867, 871-872; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 732.) As this Court has recognized, it is not uncommon for there to be a tension between a defendant's speedy trial rights and his or her right to competent, prepared counsel. When a defendant must waive his speedy trial rights in order to exercise his right to competent, prepared counsel due to counsel's own delays for which the state is not at fault, "the inherent tension between the right to a speedy trial and the right to competent, adequately prepared counsel is not, *in itself*, an impermissible infringement on the rights of the accused, including the right to a fair trial." (*People v. Frye* (1998) 18 Cal.4th 894, 939, italics added.) However, when that tension is created by *state error* that forces the defendant to forgo his right to prepared counsel in order to invoke his speedy trial rights, the state is responsible for counsel's lack of preparedness and deficient performance resulting therefrom, and the state – not the defendant – must bear the consequences of that infringement on the defendant's Sixth Amendment rights. (*Hunt v. Mitchell* (6th Cir. 2001) 261 F.3d 575, 584-585; *People v. Bolton* (2008) 166 Cal.App.4th 343, 359-361; see also Argument I-B, *ante*, citing, inter alia, *Strickland, supra*, 466 U.S. at p. 692 and *United States v. Cronic* (1984) 466 U.S. 648, 659 & fn. 25.)

In *Hunt v. Mitchell, supra*, 261 F.3d 575, for instance, the trial court erred by failing to appoint counsel to represent the defendant until the day

before his trial was to commence under state statutory law. (*Id.* at pp. 578-579, 582-584.) Due to that error, the defendant was forced to choose between waiving his right to speedy trial under state law in order to invoke his constitutional right to adequately prepared, competent counsel and waiving the latter right in order to invoke the former. (*Id.* at p. 584.) The defendant refused to waive his speedy trial right and therefore counsel had to proceed through the jury selection process, opening statements, and the cross-examination of three witnesses before the case was continued. (*Id.* at pp. 579, 583-584.) The defendant challenged his ensuing conviction on the ground that the court's erroneous, belated appointment of counsel constructively deprived him of his Sixth Amendment right to competent, prepared counsel.

The Court of Appeals for the Sixth Circuit agreed that under the circumstances, no attorney appointed on the day of trial could prepare to represent the defendant competently in the proceedings held before the trial was continued. (*Hunt v. Mitchell, supra,* 261 F.3d at p. 585, citing *United States v. Cronic, supra,* 466 U.S. at pp. 659-660.) The Court further held that the defendant was not responsible for counsel's lack of preparedness based on his refusal to waive his speedy trial rights in order to allow counsel adequate time to prepare. Rather, the trial court's appointment error forced upon the defendant an intolerable choice between two substantial rights. (*Id.* at pp. 484-585.) Because state error created a situation in which the defendant was forced to surrender his Sixth Amendment right to representation by prepared, competent counsel in order to invoke his state speedy trial rights, it was the state and not the defendant that was responsible for the infringement on the defendant's Sixth Amendment right and the state bore the burden of the consequences thereof. (*Ibid.*)

Similarly, in *People v. Bolton, supra,*166 Cal.App.4th 343, trial court error resulted in relieving counsel of record four days before trial was

scheduled to commence under the state's speedy trial statutes, after the defendant had been in custody for three and a half months. (*Id.* at pp. 350-351, 359-360.) The defendant understood that substituting counsel would necessarily entail a continuance of the trial date. (*Id.* at pp. 351-356, 359-360.) Thus, like the defendant in *Hunt v. Mitchell*, court error forced the defendant to choose between his speedy trial rights and his right to the assistance of prepared, competent counsel. (*Id.* at pp. 356, 359-360.) The defendant invoked the former, advising the court that he would therefore represent himself because representation by substitute counsel would infringe on his speedy trial right. (*Id.* at pp. 351-355, 360.) On appeal from his ensuing conviction, the defendant argued that his waiver of his right to counsel was not voluntary and therefore he was improperly deprived of that right. (*Id*. at pp. 350-351, 361.)

The Court of Appeal agreed. At the outset, the court recognized that not every tension between a defendant's speedy trial right and right to be represented by competent, prepared counsel "'constitutes an impermissible infringement on the rights of the accused.' (*People v. Frye*, *supra*, 18 Cal.4th at p. 939.)" (*People v. Bolton, supra,* 166 Cal.App.4th at p. 356.) However, the court held, "[i]n this case, the tension between Bolton's right to a speedy trial and his right to competent, adequately prepared counsel arose only because the trial court" erred in relieving counsel four days before the last day on which trial was scheduled to commence. (*Id.* at p. 356.) Because it was court error that forced the defendant to choose between those rights, his ultimate "choice" to forgo his right to substitute counsel in order to invoke his speedy trial right was involuntary and he was denied his right to the assistance of counsel. (*Id.* at pp. 356, 359-361.)

The facts of this case fall squarely within the legal principles applied in *Hunt* and *Bolton*, *supra*. Here, as in *Hunt* and *Bolton*, it was trial court error

that resulted in Mr. Rozenberg's withdrawal only a month before the last day for this capital murder trial to commence upon Mr. Morales's first invocation of his right to a speedy trial. It was state error that created the tension between Mr. Morales's asserted right to a speedy trial and his right to representation by prepared, competent counsel. In the face of that impermissibly forced choice, Mr. Morales agreed to only a limited, qualified waiver of the speedy trial right he had invoked in order to effectuate his Sixth Amendment right to counsel, after which he insisted that his speedy trial rights be honored. On the face of the record of the April 23, 2004 proceedings and the proceedings that actually resulted, the pursuit of his speedy trial right forced him to forgo representation by adequately prepared counsel who would have filed, litigated, and obtained the court's ruling on the section 995 motion before the jury selection process commenced. (2RT 163-165.) Because it was court error that thrust upon Mr. Morales that intolerable choice between two rights, the state – not Mr. Morales's invocation of his speedy trial right – was responsible for counsel's failure to secure dismissal of the special circumstance before jury selection and for the harm to Mr. Morales that resulted. At bottom, absent the court's appointment errors, the jurors would never have heard the allegation.

In any event, even if the state were not responsible for counsel's errors in this regard, defense counsel's own explicit agreement to defer the court's ruling on the motion to dismiss until after the jury was selected fell well below objective standards of reasonable competence in a capital murder trial. (4RT 516-517; see § 997.) The motion was fully briefed before live voir dire commenced. No conceivable tactical reason could justify counsel's acquiescence in proceeding through voir dire, which resulted in exposing the jurors to the prosecution's inherently inflammatory attempted rape felony-murder theory; a theory they should never have heard.

Finally, it may be said that under the facts of this unique case, even if the trial court had dismissed the special circumstance allegation before voir dire, defense counsel would still have been faced with the court's ruling permitting the prosecutor to proceed on an attempted rape felony-murder theory of first degree murder. Under that hypothetical scenario, it is conceivable that a competent attorney might decide to voir dire the jurors on that theory given its tendency to affect their ability to be impartial. However, that hypothetical decision under that hypothetical scenario would not have been a reasonably *informed* one in this case because it would have been based on a false premise created by the state that attempted rape felony- murder liability would actually be in issue. (See *People v. Frierson* (1979) 25 Cal.3d 142, 163 [tactical choice made in absence of "factual framework within which to make a competent, informed tactical decision" is not reasonable]; accord, *Rompilla v. Beard* (2005) 545 U.S. 374, 387; see also *Strickland*, *supra*, 466 U.S. at p. 686 [the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense"]; *United States v. Bagley* (1985) 473 U.S. 667, 682-683 [prosecutor may prevent effective assistance of counsel where, "'[i]n reliance on [a prosecutor's] misleading representation, the defense might abandon . . . trial strategies that it otherwise would have pursued'"]; *Banks v. Dretke*, *supra*, 540 U.S. at p. 691 [defense counsel's action or inaction made in reliance on prosecutor's misrepresentations cannot be grounds for procedural default].) Thus, even under that hypothetical scenario, state error would have produced the same intolerable result: conducting voir dire on an inherently inflammatory topic that was not a legitimate issue in the case.

For any or all of the foregoing reasons, whether as a result of state error, defense counsel's own negligence, or some combination thereof, defense counsel's failure to secure dismissal of the attempted rape felony-murder

special circumstance allegation before jury selection commenced and the jurors were sworn fell below objective standards of reasonably competent assistance in a capital murder trial. The jurors' extensive exposure to that unfounded and inherently prejudicial allegation throughout voir dire undoubtedly colored their view of the evidence and arguments they heard at trial, detailed in Parts G & H, *ante,* to Mr. Morales's considerable detriment. (See also Argument IV, *post*.)

2. Defense Counsel's Failure to Make Appropriate Objections to the Prosecutor's Offers of Proof Fell Below Objective Standards of Reasonably Competent Capital Trial Assistance

When the prosecutor made his original offer of evidentiary proof on August 25 in support of his attempted rape felony-murder theory of murder, the court asked defense counsel if they had "discovery of all this?" Lead defense counsel replied simply, "yes." (7RT 1338.) Thereafter, and without any inquiry of the prosecutor, the trial court made its original ruling allowing the prosecutor to present evidence and proceed on that theory. (7RT 1339-1340.)

However, as discussed in detail in Parts B-4 and F, *ante*, defense counsel's subsequent remarks and repeated objections on August 25, 26, and 30 made it clear that they did *not* have "discovery of all this" conforming to the prosecutor's offers: the discovery they had was that: (1) Joe and only Joe reported that a perpetrator *other than* Mr. Morales "grabbed" the victim's "chest" (not "breasts" or a child's equivalent) and that Joe had never identified Mr. Morales as any of the perpetrators; and (2) "hearsay on hearsay" concerning evidence Jorge might or might not possess. (7RT 1360-1361, 1373-1375, 1390-1392.) While defense counsel later made that clear and objected to the prosecutor's representations to the contrary, they never explicitly connected those objections to the offers of proof on which the court based its critical evidentiary ruling. Furthermore, in their written motion filed

on August 30 to reconsider and vacate the court's ruling, counsel inexplicably failed to argue that the ruling was based upon false and incompetent offers of proof for the reasons they had articulated in the interim. (26CT 7610-7613; 7RT 1401-1403.)[52] For all of the reasons set forth in Part F, as well as in Part B, subparts 4-6, *ante* – and as defense counsel otherwise recognized – the prosecutor's offers of proof were false, misleading, or based on incompetent evidence. Counsel's failure to object on those grounds at the time of the original August 25 ruling or in their written August 30 motion for reconsideration defies any reasonable explanation. (See, e.g., *People v. Landau*, *supra*, 246 Cal.App.4th at p. 863 [where counsel does object to evidence on one ground, there is no reasonable strategic basis on which to withhold an objection on a meritorious ground].) The only explanation for their performance was "inattention, not reasoned strategic judgment." (*Wiggins v. Smith*, 539 U.S. at pp. 526-527.)

For all of the reasons set forth in Parts D and F, *ante*, Mr. Morales submits that the record before the court shortly after it made its original ruling and shortly before reaffirming it two court sessions later was adequate to alert the court to the deficiencies in the prosecutor's offers and trigger its heightened duties to exclude any evidence and prohibit any suggestion that Mr. Morales (or anyone else) had committed any kind of uncharged sexual assault against the victim. However, to the extent more focused objections from defense counsel were necessary, their failure to make them at the appropriate time and

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[52] To the contrary, defense counsel's motion for reconsideration of the court's ruling included the rather vague and inexplicable representation: "The Defense agrees that we have had notice of many of the facts that the People plan on introducing into evidence; so this objection is not based on any lack of notice or discovery." (27CT 7611.)

in the appropriate context fell below objective standards of reasonably competent capital trial representation.

3. Defense Counsel's Failure to Move to Strike the Erroneously Admitted Evidence and Admonish the Jurors Accordingly and to Object to The Prosecutor's Misuse of That Evidence in Argument Fell Below Objective Standards of Reasonably Competent Capital Trial Assistance

As set forth in Parts B-7 and G, *ante*, when the prosecutor notified the court and counsel at the close of his case-in-chief that he would not be submitting the attempted rape felony-murder theory to the jury as he had promised, defense counsel objected, the trial court ruled, and the prosecutor conceded that Mr. Morales's putative attempted rape of the victim, and evidence admitted and inferences permitted to prove that uncharged crime, was irrelevant to any legitimate issue in the case. (12RT2529-2531, 2562-2563.) However, defense counsel objected on those grounds only to the admission of Exhibits 24 and 25. A motion to strike the other evidence that had already been admitted for that purpose and to admonish the jurors to disregard that evidence as well as any inference or suggestion of any uncharged crimes would have been meritorious for the same reasons. However, defense counsel did not make one. Apart from an inexcusable neglect or ignorance of the law, the only conceivable reason for defense counsel's omission was that they decided, as a tactical matter, that such a motion would do more harm than good. The question then becomes whether that strategy was a *reasonable* one. (See, e.g., *In re Jones* (1996) 13 Cal.4th 552, 586; *In re Saunders* (1970) 2 Cal.3d 1033, 1048; *United States v. Span* (9th Cir. 1996) 75 F.3d 1383, 1389.)

Although this Court has consistently held that it ordinarily must be presumed jurors will follow instructions to disregard evidence or remarks (see, e.g., *People v. Letner and Toben* (2010) 50 Cal.4th 99, 173), it has also often

held that defense counsel may reasonably disagree and make a tactical decision not to bring a meritorious motion to strike for fear that it will have the opposite effect of highlighting, rather than excising, objectionable evidence or insinuations in the minds of the jurors (see, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 165, and authorities cited therein). While such a tactical decision may be a reasonable one depending on the circumstances of the particular case, it is not always reasonable. (See, e.g., *People v. Centeno, supra*, 60 Cal.4th at p. 675; *Zapata v. Vasquez*, *supra*, 788 F.3d at pp. 1114-1116.)

In deciding whether or not to move to strike and seek a jury instruction to disregard evidence, defense counsel necessarily assesses the risk that the jurors will focus on the evidence without the instruction versus the risk they will do so with the instruction. Here, at the close of the prosecutor's case-in-chief, the prosecutor had conceded that Mr. Morales's putative commission of attempted rape, and the evidence that had been admitted to prove that uncharged crime, was irrelevant and the trial court had ruled that the commission of some other uncharged sexual offense was more prejudicial than probative. At that point, then, defense counsel may reasonably have assumed that those topics would be avoided for the remainder of the guilt phase given the prosecutor's duties to limit his argument to relevant matters and to abide by the court's rulings by refraining from comment on evidence and inferences deemed more prejudicial than probative. (See Part H, *ante*.) Under these circumstances, Mr. Morales will assume for the sake of argument that defense counsel may have made a reasonable strategic decision not to move to strike the evidence and admonish the jury at the close of the prosecutor's case-in-chief for fear that it would highlight the evidence and the improper inferences to be drawn therefrom when otherwise those topics would be avoided. Assuming defense counsel did make that tactical choice, it was incumbent upon counsel to resist conduct that would undercut the strategic basis of their

decision. (See *Washington v. Hofbauer*, *supra*, 228 F.3d at p. 704 [when defense counsel makes a "risky" strategic decision to allow the introduction of uncharged crimes or misconduct evidence for limited, permissible purposes, objective standards of reasonable competence demand that he or she be "doubly cautious about the potential misuse of that evidence" by, inter alia, objecting to the prosecutor's improper use of it in argument].)

But as set forth in Part H, *ante*, any strategic basis for counsel's decision at the close of the prosecutor's case-in-chief was shattered by the prosecutor's summation in which he highlighted the erroneously admitted evidence and urged the jurors to infer that Mr. Morales had attempted to rape the victim. At that point, the risk counsel sought to avoid by withholding the motion to strike and admonish the jury was realized. After that point, the only way to mitigate the considerable harm to Mr. Morales from the erroneously admitted evidence and the prosecutor's improper use thereof in argument was an admonition from the court prohibiting the jurors from considering the erroneously admitted evidence, or the condition of the victim's clothing, for the purpose of inferring that Mr. Morales had committed an uncharged attempted rape or other sexual crime against the victim. Yet defense counsel did not move to strike the evidence or admonish the jurors accordingly in the face of the prosecutor's summation. No conceivable, reasonable strategy could justify counsel's omission.

Moreover, separate and apart from the evidentiary errors the prosecutor induced, the prosecutor's argument itself constituted misconduct for all of the reasons set forth in Part H, *ante*. Nevertheless, counsel made no objection to the argument and requested no admonition to the jurors to disregard it.

It is often hypothesized that defense counsel might make a reasonable tactical decision not to object to isolated instances of ordinary misconduct so as to avoid highlighting the objectionable matter or when the remarks are or can

be adequately neutralized through other means – such as brief misstatements of the law that the jurors are generally told to disregard or obvious misstatements of the evidence that can be countered effectively with responsive argument. (See, e.g., *People v. Centeno, supra*, 60 Cal.4th at p. 675; *People v. Frierson* (1991) 53 Cal.3d 730, 749; *Zapata v. Vasquez, supra*, 788 F.3d at p. 1115; *Washington v. Hofbauer, supra*, 228 F.3d at p. 706.) Importantly, however, this Court has recognized that such a hypothetical tactic is not *always* reasonable and must "'never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions.' [*People v. Ledesma* 43 Cal.3d at p. 217]." (*People v. Centeno, supra*, at p. 675; accord, e.g., *Washington v. Hofbauer, supra*, at p. 706; *Zapata v. Vasquez, supra*, at pp. 1115-1116.)

Here, the prosecutor's misconduct was not limited to a single, brief or isolated impropriety. His improper remarks in summation were the coup de grace in an ongoing course of behavior that disregarded the truth, the rules of conduct, and the duties of his office. The unfounded and unfairly prejudicial allegation that Mr. Morales attempted to rape the victim before she was killed was introduced and highlighted to the jurors throughout voir dire, reinforced through the evidence the prosecutor deceived the court into admitting, and validated through the prosecutor's improper closing argument. Reasonably competent counsel are aware that juries hold prosecutors in heightened regard and therefore the prosecutor's "improper suggestions [and] insinuations" were "apt to carry much weight against" Mr. Morales, particularly because they were *seemingly* based on properly admitted and relevant evidence, "when they should properly [have] carr[ied] none." (*Berger v. United States, supra*, 295 U.S. at p. 88; accord, e.g., *People v. Perez, supra*, 58 Cal.2d 229, 247.) Even if counsel's omissions in responding to the prosecutor's previous acts of misconduct concerning the uncharged sex crimes allegations could

hypothetically be justified as "reasonable," once the prosecutor argued Mr. Morales's unfounded, irrelevant, and extraordinarily inflammatory attempted rape of the victim to the jury as proof of his guilt of the charged crimes, all bets were off.

Defense counsel certainly had no way to effectively rebut the prosecutor's argument with their own argument. As to the *legal* irrelevance and impropriety of the inference the prosecutor urged, it concerned a matter of law and hence could only be corrected by a clear and direct admonition from the court. (See, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 488-489 ["arguments of counsel cannot substitute for instructions by the court"]; *Carter v. Kentucky* (1981) 450 U.S. 288, 303-304 [arguments of counsel did not substitute for instructions from the court that the law prohibits considering the defendant's failure to testify].) Similarly, only the court could direct the jurors to disregard the irrelevant sexual assault evidence it had admitted – including but not limited to the evidence the prosecutor highlighted in his own argument – and expressly instructed them to consider. (See 27CT 7658-7659, 7661-7662, 7664, 7688-7689 [instructions defining and directing jurors to consider all evidence other than "any offer of evidence that was rejected, or any evidence that was stricken by the court"]; see also *Boyde v. California* (1990) 494 U.S. 370, 384 [jurors would have followed court's instruction to consider all of the evidence over prosecutor's argument and ambiguous instructions susceptible of a contrary interpretation].) Nor, as explained in Part G, *ante*, could counsel make a reasonable tactical decision to effectively rebut the prosecutor's argument as a matter of *fact* with their own argument. Any such argument would have been improper inasmuch as it would have gone to irrelevant matter and would only have backfired inasmuch as it would have seemingly endorsed in the eyes of the jurors the erroneous impression that Mr. Morales's commission of uncharged sexual crimes was a relevant issue in the

case. (See *Washington v. Hofbauer*, *supra*, 228 F.3d at p. 708 [counsel could not make reasonable tactical decision to withhold objection to prosecutor's improper argument in favor of making a responsive argument in rebuttal that would necessarily entail also arguing improper matter].)

Defense counsel's failure to move to strike the erroneously admitted evidence and admonish the jury to disregard it and the prosecutor's argument for the purpose of inferring that Mr. Morales engaged in uncharged sexual criminal activity was particularly inexcusable given the capital nature of this case. Reasonably competent counsel in a capital case would have understood that the same jurors would receive standard penalty phase instructions "to consider the evidence received during the *entire* trial," including the guilt phase, in determining penalty and therefore would be *directed* to consider the improperly admitted uncharged violent sex crimes evidence in determining Mr. Morales's death-worthiness. (CALJIC No. 8.84.1; see also CALJIC No. 8.85 [standard instruction to consider evidence in both phases in considering and weighing statutory factors]; 28CT 8002, 8029 [instructing jurors with CALJIC Nos. 8.84.1 and 8.85]; Argument IV, *post*.) Reasonably competent counsel would also have understood that the jurors would consider the prosecutor's argued inferences of unadjudicated sexual criminal activity not only at the guilt phase but also at the penalty phase in deciding whether Mr. Morales would live or die. (CALJIC No. 8.85 [standard instruction to consider "[t]he presence . . . of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceeding, which involved the use or attempted use of force or violence . . . ."]; 28CT 8028-8029.) A meritorious motion to strike the erroneously admitted evidence and an objection to the prosecutor's improper argument would have precluded the jurors from considering them at penalty. As set forth in detail in Argument IV, *post*, in order to present the evidence at penalty and have the jury consider whether Mr.

Morales committed any unadjudicated violent sexual crimes in determining whether he should live or die, the prosecutor would have had to persuade the court that he could present sufficient evidence to prove those crimes beyond a reasonable doubt under section 190.3, factor (b), and would have had to satisfy that burden at trial before a juror could consider them. (See, e.g., *People v. Yeoman* (2003) 31 Cal.4th 93, 132.) Instead, as discussed in Argument IV, *post*, because the uncharged sexual assault evidence was admitted at the guilt phase and defense counsel did not move to strike it or object to the prosecutor's use thereof in summation, the prosecutor proceeded at penalty to characterize all of the guilt phase evidence as section 190.3, factor (a), evidence concerning the "circumstances" of the crimes adjudicated at the guilt phase. And the prosecutor relied on the erroneously admitted evidence to argue Mr. Morales's commission of violent uncharged sexual crimes as significant aggravating factors demanding his death, without ever having to prove them beyond a reasonable doubt. (14RT 3145, 3185-3186.) For these reasons, as well, defense counsel's failure to move to strike the erroneously admitted guilt phase evidence, to object to the prosecutor's use thereof in summation, and to move to admonish the jurors accordingly fell below objective standards of reasonably competent assistance in a capital murder trial.

In sum, based on the objections and motions defense counsel did make, their trial strategy was clearly to prevent the jury from hearing evidence or argument suggesting, or otherwise speculating, that Mr. Morales committed any uncharged violent sex offenses against the victim – a strategy demanded by objective standards of reasonable competence in a capital case given the potentially devastating effects of such crimes at both the guilt and penalty phases. But their strategy failed due in no small part to their own inexcusable negligence at virtually every stage of the guilt phase proceedings, from voir dire through closing arguments. For any and all of the foregoing reasons,

defense counsel's performance fell well below objective standards of reasonable competence in a capital murder trial.

As Mr. Morales has demonstrated, from the inception of this case to the end, virtually every actor integral to the system and charged with the solemn obligation to ensure that all criminal defendants receive a fair trial and capital defendants are afforded heightened protections failed to effectively serve his or her function. "In a death penalty case, we expect the trial court and the attorneys to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure." (*People v. Hernandez, supra*, 30 Cal.4th at p. 878.) This trial fell well short of that mark.

J. The Prosecutor, Trial Court, And Defense Counsel's Errors Violated Mr. Morales's Rights to a Fair Trial, the Effective Assistance of Counsel, and Highly Reliable Death Eligibility and Gun Enhancement Verdicts In Violation of the Sixth, Eighth and Fourteenth Amendments and Resulted in a Miscarriage of Justice Under the California Constitution, Requiring that the Special Circumstance and Gun Enhancement Verdicts be Set Aside and the Death Judgment Reversed

1. The "Reasonable Probability" Standard is the Test for Prejudice to Demonstrate Ineffective Assistance of Counsel in Violation of the Sixth Amendment, Fundamental Unfairness Resulting From Prosecutorial Conduct and Trial Court Rulings in Violation of the Fourteenth Amendment, as Well as a Miscarriage Of Justice in Violation of the California Constitution

A prosecutor's misconduct violates the Fourteenth Amendment if it results in a fundamentally unfair trial. (*Kyles, supra*, 514 U.S. at p. 434 [prosecutor's suppression of evidence]; *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [prosecutor's argument]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [argument].) Similarly, with respect to defense counsel errors (or deficient performance under *Strickland*'s first prong) "the ultimate focus of inquiry" under *Strickland*'s test for ineffective assistance of counsel is "on the

fundamental fairness of the proceeding whose result is being challenged." (*Strickland, supra*, 466 U.S. at p. 696.) Like errors on the part of the prosecutor and defense counsel which do not alone violate the constitution (separate and apart from their effect on the proceedings), a trial court's evidentiary or instructional errors which do not alone violate a provision of the Bill of Rights can also result in a fundamentally unfair trial based on the totality of the circumstances under which the case was actually tried. (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-72; accord, *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 290, 302-303 & fn. 3; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 484-490.) The combined effect of errors (or adverse events) on the part of any or all of these trial actors can similarly result in a fundamentally unfair trial. (*Taylor v. Kentucky*, *supra*, at pp. 484-490; *Chambers v. Mississippi*, *supra*, at pp. 290, 302-303 & fn. 3; *People v. Hill* (1993) 17 Cal.4th 800, 844-847; see also *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1220-1221 [cumulative effect of defense counsel errors and prosecutor's misconduct].) Indeed, as noted in Part F, *ante*, even acts or omissions on the part of these actors that are not necessarily "erroneous" at the time they are made can have an *effect* on the trial, viewed in hindsight under the totality of the circumstances, that undermines confidence that the jury's verdict was based solely on the state's lawful, relevant evidence proved beyond a reasonable doubt, not impermissible extraneous factors, a result that would deprive the defendant of a fair trial. (See, e.g., *Taylor v. Kentucky*, *supra*, at pp. 484-490; *Kentucky v. Whorton*, *supra*, 441 U.S. at pp. 788-790; *Chambers v. Mississippi*, *supra*, at pp. 290, 302-303 & fn. 3; *People v. Soper*, *supra*, 45 Cal.4th at p. 783, and authorities cited therein.)

The Supreme Court has made clear in this regard that a "fair trial [is] understood as a trial resulting in a verdict worthy of confidence" (*Kyles*, *supra*, 514 U.S. at p. 434), or one "whose result is reliable" (*Strickland*, *supra*, 466

U.S. at pp. 687-689). In other words, a fair trial violation results under both the Fourteenth and Sixth Amendments when defense counsel's erroneous or unreasonable performance and/or the prosecutor's misconduct and/or the trial court's rulings undermine confidence in the constitutional reliability of the verdict.

"A reasonable probability" that the result would have been different absent the error "is a probability sufficient to undermine confidence in the outcome" and establish a fair trial violation under both the Sixth and the Fourteenth Amendments. (*Strickland, supra*, 466 U.S. at p. 694; accord, *Kyles, supra*, 514 U.S. at p. 434.) The same test and analysis apply to establish a fair trial violation resulting from trial courts' evidentiary or instructional rulings. (See generally *Estelle v. McGuire, supra*, 502 U.S. at pp. 71-72; see also *Jones v. Gibson* (10th Cir. 2000) 206 F.3d 946, 959 ["reasonable probability" test applied to determine whether trial court ruling resulted in fundamentally unfair trial under *Estelle*]; *Sims v. Stinson* (S.D.N.Y. 2000) 101 F.Supp.2d 187, 194-199 [collecting and analyzing cases for same proposition].)[53]

Article VI, section 13 of the California Constitution is intended to reflect the same "constitutional requirements of a fair trial and due process" by

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[53] The federal circuit courts are in accord that the "reasonable probability test to elaborate the underlying principle" of "fundamental fairness" under *Strickland* and *Kyles* is the uniform standard "applicab[le] to other areas in which fundamental fairness is the guide." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399-1402 & fn. 28 (en banc), vacated on other grounds, 478 U.S. 1016 (1986), reinstated (11th Cir. 1987) 809 F.2d 700; *Nichols v. Scott* (5th Cir. 1995) 69 F.3d 1255, 1278 [applies to claims that prosecutor's misconduct resulted in fundamental unfairness under *Darden*]; *Hein v. Sullivan* (9th Cir. 2010) 601 F.3d 897, 915 [same]; *Shurn v. Delo* (8th Cir. 1999) 177 F.3d 662, 667 [prosecutor's closing argument resulted in fundamentally unfair trial under "reasonable probability" test]; *Osborne v. Wainwright* (11th Cir. 1983) 720 F.2d 1237, 1238-1239 [applies to trial court rulings under *Estelle*]; *Collins v. Scully* (2nd Cir. 1985) 755 F.2d 16, 18-19 [same].)

requiring reversal of criminal convictions from errors resulting in a "miscarriage of justice." (*People v. Watson* (1956) 46 Cal.2d 818, 836 [construing former Art. VI, § 4 ½ of the California Constitution].) Accordingly, the same "reasonable probability" standard that establishes fundamental unfairness also establishes a violation of the California Constitution. (*Id*. at pp. 835-836; see also *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, and authorities cited therein [*Watson* and fair trial violation tests as articulated in *Strickland* are essentially identical].)

Under the "reasonable probability" standard, a "different result" means just that and does not require proof that the jurors unanimously would have acquitted the defendant or convicted him of a lesser offense absent the error or the cumulative effect of errors. If there is a reasonable probability that even one juror would have had reasonable doubt over an element essential to the verdict absent the error or errors, that is a probability of a "different result" sufficient to undermine confidence in the outcome and demand reversal. (See, e.g., *Buck v. Davis* (2017) ___ U.S. ___, 137 S.Ct. 759, 776 [under *Strickland*]; *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [same]; *Cone v. Bell* (2009) 556 U.S. 449, 452, 475 [under *Kyles*]; *People v. Walker* (2015) 237 Cal.App.4th 111, 118 [under *Watson*]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, and authorities cited therein.)

Both this Court and the United States Supreme Court have "'"made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility."' [Citations.]" (*Richardson v. Superior* Court (2008) 43 Cal.4th 1040, 1050; accord, *Strickland, supra*, 466 U.S. at p. 693.) The critical question for the reviewing court is "whether we can be confident that the jury's verdict would have been the same" absent the error or errors. (*Kyles, supra*, 514 U.S. at p. 453; accord, *Strickland, supra*, 466 U.S. at pp. 687-689, 694-695; *Williams v. Taylor* (2000)

529 U.S. 362, 398-399.) If there is a reasonable chance that it would not, the verdict is insufficiently reliable to inspire the confidence demanded by the Sixth and Fourteenth Amendments or, in capital cases, to inspire the *heightened* degree of confidence demanded by the Eighth Amendment.

Finally, harmless error analysis focuses on "the basis on which 'the jury *actually* rested its verdict,'" not on the bases or theories on which a hypothetical juror could have based his or her verdict. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [under *Chapman* test]; accord, *People v. Perez* (2005) 35 Cal.4th 1219, 1233 [under "reasonable probability" test]; *Strickland*, *supra*, 466 U.S. at pp. 694-696; *Kyles*, *supra*, 514 U.S. at p. 453; *In re Martin* (1987) 44 Cal.3d 1, 51 [focus is effect on *this* jury]; *People v. Figueroa* (1986) 41 Cal.3d 714, 722.) Under the "reasonable probability" test, when a review of the entire record – "including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict" – demonstrates a reasonable probability "that the jury in fact found the defendant guilty based solely on" one theory of liability, the reviewing court's prejudice analysis focuses solely on that theory. (*People v. Perez*, *supra*, at pp. 1233-1234.)

2. The Critical Disputed Guilt Phase Issue was Whether Mr. Morales was the Actual Killer for Purposes of Automatic Death Eligibility and It Is Reasonably Probable that the Jurors Unanimously Based Their Death-Eligibility Verdicts Solely On Their Finding That He Was

Defense counsel did not seriously dispute that Mr. Morales was guilty of the charged burglary and robbery and hence strictly liable for first degree murder under the felony-murder rule, regardless of his role in the victim's actual killing. (See 12RT 2722-2723; see § 189; *People v. Thompson* (2010) 49 Cal.4th 79, 117-118 [all participants in enumerated felonies are strictly

liable for any killing occurring in their commission as first degree murder under felony- murder rule]; *People v. Pulido* (1997) 15 Cal.4th 713, 719-725.) Accordingly, the jury convicted Mr. Morales of first degree murder under robbery and burglary felony-murder theories, as evidenced by its true findings on the corresponding special circumstance allegations.

As the trial judge recognized, the critical disputed guilt phase issue was Mr. Morales's identity as the actual killer for purposes of the felony-murder special circumstance allegations. (12RT 2564.) Under the circumstances of this case, the actual killer guilty of first degree felony murder was automatically liable for the corresponding felony-murder special circumstance allegations, without the need to decide any additional elements. (§ 190.2, subd. (a)(17), (d).)[54] The jurors were so instructed. (27CT 7698-7700.)

Although the trial court recognized that the prosecution was proceeding solely on the theory that Mr. Morales was the actual killer, it also recognized that the jurors could have reasonable doubt over that element. (12RT 2574-2575; see also 12RT 2657-2674 [prosecutor's penalty phase summation].) Therefore, the court sua sponte instructed the jurors that if they found "that the

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[54] The felony- murder rule for purposes of both first degree murder and a special circumstance allegation requires that the killing occur "in the commission" of the enumerated underlying felony. For the actual killer, the only distinction between the special circumstance and first-degree murder liability is that the former also requires the victim be killed while the defendant is "engaged" in the underlying felony, meaning that the felony must be committed for a felonious purpose "independent" of, and not merely "incidental to," to the murder. (*People v. Green* (1980) 27 Cal.3d 1, 61-62.) Under the facts of this case, in which the evidence established without dispute that the victim was killed while the perpetrators were engaged in the underlying burglary and robbery, it was a distinction without a difference. The actual killer guilty of felony murder automatically was liable for the corresponding felony-murder special circumstance, without the jury having to make any additional findings.

defendant was not the actual killer of a human being or if [they were] unable to decide whether the defendant was the actual killer or an aider and abettor," they were to consider and resolve additional elements required for aiding and abetting liability. (27CT 7698-7699.)

The jurors' true findings on the enhancement allegation that Mr. Morales personally used and discharged a firearm, causing the victim's death, reveal that they did unanimously determine that Mr. Morales – as opposed to any of the six or more other perpetrators – was the actual killer. (27CT 7757 [verdict]; see also 27CT 7716-7717 [instructions].) The record thereby demonstrates that the jurors unanimously based their special circumstance verdicts on the same finding and therefore determined that Mr. Morales was automatically death eligible. (See *People v. Young* (2005) 34 Cal.4th 1149, 1205.) Given that the jurors were explicitly instructed that they were *only* to consider the elements required for aiding and abetting liability if they first found that Mr. Morales was *not* the actual killer or were unable to decide that question, the record also establishes that they based their verdicts *solely* on their unanimous finding that Mr. Morales was the actual killer without reaching or considering the question of aiding and abetting liability. (27CT 7698-7699; see also 27CT 7719 [instruction to "disregard any instruction which applies to a state of facts which you determine does not exist"].)

Thus, the critical question for this Court to resolve is "whether [it] can be confident" that the death-eligibility verdicts *actually* rendered – i.e., that Mr. Morales was the actual killer and thus automatically death eligible – "would have been the same" absent the errors on the part of the prosecutor, the trial court, defense counsel, and/or any combination thereof. (*Kyles, supra*, 514 U.S. at p. 453; accord, *Strickland, supra,* 466 U.S. at pp. 687-689, 694-695.) As set forth below, because there is "'"a reasonable chance, more than an abstract possibility"'" (*Richardson v. Superior Court, supra,* 43 Cal.4th at p.

1050) that at least one of the jurors would have had reasonable doubt that it was Mr. Morales and not one of his six or more co-felons who actually killed the victim, the answer is no.

3. Absent the Erroneous, Inflammatory Allegation that Mr. Morales Attempted To Rape the Victim Before She Was Killed, There Is A "Reasonable Chance" that at Least One Juror Would Have Had Reasonable Doubt That he Was the Actual Killer, Thus Undermining Confidence in the Death Eligibility and Gun Enhancement Verdicts

About six or more men participated in the underlying burglary and robbery of the victim and her neighbors. (See, e.g., 29CT 8323; 8RT 1437-1438, 1441, 1525, 1546-1548; 9RT 1737, 1788-1789; see also 12RT 2661-2662.) The prosecutor effectively conceded that the men did not have any plan to hurt or kill anyone. He not only declined to submit a theory of premeditated and deliberate first degree murder (12RT 2530); the only alleged "target" offense for the charged burglary was theft, not any assaultive crimes or crimes against the person (§ 459 [element of burglary is intent to commit "any felony"]; 27CT 7708 [burglary instruction identifying theft as only intended, or target, offense]).

The prosecution's evidence concerning motive for the crimes consisted of Mr. Morales's own recorded statements to his mother that "the guy that took us" evidently told the others that the house was a front for "cooking" and selling drugs, where they could steal drug proceeds. (29CT 8319-8320.) Mr. Morales only realized later that they had burglarized the wrong house; the man they were targeting had two houses and the house they had burglarized was where his mistress – the victim – lived, not where the man and his wife sold drugs. (29CT 8319-8321.)

Also according to Mr. Morales's admissions, he did not intend to hurt the victims even after discovering the mistake. As Mr. Morales told his

mother, "nothing would have happened" to the victim if she had "kept quiet and she could have called the police after." (29CT 8325.) She was only shot because she identified him by name during the burglary. (29CT 8325; see also 29CT 8310.) That motive was not personal to Mr. Morales but applied equally to all of the perpetrators; any one would reasonably have feared that once the victim identified Mr. Morales to police, it was only a matter of time or resolve before police would discover the identity of his co-felons.

As previously stated, after the prosecution presented its case, the trial court recognized that reasonable jurors could have reasonable doubt over whether Mr. Morales or one of his many other co-felons was the actual killer. (12RT 2654, 2574-2575.) The trial judge also recognized that implications of uncharged sexual crimes carried an intolerable risk of unfairly influencing the jurors in deciding that critical disputed issue against Mr. Morales. (12RT 2563-2564.) Given that these determinations were made at the close of evidence, after the trial judge heard all of the evidence, personally observed the proceedings and the testifying witnesses, and thus had a unique and superior feel for the case, they are entitled to considerable weight.

a. The inflammatory nature of sexual assault allegations and their importance to the prosecutor in this case

As mentioned in Part D-1, *ante*, allegations of rape or attempted rape have long been recognized as exceptionally inflammatory in any case. (See, e.g., *People v. Frank* (1985) 38 Cal.3d 711, 732; *People v. Alcala*, *supra*, 36 Cal.3d at pp. 632-636, superseded on another ground by statute as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Guerrero, supra*, 16 Cal.3d at p. 730; *People v. Fosselman, supra*, 33 Cal.3d at pp. 580-581.) They carry particularly harmful weight when introduced as part of a capital murder case. Death-qualifying murder convictions and death sentences are much more

likely to result in the face of allegations that the defendant sexually assaulted the victim than they are in other cases. (Shatz, S., *The Meaning of Meaningful Appellate Review in Capital Cases: Lessons from California* (Winter 2016) 56 Santa Clara L. Rev. 79, 113-114 [most California death verdicts – 35.1% – involve "rape murders;" while next category in ranking is "multiple murder," comprising only 16.6%]; Shatz, S., *Chivalry is not Dead: Murder, Gender, and the Death Penalty* (Winter 2012) 27 Berkeley J Gender L. & Just. 64, 99 [single victim murders involving rape are far more likely to result in death penalty than other single victim murders, such as gang murders or domestic violence murders].)

Similarly, murder charges that incorporate or are accompanied by allegations of rape or attempted rape are more likely to result in guilty verdicts (and death sentences) than a charge of rape alone is likely to result in a guilty verdict. (P. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* (2000) 26 Ohio N. U. L. Rev. 689, 692, 702-717.) For example, the results of one study comparing rape trials to murder trials in which rape is a component demonstrated that in the latter category of cases, judges and juries tend to ignore reliability problems with the evidence and blur the lines between rape and some other sexual assault than they do in the former category. (*Ibid*.) These difference tend to demonstrate that the capital murder convictions and resulting death sentences in the latter cases are more a product of society's "visceral outrage" over the suggestion of rape-murder than they are of a fair weighing of the evidence and a "reasoned moral response" to the life and death decision. (*Ibid*.)

The jurors in this case presumably understood that "[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United State v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) For the reasons set forth in Parts G & H, *ante*, it is certainly reasonably probable that at least

one juror, if not all of them, believed that Mr. Morales attempted to rape the victim in the kitchen and was probably responsible for a sexual battery committed in the bedroom, as well. Any doubt they should have had over his culpability for those crimes was irrelevant since the jurors were not required to determine that question by any standard of proof at all. To paraphrase this Court, the "'net effect'" of the errors on "the jury was to paint a sign on the (defendant) which said [not only] "rapist,"'" but a willing rapist *of the victim of the charged murder*, which was extraordinarily prejudicial. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 730.)

"Short of homicide," society considers rape, or attempted rape, as the most violent and abhorrent crime one person can inflict upon another. (*Coker v. Georgia* (1977) 433 U.S. 584, 597.) The jurors' resolution of the critical question of whether they were convinced beyond a reasonable doubt that Mr. Morales, and not one of the six or more men who committed the burglary and robbery with him, actually killed the victim would naturally and substantially be influenced by their belief that he was willing and capable of trying to rape her, which was a far more violent, "horrendous," and "egregious" (2RT 706-707) crime than the burglary and robbery the other men committed. (See, e.g., *People v. Guerrero*, *supra*, 16 Cal.3d at p. 725; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1385; *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 228-230.)

Compounding the harmful effects of this inevitable inference of propensity, the uncharged sexual crimes undoubtedly provoked the jurors' visceral outrage over the trauma they inflicted on the victim before she died, as well as on her children, and shifted their focus from "logically evaluat[ing]" the critical factual and legal questions over Mr. Morales's death eligibility to an instinctive, emotional desire to punish. (*People v. Scott*, *supra*, 52 Cal.4th at p. 491; accord, e.g., *People v. Vance*, *supra*, 188 Cal.App.4th at p. 1206; see also

P. Crocker, *Is the Death Penalty Good for Women?* (2001) 4 *Buffalo Crim. L. Rev.* 917, 956 ["Studies document that many jurors make up their minds on the proper punishment for the defendant while hearing evidence about the defendant's guilt. [Fn. om.] The crime of rape-murder is especially susceptible to this premature decisionmaking . . . ."].)

As evidenced by the prosecutor's single-minded determination throughout the guilt phase to present the evidence and argument to the jury at the cost of repeatedly violating his ethical duties, it was obviously important to him to influence the jurors' guilt phase decisions with Mr. Morales's putative uncharged sexual crimes. This Court has "seen how important" the allegations that Mr. Morales committed uncharged, violent sexual crimes against the victim before she was killed "were to the People's case and 'there is no reason why [the Court] should treat this evidence as any less crucial than the prosecutor – and so presumably the jury – treated it.' [Citation]" (*People v. Powell* (1967) 67 Cal.2d 32, 56-57.)

b. By some of the eyewitness accounts, Mr. Morales could not be the actual shooter; by others, there was room for more than reasonable doubt that he – as opposed to any of the other burglars – was the actual shooter

The victim's oldest child, Brianda, as well as the neighbors, Carlos Gutierrez and Mayra Lopez, identified Mr. Morales as one of the perpetrators of the burglaries of both the victim's and the neighbors' houses. (8RT 1469, 1619-1620, 1622, 1626; 9RT 1791-1793, 1795-1796, 1860, 1863; 11 2432, 2451-2452.) However, the neighbors were not present in the victim's house and the children were not present in the kitchen when the victim was shot and killed. The witnesses did not see who shot the victim and could not even testify to the people present in the kitchen when she was killed. From the children's vantage point in the master bedroom, they could not even see anyone enter or

exit the kitchen. (Ex. 81 [diagram of floor plan]; 9RT 1758-1761 [identifying master bedroom as "N/W bedroom" on diagram]; 9RT 1807 [marking master bedroom on diagram with "TV"].)

Mr. Gutierrez and Ms. Lopez identified Mr. Morales as one of the intruders in their home who held them both at gunpoint. (8RT 1451, 1554-1555.) They were continuously held at gunpoint, face down on the floor, until the gunshot was fired next door and the men fled. (8RT 1446, 1551, 1589, 1551; 10RT 1977-1981.) Neither Mr. Gutierrez nor Ms. Lopez reported that Mr. Morales ever stopped holding them at gunpoint or that they saw him leave their house. From their testimony and prior accounts, the jurors reasonably could have determined that Mr. Morales remained in their home throughout the incident, holding them at gunpoint, and only fled after he heard the gunshot next door.

11-year-old Brianda did identify Mr. Morales as one of the burglars who entered her home. She consistently identified him as the single, knife-wielding intruder with the bald or closely-shaved head. (9RT 1836, 1846, 1863, 1866, 1913; 10RT 2023, 2056, 2434, 2454; 3SCT 718; see also 10RT 2009, 2038.) The younger children were never able to identify Mr. Morales, though they also described a single, knife-wielding perpetrator with a light complexion and a bald or very closely-shaved head. (8RT 1643, 1687-1688; 3SCT 719, 721.) Video images taken of Mr. Morales only days before the crimes depicted him with a light complexion and – as the trial judge described it – a "really close-shaved head." (8RT 1657; 10RT 2247, 2273, 2433-2434; 3SCT 691-694 [Exhibits 94 and 95].) The prosecutor relied on Brianda's identification of Mr. Morales as the most reliable of the children's accounts, from which the jurors could certainly find that he was the knife-wielding burglar all of the children described.

Importantly, the children provided accounts by which they either directly or circumstantially reported that the knife-wielding intruder was in the bedroom with them when the single gunshot fired from the kitchen. While Brianda reported that Mr. Morales and another intruder removed their mother from the bedroom, she also insisted that Mr. Morales returned to the bedroom alone to continue searching it. (9RT 1796, 1799-1800, 1863-1864, 1868, 1876-1877; 3SCT 718.) In her forensic interview statement, she reported that the man in the ponytail then left the bedroom, shortly after which she heard her mother's screams. (3SCT 717.) A single intruder was still in the bedroom, noisily searching it, at the time of the shot; although she did not explicitly identify him, that man must have been Mr. Morales because the only other man she saw in the bedroom had already left. (3SCT 718-721.) Although Brianda could no longer recall at trial who had left the bedroom and who remained behind by the time the shot was fired, she never contradicted her earlier account. (9RT 1868-1869.) Similarly, according to Jennifer's prior statements, the knife-wielding perpetrator was still in the master bedroom when she heard the sound of the gunshot from the kitchen. (10RT 1993-1994; 3SCT 719.) While Jennifer could not remember this detail – or many others – by the time of trial, she never contradicted her earlier accounts. (9RT 1722.) By these accounts, and accepting Brianda's identification of Mr. Morales as the knife-wielding burglar, Mr. Morales simply could not have been the actual shooter.

To be sure, according to Joe's prior forensic interview statement and trial testimony, all of the men had left the bedroom by the time he heard the shot. (9RT 1697; 3SCT 721; see also 8RT 1650.) But even by that account, the shooter could have been *any* of the burglars, thus leaving ample room for reasonable doubt that Mr. Morales was the actual killer.

Not surprisingly, the prosecutor told the jurors that his own eyewitnesses' descriptions and accounts were too inconsistent to be reconciled

and therefore the jurors should simply excise them in deciding the identity of the actual killer. (12RT 2625-2626, 2643.) More important, the prosecutor argued, was the evidence of Mr. Morales's three "confessions" (12RT 2644-2645): (1) the testimony of Mr. Morales's girlfriend and co-defendant-turned-prosecution-witness, Xiomara Escobar, provided by way of a plea agreement under which she expected leniency in exchange for her testimony, that Mr. Morales confessed to robbing and killing the victim; (2) Detectives Toms and Wolfe's testimony that, during their interrogation of Angel Ivan as a suspect in the crimes, Angel Ivan told them that Mr. Morales had confessed to robbing and killing the victim; and (3) the surreptitiously recorded "pretext" phone conversation between Mr. Morales's mother and Mr. Morales in which he admitted to participating in the burglary and robbery of the victim and took responsibility for her resulting death. But the evidence concerning those admissions was far from overwhelming, as the jury's own verdicts reveal.

c. The jurors had doubts over Xiomara Escobar's testimony and there were serious credibility problems both with it and with Angel Ivan's pressured police statement that Mr. Morales admitted to killing the victim

The jurors clearly had reasonable doubt over the credibility of Xiomara Escobar's testimony purporting to relay Mr. Morales's "confessions." Although Ms. Escobar claimed that Mr. Morales also confessed to the robbery of "Mago" or Margarita Martinez (as charged in count seven) when he confessed to killing the victim, the jurors *acquitted* Mr. Morales of that crime. (12RT 2556-2557; 28CT 7774.) Indeed, there were ample reasons to doubt the credibility of her testimony as a whole.

As set forth in greater detail in the Statement of Facts, Ms. Escobar was arrested and questioned in Minnesota, where she disavowed any knowledge of Mr. Morales' involvement in the crimes. She continued to do so

after being extradited to California and questioned again here. She finally changed her story only after she was charged and held to answer as a co-defendant following the preliminary hearing; after the prosecution team impressed upon her that she could lose her children forever and receive 15 to 50 years in prison if she did not cooperate in the prosecution against Mr. Morales; and finally after she brokered an agreement under which she pled guilty to an accessory charge that exposed her to a three-year maximum sentence, but under which was promised a recommendation and expected leniency – "probably" only jail time – in exchange for her testimony against Mr. Morales. (11RT 2273-2277, 2292-2299; 3SCT 707-710 [Ex. 111].) By the time she finally implicated Mr. Morales, she was intimately familiar with the details of the crimes and the prosecution's theory of the case, having both been a codefendant with Mr. Morales at the pretrial proceedings and preliminary hearing and having spoken to Mr. Morales's mother about the accusations against him.[55] (11RT 2291, 2296, 2298.) Even then, her testimony concerning Mr. Morales's admission to killing the victim was far from persuasive. She gave inconsistent accounts of the admission he made: at one point, she claimed he only indirectly admitted he had "done it" and at another she agreed with the prosecutor's leading question that he admitted to killing the victim because she had recognized him. (11RT 2264, 2297, 2302.) She also gave inconsistent accounts of the circumstances under which he finally made his alleged admission. (11RT 2263-2264, 2297.)

Furthermore, Ms. Escobar's brother, Ever Flores, was identified as one of the burglars/robbers; in fact, she admitted that her brother regularly brought guns to their home and had given one to Mr. Morales. (8RT 1566-1567, 1569-

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[55] Indeed, as a co-defendant, Ms. Escobar would have received all of the prosecution's discovery concerning the crimes.

1570, 1615-1616; 11RT 2281-2282, 2430-2432.) Hence, her brother was also a suspect in the crimes and a logical suspect in the victim's actual killing. Her testimony, not surprisingly, did not connect her brother in any way to the crimes. Ms. Escobar's motive to protect herself, her children, and her brother by telling the prosecution what it wanted to hear, without regard to the truth, was more than enough to raise doubts over her credibility – doubts that the jurors had and acted upon by acquitting Mr. Morales of the count seven robbery charge. (See, e.g., *Gov't of the Virgin Islands v. Hendricks* (3d Cir. 1973) 476 F.2d 776, 779 [heightened caution and scrutiny should be applied to testimony of witness "who recognizes, or may recognize, the possibility of being rewarded by the Government"]; *United States v. Holmes* (9th Cir. 2000) 229 F.3d 782, 786-787 [suspect informers include those who receive, or expect to receive, benefit for information].)

For his part, Angel Ivan gave his police statement under extreme pressure. He was interrogated for "several hours" until midnight "as a suspect" at two different sheriff's stations. He was continually threatened with arrest either as a perpetrator who had been identified or as a witness who was lying to police when he repeatedly insisted that Mr. Morales had not confessed to him and later said that Mr. Morales had admitted only to the robbery and not to killing the victim. He finally supplied the information the police wanted to hear in order to avoid arrest and be "allowed to go home." (10RT 2097-2098, 2120, 2128, 2133, 2159-2162, 2165-2168, 2169-2172, 2177, 2186-21876?, 2189-2191, 2198-2199, 2206-2209, 2216-2218; 11RT 2225-2235.) He did not provide any details about the shooting itself, such as the weapon used, where the victim was killed, or who was present when she was killed. (See also Statement of Facts, *ante*.)

Thus, there were inherent credibility problems underlying both Ms. Escobar's testimony and Angel Ivan's statements during his own police

interrogation. In apparent recognition of those problems, the prosecutor also told the jurors that they could ignore that evidence and convict Mr. Morales as the actual killer based *solely* on the most "crucial" "confession" he made to his mother during the pretext phone call. (12RT 2658-2663; see 29CT 8308-8331 [Ex. 108].) However, the recorded conversation between Mr. Morales and his mother was hardly the smoking gun the prosecutor characterized it to be.

d. The overarching problems with, and the jurors' expressions of doubt over, the reliability of Mr. Morales's surreptitiously recorded, transcribed statements to his mother during the "pretext" telephone conversation

As defense counsel argued to the jurors below, there were "major problems with the tape" recording and the transcript of the recorded conversation. (12RT 2685.) As a preliminary matter, the conversation itself was in Spanish spoken by Honduran speakers. (Exs. 107 & 108; 10RT 2112-2113.) Therefore, unlike most recorded evidence, the prosecution's transcript thereof, which translated and transcribed the conversation into English, became the only competent evidence of the conversation.[56]

The transcript itself totaled 24 pages and denoted 134 instances in which the conversation was designated as "unintelligible." (29CT 8308-8332 [Ex. 108].) The transcript contained no clear and unequivocal admissions to personally killing or shooting the victim. The actual evidence consisted of

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[56] Mr. Morales's mother was called to testify at trial and confirmed that she made the call at the direction of Detective Wolfe, who recorded it, listened in, and wrote her notes to prompt her questions during the conversation. (11RT 2308-2310, 2319-2321.) However, she claimed not to recall the substance of the conversation. (11RT 2309, 2322-2323.) Detective Wolfe, who recorded the conversation and listened in, did not testify to the substance of the conversation he overheard but rather referred the jurors to the recording itself. (11RT 2367-2374.)

transcribed words taken from significantly unintelligible passages. The allegedly incriminating statements Mr. Morales made were in the form of answers to questions posed by his mother that were often ambiguous or compound or significantly unintelligible. Mr. Morales's transcribed words took their meaning from the context in which they were given, but that context was incomplete and unclear. Jurors applying their common sense no doubt appreciated that the omission of a sentence or indeed even a single word could have dramatically affected the meaning of the isolated words that were transcribed.

In any event, as defense counsel argued below, even accepting the prosecution's interpretations of Mr. Morales's words as admissions to all of the charged crimes and to personally killing the victim, there were significant reasons to doubt the *truth* of those statements. A reasonable inference from the conversation as a whole was that Mr. Morales suspected – correctly – that someone had put his mother up to the call and was listening in to the conversation, but believed – incorrectly – that the eavesdropping third party (or parties) was a confederate. This mistaken belief gave him motive to falsely implicate himself and only himself to his mother as a message to ensure his confederates that he would not implicate them and thereby protect himself and his family from retaliation. Indeed, although the prosecution's evidence demonstrated otherwise, Mr. Morales falsely insisted to his mother that he did not know his co-felons and was careful never to attribute a particular act to a particular person. In short, as set forth in detail below and as the trial judge herself recognized, there was room for reasonable doubt that Mr. Morales ever actually admitted to personally killing the victim or, if he did, doubt that his statements were truthful.

Indeed, the jurors did have reasonable doubt over the reliability of Mr. Morales's alleged "admissions" in the transcript. In one part of the

conversation, as the prosecutor emphasized in argument, Mr. Morales referred to being involved in a very similar home invasion robbery in Ontario of a woman named "Mago." (12RT 2677-2678; 29CT 8321-8322.) That robbery was charged in count 7. (3CT 665-677.) Like the other excerpted parts of the conversation, the transcribed discussion concerning this incident was interspersed with "unintelligible" matter. (29CT 8321-8322.) The intelligible segments on their own, and taken out of the context of the unintelligible segments, appeared to incriminate Mr. Morales in that robbery, as the prosecutor argued. (12RT 2677-2678.) However, the jurors *acquitted* Mr. Morales of that charge. (27CT 7774, 7785.)

Importantly, Mr. Morales offered no special defense to the robbery charge involving "Mago" differentiating it from the charged crimes against the murder victim. And the prosecution's evidence against him with respect to that charge and the charges involving the victim was quite similar.

The robbery charged in count seven was very similar to the crimes of conviction – a home invasion robbery committed by a group of armed Honduran men against a group of occupants in a house, looking for "drugs" and money. (11RT 2388-2391; 12RT 2495-2502, 2516; 29CT 8321.) Like the crimes for which he was convicted, the prosecution presented eyewitness testimony identifying Mr. Morales as one of the robbers. (12RT 2502-2508. 2516.) Just as the prosecutor argued with respect to the percipient witness testimony on the question of Mr. Morales's identity as the actual killer, the prosecutor told the jurors that they did not need to believe the eyewitness identification in order to convict Mr. Morales of the count seven robbery charge because of the overwhelming evidence that he "confessed" to that crime both: (1) in his recorded conversation with his mother; and (2) to his girlfriend, Xiomara Escobar. (12RT 2678; see also 12RT 2556-2557 [Escobar's testimony concerning confession to robbery charged in count seven].) The

jury's acquittal on that count thus reveals their doubts not only over Ms. Escobar's testimony but also over the reliability of Mr. Morales's partially transcribed statements, made in the context of a significantly unintelligible recording, as the proof the prosecutor attributed to them. (See, e.g., *People v. Robinson* (1954) 42 Cal.2d 741, 745 [jury's failure to convict on all counts shows close case].)

i. Mr. Morales's ambiguous transcribed statements, interspersed throughout a significantly unintelligible conversation that deprived them of a complete and highly reliable context, were as susceptible of interpretations consistent with his "innocence" as the actual killer as they were with his guilt

The ambiguity of the transcribed statements is illustrated from the outset. The first two pages of the transcript document conversation concerning matters unrelated to the crime, portions of which were designated unintelligible. (29CT 8308-8310.)[57] The first intelligible reference to the crimes themselves appears at the middle of the third page as follows:

> [Mrs. Sanchez:] Uh uh. And why didn't you tell me about what happened to you. Why didn't you talk to me about it.
>
> [Mr. Morales:] It's that I hadn't talked to anybody.
>
> [Mrs. Sanchez:] And how did that happen.
>
> [Mr. Morales:] Huh.
>
> [Mrs. Sanchez:] How did that happen.
>
> [Mr. Morales:] It was a woman that recognized me, I don't know how.

(29CT 8310.)

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[57] The transcript refers to Mr. Morales's mother, Alejandra Sanchez, as "Olivia" only and to Mr. Morales as "Mario." For clarity's sake, Mr. Morales identifies the speakers here by their last names, Mrs. Sanchez and Mr. Morales.

No intelligible matter preceded this exchange to give context to Mrs. Morales's questions and explain to what she was referring. The questions' evident reference to the crimes against the victim is based solely on Mr. Morales's statement about being recognized. It seems obvious that there was *some* relevant discussion about the crimes that was not intelligible, which preceded Mrs. Morales's vague question, since Mr. Morales's answer indicated that he clearly understood to what she was referring by "that" and "what happened to you." While the exchange is susceptible of an inference that they were referring to the victim's death and why she died, it does not attribute the lethal act to any particular perpetrator.

Indeed, throughout the conversation, Mrs. Sanchez inquired into what Mr. Morales' *group* did as a whole, referring to "you guys." (29CT 8311:15, 8318:1, 8322: 22, 8323:20, 8324:13, 8325:3-5) And she frequently used the terms "you guys" and "you" interchangeably.[58] One particularly illustrative

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[58] For example, at one point, the following exchange occurred:

> [Mrs. Sanchez:] what did **they** take from that house?
>
> [Mr. Morales:] What.
>
> [Mrs. Sanchez:] what did **you** take from that house? . . . .

(29CT 8319, bold font added.)

Yet another example of the interchangeable use of the first and second person plural and singular follows:

> [Mr. Morales] One, two, there were about six of us.
> [Mrs. Sanchez]: About six, but who was in the house that let **you** in.
> [Mr. Morales]: Huh
> [Mrs. Sanchez]: Who was in the house that let **you guys** enter?

example of the ambiguity in the questions and answers is the following exchange, which the prosecution attributed to a discussion about the single murder weapon used by a *single* shooter, in which Mrs. Sanchez asked her son, "[a]nd what type of firearm **did you guys** use for this[?]" to which Mr. Morales responded, a "big one. . . . an AK-47." (29CT 8322, bold font added.) Therefore, even when asking Mr. Morales what "you" had done, it was unclear if she was referring to the second person plural ("you" as a group of "guys") or the second person singular ("you," as in Mr. Morales individually), or whether Mr. Morales's own responses were in the first person plural or singular.

With this background in mind, immediately after Mr. Morales's above-transcribed statement, "it was a woman that recognized me," the following exchange was transcribed:

> [Mrs. Sanchez:] The woman recognized you?
>
> [Mr. Morales:] Ah huh.
>
> [Mrs. Sanchez:] You should have done anything else other than that. Huh.
>
> [Mr. Morales:] Yes.
>
> [Mrs. Sanchez:] (unintelligible) you should have thought about your child that was going to be born. And what are you thinking now. What.
>
> [Mr. Morales:] Well I don't know
>
> [Mrs., Sanchez:] What. What.
>
> [Mr. Morales:] I don't know.
>
> [Mrs. Sanchez]: Was, **was it you there and was it you that did that or what**?
>
> [Mr. Morales:] Huh?
>
> [Mrs. Sanchez]: **you did that *or* where you there at the time or what.** What.

(29CT 8323, bold font added.)

[Mr. Morales] why?

[Mrs. Sanchez]: Just because I'm asking you because I'm your mother and I want to know, tell me in confidence because who is going to know about this telephone number just you. I'm here alone.

[Mr. Morales]: ***Well yes it was me.***

[Mrs. Sanchez]: Listen, if you would have done anything else . . .

[Mr. Morales]: **Even it hadn't been, still the same.**

[Mrs. Sanchez]: What?

[Mr. Morales]: **Even if it hadn't been, still the same.**

[Mrs. Sanchez]: **But the, the, the crime is lesser.**

[Mr. Morales]: huh.

[Mrs. Sanchez]: **The crime would have been less, less, less serious.**

[Mr. Morales:] (Unintelligible)

[Mrs. Sanchez:] What.

[Mr. Morales:] Yes but . . .

[Mrs. Sanchez]: **What things did you guys do and who was with you**?

[Mr. Morales]: A lot.

[Mrs. Sanchez]: What do you mean a lot?

[Mr. Morales]: Yes.

[Mrs. Sanchez]: Nah.

(29CT 8310-8311, bold and italicized font and ellipses in original; plain bold font added.)

The statement attributed to Mr. Morales in the bold and italicized font of the original transcript, "yes it was me" was the centerpiece of the prosecution's case that Mr. Morales was the actual killer. (See RT 2660-2661.) While that may have been one reasonable interpretation of the exchange, it was by no means the only one. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933

[where circumstantial or ambiguous evidence is susceptible of more than one reasonable interpretation – one consistent with innocence and one with guilt – reasonable doubt standard demands that jurors adopt the former]; accord, *People v. Wiley* (1976) 18 Cal.3d 162, 174-175; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549; see also *People v. Harvey* (1984) 163 Cal.App.3d 90, 105, fn. 7 ["Substantial evidence means more than simply one of several plausible explanations for an ambiguous event"].)

Once again, the statement, "yes it was me" was both preceded and followed by unintelligible remarks attributed to both Mr. Morales and his mother. (29CT 8310:6, 20, 8311:12.) And Mrs. Morales's questions about "that" were uninformed by any contextual exposition to explain precisely to what "that" referred – the burglary and robbery that resulted in the murder or the actual shooting itself. Furthermore, Mrs. Sanchez's questions were not only ambiguous; the critical questions were compound ones. It was unclear from her first question, "was, **was it you *there*** and **was it you that *did that*** or what?" whether she was asking him if he was simply present or if he had done something – "that." Mr. Morales sought clarification, immediately replying, "Huh[?]" But Mrs. Sanchez responded with a compound question: "**you did that *or* were you there at that time** or what. What." (29CT 8310, emphasis added.) Mr. Morales's answer to that compound question, "yes, it was me," was thus susceptible of very different interpretations.

One interpretation, as the prosecutor argued, may have been that Mr. Morales was admitting that "yes, it was me" who "did that" – "that" referring to the actual shooting. But another equally reasonable interpretation – given the compound nature of his mother's question – was simply that he was admitting, "Yes it was me" who "*was there at the time*," meaning that he was simply present at the scene (having participated in the burglary and robbery) when the victim was shot and killed.

Mr. Morales also could have meant that he was legally responsible or *liable* for the victim's death given that she was killed during the burglary and robbery in which he participated and because she recognized him by name. Other remarks in the conversation are consistent with this interpretation. For instance, the exchange in which Mr. Morales's mother refers to "the crime" being "lesser" or "less serious" and Mr. Morales saying it would "still be the same" could be interpreted as consistent with the legally accurate principle that under the felony-murder rule no matter what he did or did not do, it was "still the same" murder liability for the actual shooter and for the other men who participated in the burglary and robbery. Indeed, as he later put it, "It could have been me like it could be any other that was with me." (29CT 8322.) It did not matter because they were all equally guilty. Particularly given the partly unintelligible questions and answers during the conversation, the above exchange could reasonably have been interpreted as his mother saying that "if [he] would have done anything else" not to be *"there"* when the victim was killed – for instance, if he had fled the scene after the victim recognized him and before she was killed – his crime would have been "lesser" or "less, less, less serious" and Mr. Morales replying that "even if [he] hadn't been" "*there* at the time," it was "still the same," meaning – correctly – he would still be equally liable for her death under the felony-murder rule. (29CT 8311.)

The interpretation that Mr. Morales was *not* admitting that he "did that," but rather was admitting to simply having been "there at the time," is also consistent with his mother's follow-up question "what things did *you guys do.*" (29CT 8311, italics added.) If Mr. Morales had just admitted to killing the victim, her question about what he and his confederates had done made little sense. It made more sense that Mrs. Sanchez had simply gotten her son to admit that he was "there" when the felonies and killing were committed and therefore her next question was directed to ascertaining exactly who did what.

At bottom, given the incomplete and partly unintelligible context in which Mr. Morales gave his answers and the ambiguous and compound nature of his mother's questions, the foregoing exchange – the centerpiece of the prosecution's theory that Mr. Morales was the actual killer – was susceptible of any number of interpretations that did not amount to an admission to personally killing the victim.

Following the above-transcribed exchange, Mr. Morales and his mother had an extended conversation, transcribed over the next five pages of the 24-page transcript that seemingly touched on a variety of topics, including some apparent but oblique references to the crimes that were indecipherable given that 36 segments were denoted as "unintelligible." (29CT 8312-8317.) Although it is clear that the topic of the crimes was discussed during part of the conversation, none of the intelligible remarks contained any direct or indirect incriminating statements. (*Ibid*.) The next intelligible exchange concerning the crimes was Mrs. Sanchez's inquiry into Mr. Morales's feelings of moral culpability for what had happened, followed by another substantially unintelligible exchange on the subject:

> [Mrs. Sanchez:] No, I just wanted to ask you something, I know this is very personal to you but I, I, don't feel comfortable about how you are feeling for having done **that**.
>
> [Mr. Morales:] Imagine that, I don't know.
>
> [Mrs. Sanchez:] (unintelligible) because to kill . . . .
>
> [Mr. Morales:] (unintelligible) **thank God**.
>
> [Mrs. Sanchez:] Well what happened to the lady I don't know.
>
> [Mr. Morales:] God has helped me.
>
> [Mrs. Sanchez:] How do you feel?
>
> [Mr. Morales:] Well, a little more at ease.

(29CT 8317, bold font added.) This exchange about Mr. Morales's feelings of guilt would seem naturally to include some discussion about Mr. Morales's actual role in the crimes – just what "that" was that Mr. Morales had done and how he felt about it. But since the most relevant question and answer was largely unintelligible, the jurors were left to guess about what Mr. Morales said he had or had not done to feel guilty about. The intelligible parts of the exchange in which his mother remarks "to kill" and Mr. Morales responds with an unintelligible answer followed by the phrase, "thank God," is certainly consistent with an interpretation that in the unintelligible segment, Mr. Morales had minimized his role or moral responsibility for the act of killing. It does not seem logical or reasonable that Mr. Morales's was "thanking God" for actually killing the victim given the context of the exchange about his level of guilt. It is more reasonable in context that his unintelligible response was something along the lines of, "Well, I'm not the one who killed her, thank God."

The next relevant exchange transcribed was as follows:

> [Mr. Morales:] (unintelligible) lies (unintelligible)
>
> [Mrs. Sanchez:] Oh yeah.
>
> [Mr. Morales:] I wasn't in any store or anything.
>
> [Mrs. Sanchez:] No.
>
> [Mr. Morales:] No, it that they're imagining (unintelligible) (unintelligible) around the stores and . . . .
>
> [Mrs. Sanchez:] Ah huh, but it wasn't **you guys.**
>
> [Mr. Morales:] No. (unintelligible)
>
> [Mrs. Sanchez:] And how, **how did you do that**?
>
> [Mr. Morales:] What.
>
> [Mrs. Sanchez:] How did you do that, with what?
>
> [Mr. Morales:] (unintelligible)

[Mrs. Sanchez:] Well, I said **how did you do that, what did you do it with? Did she die from a blow or what**.

[Mr. Morales:] ***No. A shot***.

[Mrs. Sanchez:] Yeah. Poor lady.

[Mr. Morales:] (unintelligible) bitch, puta

[Mrs. Sanchez:] What

[Mr. Morales:] They're bitches

[Mrs. Sanchez:] Why?

[Mr. Morales:] They don't have proof that it was me.

[Mrs. Sanchez:] Ah huh.

[Mr. Morales:] ***The bullet doesn't have my print on it.***

[Mrs. Sanchez:] Oh no.

[Mr. Morales:] ***The firearm doesn't either***.

[Mrs. Sanchez:] Um.

[Mr. Morales:] Yeah, **he's the one that knows I was there.**

[Mrs. Sanchez:] Ah huh. I hope that . . . .

[Mr. Morales:] (unintelligible)

[Mrs. Sanchez:] I hope that helps you because it's difficult . . . .

[Mr. Morales:] (unintelligible)

(29CT 8317-8318, bold and italicized fonts in original, plain bold font added.) In this exchange, Mrs. Sanchez again uses the term "you guys" and "you" interchangeably. Furthermore, the immediate question before Mr. Morales's answer was not directed to what he had done at all but rather asked generally how the victim died, to which Mr. Morales replied "a shot." Mr. Morales's unintelligible statements during this exchange only add to the uncertainty over its meaning. His statement, "he's the one that knows I was there" certainly indicates that he had said something about another man and suggests that Mr. Morales himself was simply "there," but the actual meaning could not be

determined given the unintelligible parts of the conversation. Under the circumstances, Mr. Morales's statement that the victim died by "a shot" was certainly susceptible of the interpretation that he was simply recounting how the victim had died and not admitting that he was the one who killed her. Indeed, his follow-up remarks that there was no proof that it was him and that his prints were not on the gun or the bullets were consistent with the interpretation that there was no such evidence because Mr. Morales had never handled the murder weapon.

Next there followed a significantly unintelligible exchange, previously discussed, in which Mr. Morales apparently explains that the group's motive for the burglary was their mistaken belief that the house was used by a man to both "cook" and sell drugs and therefore there would be drugs and sales proceeds in the house. (29CT 8319-8321.) Mr. Morales next discussed the robbery of "Mago" in Ontario, the crime charged in count seven of which the jury acquitted Mr. Morales. (29CT 8321-8322.) Immediately thereafter, the following – significantly unintelligible – exchange was transcribed:

> [Mrs. Sanchez:] Ah huh.
>
> [Mr. Morales:] (unintelligible)
>
> [Mrs. Sanchez:] Ah huh.
>
> [Mr. Morales:] (unintelligible)
>
> [Mrs. Sanchez:] ah huh.
>
> [Mr. Morales:] that had happened to her . . .
>
> [Mrs. Sanchez:] Ah huh.
>
> [Mr. Morales:] (unintelligible)
>
> [Mrs. Sanchez:] ah huh.
>
> [Mr. Morales:] (unintelligible) suspicious right.
>
> [Mrs. Sanchez:] ah uh.

[Mr. Morales:] ***But they don't have any proof to say that I was the problem because she never saw my face or anything.***

[Mrs. Sanchez:] Ah huh.

[Mr. Morales:] (unintelligible) she doesn't have, you have to have proof to arrest you.

[Mrs. Sanchez:] Ah huh.

[Mr. Morales:] ***They don't have the firearm, the bullet doesn't have any prints. . . .***

[Mrs. Sanchez:] Well yeah, hopefully everything comes out okay.

[Mr. Morales:] **It could have been me like it could have be [sic] any other that was with me**.

[Mrs. Sanchez:] Ah huh. Oh well.

[Mr. Morales:] that's why (unintelligible)

[Mrs. Sanchez:] ***And what type of firearm did you guys use for this.***

[Mr. Morales:] ***Big one.***

[Mrs. Sanchez:] ***A big firearm, oh no.***

[Mr. Morales:] An AK-47.

[Mrs. Sanchez:] An AK-47?

[Mr. Morales:] Yes.

[Mrs. Sanchez:] Well no . . .

(29CT 8322, bold and italicized font and ellipses in original; plain bold text added.)

As a preliminary matter, it is unclear whether the above-quoted exchange referred to the robbery of "Mago" or the crimes against the victim. The subject of the "Mago" robbery immediately preceded the exchange. Furthermore, Mr. Morales's statement that "they dont have any proof to say that I was the problem because she never saw my face or anything" was consistent with the evidence about the "Mago" robbery, wherein the

perpetrators wore masks and "Mago" was unable to identify Mr. Morales because she hadn't seen the robbers' faces, and inconsistent with the evidence and Mr. Morales's own remarks about the crimes against the victim, wherein the perpetrators did not wear masks and the victims did see Mr. Morales's face and he was recognized by name. (8RT 1481; 9RT 1894; 10RT 2038; 11RT 2389, 2391.) For his part, the prosecutor theorized that an AK-47 was the murder weapon and therefore at least this part of the exchange referred to the crimes against the victim. (12RT 2661.) Since the jury acquitted Mr. Morales of the charged robbery of "Mago," and Mr. Morales did incriminate himself by admitting that he and his "guys" had collectively "use[d]" a gun "for this," the jurors apparently did not interpret the exchange as referring to the "Mago" robbery. But even accepting that it referred to the shooting of the victim, given the phrasing of his mother's question in the second person plural – "what type of firearm did **you guys** use for this?" – Mr. Morales's answer, "an AK-47," likewise presumably referred to the first person *plural* and did not amount to an admission in the first person singular to actually shooting the victim.

Following the foregoing exchange, Mr. Morales and his mother discussed some of their family members, apparently unrelated to this case. (29CT 8323.) After Mr. Morales made some unintelligible remarks which may or may not have returned to the subject of the crimes against the victims and their details, Mrs. Sanchez elicited other details about the crimes, including that there were "about six of us" who burglarized the victim's house, there were three children in the house, there was another house on the property that "you guys" also burglarized, and "you guys" had traveled to the houses by taxi. (29CT 8323-8325.) Following more unintelligible remarks by Mr. Morales, the following questions and answers were transcribed:

> [Mrs. Sanchez:] ***Oh yeah and the when [sic] did the lady say she recognized you***.

[Mr. Morales:] ***My name.***

[Mrs. Sanchez:] ***She just mentioned your name.***

[Mr. Morales:] She was saying we don't have anything here.

[Mrs. Sanchez:] Um.

[Mr. Morales:] ***I told her she was a dummy, told her she was a puta, dummy she should have kept quiet and she could have called the police after.***

[Mrs. Sanchez:] Ah huh.

[Mr. Morales:] ***Nothing would have happened to her, I didn't even know her***.

[Mrs. Sanchez:] Oh no.

[Mr. Morales:] (unintelligible)

[Mrs. Sanchez:] Ah huh. And, oh my God. When they told me about this, I felt, I felt very bad because I thought, I was hoping it wasn't you.

[Mr. Morales:] And is everyone talking about (unintelligible) yes or no [sic].

[Mrs. Sanchez:] No, just talking about, well that this happened and . . . [Mr. Morales:] They haven't mentioned anyone.

[Mrs. Sanchez:] What.

[Mr. Morales:] They haven't mentioned any one, anything.

[Mrs. Sanchez:] No, not by names, they don't say anything to me. They don't mention any names.

[Mr. Morales:] (unintelligible)

[Mrs. Sanchez:] I just listen, I tell myself I don't want to start something.

[Mr. Morales:] (unintelligible)

[Mrs. Sanchez:] ***Oh you, you're crazy. You're crazy. No. And where, and where did you shoot the lady?***

[Mr. Morales:] Huh.

[Mrs. Sanchez:] ***Where did you shoot the lady?***

[Mr. Morales:] ***I think the heart.***

[Mrs. Sanchez:] Oh, ungrateful.

(29CT 8325-8326, bold and italicized font in original.)

To be sure, in this exchange, Mrs. Sanchez did use the second person singular, asking Mr. Morales where "you" shot the victim. And one interpretation of Mr. Morales's answer was that he actually shot and killed the victim. But again, that is not the only reasonable interpretation of the exchange. This question and answer could not be viewed in isolation. They were part of an overall, longer discussion in which Mrs. Sanchez consistently asked vague questions about what "you guys" did and used the terms "you" and "you guys" interchangeably. Indeed, this question and answer followed the question about the kind of gun "you guys" used. (29CT 8322.) Thus, in context, one reasonable interpretation of the exchange is that Mr. Morales believed that his mother was simply asking where the victim had been shot and not asking whether or where *he personally* shot her and that his answer therefore did not amount to an admission to being the actual killer. Indeed, Mr. Morales's expression of uncertainty over where she had been shot – "I *think* the heart" – is consistent with someone else having been the actual shooter. If Mr. Morales were the man who had actually shot the victim at close range directly into the chest and heart (12RT 2467, 2471-2473), one would expect greater certainty about where he had shot her.

Furthermore, as previously discussed, although Mr. Morales explained that the victim had been shot because she had recognized him, "and nothing would have happened to her" if she had not identified him by name, that motive was not personal to Mr. Morales alone. Ultimately, Mr. Morales's statement that "[i]t could have been me like it could be any other that was with me" only underscored the ambiguity of his answers as admissions of guilt

based either on his personal acts or on the acts of all the "guys" for which he was legally responsible. As he had told his mother, it did not matter who actually killed the victim since it was "still the same" for everyone involved in the felonies: liability for her murder under the felony-murder rule.

ii. Even assuming that Mr. Morales's transcribed statements constituted admissions to being the actual killer, there were reasonable grounds on which to doubt their veracity

Furthermore, even assuming for the sake of argument only that Mr. Morales's answers to his mother's questions did constitute admissions to being the actual killer, there were reasons to doubt the truthfulness of those admissions, as defense counsel argued below. (See 12RT 2700-2705.) As defense counsel pointed out, Mr. Morales had reason to be suspicious of his mother's call and indeed expressed suspicion during the conversation. When she called Mr. Morales from her home telephone, Mr. Morales almost immediately asked her from where she was calling. (29CT 8308.) She told him twice that she was *not* calling from home. (29CT 8308-8309.) In a subsequent search, police discovered that Mr. Morales's Minnesota telephone had caller ID, which displayed the time and date of his mother's call to him and her home telephone number as the calling number. (11RT 2438-2439.) Therefore, as defense counsel argued, Mr. Morales knew that his mother was lying to him. (12RT 2700.) He also expressed disbelief when his mother denied that "they had visited" her "the other day," although Angel Ivan had told Mr. Morales "they" had. (29CT 8309-8310.) Knowing that his mother was lying to him, Mr. Morales pressed her about how she had discovered where he was and obtained his phone number. (29CT 8316-8317.) She denied that she had spoken to Angel Ivan and obtained Mr. Morales's whereabouts and phone number from him or anyone else they knew. (*Ibid.*) Instead, she cryptically claimed, "I got it from someone over here. I'm an investigator." (29CT 8317.)

Mr. Morales expressed reluctance to answer his mother's questions about the details of the crimes, but when she pressed him, he asked her why she wanted to know. (29CT 8310.) A reasonable interpretation of this conversation as a whole was that Mr. Morales knew his mother was lying to him and suspected – correctly – that a third party had orchestrated the call in order to determine what he would say about the crimes.

The most logical interested third party for someone in Mr. Morales's position to suspect was either the police or one or more of his accomplices. (See RT 2699-2702.) As defense counsel argued, given the statements he did make incriminating himself in the burglary and felony murder of the victim, the more logical explanation was that Mr. Morales believed the latter, not the former. (12RT 2704-2706.) Indeed, early on in the conversation, Mr. Morales told his mother that Angel Ivan had told him "that they had visited you the other day" and – evidently in an unintelligible segment – was concerned that "they" were bothering her. (29CT 8309-8310.) Mrs. Sanchez denied that "they" had visited her or were "bothering" her. (29CT 8310.) Although the intelligible portions of the conversation did not specify who "they" were, it is clear from other parts of the conversation in which Mrs. Sanchez readily acknowledged that the police came to her home and questioned her, that they were not referring to the police in this part of the conversation. (29CT 8319, 8321.) Indeed, later in the conversation, Mrs. Sanchez did express her fear, "what if they get revenge and get us here." (29CT 8319.) A reasonable inference from all of this evidence, as defense counsel argued, was that although Mr. Morales correctly suspected that a third party had set up and was eavesdropping on the call, he incorrectly believed that it was one or more of his accomplices – indeed, even the actual killer – who was testing him to see if he would name or implicate his confederates. (12RT 2700-2706.) Fearing

retribution if he did so, Mr. Morales made sure that he lied to his mother to pass their test.

Supporting this interpretation, Mrs. Sanchez repeatedly asked her son to identify the other men who participated in the crimes. (29CT 8311-8312, 8325.) Mr. Morales insisted that he and his mother "don't know them, they're from Los Angeles." (29CT 8311, 8325.) However, according to other evidence the prosecution presented, the children and the neighbors viewed stills from a video tape of Mr. Morales's baby shower, seized from Mr. Morales's home, in which Mr. Morales and his friends appeared. (8RT 1467-1470, 1566-1570, 1614-1616; 9RT 1829-1832; 11RT 2280-2283, 2429-2433; Exs. 96-99.) Witnesses identified some of the friends from the recording as other perpetrators of the crimes, including Ever Flores (Xiomara Escobar's brother) and "Kiki" Enriquez (who was originally charged as a co-defendant). (8RT 1467-1470, 1566-1570, 1614-1616; 9RT 1829-1832; 11RT 2429-2433.) Ms. Escobar also testified that Mr. Morales left on the night of the crimes with a group of men in a taxi, one of whom was "Kiki," and that he later told her Kiki was one of the perpetrators. (11RT 2249, 2301.) Angel Ivan reported to police that Mr. Morales had told him that he committed the crimes with two of their cousins. (10RT 2181-2182.)

Yet in the transcript of his conversation with his mother, Mr. Morales repeatedly insisted that he did not know the other perpetrators or their names, they were simply some men "from Los Angeles." (29CT 8311, 8325.) And in none of his intelligible statements did Mr. Morales attribute a particular act or crime to a particular person. Assuming that Mr. Morales did not tell his mother that he was not the actual killer in one of the unintelligible segments of the recording, a reasonable inference from all of this prosecution evidence was that Mr. Morales was lying about the other men's involvement in the crimes in order to assure them – whom he believed were listening in – that he would

protect them, and thereby protect himself and his family from retribution. It was reasonable to infer that if Mr. Morales was lying to protect the identities and actions of the other perpetrators in this regard, any other statements he made that tended to protect them or mitigate their culpability, including any statements he made that suggested he was the actual killer, were suspect for the same reasons.

It is true that at one point in the conversation, the transcript attributes to Mr. Morales the statement, "Kiki was there," whom his mother apparently did know based on her response. (29CT 8312.) However, this statement only underscores the ambiguous and cryptic nature of the transcribed conversation as a whole. It *immediately* followed Mr. Morales's statement that he and his mother "didn't know" the other perpetrators, "they're from Los Angeles." (29CT 8311.) And it preceded Mr. Morales's statement later in the conversation, "I told you they were just people from Los Angeles." (29CT 8325.) Without more, these statements were irreconcilable: either Mr. Morales and his mother did not know his co-felons, as he twice insisted, or they did and one was Kiki. The only explanation was either that the unintelligible portions of the conversation contained some matter to give the remarks context and explain away the inconsistency or that Mr. Morales's statements were internally inconsistent and therefore untrustworthy. Either way, from this and the other evidence detailed above, it would have been reasonable for the jurors to infer that Mr. Morales's other transcribed statements, including any apparent admission to being the actual killer, were of doubtful reliability – just as the jurors doubted the reliability of his transcribed statements indicating his participation in the "Mago" robbery.

4. Conclusion

In summary, the critical disputed guilt phase issue was the identity of the actual killer – the issue on which the truth of the felony-murder special circumstance allegations hinged. As the trial court recognized (see 12RT 2654, 2574-2575) and as the foregoing demonstrates, there was room for doubt that Mr. Morales and not one of his accomplices was the actual killer. The eyewitness accounts included affirmative evidence that Mr. Morales was not in the kitchen when the single, fatal shot was fired. There were troubling questions over the reliability of the prosecution's key evidence to the contrary. The innuendo and argument that Mr. Morales was responsible for committing uncharged, violent sexual crimes against the victim permeated the trial from beginning to end and cut straight to the heart of the critical guilt phase dispute: Mr. Morales's putative commission of those uncharged crimes against the victim undoubtedly carried "excessive weight" in the eyes of the jurors as tending to show that he was a man of uniquely violent and amoral character, disposed to committing violent crimes against the victim more egregious than robbery and burglary and hence more likely than his accomplices to have committed the more egregious crime of actually shooting the victim. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 725.) Moreover, the nature of the putative uncharged crimes against the victim tended to shift the jurors' focus from the legitimate evidentiary questions over the actual killer's identity to their natural feelings of sympathy for the victim and her children and a concomitant, visceral desire to punish Mr. Morales for their suffering. It bears repeating that the prosecutor obviously viewed the uncharged sexual criminal activity as important to his case, as demonstrated by his tactics in first misleading the court to get it before the jurors, later insulating it from meaningful testing, and finally arguing it to the jurors in summation. There is no reason for this Court to consider it as any less important to the juror' critical death-eligibility

determination than the People did below. (*People v. Powell*, *supra*, 67 Cal.2d 32, 56-57; accord, e.g., *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131 [The prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be"].) For all of the foregoing reasons, there is a "reasonable chance, more than an abstract possibility" that in the absence of the prosecutor's misconduct, the trial court's errors, and/or defense counsel's deficient performance, at least one juror would have had the same doubt over Mr. Morales's identity as the actual killer as all of the jurors had over his identity as a perpetrator of the robbery charged in count seven. (*Richardson v. Superior* Court (2008) 43 Cal.4th 1040, 1050; accord, *Wiggins v. Smith*, *supra*, 539 U.S. at p. 537; *Cone v. Bell*, *supra*, 556 U.S. at pp. 452, 475; *People v. Walker* (2015) 237 Cal.App.4th 111, 118; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, and authorities cited therein.) The jury's death-eligibility verdicts, as well as their verdict on the gun use enhancements based on the same finding that Mr. Morales was the actual killer, therefore resist the confidence demanded by the Sixth and Fourteenth Amendments and the heightened degree of confidence demanded by the Eighth Amendment. The special circumstances and personal gun use enhancements under Penal Code section 12022.53 must be set aside and the death judgment reversed.

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IV.

THE CUMULATIVE EFFECT OF ERRORS COMMITTED IN BOTH THE GUILT AND THE PENALTY PHASES, WHICH DIRECTED THE JURORS TO CONSIDER UNFOUNDED AND UNRELIABLE AGGRAVATION OF UNADJUDICATED VIOLENT SEXUAL CRIMES AGAINST THE VICTIM WITHOUT SUBJECTING THE EVIDENCE TO ANY STANDARD OF PROOF, VIOLATED STATE LAW AS WELL AS MR. MORALES'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FUNDAMENTALLY FAIR PENALTY TRIAL AND A HIGHLY RELIABLE DEATH VERDICT

A. Introduction

The erroneously admitted unadjudicated sexual assault evidence introduced at the guilt phase became part of the "evidence received during the entire trial" that the penalty phase jurors were instructed to consider in determining whether Mr. Morales should live or die. (28CT 8002 [instruction with CALJIC No. 8.84.1]; see also 28CT 8028-8029 [instruction with CALJIC No. 8.85 that "you shall consider all of the evidence which has been received during any part of the trial of this case"].) So, too, did the inferences the prosecutor argued in his guilt phase summation from both the erroneously admitted evidence and the evidence that was admitted for purposes other than proving an uncharged sexual crime, such as the condition of the victim's body when it was found.

Not surprisingly, the prosecutor also made use of that guilt phase evidence in his penalty phase summation to argue that the commission of unadjudicated "sexual assault" crimes were significantly aggravating reasons to sentence Mr. Morales to death. As he had done at the guilt phase, the prosecutor was able to reap the aggravating benefits of this evidence and argument without the burden of ever having to prove beyond a reasonable doubt that Mr. Morales committed a sexual crime.

As set forth in Argument III, the putative sexual crimes, and the evidence offered to prove them, were not relevant to any legitimate issue concerning Mr. Morales's guilt of the charged crimes of which he was convicted. As a result, they should never have been injected into the guilt phase for all of the reasons set forth in Argument III. In addition, as set forth in Part C, *post*, they were not legitimate circumstances of the crimes of conviction that the jurors could consider under Penal Code section 190.3, factor (a). Instead, because of the nature of the evidence and the prosecutor's use of it at both the guilt and the penalty phases for purposes governed by Penal Code section 190.3, factor (b), the jurors could not consider it unless the prosecution could prove beyond a reasonable doubt that Mr. Morales was liable for a specific violation of the Penal Code governing "sexual assault." (Title 9 of California Penal Code covering "Of Crimes Against the Person Involving Sexual Assault.")

As set forth in Part D, *post*, the guilt phase evidence was insufficient as a matter of law to satisfy the prosecution's burden. Hence, absent the guilt phase errors, the jurors would never have heard the erroneously admitted sexual assault evidence and the prosecution's sexual assault argument in either the guilt *or* penalty phases. Having been presented at the guilt phase, the jurors were thus exposed to aggravating evidence and argument in determining penalty that they should never have heard. Consequently, the guilt phase errors in the admission and use of the evidence continued to have a prejudicial impact on the penalty phase.

As set forth in Part E, *post*, the prosecutor exacerbated the effect of the guilt phase errors in his penalty phase summation by urging the jurors to consider the guilt phase evidence for the aggravating purpose of demonstrating unadjudicated criminal activity involving sexual violence against the victim in aggravation. The prosecutor compounded the prejudicial effect of the errors still further, and committed independent misconduct, by misstating the guilt

phase evidence and the permissible inferences to be drawn therefrom over defense counsel's repeated objections. Although the trial court sustained defense counsel's objections, they were ineffective in deterring the prosecutor. Yet the trial court erroneously refused to admonish the jurors to disregard the prosecutor's remarks, thus increasing the damaging effects of the prosecutor's misconduct.

Indeed, as set forth in Part F, *post*, the trial court's instructions put its imprimatur on the prosecutor's theory of aggravation by affirmatively instructing the jurors to consider both the guilt phase evidence and "the presence . . . of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceeding, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" in determining the appropriate penalty. Although the *only* unadjudicated criminal activity evidence before the jurors was the guilt phase evidence suggesting the commission of uncharged sexual crimes, although the prosecutor explicitly argued those putative crimes in aggravation at penalty, and although the trial court was fully aware of the gaps in the state's case to prove that Mr. Morales was liable for a specific sexual crime defined in the Penal Code, the trial court failed to discharge its sua sponte obligations to instruct the jurors that they could not consider such evidence in aggravation unless the prosecution proved beyond a reasonable doubt that Mr. Morales committed a specific violation of the Penal Code governing "sexual assault." Even if the evidence met the test of bare legal sufficiency to support a particular unadjudicated sexual crime and the prosecutor could rely on that evidence in his penalty phase summation, the trial court's sua sponte instructional duty was vital to achieving the reliability demanded under state law and the federal Constitution and its failure to discharge that duty was error.

Further, as set forth in Part E, *post*, through a series of missteps and oversights, defense counsel failed to avail themselves of meritorious objections

and motions to protect Mr. Morales from the devastating effects of the accusations that he committed "heinous" and "egregious" sexual crimes against the victim before she was killed. The message counsel's negligence conveyed to the jurors was that there was no dispute that Mr. Morales was responsible for such aggravating conduct and that it could and should weigh heavily on death's side of the scale.

Finally, as set forth in Part G, *post*, the prosecution's case for death was a close one that nearly resulted in a mistrial due to jury deadlock. The cumulative effect of any or all of the guilt and penalty phase errors resists a confident determination – and certainly resists a highly confident one, as demanded by the Eighth Amendment – that the jury's close death verdict was based solely on lawful, accurate, and constitutionally relevant aggravation bearing on Mr. Morales's personal culpability and not on improper, inaccurate, or constitutionally irrelevant considerations. Certainly, absent the cumulative effect of the errors, this Court cannot be confident that none of the jurors – including the hold-out juror who finally capitulated to the majority after two days – would have voted to spare Mr. Morales's life. The death judgment violates state law, as well as Mr. Morales's Sixth, Eighth, and Fourteenth Amendment rights, and must be reversed.

B. Unadjudicated Violent Crimes are Irrelevant to the Jury's Choice Between Life and Death Unless the Defendant is Personally Culpable for them and His Criminal Liability is Proved Beyond a Reasonable Doubt

1. Constitutionally relevant evidence at the penalty phase is limited to reliable evidence concerning the defendant's personal culpability and characteristics

Where, as in California, aggravating circumstances are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648, quoting from

Poland v. Arizona (1986) 476 U.S. 147), they must provide a principled basis for doing so (*Arave v. Creech* (1993) 507 U.S. 463, 474). To be acceptable under the Eighth Amendment and the due process clause of the Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586; *Booth v. Maryland* (1987) 482 U.S. 496, 502, disapproved on another ground in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, 830, fn. 2; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 & fn. 12.)

The constitutional relevance of an aggravating factor must be assessed in terms of the fundamental requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic and law, bears on the selection of who, among those eligible for death, should die and who should live. See *Gregg*, 428 U.S. at 192, 96 S.Ct. 2909; see also *United States v. Davis*, 912 F.Supp. at 943-944." (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Indeed, "heightened reliability is the key to a constitutionally defensible determination that death is the appropriate punishment in a specific case.' *Woodson*, 428 U.S. at 305, 96 S.Ct. at 2991." (*Ibid*.)

At its core, the sentencing decision must "be directly related to the *personal* culpability of the defendant . . . ." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319 and *id*. at pp. 327-328, 336, italics added, citing, inter alia, *Lockett v. Ohio* (1978) 438 U.S. 586, 607, *Tison v. Arizona* (1987) 481 U.S. 137, 147, and *Enmund v. Florida* (1982) 458 U.S. 782.) This is so because the "Eighth

Amendment mandates an *individualized* assessment of the appropriateness of the death penalty" at the selection phase. (*Penry v. Lynaugh*, *supra*, at p. 319, italics added; accord, e.g., *Lockett v. Ohio*, *supra*, at p. 605; *Enmund v. Florida*, *supra*, at p. 798; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; *Woodson v. North Carolina*, *supra*, 428 U.S. at pp. 303-304.) Hence, factors that may be considered in aggravation – or, for that matter, mitigation – must have some bearing on the defendant's "*personal* responsibility and moral guilt." (*Enmund v. Florida*, *supra*, at p. 801, italics added.) Put another way, they must reflect on "the character of the *individual*" (*Zant v. Stephens*, *supra*, 462 U.S. at p. 879, italics added) and "the circumstances of *his* crime" of conviction rendering him death eligible (*Kansas v. Marsh* (2006) 548 U.S. 163, 173-174, italics added.). (Accord, e.g., *Sumner v. Shuman* (1987) 483 U.S. 66, 76, fn. 5, italics added [sentence imposed at the penalty phase of a capital trial "should reflect a reasoned moral response to *the defendant's* background, character, and crime"].)

With this background in mind, constitutionally relevant aggravating considerations "in the penalty selection process of a capital case" are typically of the "'general type long considered by sentencing authorities' in other criminal cases" (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 466, quoting from *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825), including the manner or circumstances in which *the defendant committed* the capital crime (see *Kansas v. Marsh*, *supra*, 548 U.S. at pp. 173-174*; Tuilaepa v. California* (1994) 512 U.S. 967, 976), the "specific harm *caused by the defendant*" (*Payne v. Tennessee*, *supra*, at pp. 822-825, italics added), "the *defendant's* criminal record (see *Barclay v. Florida* (1983) 463 U.S. 939, 956, 103 S.Ct. 3418, 3428), or other aggravating evidence *about the defendant* (*Zant v. Stephens*, *supra*, 462 U.S. at p. 875)" (*People v. Bacigalupo*, *supra*, at p. 466, italics added).

Consistent with these principles, the traditional "circumstances of the defendant's crime" factor, considered in capital and non-capital sentencing proceedings, must "focus on *what the defendant did* when the current offense was committed." (*People v. Coronado* (1995) 12 Cal.4th 145, 156-157, italics added; see also, e.g., *People v. Thomas* (1992) 2 Cal.4th 489, 535, italics added ["the injury inflicted *by the defendant* – including the impact of the crime on the family of the victim – is one of the circumstances of the crime" the jury can consider at penalty under state law and *Payne v. Tennessee*, *supra*, 501 U.S. 808 and *Booth v. Maryland*, *supra*, 482 U.S. 496].) In order to make the constitutionally-mandated "individualized" determination over whether the defendant should live or die under *Lockett*, *supra*, for murder, "[a] sentencing body must examine the defendant's *personal* role" in the events leading to the murder. (*People v. Banks* (2015) 61 Cal.4th 788, 801, italics in original.) In order to consider a particular act committed against the victim "[f]or purposes of imposing the death penalty, [the defendant's] culpability must be limited to his participation in [that act] and his punishment must be tailored to his *personal* responsibility and moral guilt." (*Enmund v. Florida*, *supra*, 458 U.S. at p. 801; italics added; accord, *Tison v. Arizona*, *supra*, 481 U.S. at p. 149; *People v. Banks*, *supra*, 61 Cal.4th at p. 801.) Pursuant to these principles, where the victim is killed during the commission of a series of crimes that are committed by more than one person, "[t]he focus must be on [the defendant's own personal] culpability, not on that of those who committed the [felonies], for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (footnote omitted), which means that we must focus on 'relevant facets of the character and the record of the individual offender.' *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)." (*Enmund v. Florida*, *supra*, at p. 798.)

In *Enmund*, the Supreme Court applied these principles to determine whether or to what extent the act of an accomplice or co-felon can be considered as a basis to sentence the defendant to death. Specifically, when a defendant commits a qualifying felony and is vicariously liable for a co-felon's act of killing in the commission of the felony, he cannot be sentenced to death based on the lethal act of another absent proof of actual, personal culpability for the killing itself. (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-801.) It is not enough that the defendant's commission of the underlying felony can be said to have been the "but for" "cause" of the victim's death under the felony-murder rule. (*Id*. at p. 798.) To the contrary, "American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical to 'the degree of his moral culpability' [Citation] . . . ." (*Id*. at p. 799.) The Supreme Court later clarified in *Tison*, *supra*, that in order for the killing actually committed by a co-felon to be considered an "aggravating" factor warranting the defendant's death, his personal culpability for that act must be established by proof that he shared the perpetrator's intent to kill or that he committed the underlying felony as a "major participant" who harbored "reckless indifference to human life." (*Tison v. Arizona*, *supra*, 481 U.S. at p. 158; accord, e.g., *Robinson v. Schriro* (9th Cir. 2010) 595 F.3d 1086, 1103-1108 ["manner of a killing that a defendant did not participate in or direct" is constitutionally irrelevant to defendant's personal culpability in the absence of proof that he intended or reasonable anticipated that the killing would be accomplished in that manner].)

As this Court has recognized, the principles of *Enmund*, *Lockett*, and all of the foregoing authorities that demand focus on the defendant's *personal* culpability apply equally to all selection factors – both aggravating and mitigating – at the penalty phase of a capital case. (See, e.g., *People v. Belmontes* (1988) 45 Cal.3d 744, 811-813, and authorities cited therein [under *Enmund* and *Lockett*, sentence received by codefendant is reflection of

codefendant's personal culpability and has no bearing on distinct and critical question of defendant's own personal culpability]; *People v. Rowland* (1992) 4 Cal.4th 238, 279 [same]; *People v. Beardslee* (1991) 53 Cal.3d 68, 111-112 [co-defendant's expression of pride in murders bore only on co-defendant's individual culpability and was constitutionally irrelevant to jury's determination at penalty phase of defendant's individual, personal culpability]; *People v. Beeler* (1995) 9 Cal.4th 953, 991-992; *People v. Lancaster* (2007) 41 Cal.4th 50, 102; see also *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 585-586 [defendant's service of prior prison term has no bearing on his personal culpability if it resulted from invalid conviction].) Pursuant to these principles, absent proof of a defendant's *own* culpable mental state that he knowingly facilitated, aided or encouraged the actions of an accomplice, the accomplice's actions have no bearing on the defendant's personal culpability. Consequently, they are constitutionally irrelevant to the jury's determination of whether the defendant should live or die.

A death verdict based even in part on "considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process'" violates the Eighth and Fourteenth Amendments. (*Booth v. Maryland*, *supra*, 482 U.S. at p. 502, quoting from *Zant v. Stephens*, *supra*, 462 U.S. at p. 885.) The Eighth Amendment, of course, demands a heightened degree of reliability in death judgments. (See, e.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340.) Hence, a death judgment must inspire a heightened degree of confidence that it is based on permissible factors relating to the offense and the offender and not on "constitutionally impermissible or totally irrelevant" considerations.

Consistent with the foregoing principles, Penal Code Section 190.3 sets forth the aggravating and mitigating factors that a jury shall take into consideration when determining whether a death-eligible defendant should live or die. The prosecution may not rely on evidence in aggravation that is not

relevant to the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.)

2. In order for the prosecution to rely on an unadjudicated violent crime as an aggravating factor weighing in favor of death, it must present sufficient evidence to prove beyond a reasonable doubt that the defendant is directly or vicariously liable for a specific Penal Code violation and the jury must be instructed accordingly

a. The relevance and admissibility of evidence of a defendant's criminal activity involving force or violence other than the crimes of conviction in the present case

Penal Code section 190.3 provides in relevant part:

> In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant in aggravation [or] mitigation, including the nature and circumstances of the present offense, any prior felony conviction or convictions . . . the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence . . . .
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.
>
> However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

(See also *id*. factor (b), italics added [in determining penalty, the trier of fact shall take into account "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"].)

The "presence . . . of other criminal activity by the defendant which involved the use or attempted use of force or violence" refers to crimes *other* than those for which the defendant has been convicted in the present case. This factor refers to both "unadjudicated" crimes (*People v. Ashmus* (1991) 54 Cal.3d 992, 1000-1001, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117), as well as the criminal conduct underlying adjudicated crimes resulting in convictions in other cases (*People v. Whitt* (1990) 51 Cal.3d 620, 653, fn. 26; *People v. Melton* (1988) 44 Cal.3d 713, 763-765).

This Court has held that the defendant's other violent criminal activity is relevant to the decision to impose capital punishment because it tends to show the defendant's propensity for violence. (*People v. Ray* (1996) 13 Cal.4th 313, 349-350; *People v. Wright* (1990) 52 Cal.3d 367, 432; *People v. Balderas* (1985) 41 Cal.3d 144, 202.) As previously discussed, such propensity evidence is inadmissible for the purposes of proving the defendant's guilt. (See Argument III-D-1, *ante.*) However, it is relevant and admissible at the penalty phase because it assists the jury in determining whether the defendant, as an individual, is deserving of death. (See, e.g., *People v. Ray*, *supra*, at pp. 349-350, and authorities cited therein.)

Consistent with this purpose, the plain language of factor (b) demands that the unadjudicated violent crime must have been committed "*by the defendant*" to be relevant and considered by the jury. (Pen. Code, § 190.3, factor (b), italics added.) And consistent with the constitutional requirement that aggravation must "be directly related to the *personal* culpability of the defendant" (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 319, 327-328, 336, italics added), this Court has construed this language to encompass only unadjudicated violent crimes for which the defendant is "criminally liable," either directly or vicariously. (*People v. Ray*, *supra*, 13 Cal.4th at p. 351;

accord, *People v. Williams* (2013) 56 Cal.4th 630, 685; *People v. Hayes* (1990) 52 Cal.3d 577, 633; see also § 31 [vicarious liability].)

b. Given the reliability concerns inherent in evidence of unadjudicated violent crimes and the "overriding importance" jurors attach to them in aggravation, it is inadmissible and cannot be considered by the jurors unless the prosecution can prove beyond a reasonable doubt that the defendant is liable for a specific Penal Code violation and the jurors are so instructed

Jurors tend to attach "overriding importance" to evidence that the defendant has committed other violent crimes in making the choice between life and death. (*People v. Robertson* (1982) 33 Cal.3d 21, 54, citing *People v. McClellan* (1969) 71 Cal.2d 793, 804.) With respect to *unadjudicated* crimes, "the lack of a conviction" "raises reliability concerns" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1123) that threaten "undue prejudice" to the defendant absent a reliable determination that he did, in fact, commit the crimes (*People v. Ashmus*, *supra*, 54 Cal.3d at pp. 1000-1001). These reliability concerns are especially acute when the crime was not adjudicated because the charge was dismissed under Penal Code section 995 due to insufficient evidence. (See *People v. Ghent* (1987) 43 Cal.3d 739, 774.)

For these reasons, in order to present and have the jurors consider evidence of unadjudicated criminal activity involving force or violence, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant committed a specific Penal Code violation. (*People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Williams* (2013) 56 Cal.4th 630, 685; *People v. Livingston* (2012) 53 Cal.4th 1145, 1174.) As this Court has explained, "undue prejudice is threatened by evidence of violent criminal activity, and sufficient probativeness is assured without a . . . conviction *only* through the requirement of proof beyond a reasonable doubt." (*People v. Ashmus*, *supra*, 54 Cal.3d at pp. 1000-1001, italics added; accord, e.g., *People v. Yeoman*, *supra*,

31 Cal.4th at pp. 133-134 [requirement "enhances the reliability of the sentence"]; *People v. Ghent*, *supra,* 43 Cal.3d at p. 774 [proof beyond a reasonable doubt standard is essential to avoiding reliability concerns inherent in relying on criminal conduct underlying charge dismissed under section 995].) This rule is consistent with the well-settled principle that "the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (*Gilmore v. Taylor* (1993) 508 U.S. 333, 342; accord, *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-590.)

Hence, evidence of unadjudicated violent criminal activity is inadmissible and cannot be considered at the penalty phase absent evidence sufficient to prove beyond a reasonable doubt the defendant's criminal liability for a specific Penal Code violation. (*People v. Boyd*, *supra,* 38 Cal.3d at pp. 776-778; *People v. Williams*, *supra,* 56 Cal.4th at p. 685.) The trial court should not admit or permit the jury to consider evidence suggesting the commission of unadjudicated other crimes in aggravation unless "'a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citations.]" (*People v. Boyd*, *supra*, at p. 778; accord, e.g., *People v. Clair* (1992) 2 Cal.4th 629, 672-673.)

Consistent with these rules, if the defendant has been previously acquitted of the unadjudicated crime, the acquittal is an absolute bar to admitting or considering evidence for the purpose of proving the defendant's commission of the crime. (§ 190.3; *People v. Haskett* (1982) 30 Cal.3d 841, 866-867; *People v. Ghent*, *supra,* 43 Cal.3d at p. 774.) A dismissal of a charge under Penal Code section 995 does not amount to an acquittal for purposes of this rule. (*People v. Ghent*, *supra,* at p. 774.) However, it does make the reasonable doubt standard indispensable to the reliability demanded of aggravating evidence and death judgments. (*Ibid.*)

Furthermore, it is well settled that the trial court is under a sua sponte obligation to "'instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Wickersham* (1982) 32 Cal.3d 307, 323; accord, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Pursuant to this rule, when the prosecution presents evidence suggesting the commission of an unadjudicated violent crime other than those for which the defendant has been convicted (in the present case or a prior case) and relies on it in aggravation, instruction on the foregoing principles is "'vital to a proper consideration of the evidence'" and must be given sua sponte. (*People v. Robertson, supra,* 33 Cal.3d at pp. 53-54 (plur. opn.), and authorities cited therein; accord, e.g., *People v. Champion*, *supra,* 9 Cal.4th at p. 949.) Specifically, the court must instruct the jurors that before any of them can consider evidence of an unadjudicated other crime in aggravation, he or she must first find "beyond a reasonable doubt that the defendant did in fact commit" the crime (CALJIC No. 8.87 (2010 rev) or, put another way, that unless "the People [] prove beyond a reasonable doubt that the defendant committed" the crimes, the jurors must "completely disregard' the evidence (See CALCRIM No. 764).

Furthermore, when the facts of the case raise a danger of "confusion over which 'other crimes' . . . the prosecution is relying on as aggravating circumstances" (*People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19), or that the jurors might consider criminal activity that is not "proper aggravating evidence" (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 151), the proposition that the prosecution must prove beyond a reasonable doubt the defendant's commission of a *specific* Penal Code violation involving force or violence is "'closely and openly connected with the facts before the court" and instruction thereon is "necessary for the jury's understanding of the case'" (*People v.*

Wickersham, supra, 32 Cal.3d at p. 323). Under these circumstances, the trial court is therefore under a sua sponte obligation to instruct on this principle by specifying the crimes that the jurors may consider if proved beyond a reasonable doubt. (See *People v. Robertson, supra*, at p. 55, fn. 19; *People v. Yeoman, supra*, at p. 151.) Put another way, when the "facts before the court" are such that there can be "no assurance the jury will consider only proper aggravating evidence" without such instruction (*People v. Yeoman, supra*, at p. 151, citing *People v. Robertson, supra*, 33 Cal.3d at p. 55, fn. 19), it ineluctably follows that the instruction is "'vital to a proper consideration of the evidence'" (*People v. Robertson, supra*, at pp. 53-54) and therefore must be given even absent a request. Indeed, the Judicial Council has determined this principle is an inextricable part of the proof beyond a reasonable doubt requirement in this context. The standard pattern instruction on the reasonable doubt standard applicable to unadjudicated other crimes in aggravation directs courts to specify the other crimes the jurors may consider under that standard. (CALCRIM No. 764 [directing courts in body of instruction to "insert specific description of alleged offense(s)"] & Bench Notes to CALCRIM No. 764; CALJIC No. 8.87 [directing courts in body of instruction to "describe criminal acts/activity"].) As the Use Notes and Comment to CALJIC No. 8.87 directed at the time of trial: "The prosecution should be required to specify the . . . crimes which it claims defendant committed and establish the commission of the . . . crimes by defendant beyond a reasonable doubt. The court should so instruct the jury sua sponte." (Accord, Bench Notes to CALCRIM No. 764.)[59]

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[59] The Bench Notes to CALCRIM No. 764 distinguish between a reasonable doubt instruction specifying the other crimes that may be considered, which must be given sua sponte, and instructions on the *elements* of those other crimes, which need not be given sua sponte but must be given on request. The Use Notes and Comment to CALJIC No. 8.87 draw the same distinction.

3. When the prosecution relies on unadjudicated violent criminal activity evidence as a reason to sentence the defendant to death, these principles apply regardless of whether the evidence was admitted at the guilt or the penalty phase

With one exception – explained in Part 4, *post* – these principles apply regardless of whether the evidence of the unadjudicated violent crime is presented at the guilt or the penalty phase of trial. (*People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-55; accord, e.g., *People v. Champion*, *supra*, 9 Cal.4th at p. 949; *People v. Bittacker* (1989) 48 Cal.3d 1046, 1103, overruled on other grounds by *People v. Black* (2014) 58 Cal.4th 912.) When the "'evidence discloses a [violent] crime in addition to the one of which the defendant was convicted'" and the prosecution relies on that unadjudicated violent crime in aggravation, the trial court is under a sua sponte duty to instruct the jurors that they cannot consider the evidence unless they first find beyond a reasonable doubt that the defendant committed a specific Penal Code violation. (*People v. Bacon*, *supra*, 50 Cal.4th at pp. 1123-1124, and authorities cited therein; *People v. Kaurish* (1990) 52 Cal.3d 648, 707-708; *People v. Wright* (1990) 52 Cal.3d 367, 437.) A reasonable doubt instruction is necessary under these circumstances in order to redress the "reliability problems" inherent in the "lack of conviction" and thereby ensure a heightened degree of confidence that the jurors appropriately afforded the evidence the "overriding importance" that they are wont to give it. (*People v. Bacon*, *supra*, at pp. 1123-1124; *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 1000-1001; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585 [reliance on inaccurate evidence that defendant had previously been convicted of a violent felony violated the Eighth Amendment].)

The circumstances of the crime of *conviction* include the "crimes actually charged, proven, and finally adjudicated in the guilt trial" and may be

considered under factor (a) without the prosecution having to satisfy any additional burden of proof above and beyond what it already satisfied in obtaining the conviction. (*People v. Montiel* (1993) 5 Cal.4th 877, 939; see also, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1156 [non-capital crimes of which the defendant was convicted at the guilt phase may be considered as part of the "circumstances of the crime" under factor (a)].) Under these principles, an unadjudicated crime is not a crime of "conviction." While the prosecution may present evidence concerning the manner in which the crimes of conviction were committed, that does not give the prosecutor carte blanche to present and rely on evidence of unadjudicated violent crimes under the rubric of factor (a), thereby circumventing the rules applicable to such evidence, simply because the unadjudicated crimes share a proximity of time and place with the crimes of conviction.

Nor does the fact that the unadjudicated crimes were committed against the same victim as the crimes of conviction transform the former into "circumstances" of the latter under the rubric of factor (a), thereby absolving the prosecution of its burden of proof beyond a reasonable doubt. So-called "victim impact" evidence is relevant and admissible at the penalty phase under two circumstances. First, evidence of the impact the *crimes of conviction* had on the victim(s) and family members is relevant and admissible as a circumstance of the crime of conviction under factor (a). (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 824-827 [victim impact evidence is evidence of the "specific harm caused by the crime in question"]; *People v. Edwards* (1991) 54 Cal.3d 787, 835 [evidence of impact of the crimes of conviction on the victim and his or her family members is relevant under factor (a) as "circumstances" of the crimes of conviction].) Second, evidence of the impact unadjudicated crimes of force or violence had on the victim(s) and family members is relevant and admissible as a "circumstance" of the unadjudicated crimes under *factor (b), provided that the defendant's criminal liability is proven beyond a*

reasonable doubt. (*People v. Johnson* (2016) 62 Cal.4th 600, 645-647, and authorities cited therein.) In either case, the critical condition precedent is that the defendant's commission of the crime or crimes first be proved beyond a reasonable doubt before the jurors may consider the impact thereof on the victim or victims on death's side of the scale.

4. Only when unadjudicated violent crimes evidence was properly admitted and "used only" at the guilt phase for a relevant, limited issue to prove the defendant's guilt of the crimes of conviction and the prosecution does not ask the jurors to consider it for aggravating purposes at the penalty phase does it qualify as a circumstance of the crimes under factor (a) that need not be proved or found beyond a reasonable doubt

The only exception to the foregoing principles exists when: (1) evidence of the defendant's uncharged crime was properly admitted at the guilt phase and "'used *only* for'" a limited, legitimate purpose relevant to the defendant's guilt of the crime of conviction, such as motive or intent under Evidence Code section 1101; and (2) the prosecution does "'*not* ask the jury to consider it in determining defendant's sentence'" at penalty. (*People v. Rich* (1988) 45 Cal.3d 1036, 1121-1122, italics added, quoting from *People v. Robertson*, *supra*, 33 Cal.3d at pp. 60-61 (conc. opn. of Broussard, J.); accord, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 488-490 [instruction not required where unadjudicated other crime evidence was properly admitted at the guilt phase for a legitimate purpose and "neither prosecution nor defense counsel referred to [it] during penalty phase opening statements or closing argument"].)[60] The reasons for this exception are manifest.

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[60] Where the evidence was properly admitted at the guilt phase to prove an intermediate or ultimate fact relevant to the defendant's guilt of the crime of conviction, the defendant is entitled on request to an instruction limiting the jurors' penalty phase consideration of the evidence for that limited purpose concerning the circumstances of the crimes of conviction. (*People v. Rich*, *supra*, 45 Cal.3d at p. 1121; Evid. Code, § 355 [when evidence admitted for

Under these circumstances, the uncharged crime is a legitimate "circumstance of the crime of conviction" under factor (a) insofar as it was properly admitted at the guilt phase as relevant, and used only to establish an element or other fact material *to proving "the crime of which the defendant was convicted in the present proceedings . . . .*" (§ 190.3, factor (a), italics added.) Also, under these circumstances, the concerns that otherwise demand proof beyond a reasonable doubt are not the same. When an unadjudicated violent crime was admitted and used solely to prove a limited issue material to the defendant's guilt at the guilt phase, the jurors do not attach the same "overriding importance" to it that they do when they are free or encouraged to consider it as proof of the defendant's violent character or criminal propensity and thus as a reason to sentence him to death. (See *People v. Robertson, supra*, 33 Cal.3d at p. 54.) Similarly, it may be said that the "reliability concerns" which inhere in other violent crimes evidence that has not been subjected to the adjudicative process are less acute when evidence of an uncharged crime was subjected to the scrutiny by the court, the opportunity for adversarial testing by the defense, and the burden of proof by the prosecution, that are required to admit and use such evidence for a limited purpose at the guilt phase, as detailed in Argument III-D. (See *People v. Bacon*, *supra*, 50 Cal.4th at p. 1123 ["the lack of a conviction" concerning unadjudicated violent criminal activity "raises reliability concerns" that can only be resolved beyond a reasonable doubt]; *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 1000-1001.)

Absent these limited circumstances, however, the prosecution cannot avoid its heavy burden of proof beyond a reasonable doubt by the mere expedient of affixing the factor (a) label to evidence of unadjudicated violent criminal activity. To paraphrase Justice Scalia in a similar context, it does not

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limited purpose only, "the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"].)

matter what label the prosecutor chooses to use – whether he calls the evidence "factor (a)," "factor (b)," or "Mary Jane." (*Ring v. Arizona* (2002) 536 U.S. 584, 610 (conc. opn. of Scalia, J.). If: (1) the unadjudicated violent crimes evidence was *not* properly admitted or "used *only*" at the guilt phase as relevant to proving a limited issue material to the defendant's guilt of the crimes of conviction; or (2) the prosecutor *does* "ask" or intends to "ask the jury to consider it in determining defendant's sentence'" at penalty, the principles governing factor (b) evidence apply. (*People v. Rich*, *supra*, 45 Cal.3d at pp. 1121-1122.) The prosecution must present sufficient evidence to support a rational juror finding beyond a reasonable doubt that the defendant is criminally liable for a specific Penal Code violation and the trial court is under a sua sponte obligation to provide the reasonable doubt instruction. (See, e.g., *People v. Robertson*, *supra*, 33 Cal.3d at pp. 54-55 [instruction required at penalty phase where other crimes should not have been admitted at guilt phase at all "but for counsel's inexplicable failure to object," even though prosecution did not mention them in penalty phase summation]; *People v. McClellan*, *supra*, 71 Cal.2d at pp. 804-806 [although other crimes evidence was properly admitted at guilt phase, instruction was required because the prosecutor *did* refer to it at penalty as reason to impose death]; *People v. Bittacker*, *supra*, 48 Cal.3d at p. 1103 [instruction required where evidence admitted at guilt phase and prosecutor "referred to this event in his penalty phase argument"]; *People v. Phillips* (1985) 41 Cal.3d 29, 73 [same]; *People v. Champion*, *supra*, 9 Cal.4th at p. 949 [failure to instruct under both direct and vicarious liability principles was error where prosecutor relied on guilt phase evidence of unadjudicated violent crimes in aggravation in penalty phase summation, but harmless given prosecutor's further argument that jurors had to find the defendant guilty of the crimes beyond a reasonable doubt before they could consider them in aggravation].) As in other contexts, "the relevant inquiry is one not of form but effect." (*Apprendi v. New Jersey* (2000) 530 U.S. 466,

494; accord, e.g., *United States v. DiFrancesco* (1980) 449 U.S. 117, 142 ["The exaltation of form over substance should be avoided"]; *People v. Saunders* (1993) 5 Cal. 4th 580, 593; see also *People v. Phillips, supra*, 41 Cal.3d at pp. 73-74, 82 & fn. 33 [where prosecutor relies on unadjudicated crimes evidence as aggravation in penalty phase summation, reasonable doubt instruction required even if prosecutor purports to rely on it under factor (a) or does not explicitly tie it to factor (b)].)

C. The Prosecution Bore the Burden of Proving Beyond a Reasonable Doubt that Mr. Morales Committed a Specific Unadjudicated Sexual Crime or Crimes

As set forth in Argument III, *ante,* the prosecutor introduced sexual assault evidence at the guilt phase for the purpose of proving Mr. Morales's commission of an uncharged attempted rape of the victim as the predicate felony for his unsupportable felony-murder theory of first degree murder liability. At the close of his case-in-chief, the prosecutor informed the court and counsel that he was reneging on his promise to submit that theory to the jury – the promise that had been the foundation for the trial court's ruling admitting the otherwise irrelevant and prejudicial sexual assault evidence. The prosecutor conceded that in the absence of that theory, Mr. Morales's commission of attempted rape and the evidence he had introduced to prove it were, in fact, irrelevant for any legitimate purpose concerning Mr. Morales's guilt of the charged crimes. The trial court agreed, as it had observed in limine, that in the absence of a valid felony-murder theory or any sex crime charge or allegation, any suggestion that the victim had suffered uncharged sexual crimes was irrelevant and more prejudicial than probative. (Argument III, Parts B-7 & G, *ante*.) Hence, as set forth in Argument III, *ante,* the guilt phase evidence suggestive of unadjudicated sexual crimes was *not* properly admitted as relevant to a legitimate issue concerning Mr. Morales's guilt of the charged crimes. (See *People v. Rich, supra,* 45 Cal.3d at pp. 1121-1122; *People v.*

Robertson, supra, 33 Cal.3d at pp. 54-55 (plur. opn.) and *id*. at pp. 60-62 (conc. opn. of Broussard, J.) Furthermore, the evidence was not "used" for any legitimate guilt phase purpose, much less "used *only*" for such a purpose. (*People v. Rich, supra,* at pp. 1121-1122, italics added; accord, *People v. Robertson, supra,* at pp. 54-55 (plur. opn.) and *id.* at pp. 60-62 (conc. opn. of Broussard, J.); Argument III-H, *ante*.)

To the contrary, the paramount functions of the sexual assault evidence and argument in the guilt phase were to appeal to the jurors': (1) "natural and inevitable" inclination to consider the putative uncharged violent sexual crimes as proof of Mr. Morales's abhorrent, violent criminal propensities; and (2) sympathy for the victim and her family given the unique and profound trauma that the uncharged sexual offenses crimes inflicted on them. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724; Argument III, *ante*, and authorities cited therein.) As set forth in Argument III, these purposes were grossly improper and legally irrelevant to Mr. Morales's guilt of the charged crimes. However, they are the very purposes that factor (b) is intended to serve at penalty. (See, e.g., *People v. Ray*, *supra*, 13 Cal.4th at pp. 349-350 [unadjudicated violent criminal activity under factor (b) is relevant to penalty determination as proof of defendant's violent criminal propensity]; *People v. Johnson*, *supra*, 62 Cal.4th at p. 645, and authorities cited therein [relevant factor (b) evidence includes impact of unadjudicated criminal activity on victim(s)].)

Likewise, as set forth in Part E, *post,* in his penalty phase summation, the prosecutor *did* "ask the jury to consider" the guilt phase evidence of unadjudicated sexual criminal activity involving force or violence "in determining defendant's sentence.'" (*People v. Rich*, *supra*, 45 Cal.3d at pp. 1121-1122; accord, *People v. McClellan*, *supra*, 71 Cal.2d at pp. 804-806; *People v. Champion*, *supra*, 9 Cal.4th at p. 949; *People v. Bittacker*, *supra*, 48 Cal.3d at p. 1103.) The prosecutor's argument was buttressed by the trial court's affirmative instructions to consider all of the guilt phase evidence and

"the presence . . . of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceeding, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" in determining the appropriate penalty. (See Part F, *post.*)[61]

Under these circumstances, and pursuant to the authorities set forth in Part B, *ante*, the unadjudicated violent sexual crimes evidence admitted at the guilt phase did not qualify at penalty as legitimate circumstances of the crimes of *conviction* evidence under factor (a). (See *People v. Rich, supra,* 45 Cal.3d at pp. 1121-1122; *People v. Robertson, supra,* 33 Cal.3d at pp. 54-55 (plur. opn.) and *id.* at pp. 60-62 (conc. opn. of Broussard, J.) Rather, the principles governing factor (b) evidence applied to the prosecutor's use and the jury's consideration thereof on death's side of the scale. (*People v. Robertson, supra*, at pp. 54-55, 60-62; *People v. Champion, supra*, 9 Cal.4th at p. 949; *People v. Bittacker, supra*, 48 Cal.3d at p. 1103; *People v. Phillips, supra*, 41 Cal.3d at pp. 68, 71-72, 82-83; *People v. McClellan, supra*, 71 Cal.2d at pp. 804-806.)

Certainly, the concerns underlying imposition of the proof beyond a reasonable doubt standard to factor (b) evidence applied with force to the guilt phase evidence suggesting the commission of unadjudicated violent sex crimes and the prosecutor's use and the jurors' consideration thereof in aggravation of penalty. It is beyond peradventure that the jurors would attach "overriding importance" to that aggravation in determining the appropriate penalty. (*People*

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[61] In contrast, the jurors also heard evidence at the guilt phase that Mr. Morales had participated in another home invasion robbery of Margarita "Mago" Martinez and her guests, in support of the count seven robbery charge. The jurors acquitted Mr. Morales of the count seven charge. Although the trial court instructed the jurors to consider the guilt phase evidence and did not instruct them that they could not consider evidence relating to crimes for which Mr. Morales was acquitted, the prosecution did not openly rely upon the evidence relating to that crime in aggravation.

v. Robertson, supra, 33 Cal.3d at p. 54; accord, *People v. McClellan, supra,* 71 Cal.2d at p. 804.) The jurors were repeatedly exposed throughout the guilt and penalty phases to the conjecture that Mr. Morales was responsible for uncharged sexual crimes against the victim. Furthermore, as defense counsel emphasized on voir dire, allegations of violent *sexual* crimes are inherently inflammatory and were particularly likely to carry an inordinate degree of weight on death's side of the scale in this case, above and beyond that which inheres in other unadjudicated crimes evidence in any case. (Argument III-L-1, *ante*.)

Additionally, the "reliability concerns" inherent in the "lack of conviction" were not only present but particularly acute here. (*People v. Bacon, supra,* 50 Cal.4th at p. 1123; accord, *People v. Ashmus, supra,* 54 Cal.3d at pp. 1000-1001.) This was not a case in which the prosecution had no power to charge and "adjudicate" the putative other crimes because, inter alia, they were committed in a different jurisdiction, or arose from a separate transaction that could not be joined with the charged crimes, or the statute of limitations for prosecuting them had expired. Instead, the only legal obstacle to charging and "adjudicating" the uncharged crimes, allegedly committed against the same victim at the same time as the charged crimes, was the prosecution's burden of proving charged crimes beyond a reasonable doubt. The "lack of conviction" creating the "reliability concerns" here, then, was a reflection of the lack of evidence to satisfy that burden. The prosecutor could not reap the considerable aggravating benefits of the sexual assault evidence and argument he presented at the guilt phase without the burden of proving beyond a reasonable doubt Mr. Morales's liability for a violation of the Penal Code governing "sexual assault." (Pen. Code, Part 1 "Of Crimes and Punishment," Title 9 "Of Crimes Against the Person Involving Sexual Assault," §§ 261-368.7) Under the circumstances, "undue prejudice [was] threatened by evidence of violent [sexual] criminal activity, and sufficient probativeness

[could be] assured without a . . . conviction *only* through the requirement of proof beyond a reasonable doubt" at penalty. (*People v. Ashmus*, *supra*, at pp. 1000-1001, italics added; accord, e.g., *People v. Bacon*, *supra*, at p. 1123.)

D. The Condition of the Victim's Clothing and Erroneously Admitted Guilt Phase Evidence Were Insufficient to Prove Beyond a Reasonable Doubt that Mr. Morales was Criminally Liable for Attempting to Rape or Committing any Other Specific Sexual Crime Against the Victim

According to the prosecution, the evidence that the victim's body was found partially unclothed was itself sufficient to prove that Mr. Morales attempted to rape or otherwise "sexually assault" her.[62] (7RT 1330-1332.) However, as previously discussed, although her body was found immediately after her murder and a "sexual assault" kit was performed, there was no evidence of semen, DNA, other bodily fluids, or any trauma or injury to any intimate part of the victim. (9RT 1900; 12RT 2487.) In fact, other than the injuries caused by the single gunshot that killed her, there was no injury, bruise, or abrasion to *any* part of the victim's body to suggest that a struggle had occurred, much less to support a reasonable inference that a specific violent sexual crime had been committed against her. (12RT 2463-2465, 2469-2470, 2472-2474, 2477-2478, 2483-2485, 2492.)[63]

Pursuant to this Court's precedents, this evidence was insufficient to support a rational finding beyond a reasonable doubt that Mr. Morales

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[62] Although the victim's shirt was on and covering her chest, the victim's shorts and underwear had been pulled down and were found near her feet. (8RT 1553, 1603; 9RT 1760, 1762, 1882-1883.)

[63] Furthermore, as discussed in Argument III-G, *ante*, the prosecutor did not offer or present the results of the "sexual assault kit." The only reasonable inference from the record as a whole is that the results came back negative for any indicia of a "sexual assault."

attempted to rape the victim. (See, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 39-42, overruled on another ground in *People v. Rogers* (2006) 39 Cal.4th 826, 879, and authorities cited therein; *People v. Craig* (1957) 49 Cal.2d 313, 318–319; *People v. Granados* (1957) 49 Cal.2d 490, 497; *People v. Anderson* (1968) 70 Cal.2d 15, 34-36.) As this Court has recognized, the foregoing "decisions, as a group, may be read to establish 'the victim's lack of clothing" alone – without evidence of "semen, wounds to the victim's genital area or both" – 'is insufficient to establish specific sexual intent'" for *any* sexual crime. (*People v. Holloway* (2004) 33 Cal.4th 95, 139.)

In *People v. Rundle* (2008) 43 Cal.4th 76, the Court explained and qualified the rule to be taken from this line of decisions. The Court recognized that when the victim's body is unclothed or partially unclothed, the absence of physical evidence on the body that would normally be forthcoming if the victim were sexually assaulted can be determinative:

> When a victim is discovered a relatively short time after the crime, it is more likely the crime scene and the victim's body will show evidence of sexual assault—such as trauma to the body or sexual organs, or the presence of the perpetrator's bodily fluids—if such an assault occurred. An absence of such evidence in that type of case may be strong evidence the perpetrator did not have *or intend to have* sexual contact with the victim, which may tend to outweigh other facts and inferences, *rendering the evidence of sexual assault legally insufficient.*

(*People v. Rundle*, *supra*, 43 Cal.4th at p. 139, italics added, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 417-418.) On the other hand, the absence of physical evidence does not have the same significance when: (1) the victim's body is discovered long after the crime and is in such a state of decomposition that it cannot be determined either way if there was other physical evidence on the body at the time of death; and (2) there exists other, non-physical evidence to prove that a sexual crime was committed.

In *Rundle* itself, the victim's body was found in a secluded area; she was not only naked but bound. (*People v. Rundle, supra*, 43 Cal.4th at pp. 91, 95-96, 139.) Her body was so decomposed that even her cause of death could not be determined, much less the condition of the rest of her body at or near the time of her death. (*Id*. at pp. 91, 95-96, 139.) Hence, although there was an absence of physical evidence that a sexual crime was committed, in contrast to cases in which the victim's body is found shortly after the murder, there was not an absence of physical evidence that would *normally be forthcoming* if the victim had been raped or sexually assaulted. (*Id*. at pp. 139-140; see also, e.g., *People v. Hall* (1964) 62 Cal.2d 104, 111 ["the absence of evidence which would normally be forthcoming can undermine the solidity of proof relied upon to support a finding of guilt" beyond a reasonable doubt].) Given the advanced stage of decomposition, physical evidence such as semen, DNA, or trauma would not normally be forthcoming and hence its absence was simply inconclusive. (*People v. Rundle, supra*, at pp. 139-140.) Also in contrast to cases like *Johnson*, *Craig*, *Granados*, and *Anderson*, there was substantial additional evidence which – together with the facts that the victim's body was found bound, naked, and in a secluded location – was sufficient to support a reasonable inference that the defendant had raped or attempted to rape the victim, including the defendant's own confessions to having had sex with her before killing her and to committing a prior rape murder under very similar circumstances. (*Id*. at pp. 91, 96-97, 139-140.) Finally, apart from the murder, no other crimes were committed against the victim, such as robbery, to suggest another motive for her murder or the condition of her clothing.

Hence, when the victim's body *is* found shortly after the crimes and there is no evidence of "semen, wounds to the victim's genital area or both," the rule remains that the victim's partial state of undress alone "'is insufficient to establish specific sexual intent.'" (*People v. Holloway, supra*, 22 Cal.4th at p. 139, citing *Johnson, Craig, Granados*, and *Anderson, supra*.) To the

contrary, "[a]n absence of such evidence in that type of case" constitutes *affirmative*, "strong evidence the perpetrator did *not* have or intend to have sexual contact with the victim, which may tend to outweigh other facts and inferences . . . ." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 139, italics added.)

Importantly, even if a homicide victim's partly unclothed body were sufficient to support an inference of some kind of undifferentiated sexual intent or sexual assault, that is not enough to prove the commission of a *specific* sexual crime, as required under Penal Code section 190.3. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72; *People v. Boyd*, *supra*, 38 Cal.3d at p. 776-778.) An undifferentiated "sexual assault" is not a crime defined in the Penal Code. Rather, it is an umbrella term the Legislature has utilized to describe a *category* of criminal conduct that is specifically codified in provisions of the Penal Code. (Title 9 of California Penal Code covering "Of Crimes Against the Person Involving Sexual Assault.") Hence, as this Court has held, even "clear and substantial evidence of a forcible sexual attack *of some kind*," without proof of the "particular nature of the sexual assault," is insufficient to prove the essential elements of a specific sexual crime defined in the Penal Code, such as forcible oral copulation as opposed to rape as opposed to some other crime falling within the general category of "sexual assault." (*People v. Raley* (1992) 2 Cal.4th 870, 889-891, superseded by statute on other grounds as stated in *People v. Brooks* (2013) 3 Cal.5th 1, 63, fn. 8.)

Here, in contrast to the facts of *Rundle*, and as in cases like *Johnson*, *Craig*, *Granados*, and *Anderson*, the victim's body was found immediately after the crimes. Therefore, as the trial court found in dismissing the attempted rape felony-murder special circumstance allegation, the absence of any physical evidence that the victim had been sexually assaulted was itself "strong evidence the perpetrator did not have or intend to have sexual contact with the victim, which . . . tend[ed] to outweigh other facts and inferences, rendering the evidence of sexual assault legally insufficient" notwithstanding the condition of

the victim's clothing. (*People v. Rundle, supra,* 43 Cal.4th at p. 139; 7RT 1327, 1335-1336.) As the trial court further reasoned, even if the condition of the victim's clothing could support a reasonable inference of some kind of sexual intent or assault, such an inference was legally insufficient to prove a specific sex crime defined in the Penal Code. (*People v. Raley, supra,* 2 Cal.4th at pp. 889-891; 7RT 1332, 1334-1336.) Moreover, as explained in detail below and as the trial court further observed, the other kind of evidence that existed in *Rundle* – and that must exist to prove a specific violation of the Penal Code governing "sexual assault" – was absent here. At the same time, evidence was present in this case that did not exist in *Rundle* and similar cases that tended further to negate any inference that Mr. Morales himself was criminally liable for any sexual crime. (7RT 1327-1328, 1332-1333.)

In this regard, the trial court's observations concerning the deficiencies in the prosecution's preliminary hearing evidence provide a logical starting point for analyzing the sufficiency of the trial evidence, and whether it filled the evidentiary gaps the court identified, to prove that Mr. Morales was liable for a specific violation of the Penal Code governing "sexual assault."

1. The trial court's observations concerning the gaps in the prosecution's preliminary hearing evidence to support rational juror findings beyond a reasonable doubt that the victim suffered any sexual assault, or that a specific sexual crime was committed against her, or that Mr. Morales was directly or vicariously liable for any such crime

The trial court emphasized the absence of physical evidence that would normally be forthcoming if the victim had suffered a violent sexual crime, such as attempted rape, sodomy, penetration by foreign object, or forcible oral copulation. (7RT 1327, 1335.) The court also recognized that the robbery provided a reasonable explanation for the condition of her clothing. (7RT 1327, 1332.) Furthermore, there were several perpetrators of the burglary and robbery that resulted in the victim's death in this case. Accepting the inference

that Mr. Morales was the man who actually shot and killed the victim in the kitchen, it did no more than place Mr. Morales in the kitchen with the victim at the time of the shooting. While her clothing had to have been disturbed sometime after she left her children in the bedroom and before the men fled the house, there was no other evidence to pinpoint *when*, how or why that act was committed. As the trial court emphasized, the evidence "didn't even establish that the Defendant was the only one in the kitchen. Now, if that would have been the case and he was the only one that went into the kitchen and committed these acts, that would have been a different story. All I know is these individuals gained entry. There was more than one including the Defendant, and from there we have the Defendant's admission that he shot the victim. That's it." (7RT 1328.)

Thus, the gaps in the evidence left too many questions that could not be answered to establish Mr. Morales's guilt of any specific sexual crime beyond a reasonable doubt:

> I don't know if her clothing was removed prior, during, or after [she was shot]. I don't know if the clothing was removed by the Defendant. I don't know if the clothing was removed by the other accomplices that were involved. I don't know if the Defendant knew the other accomplices had removed the clothing. I don't know why the clothing was removed. I don't know if it was for an attempted rape or any other type of the sexual offense or a sexual battery or for intimidation. . . . Could they be looking for jewelry? I don't know, Money? More money?

(7RT 1327, 1332.)

Even assuming that the victim's partially unclothed state could support an inference of some undifferentiated sexual intent, the court continued, it was insufficient to prove the specific intent to commit a specific crime: assuming the intent "to commit some kind of sexual offense. Which one? Rape? Oral copulation? Digital penetration? . . . Sexual battery? I could go down the list of the Penal Code dealing with the sexual offenses." (7RT 1332.) Without more,

the evidence was insufficient to prove beyond a reasonable doubt that the person who partially disrobed the victim harbored the intent to commit a *specific* sexual crime over another, whether "rape[,] [o]ral copulation[,] [d]igital penetration[,] . . . [s]exual battery[,]" or sodomy. (7RT 1332, 1334-1336; see *People v. Raley, supra*, 2 Cal.4th at pp. 889-891.)

In response to these remarks, the prosecutor was unable to supply the court with any evidence from which a juror could reasonably infer the specific intent to commit one sexual act over another. To the contrary, his only argument concerning specific intent was a vague one that the condition of the victim's clothing alone was sufficient to support an inference that she was forcibly disrobed in order to do "*something* untoward," being "a rape, *or something* non-consensual." (7RT 1330, italics added.) The issue was, according to the prosecutor, does the evidence "pass the smell test. Is there a strong suspicion? Does this look funny? Does this smell funny? Does is this [sic] look like something is going on?" (7RT 1331-1332.) The evidence passed, according to the prosecutor, because "there's really no other explanation" for removing the victim's clothing. However, the prosecutor failed to elaborate on an "explanation" that would point to the intent to commit one sexual act over another, or that would satisfy the element of one specific crime over another. (7RT 1332.)

With respect to the court's concerns over the lack of evidence as to who was even present when the victim's clothing was disturbed and to prove that Mr. Morales committed that act and not one of the other burglars, the prosecutor acknowledged that he could not answer the question as to "whether [the defendant was] the only one there or not the only one there?" Rather, he argued, "I don't think it matters." (7RT 1330.) According to the prosecutor, Mr. Morales's admission to shooting the victim amounted to an admission that he was in the kitchen; that admission, together with the fact that the victim's partially unclothed body was found in the kitchen, was sufficient not only to

prove that Mr. Morales was present during the putative attempted rape but also liable for that crime, either directly or vicariously, because "his presence with a firearm can at least provide the necessary requisite force or fear to the victim that would show that a rape, something non-consensual was occurring." (7RT 1330.)

Of course, even if Mr. Morales were present with a firearm when someone else removed the victim's bottom garments with the intent to rape her, that evidence would not support the requisite mens rea element that Mr. Morales harbored the specific intent to aid and abet the commission of that crime. Aiding and abetting requires proof beyond a reasonable doubt that the defendant had "(1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) A defendant's mere presence when a crime is committed is insufficient to prove he aided and abetted it. (See, e.g., *People v. Stankewitz* (1990) 51 Cal.3d 72, 90.)

The trial court recognized as much, countering that even accepting the prosecutor's factual premises, an "equally reasonable scenario" was Mr. Morales "went into the kitchen. An accomplice was in there. He was taking the clothes off the victim. He [Mr. Morales] said: Stop. Don't do that. That's not part of this deal. And ultimately the victim recognizes the Defendant and he has to shoot her. That's as reasonable an interpretation as the one that you have that says he's involved." (7RT 1333.)

In making these observations, the court acknowledged that evidence is not legally insufficient simply because it supports innocent interpretations as well as guilty ones. (7RT 1332-1334.) The real problem, the court explained, was that "[w]e have no evidence, absolutely no evidence to establish that the Defendant, himself, either aided and abetted or was the actual participant [sic],

the actual participant of removing the clothes from the victim and what was the intent for anyone involved. I realize there's reasonable interpretations, and what you think is reasonable. But I think merely taking the pants off and the underpants off does not lead to rape." (7RT 1333.)

Although the court's ruling was directed to the attempted rape felony-murder special circumstance allegation, its reasoning was not limited to attempted rape. To the contrary, the court recognized that the prosecutor's evidence was insufficient to prove any particular violation of the Penal Code governing sexual assault over another or to prove Mr. Morales's identity as the perpetrator or an aider and abettor. The prosecutor obviously recognized as much; in response to the court's dismissal of the allegation, he did not move to amend the information with a felony-murder special circumstance allegation premised on some other sexual offense, such as attempted sodomy, forcible oral copulation, or penetration by object. (See § 190.2, subds. (a)(17)(C), (D), (F), and (K) [special circumstances of murder in commission or attempted commission of rape, sodomy, oral copulation, or forcible penetration by object].)

2. The evidence the prosecutor presented at trial did not fill the evidentiary gaps the court identified

The evidence the prosecutor presented at trial did not fill in the evidentiary gaps the trial court identified. Like the preliminary hearing evidence, the trial evidence was deficient in two respects. First, it was insufficient to prove that an attempted rape or indeed any other specific sexual crime was committed. Second, even if someone committed some kind of crime falling within the category of "sexual assault," the evidence was insufficient to prove that Mr. Morales was criminally liable – or otherwise personally culpable – for it.

As discussed in Argument III-B-6, *ante*, the evidence the prosecutor promised to present to fill the gaps in the attempted rape felony-murder theory never materialized. And the evidence the prosecutor did present was insufficient to overcome the deficiencies the trial court identified in dismissing the special circumstance allegation. (See *People v. Ghent*, *supra*, 43 Cal.3d at p. 774 [a penalty phase juror may consider a crime for which a charge was dismissed under Penal Code section 995 only if the prosecution persuades them beyond a reasonable doubt that the defendant was liable for it].)

The prosecutor implicitly recognized as much when he decided to renege on his promise to submit to the jury a felony-murder theory of liability premised on an uncharged attempted rape. (See Argument III, *ante*.) Likewise, he implicitly recognized that the evidence he had persuaded the court to admit in support of that theory was insufficient to prove that Mr. Morales attempted to commit some other specific sexual crime on which a felony-murder theory could be based – such as sodomy, forcible oral copulation, or penetration by object – when he did not seek instructions thereon. (§189 [felony-murder theory of first degree murder based on violation or attempted violation of Penal Code sections 286, 288a, or 289].)

Specifically, the prosecutor presented no further evidence to meet the court's concerns about the lack of evidence that the victim's clothing was removed before she died as opposed to after. (See 7RT 1327.) To the contrary, the most reasonable inference from the additional evidence the prosecutor did present – that the victim's body showed no evidence of any kind of physical force, including scratches, bruising, or abrasions, apart from the single gunshot that killed her – was that her shorts and underwear were removed after she was killed, in a quick and final search of her body for cash. (12RT 2463-2465, 2469-2470, 2472-2474, 2477-2478, 2483-2485, 2487, 2492.) While one might speculate that the victim could have fearfully complied with an order at gunpoint to remove her clothing herself – which also would have left no

evidence of physical force – that is not enough. "By definition, 'substantial evidence' requires evidence and not mere speculation. In any given case, one 'may speculate about any number of scenarios that may have occurred. . . . A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.'" (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002, quoting *People v. Morris* (1988) 46 Cal.3d 1, 21.) "A finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence. [Citations.]" (*People v. Morris, supra,* at p. 21, overruled on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5, internal quotation marks and ellipses omitted; accord, e.g., *People v. Redmond* (1969) 71 Cal.2d 745, 755 [a suspicious inference that raises a mere "possibility . . . is not a sufficient basis for an inference of fact"].) The Court's decision in *People v. Morris, supra,* is instructive.

In *People v. Morris, supra,* this Court reviewed the sufficiency of evidence to prove robbery as an essential element to a robbery felony-murder special circumstance. The victim in that case was shot twice in a public bathhouse where robberies frequently occurred. (46 Cal.3d at pp. 10, 19.) The victim's naked body was found minutes after the shooting. (*Id.* at pp. 19-20.) None of his personal possessions were found at the scene. There was evidence that three days after the murder, the defendant was in possession of a credit card that had been loaned to the victim two months earlier. (*Id.* at pp. 11, 20.)

There was also evidence that the defendant drove to the bathhouse with the murder weapon, took it with him into the bathhouse and shot the victim, then ran to his car and escaped. (*People v. Morris, supra,* 46 Cal.3d at pp. 10-11, 22.) An eyewitness testified that he observed the shooting, after which he ran away; when he turned, he saw the defendant running away toward his car. (*Id.* at pp. 10-11, 20.) However, "there were no witnesses to any of the events surrounding the shooting." (*Id.* at p. 20.) The defendant admitted committing

the murder to a friend; his only admission regarding his motive for the crime was that "'. . . . he go out there and make money, you know, with these homosexuals, you know, dates – he had to kill one.'" (*Id.* at p. 20 & *id* at pp. 10-11.) The defendant was convicted of first degree premeditated and deliberate murder, along with a robbery felony-murder special circumstance. (*Id.* at pp. 9-10.) On appeal, he argued that the evidence was insufficient to prove the robbery felony-murder special circumstance. (*Id.* at p. 19.) This Court agreed.

The Court first recounted the definition of robbery –a necessary element of robbery felony murder– 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.'" (*People v. Morris, supra,* 46 Cal.3d at p. 10.) The Court agreed that the evidence was sufficient to support a reasonable inference that the defendant took the credit card from the victim. However, the Court reasoned:

> It is impossible to make a reasonable inference from these facts that the taking occurred either before or during the shooting, that the taking was from the person of the victim, and that the taking was accomplished by means of force or fear. If, prior to the shooting, the assailant removed the credit card from the victim's clothes, then the taking constituted a theft but not a robbery. Similarly, if, prior to the shooting, the victim volunteered the credit card to his assailant as a form of consideration for sexual services, then no robbery was committed.
>
> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." [Citations.] In the absence of any substantial evidence that the taking was accomplished either before or during the killing by means of force or fear, we must conclude that the evidence will not support a conviction of

> robbery. Absent substantial proof of the robbery, the special circumstance finding of robbery-murder must fall.

(*People v. Morris*, *supra*, 46 Cal.3d at p. 21.)

Here, as in *Morris*, while there were eyewitnesses to some of the events preceding the shooting, there were no witnesses to the shooting itself or to the events that resulted in the victim's partially unclothed state. The prosecution also presented evidence of three detailed admissions Mr. Morales made to his brother, his girlfriend, and his mother discussing the robbery, burglary, the victim's death. But in none of those admissions did Mr. Morales mention anything about removing the victim's clothing or personally committing any kind of sexual assault. As in *Morris*, evidence concerning how, why, and when the victim's clothing was removed was lacking. Particularly given the absence of physical evidence that would normally be forthcoming if the victim suffered a sexual crime, the various explanations for the condition of her clothing amount to no more than speculation.

Even if the evidence could support a reasonable inference that the victim was alive while her bottom garments were removed, the prosecution presented no further evidence to meet the court's concern that the evidence "didn't even establish that the Defendant was the only one in the kitchen" with the victim, which would support the inference that he was the person who removed her clothing. (7RT 1328.) To the contrary, the children testified that more than one perpetrator removed their mother from the master bedroom. (8RT 1648; 9RT 1694-1695, 1720-1721, 1741-1742, 1799-1800, 1868; 3 SCT 717, 719, 721.) While they testified that the men took her into the kitchen, in fact none of the children could see the kitchen or its entrance located in the southeast corner of the house from their vantage point in the master bedroom at the northwest corner of the house. (Ex. 81 [diagram of floor plan]; 9RT 1758-1761 [identifying master bedroom on diagram]; 9RT 1807 [same].) It should have been clear that the children only testified that their mother was taken

directly into the kitchen because her body was later found in that room. While Brianda identified Mr. Morales as one of the men who removed their mother from the bedroom, she also insisted in both her trial testimony and her forensic interview statement that Mr. Morales *returned* to the bedroom alone to continue to search it. (9RT 1863-1864, 1868, 1876-1877; 3 SCT 718.) According to Joe and Jennifer, the knife-wielding perpetrator – whom Brianda identified as Mr. Morales – was not one of the men who removed their mother at all; rather, he remained behind in the bedroom when other perpetrators removed her. (8RT 1648; 9RT 1695-1696, 1721, 1742; 10RT 1968-1971, 1993, 3 SCT 719.) Thus, by all of the children's accounts, the victim was alone with the *other* perpetrators for some time before the shooting. Indeed, according to Brianda, after Mr. Morales returned to the bedroom, the perpetrator in the ponytail left, immediately after which she could hear the sound of her mother's screams. (3 SCT 717.) Assuming that the victim was alive when her bottom garments were removed, Brianda's account tended circumstantially to demonstrate that the act was most likely committed by the ponytailed perpetrator outside of Mr. Morales's presence. For all of these reasons, assuming that the victim was alive when her clothing was removed, the perpetrator of that act could have been *any* of the burglars, the most likely of whom was the ponytailed man. Certainly, Mr. Morales was no more likely to be the perpetrator than anyone else. Based on the same record, the prosecutor also failed to fill the other gaps the court had identified with evidence that Mr. Morales was present when the victim's shorts were removed (much less that he was present and aided and abetted that act with the specific intent of committing or facilitating a specific sexual crime against her, as discussed below). (See 7RT 1330-1333.)

The prosecutor also failed to meet the court's concerns about the absence of evidence of sexual intent and certainly did not meet its concerns about the absence of evidence of intent to commit a *specific* sexual crime. The

prosecutor had represented to the court that he would meet that evidentiary gap with Joe's testimony that Mr. Morales "walked up and grabbed the victim's breasts" in the bedroom. (7RT 1336.) That evidence, according to the prosecutor, would support inferences that: 1) Mr. Morales harbored the intent to commit an unlawful sexual act on the victim; 2) the victim's clothing was later removed for a "sexual" purpose; and 3) Mr. Morales was the man who removed her clothing with that intent. But, as discussed in Argument III-B-6, *ante*, Joe never made any such prior statement or so testified at trial.

Instead, he reported after the crimes and testified at trial that one of the men pulled his mother's shirt down and a second, ponytailed perpetrator "grabbed" or "touched" her "*chest.*" (8RT 1647-1648 & 9RT 1693-1695; 9RT 1923, 1927-1928, 1938; 3 SCT 721-722.) But as he testified at trial, this occurred when the victim's necklace was forcibly removed from her person. (8RT 1647.) Joe's account thus described no more or less than the forcible taking of his mother's necklace from her person, or the charged *robbery*, which was consistent with his use of the term "chest" and not "breasts" or a child's equivalent of that word. It was also consistent with his description of the men pulling the victim's shirt *down*, which would have provided ease of access to her neck and "*chest*" above her breasts where a necklace would lie, as opposed to pulling her shirt *up*, which would provide ease of access to her breasts below her neckline and sternum. Indeed, that Joe's account did no more than recount a detail of the charged *robbery* as opposed to a separate, uncharged sexual battery was confirmed by the fact that his older siblings, who were also present when this incident occurred, did not describe seeing their mother's "breasts" or "chest" being grabbed or indeed seeing anything remotely like a sexual act.

In any event, Joe consistently described the man who "grabbed" or "touched" his mother's "chest" as the perpetrator with long hair in a ponytail. (8RT 1647-1648; 9RT 1693-1695, 1923; 3 SCT 721-722.) Joe never identified Mr. Morales as that ponytailed perpetrator nor would any such identification be

credible, since the prosecution's own evidence established that Mr. Morales had a bald or closely-shaved head at the time of the crimes. (See Argument III-B-6-a; 7RT 1389-1390; 8RT 1469, 1647-1648, 1656-1658; 9RT 1693-1694, 1923; 11RT 2247, 2273, 2280-2281; 3 SCT 691-694 [Exs. 94 & 95], 721-722 [Ex. 118].)

Furthermore, none of the other witnesses – the victim's children or the neighbors, including Mayra Lopez – testified to *any* statements or conduct at the scene by Mr. Morales (or anyone else) that were in any way sexually inappropriate or suggested any intent to commit any sexual misconduct. To the contrary, Mayra Lopez testified Mr. Morales was one of the two men who first entered her home and explicitly told her not to worry because they did not want to harm her in any way but only wanted money. (See 8RT 1547, 1581.) None of the men either said or did anything to Ms. Lopez that was even suggestive of a sexual interest.

The only additional, legally relevant evidence the prosecution presented at the guilt (or penalty) phase concerning the putative commission of an uncharged sexual crime was the triple hearsay statement Angel Ivan reported to police that Jorge had told Angel Ivan that Mr. Morales allegedly told Jorge that he had been "*involved* in a robbery *and a rape* of a woman." (10RT 2179, italics added.) As a preliminary matter, given the hearsay nature of Jorge's out-of-court statement offered for the truth of proving that Mr. Morales did, in fact, make that statement, reasonably competent counsel would have moved to exclude and preclude the jurors from considering it on hearsay grounds. (Evid. Code, § 1200; see, e.g., *People v. Valencia*, *supra*, 146 Cal.App.4th at pp. 103-104 [no conceivable tactical reason to fail to object to inadmissible, important hearsay evidence]; *People v. Moreno*, *supra*, 188 Cal.App.3d at p. 1191 [same]; Part G, *post*.)

In any event, the statement that Mr. Morales had been "involved in a robbery and a rape" of the victim was obviously untrue. It was undisputed that

the victim was not, in fact, raped or otherwise forcibly penetrated in a way that a layperson might refer to as "rape." Rather, the prosecution's unadjudicated theory was that Mr. Morales *attempted* to rape the victim. The demonstrable falsehood of the alleged statement, assuming Mr. Morales made it, was inconsistent with his identity as the man who removed the victim's bottom garments, or as a man who aided and abetted their removal with the intent to commit a specific sexual crime against her.

"An attempt to commit rape has two elements: the specific intent to commit rape and a direct but ineffectual act done toward its commission. [Citation.] The act must be a direct movement beyond preparation that would have accomplished the crime of rape if not frustrated by extraneous circumstances." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130; § 21a [elements of attempt].)

The only "act" the prosecutor offered as the actus reus element of attempted rape was the removal of the victim's clothing. But if Mr. Morales was the person who committed that act, or if he aided and abetted another person in the commission of that act with the intent to rape or otherwise penetrate the victim, he would have known that it did not constitute "a rape" or similar act of forcible penetration. In other words, if Mr. Morales participated in the removal of the victim's clothing with the intent to rape her, he would have known that the mere removal of her clothing was an "*ineffectual act* done toward" committing a rape that was not actually committed because it was "frustrated by extraneous circumstances." (*People v. Guerra, supra*, 37 Cal.4th at p. 1130, italics added.) Thus, assuming he made the statement that he had been "*involved in* a robbery and a rape" at all, it reflected Mr. Morales's *mistaken belief* that the victim had been raped (or suffered a similar crime that a layperson to which a layperson might refer as "rape"). That mistaken belief, in turn, was inconsistent with his identity as the person who removed the victim's clothing, or aided and abetted its removal, in a "direct but ineffectual act done

toward" the commission of an intended rape. (*People v. Guerra, supra*, at p. 1130.)

Finally, even assuming for the sake of argument that the other evidence could support a reasonable inference that Mr. Morales removed or participated in the removal of the victim's clothing, the evidence as a whole fell squarely within the rule that the "the victim's lack of clothing" alone – without evidence of "semen, wounds to the victim's genital area or both" – "'is insufficient to establish specific sexual intent'" as an element of any Penal Code provision, just as the trial court ruled. (*People v. Holloway*, *supra*, 22 Cal.4th at p. 139; accord, *People v. Rundle*, *supra*, 43 Cal.3d at p. 139; *People v. Johnson*, *supra*, 6 Cal.4th at pp. 39-42; *People v. Craig*, *supra*, 49 Cal.2d at pp. 318–319; *People v. Granados*, *supra*, 49 Cal.2d at p. 497; *People v. Anderson*, *supra*, 70 Cal.2d at pp. 34-36; 7RT 1332, 1334-1336.) Hence, it was insufficient to satisfy the prosecutor's burden to prove Mr. Morales's criminal liability for a *specific* violation of the Penal Code governing "sexual assault." Absent sufficient evidence to prove such a crime, the jurors should never have heard or considered in aggravation any evidence suggesting the commission of an unadjudicated violent sexual crime. (See, e.g., *People v. Phillips*, *supra*, 41 Cal.3d at pp. 72-75, 81-82 [jurors should not have been permitted to consider evidence in aggravation of defendant's agreed-upon plans to commit murders where, inter alia, one agreement did not constitute an actual crime because it was made with a feigned accomplice and two others were unsupported by sufficient corroborating evidence]; Part B-2, *ante*.)

For all of the foregoing reasons, the sexual assault evidence and innuendo that the prosecution presented at the guilt phase was not legally relevant to any legitimate issue concerning Mr. Morales's guilt of the charged crimes and therefore should never have been admitted at the guilt phase *or* considered at the penalty phase as a circumstance of the crime under factor (a). (Argument III and Parts B & C, *ante*.) It was also legally insufficient to prove

that Mr. Morales was directly or vicariously liable for a specific unadjudicated violent sexual crime and therefore should never have been admitted or considered at the penalty phase under factor (b).

The manner in which the prosecution presented and used the evidence at the guilt phase, as set forth in Argument III, Parts G & H, *ante,* and used it again at penalty, as set forth in Part E, *post*, created a reasonable possibility that at least one – if not all – of the jurors were misled to believe that Mr. Morales was legally and morally responsible for "horrendous" (5RT 706-707) and "egregious" (6RT 1142-1144) unadjudicated violent sexual crimes against the victim. As further set forth in Part E, *post,* the prosecutor's penalty phase summation told the jurors to consider that putative criminal activity as a reason to sentence Mr. Morales to death. For its part, as set forth in Part F, *post*, the trial court instructed the jurors to consider the guilt phase evidence as well as the presence of criminal activity involving force or violence in determining the appropriate penalty. For these reasons as well as those set forth in Part H, *post*, even if the prosecutor's erroneous introduction and use of the evidence at the guilt phase were not sufficiently prejudicial to undermine confidence in the reliability of the jury's death-eligibility determinations (Argument III-J, *ante*), they had a profoundly prejudicial impact on the question of Mr. Morales's death-worthiness at penalty. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [error that was harmless at guilt phase was prejudicial at penalty]; *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357, 1368 [defense counsel's deficient performance was harmless at guilt phase but prejudicial at penalty]; see also, e.g., *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1208, and authorities cited therein [guilt phase errors may prejudicially impact penalty determination]; *People v. Brown, supra*, 46 Cal.3d at p. 466; *People v. Hamilton* (1963) 60 Cal.2d 105, 136.)

E. The Prosecutor Argued the Commission of Unadjudicated Violent Sexual Crimes Against the Victim in Aggravation of Penalty, Committed Misconduct in Misstating the Evidence and Ignoring the Court's Rulings Sustaining Counsel's Objections, and the Trial Court Erred in Refusing to Admonish the Jurors to Disregard the Prosecutor's Improper Remarks

The prosecution told the jurors that factor (b) was a relevant aggravating factor that they should consider. (2 SCT 512, 519; 14RT 3167.) The prosecution presented no penalty phase evidence under this factor. To the contrary, the *only* evidence of other criminal activity involving force or violence was the guilt phase evidence suggesting the commission of unadjudicated sexual crimes.[64] In this regard, the prosecutor purported to rely on the guilt phase evidence to argue that Mr. Morales was deserving of the death penalty because he "grope[d]" the victim "in front of" her children in the bedroom, then dragged her into the kitchen where he stripped her naked and "sexually assault[ed]" her again before killing her. (14RT 3145, 3183, 3185-3186.) The prosecutor's argument thus exacerbated the effect of his guilt phase misconduct and unquestionably triggered the protections to which Mr. Morales was entitled under factor (b). (See Parts B-3 & C, *ante*.)

Further compounding the problem, the prosecutor – over defense counsel's repeated objections -- misstated the guilt phase evidence and the permissible inferences to be drawn therefrom. The prosecutor argued: "*[W]hat is the proper punishment*, let's talk about this, for somebody who . . .

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[64] The prosecution did introduce evidence under factor (c) that Mr. Morales had suffered a prior felony conviction for violating Penal Code section 273.5. (13RT 2875-2876; 14RT 3180; 3 SCT 732-738 [Ex. 159].) No testimony or other evidence was admitted beyond the bare record of conviction, such as witness testimony or other evidence concerning the conduct underlying that conviction; therefore, both the trial court and the prosecutor recognized that factor (b) was inapplicable to that conviction. (See 13RT 2875-2876.) In his summation, the prosecutor also told the jurors that this conviction was offered only under factor (c), not factor (b). (14RT 3180.)

gropes their mother in front of them, drags her off screaming down the hallway to sexually assault her, to strip her naked from the waist down and to kill her for the simple fact that she recognized him. That wasn't a picture that we saw during the trial. But it is one you see now. And it really shows how the children found their mother in this case after she was killed. Naked from the waist down. *What is the appropriate punishment for that*?" (14RT 3145, italics added.)[65]

The prosecutor emphasized that the children would eventually "realize" the significance of the fact that their mother was "naked from the waist down" (14RT3183) as proof that she was "sexually assault[ed]" (14RT 3145) and entreated the jurors to consider the impact of that realization on them: "[M]aybe they know now, or maybe they will realize later on, the significance of that and what that means. And how do you think they're going to live when they come to that realization?" (14RT 3183.) Indeed, the prosecutor argued, the guilt phase evidence established both that Mr. Morales "stripped" the victim naked from the waist down and that he did so to commit a sexual crime against her: "What do you think was really going on when the Defendant was pulling off her pants and her underwear and Elia says, Johnny, why are you doing this to me?" (14RT 3183; see also 14RT 3172 ["The Defendant is the one who strips her"].) Of course, the prosecutor had earlier answered his own question about what "was really going on when the Defendant was pulling off her pants and her underwear": Mr. Morales stripped her in order "to sexually assault her . . . ." (14RT 3145.) At this point, defense counsel interjected: "Objection, your

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[65] In fact, a photograph of the victim naked from the waist down – Exhibit 24 – *was* previously used in the guilt phase of the trial, although the prosecutor later withdrew it on the ground that it was no longer relevant to any legitimate guilt phase issue. (See Argument III-G, *ante*.)

Honor. Misstates the evidence." The trial court sustained the objection and directed the prosecutor to proceed. (14RT 3183.)

Despite the court having sustained the objection, the prosecutor continued, calling upon the jurors to consider "what the victim, what Elia experienced . . . ." (14RT 3184.) "Before she's groped, her shirt is pulled down, and her chest is groped by one of the Defendants" after which Mr. Morales dragged her down the hallway "screaming." (14RT 3185.) "And she's dragged down the hallway to the kitchen where her pants are taken off, her underwear is removed. What do you think is going through her mind then?" (14RT 3185.) Having already attributed the act of "stripping" the victim to Mr. Morales (14RT 3172), the prosecutor continued, "Do you really think these guys are looking for money or do you think there's something else going on? No. They want a little more action, and they have her stripped her naked. And oh, my God, what are they going to do to me. Johnny, why are you doing this?" (14RT 3186.) At this point, defense counsel again interjected, "Objection, your Honor, misstates the evidence." Again, the court sustained the objection and again the prosecutor ignored it. (*Ibid*.)

The prosecutor responded to the court's ruling by declaring in front of the jurors that "it doesn't" misstate the evidence and immediately continued: the victim "[c]alls out his name. What do you think was going on?" (14RT 3186.) As the prosecutor had already told the jurors, what "was going on" was that Mr. Morales wanted a "little more action" and "stripped [the victim] naked" to "sexually assault" her. (14RT 3145, 3172, 3183, 3186.) Given – the prosecutor argued – the horrific nature of Mr. Morales's unadjudicated violent sexual crimes against the victim, the heightened trauma she suffered as a result before she died, and the pernicious effect of the trauma on her children when they grew old enough to realize that their mother was naked from the waist down because she had been sexually assaulted, he concluded his summation with the declaration that Mr. Morales was not a man "deserv[ing]" of the

jurors' mercy but rather a man for whom the only "just" punishment was death. (14RT 3187-3188.) These were the final words the jurors heard from the prosecutor.

Immediately after the prosecutor's argument concluded and outside of the jury's presence, defense counsel complained that she had objected "more than three times" and the trial court sustained each objection but the prosecutor ignored the rulings. (14RT 3188-3189.) Moreover, defense counsel objected that the prosecutor's statement that he was not misstating the evidence in front of the jurors – in response to their last sustained objection – was improper. Although lead defense counsel stated that she was not sure if the jurors heard the prosecutor's dismissive response to their sustained objection (14RT 3189), the court reporter – and so presumably the jury – heard the remark and reported it at the time it was made (14RT 3186).

The court responded that it had already made its rulings sustaining the objections and "I don't know if it's prosecutorial misconduct." (14RT 3189.) The court asked defense counsel whether she was requesting a mistrial. Defense counsel replied that she simply wanted an admonition to the jury. (*Ibid.*) The court refused, reasoning it was "too late" to admonish the jurors because "it's already said and done" and the prosecutor would not have the chance to argue again. In any event, the court reasoned, the prosecutor's misstatements of the evidence did not constitute "prosecutorial misconduct, or willful violation of the Court's orders" since the prosecutor argued "what he believes" based on his own honest – even if mistaken – recollection of the evidence that came in. (*Ibid.*) Therefore, the court refused to assign the prosecutor's remarks as misconduct or admonish the jurors to disregard them. (*Ibid.*)

The foregoing argument by the prosecutor and discussion of the objections and evidence between the court and both parties is replete with error and misapplication of the law. First, as discussed at length in Part D and

Argument III, Parts B-6-a, F-1 and G, *ante*, the prosecutor *was* misstating the evidence when he argued that Mr. Morales "groped" the victim in the bedroom as part of a "sexual assault." Despite not only having failed to deliver on his in limine representations to the court that Joe had reported that Mr. Morales "walked up and grabbed the victim's breasts" and would so testify (7RT 1336), but also having presented affirmative evidence to the contrary, the prosecutor "smuggled [it] in by inference" in his argument to the jury anyway. (*People v. Bolton* (1979) 23 Cal.3d 208, 212.) The prosecutor's repeated misrepresentations of this evidence to the court in limine (Argument III, Parts B-6-a & F-1), to the jurors in his guilt phase opening statement (Argument III-G, *ante*), and again to the jurors in his penalty phase summation as a basis on which to return a death verdict was outrageous and "incompatible with 'rudimentary demands of justice.'" (*Giglio v. United States* (1972) 405 U.S. 150, 153-154, and authorities cited therein; see also, *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585 [reliance on inaccurate information as aggravating factor at penalty violated Eighth Amendment]; *People v. Bolton*, *supra*, 23 Cal.3d at p. 213, fn. 2; Rules of Prof. Conduct, Rule 5-200(B).)

Although the prosecutor later obliquely referred to "one of the Defendants" having groped the victim (14RT 3185), that reference did not correct or cure the impropriety of his first remarks for several reasons. First, there was no evidence that the victim had been "groped" in a "sexual" way at all. Second, Mr. Morales was the *only* "Defendant" on trial and facing the death penalty. Third, the prosecutor told the jury that death was "the appropriate punishment" for *Mr. Morales* given the despicable nature of the "sexual" "groping" in front of the victim's children which, together with the prosecutor's first remarks, clearly conveyed to the jurors that they should hold *Mr. Morales* responsible for that putative unadjudicated sexual criminal activity. Thus, as set forth in Part D, *ante*, the prosecutor's remarks improperly encouraged the jurors to sentence Mr. Morales to death based on a sexual crime

that was never committed at all. (See *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 585.) Even if the ponytailed perpetrator Joe identified as the person who touched his mother's "chest" did commit or intend to commit a sexual battery, the prosecutor's remarks improperly encouraged the jurors to sentence Mr. Morales to death for a constitutionally irrelevant crime committed by *someone else*, which had no bearing on Mr. Morales's *personal* culpability. (See, e.g., *Enmund v. Florida*, *supra*, 458 U.S. at p. 798; *Zant v. Stephens*, *supra*, 462 U.S. at p. 885; *People v. Ray*, *supra*, 13 Cal.4th at p. 351; *People v. Boyd*, *supra*, 38 Cal.3d at p. 774.)

For the reasons set forth in Part D, *ante*, the prosecutor also misstated the evidence by arguing that it was Mr. Morales who "stripped" the victim (14RT 3145) or removed her shorts and underwear (14RT 3183, 3185), which was shown by the fact that the victim asked "Johnny, why are you doing this to me?" *while* she was being stripped (14RT 3186). As discussed in Argument III-H, *ante*, the prosecutor made the same argument in his guilt phase summation, which he pointed to as proof corroborating the truth of Mr. Morales's alleged statement that he had been "involved in a robbery and a rape." (12RT 2650-2651.) The prosecutor's arguments in this regard were consistent with his misleading offer of proof to the trial court that he would present evidence that the victim had asked, "Johnny, why are you *raping* me?" (7RT 1336; Argument III, Parts B-6, F-2 & H, *ante*.) As discussed in Argument III, the prosecutor did not and could not present any such evidence. (Argument III, Parts B-6, F-2 & H, ante.) Nor was the inference the prosecutor urged in his guilt and penalty phase summations supported by any circumstantial evidence that the victim asked, "Johnny, why are you *doing* this to me?" while her clothing was being removed as opposed to any other time during the burglary and prolonged search for loot. (*Ibid.*) Thus, the prosecutor's argument again improperly encouraged the jurors to substitute speculation for the actual evidence he had promised but did not and could not

present, and to draw an extraordinarily prejudicial and unfounded inference therefrom. (See, e.g., *People v. Fuiava* (2012) 53 Cal.4th 622, 728-729 [misconduct for prosecutor to invite jury to speculate concerning defendant's other violent crimes at penalty]; *People v. Bolton*, *supra,* 23 Cal.3d at p. 212.)

Finally, for all of the reasons set forth in Part D, *ante,* the prosecutor misstated the evidence when he told the jurors that Mr. Morales had "sexually assault[ed]" the victim. As previously stated, the prosecutor implicitly recognized at the close of his guilt phase case-in-chief that his evidence was insufficient to prove that Mr. Morales was directly or vicariously liable for attempted rape or any other specific unadjudicated sexual crime. (Part D, *ante*.) While he was obviously trying to hedge his bets in his penalty phase summation by arguing that Mr. Morales had committed some kind of undifferentiated "sexual assault" at penalty, there was no evidence to support it, either. (*Ibid*.)[66] The prosecutor's argument encouraging the jurors to sentence Mr. Morales to death based on highly inflammatory considerations that found no support in the evidence was inconsistent with state law, as well as the Eighth Amendment and the due process clause of the Fourteenth Amendment.

By sustaining defense counsel's objections, the trial court agreed that the prosecutor had misstated the evidence. However, the court's refusal to admonish the jurors to disregard the prosecutor's remarks on the ground that the prosecutor's misstatements did not amount to misconduct because they were based on his honest, even though mistaken, recollection was contrary to well settled law. It has been the established law in this state for 40 years that a prosecutor's misstatement of evidence in argument is misconduct – or

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[66] In any event, as set forth in Parts D, *ante,* and F, *post,* even if the evidence supported an inference that someone committed some kind of undifferentiated sexual assault on the victim, the jurors could not properly consider that unadjudicated violent criminal activity absent proof of a specific violation of the Penal Code.

"prosecutorial error" – regardless of his or her subjective good faith or bad faith. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 823; *People v. Bolton, supra*, 23 Cal.3d at pp. 212-214; Argument III-E-2, *ante*.) And the United States Supreme Court has recognized for the last 47 years that regardless of whether it is by "negligence or design," a prosecutor's "deception of a court and jurors" through false representations of evidence is "incompatible with rudimentary demands of justice." (*Giglio v. United States, supra*, 405 U.S. at pp. 153-154, internal quotation marks and citations omitted.) This rule takes on even greater importance in the penalty phase of a capital case. (See, e.g., *Gilmore v. Taylor, supra*, 508 U.S. at p. 342 ["the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case"]; *Johnson v. Mississippi, supra*, 486 U.S. at pp. 584-590.)

Furthermore, as discussed in Argument III, the damaging and influential effects of such prosecutorial misconduct are well-recognized. (See, e.g., *Berger v. United States, supra*, 295 U.S. at p. 88; *People v. Perez* (1962) 58 Cal.2d 229, 247; *People v. Bolton, supra*, 23 Cal.3d at p. 212.) The prosecutor's misstatements in this case were particularly likely to mislead the jurors to Mr. Morales's detriment given that his penalty phase argument was made *two months* after the presentation of the guilt phase evidence, after the jurors' memory of the true evidence had faded. (See, e.g., *Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 705, 708 [prosecutor's improper characterization of witness's statements in argument was prejudicial, inter alia, because it had been a month since the jurors had heard the witnesses].) The trial court erred in refusing to assign the prosecutor's misstatements as misconduct and admonish the jurors to disregard them.[67]

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[67] Moreover, although bad faith or intentionality is not a necessary component of prosecutorial misconduct, it must be emphasized that the trial court's assumption that the prosecutor's misstatements were not intentional but

F. The Trial Court Erred By Instructing the Jurors to Consider All of the Evidence in the Guilt Phase and the Presence of Unadjudicated Violent Criminal Activity in Determining the Appropriate Penalty But Failing to Instruct That Unless They Were Convinced Beyond a Reasonable Doubt that Mr. Morales Had Committed a Specific Unadjudicated Violent Sexual Crime Against the Victim, They Were to Disregard any Evidence Suggestive of Such a Crime

The trial court's instructions buttressed the prosecutor's argument that factor (b) was a relevant aggravating factor the jurors should consider and that they should consider the guilt phase evidence demonstrating the commission of unadjudicated "sexual assault" crimes against the victim on death's side of the scale. The trial court affirmatively instructed the jurors with CALJIC No. 8.85 in relevant part as follows:

> In determining which penalty is to be imposed on defendant, *you shall consider all of the evidence which has been received during any part of the trial of this case.* You shall consider, take into account and be guided by the following factors, if applicable . . . .
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceeding, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(28CT 8028-8029, italics added; see also 28CT 8002 [instruction with CALJIC No. 8.84.1 to "consider the evidence received during the *entire* trial"].)

The trial court did not, however, instruct the jurors with CALJIC Number 8.87 that they could not consider "criminal activity" other than the crimes for which Mr. Morales was convicted, including the impact of such

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rather honest mistakes in recollection is at odds with the record as a whole, for all of the reasons discussed above and in Part D and Argument III, *ante*.

activity on the victim and her family, unless and until the People proved beyond a reasonable doubt that Mr. Morales committed a specific violation of the Penal Code. (Accord, CALCRIM No. 764; see also *People v. Champion, supra*, 9 Cal.4th at p. 949; *People v. Robertson, supra,* 33 Cal.3d at pp. 53-56; *People v. Phillips, supra*, 41 Cal.3d at p. 72; *People v. McClellan, supra*, 71 Cal.2d at pp. 803-805.) The court's failure to so instruct violated state law, as well as Mr. Morales's Sixth, Eighth, and Fourteenth Amendment rights.

As set forth in Argument III and Parts C & D, *ante*, the trial court recognized both in limine and at the close of the prosecution's guilt phase case-in-chief that Mr. Morales's commission of uncharged sexual crimes, and the guilt phase evidence admitted to prove attempted rape in support of the prosecution's bogus and abandoned felony-murder theory, was irrelevant to, and thus could not be used or considered for, any legitimate issue material to his guilt of the charged crimes and allegations. (See *People v. Rich, supra*, 45 Cal.3d at pp. 1121-1122; *People v. Robertson, supra,* 33 Cal.3d at pp. 54-55 (plur. opn.) and *id*. at pp. 60-61 (conc. opn. of Broussard, J.).) The court was also alerted (at least) by the prosecutor's penalty phase summation that he did "'ask the jury to consider'" the guilt phase evidence suggesting unadjudicated sexual crimes "'in determining defendant's sentence.'" (*People v. Rich, supra*, at pp. 1121-1122; see also, e.g., *People v. McClellan, supra*, 71 Cal.2d at pp. 804-806; *People v. Champion, supra*, 9 Cal.4th at p. 949; *People v. Bittacker, supra*, 48 Cal.3d at p. 1103; *People v. Phillips, supra*, 41 Cal.3d at pp. 65, 72-73, 82-83.) Hence, pursuant to the well-established authorities set forth in Part B, *ante*, the trial court was on notice that the putative sexual assault evidence did not constitute legitimate circumstances of the crimes *of conviction* under factor (a) but rather was subject to the legal principles governing factor (b). The trial court was thus under a sua sponte obligation to instruct the jurors that they could not consider any criminal activity involving force or violence that did not result in a conviction unless and until the prosecution proved beyond a

reasonable doubt that Mr. Morales was directly or vicariously liable for a specific violation of the Penal Code. (*People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-55; *People v. Champion* (1995) 9 Cal.4th 879, 949; *People v. Bittacker*, *supra*, 48 Cal.3d at p. 1103; *People v. Phillips*, *supra*, 41 Cal.3d at pp. 65, 72-74, 82-83; *People v. McClellan*, *supra*, 71 Cal.2d at pp. 803-805.)

The trial court was also obligated to specify what Penal Code violations the jurors could – and by necessary implication, could *not* – consider under factor (b) if proved beyond a reasonable doubt. Given the evidence and the prosecutor's arguments at the guilt and penalty phases, there was a real danger that the jurors would consider criminal activity that was not "proper aggravating evidence" without such instruction. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 151, citing *People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19; see also *People v. Wickersham*, *supra*, 32 Cal.3d at p. 323.) As set forth in Argument III, *ante*, the prosecutor argued at the guilt phase that Mr. Morales attempted to "rape" the victim, despite the absence of sufficient evidence to prove either the commission of that crime or Mr. Morales's direct or vicarious liability for it. As set forth in Part D, *ante*, the trial court acknowledged the deficiencies in the prosecution's preliminary evidence to prove as much; the prosecutor did not deliver on his promised evidence to fill the gaps the court identified; and the prosecutor implicitly recognized that the evidence he did present was insufficient to prove Mr. Morales's liability for that putative crime when he abandoned his unsupported attempted rape felony-murder theory at the 11th hour. The evidence was likewise insufficient to prove that Mr. Morales attempted to commit a specific other sexual crime, such as sodomy or forcible oral copulation. Hence, the prosecutor's arguments created a danger that the jury would consider Mr. Morales's commission of an attempted rape that was not supported by substantial evidence and thus was "not proper aggravating evidence." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 151; accord, *People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19.)

The prosecutor's penalty phase argument that Mr. Morales committed an unspecified "sexual assault" in the kitchen also created a danger that the jurors would consider "criminal activity" that was "not proper aggravating evidence." Once again, "sexual assault" is *not* itself a specific crime and hence does not qualify as a specific Penal Code violation that may be considered as an unadjudicated crime in aggravation. (See *People v. Phillips, supra,* 41 Cal.3d at pp. 71-72 [factor (b) requires proof of an actual crime, as defined by statute]; accord, *People v. Boyd, supra*, 38 Cal.3d at p. 778; see also, *People v. Raley, supra*, 2 Cal.4th at pp. 889-891 [proof of undifferentiated "sexual assault" without proof of the "particular nature of the sexual assault" is insufficient to prove the essential elements of a specific sexual crime in the Penal Code].) Rather, as noted in Part D, *ante,* the term "sexual assault" is the umbrella term for various specific sexual crimes in the Penal Code. (Title 9 of California Penal Code covering "Of Crimes Against the Person Involving Sexual Assault.").

However, lay jurors certainly would not understand that a "sexual assault" does not qualify as "criminal activity" involving force or violence under Penal Code section 190.3, factor (b), without instruction from the court. To the contrary, as demonstrated by the Legislature's own use of the term, "sexual assault" unquestionably refers to activity that is "criminal" in nature, even though not itself a crime. The cases are too numerous to count in which the term "sexual assault" (see, e.g., *People v. Merriman* (2014) 60 Cal.4th 1, 21-22, 38-43) or "sexual assault *crimes*" (*id*. at p. 40) is used as a shorthand reference to refer to a wide variety of sexual *crimes*. The common dictionary definitions of the term are: "*illegal* sexual conduct that usually involves force upon a person without consent" (*Merriam-Webster* on line dictionary, https://www.merriam-webster.com/dictionary, italics added) and ". . . an act of forcing an unconsenting person to engage in sexual activity; (Law) *a crime* involving forced sexual contact, variously defined as inclusive or exclusive of

rape" (*Oxford English Dictionary* on line dictionary, https://en.oxforddictionaries.com, italics added). In accord with the common understanding of the term, the lay jurors would have misunderstood that "sexual assault" qualified as the "criminal activity" involving force or violence they were instructed to consider absent instructions from the court. A general instruction that the prosecution bore the burden of proving unadjudicated "criminal activity" beyond a reasonable doubt would not have resolved the problem. The cumulative effect of the evidence and arguments might have persuaded the jurors under that standard that *some kind of* "sexual assault" was committed and therefore considered that "criminal activity" in aggravation under factor (b); but without being convinced beyond a reasonable doubt that a *specific* Penal Code violation in the category of sexual assault was committed, that would not be proper aggravation.

For all of these reasons, instruction on the principle that the prosecution bears the burden of proving the violation of a specific Penal Code provision beyond a reasonable doubt by specifying the crimes the jurors could consider under that standard was "'closely and openly connected with the facts before the court, and . . . *necessary for the jury's understanding of the case*.'" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 323, italics added; Part B-2-b, *ante*.) Absent such instruction, there could be "no assurance the jury [would] consider only proper aggravating evidence." (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 151; accord, *People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19.) As discussed in Part B-2-b, *ante*, the standard reasonable doubt instruction concerning factor (b) evidence incorporates that principle and directs courts to specify the crimes that may be considered (and, hence, by necessary implication the crimes or "criminal activity" that cannot be considered). (CALJIC No. 8.87 & Use Note; CALCRIM No. 764 & Bench Notes.) Hence, the trial court was under a sua sponte duty to provide that standard instruction without modification.

Had the court discharged its sua sponte instructional duties, the prosecutor would have been forced to identify the specific Penal Code violations he was alleging and the court would have had to determine whether there was substantial evidence from which the jurors could find Mr. Morales guilty of those crimes beyond a reasonable doubt. (See, e.g., *People v. McDowell* (2012) 54 Cal.4th 395, 442 [same substantial evidence standard governing the admission of unadjudicated crimes evidence governs instructions on unadjudicated crimes jurors may consider under factor (b)); see also, e.g., *People v. Guiton* (1993) 4 Cal.4th 1115, 1129-1131 [error to instruct on theory without adequate factual support].) Even assuming for the sake of argument that the evidence were barely sufficient to support an instruction on a specific sexual offense like attempted rape, the instruction would have conveyed that some kind of unspecified "sexual assault" is not enough and focused the jurors' attention on the gaps and vulnerabilities in the prosecution's evidence discussed in Part D, *ante*, to prove Mr. Morales's liability for attempted rape.[68]

Prior to the United States Supreme Court's decision in *Hurst v. Florida* (2016) ___ U.S. ___, 136 S.CT. 616, this Court reasoned that the failure to instruct on the beyond a reasonable doubt standard pursuant to Penal Code section 190.3, factor (b), violates state law only. (See, e.g., *People v. Avena* (1996) 13 Cal.4th 394, 496.) However, as discussed in greater detail in Argument VI, *post*, under *Hurst* and the related decisions of the Supreme Court, separate and apart from Penal Code section 190.3, factor (b), the Sixth, Eighth, and Fourteenth Amendments demand that aggravating factors, like putative criminal activity under factor (b), be proved beyond a reasonable

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[68] To be clear, Mr. Morales recognizes that, unlike the instructions discussed in the above text, instructions on the *elements* of specific Penal Code provisions need only be provided upon request. (See CALJIC No. 8.87, Use Notes; CALCRIM No. 764, Bench Notes.) He addresses his counsel's failure to request such instructions in Part G, *post.*

doubt. Hence, the trial court's failure to so instruct the jurors violated not only state law but also Mr. Morales's federal constitutional rights for all of the reasons set forth in Argument VI and, which are incorporated herein by this reference.

Furthermore, separate and apart from *Hurst*, this Court has recognized that the requirements that unadjudicated criminal activity be proved beyond a reasonable doubt before it can be considered in aggravation, and that the jurors be instructed accordingly, are critical to achieving a fair and reliable death judgment under state law. (See, e.g., *People v. Bacon*, 50 Cal.4th at p. 1123; *People v. Ashmus*, *supra*, 54 Cal.3d at pp. 1000-1001; *People v. Robertson* (1989) 48 Cal.3d 18, 53-54.) In this case in particular, these principles were indispensable to the fairness and reliability demanded by the Eighth and Fourteenth Amendments, as well. Given the erroneously admitted guilt phase evidence, the trial court's affirmative penalty phase instruction to consider it in determining penalty, and the prosecutor's arguments to the jurors in both phases of the trial, there was a constitutionally intolerable risk that the jurors would base their death judgment on unreliable, inaccurate and/or constitutionally irrelevant information that had no bearing on Mr. Morales's personal culpability absent such instruction. Its omission in this case therefore violated not only state law but also the Eighth and the Fourteenth Amendments. (See, e.g., *Zant v. Stephens*, *supra*, 462 U.S. at p. 885; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 585-586; *Booth v. Maryland*, *supra*, 482 U.S. at p. 502; *Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-801; see also, *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 & fn. 14 [although there is no general constitutional requirement for jury instructions on the presumption of innocence or prohibition against considering indictment as evidence of guilt, the prosecutor's remarks created constitutionally intolerable risk that jurors would rely on improper extraneous considerations absent such instructions; combined effect of instructional omission and prosecutor's remarks resulted in

fundamentally unfair trial]; *Romano v. Oklahoma* (2004) 512 U.S. 1, 11-13 [state error at penalty phase that does not itself violate the federal Constitution may nevertheless result in a fundamentally unfair penalty trial based upon the record as a whole].)

G. Defense Counsel's Performance with Regard to the Unadjudicated Violent Sexual Crimes Fell Below an Objective Standard of Reasonably Competent Assistance at the Penalty Phase of a Capital Murder Trial

Pursuant to the authorities set forth in Arguments I and III, *ante*, and incorporated herein by this reference, Mr. Morales was entitled under the state and federal Constitutions to the effective assistance of counsel at both the guilt and penalty phases of his unitary capital murder trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694; *Rompilla v. Beard* (2005) 545 U.S. 374, 390-391; *Wiggins v. Smith* (2003) 539 U.S. 510, 521-525; *Williams v. Taylor* (2000) 529 U.S. 362, 396.) According to the American Bar Association Guidelines, "[s]ince the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused." (*American Bar Association Standards for Criminal Justice*, std. 4-1.2(c) (3d ed. 1993); accord, e.g., *Smith v. Mullen* (10th Cir. 2004) 379 F.3d 919, 938-939, citing Standard 4-1.2(c); see also *Wiggins v. Smith*, *supra*, at p. 524 [Supreme Court has "long referred to [the ABA Standards and Guidelines] as 'guides to determining what is reasonable'" attorney performance].)"Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact." (*American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003), reprinted in 31 Hofstra L.Rev. 913, 1064, Guideline 10.11, Commentary; accord, e.g., *Rompilla v. Beard*, *supra*, 545 U.S. at pp. 384-388 (maj. opn.) & *id.* at pp. 394-395 (conc. opn. of

O'Connor, J.) [reasonable standards of competence demand that counsel in penalty phase of capital case make use of readily available law and evidence to exclude or mitigate prosecution's aggravating evidence]; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 524.) In other words, "[t]he primary duties of counsel" during the penalty phase of a capital murder trial "'are to neutralize the aggravating circumstances advanced by the state' by excluding or limiting it, as well as 'present mitigating evidence.'" (*Parker v. Bowersox* (8th Cir. 1999) 188 F.3d 923, 929, quoting *Star v. Lockhart* (8th Cir. 1994) 23 F.3d 1280, 1285 [defense counsel's failure to present evidence to undermine state's aggravating evidence deprived defendant of effective assistance of counsel]; accord, *Boyde v. Brown* (9th Cir. 2005) 404 F.3d 1159, 1179, opn. amended on limited grant of rhg., 421 F.3d 1154 ["Because the jury in a capital case is asked to evaluate whether aggravating circumstances in a defendant's background outweigh whatever mitigating value it can find, counsel (and the court) must be especially vigilant to ensure that the jury is not presented more aggravating facts than the law allows"].) With these duties in mind, as discussed in Argument III-I, *ante*, it is well-recognized that there can be no conceivable, reasonable tactic for failing to raise meritorious in limine objections to exclude proffered damaging evidence. (See, e.g., *People v. Nation*, *supra*, 26 Cal.3d at p. 179; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1130-1131; *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1520-1524; see also Argument III-I, and authorities cited therein.)

As further discussed in Argument III-I, *ante*, defense counsel's remarks and strategy on voir dire unquestionably reveal their appreciation of the devastating impact of the unadjudicated sexual crime accusations on the jury's determination of penalty. (See, e.g., 4RT 534-535, 581, 583-584, 613, 702, 706-707, 715; 5RT 872, 892-894; 6RT 998-999, 1044-1045, 1130.) Indeed, defense counsel did make motions and objections throughout both the guilt and

the penalty phases to the admission and use of evidence suggesting the commission of uncharged sexual crimes. (26 CT 7514-7520; 27 CT 7610-7613; 28CT 7855-7856, 8108; 7RT 1326-1338, 1401-1403; 12RT 2530-2531, 2561-2562; 13RT 2868-2870; 14RT 3183-3184, 3186, 3188-3190; see Part D, *ante*; Argument III, *ante*.)

Under the circumstances, defense counsel could have had no conceivable, reasonable trial strategy for failing to avail themselves of every legal weapon available to avoid exacerbating the harmful effects of the guilt phase errors at penalty and ensure that the jurors would not sentence Mr. Morales to death based in any part on aggravation for which there was no factual and/or legal basis. Defense counsel's failure to do so fell well below objective standards of reasonably competent assistance in the penalty phase of a capital murder trial. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.)

1. Defense counsel's failure to move to preclude the prosecutor from relying on, and the jurors from considering, the erroneously admitted guilt phase evidence or condition of the victim's clothing as proof of unadjudicated sexual crimes in aggravation fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

Before the penalty phase commenced, defense counsel knew or reasonably should have known that the jurors would consider in aggravation the erroneously admitted guilt phase evidence and the prosecutor's improper guilt phase argument concerning the commission of uncharged and unadjudicated sexual offenses unless they were clearly and explicitly prevented from doing so. (See CALJIC No. 8.84.1 [standard jury instruction to consider all evidence in both phases]; CALJIC No. 8.85 [same, preliminary to factors that shall be considered]; see also *Kimmelman v. Morrison* (1986) 477 U.S. 365, 385 [counsel has duty to know the basic legal principles governing case].)

Defense counsel were on notice from the prosecutor's guilt phase representations that he intended to encourage the jurors to consider in aggravation uncharged sexual criminal conduct against the victim at the penalty phase. (See 7RT 1338; 12RT 2530-2531, 2562-2565.) Defense counsel were also on notice from the court's rulings excluding photographic exhibits suggestive of sexual crimes from the guilt phase (Exhibits 24 and 25) that they might be admissible at the penalty phase. (12RT 2530-2531, 2562-2565.) Objective standards of reasonably competent penalty phase assistance demanded that defense counsel both understand the impropriety of the jurors' consideration of such aggravation and move to prohibit it for all of the reasons set forth in Parts B through D, *ante.*

After the guilt phase verdicts and before the penalty phase commenced, defense counsel did file a written motion broaching this topic of aggravation. Referring only to the court's guilt phase statements that the photographs it had excluded might be admissible at penalty, defense counsel "request[ed] that this information be excluded for the following reasons." (28CT 7855.) First, defense counsel pointed out that the court had dismissed the attempted rape felony-murder special circumstance allegation under Penal Code section 995. (28CT 7855-7856.) Further, "[a]lthough the court permitted the prosecution to present evidence of felony-murder in the commission of attempted rape, that theory was withdrawn by the prosecution and not argued to the jury." (*Ibid*.) In fact, defense counsel argued, the evidence presented was insufficient to prove attempted rape beyond a reasonable doubt and therefore defense counsel would have moved for a "judgment of acquittal" on attempted rape felony murder if the prosecutor had not voluntarily abandoned that theory on his own motion before the cause was submitted to the jury. (28CT 7856 & fn. 2.)[69]

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[69] Of course, as the court had ruled at the guilt phase based on the principles reflected in *People v. Davis* (1995) 10 Cal.4th 463, 512-514, a

Defense counsel also asserted that the People "failed to show that an attempted rape was somehow the motivation for [the victim's] death in the guilt phase of the trial." (28CT 7875.)[70] Defense counsel added in a footnote that the prosecution should be prevented from *presenting* any evidence for the purpose of proving attempted rape, reasoning that the prohibition against using a crime for which the defendant has been acquitted should apply given the circumstances. (28CT 7856, fn. 2.) For all of these reasons, defense counsel objected that "any *further* evidence presented to the jury by way of pictures" that were "suggestive of" attempted rape or crimes of "a sexual nature when Mr. Morales was not convicted of any kind of sexual assault" would not qualify as a circumstance of the crime of conviction under factor (a) and would violate due process. (28CT 7856, italics added.)

While defense counsel's motion reveals that they understood the factual problems underlying aggravation in the form of unadjudicated sexual crimes, it was deficient inasmuch as it was *limited* to the presentation of photographs as "further evidence" and the inferences to be drawn therefrom. The motion failed to acknowledge the much more damaging evidence that *had already been admitted* and the prosecutorial argument that had *already been given* at

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"judgment of acquittal" would not lie as to a *theory* of the otherwise properly charged first degree murder. (See, e.g., *People v. Murtishaw, supra,* 29 Cal.3d at p. 751, fn. 11.) Rather, the appropriate way in which to challenge the evidence supporting the attempted rape felony-murder theory and preclude the jurors from considering it would have been by way of objection to instructions on that theory. (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1115, 1129, 1131.)

[70] The motion was puzzling in this regard because the prosecution had never contended that the putative attempted rape or similar sexual crime was relevant to motive. As discussed in Argument III, *ante*, the only purposes for which the prosecutor had offered the uncharged sexual crimes evidence was to prove the attempted rape felony-murder theory, which he later abandoned and recognized was irrelevant, and to corroborate witness credibility, which the trial court rejected.

the guilt phase "suggestive" of the putative unadjudicated attempted rape or other unadjudicated crimes "of a sexual nature." (28CT 7855-7856.) Even with respect to the written opposition defense counsel did make, they effectively abandoned it at the hearing thereon.

The trial judge's opening comments on defense counsel's written opposition acknowledged her guilt phase ruling excluding the photographs for the offered purposes of proving uncharged sexual crimes because they were irrelevant to the question of Mr. Morales's guilt. (13RT 2868.) The prosecutor responded that the photographs were relevant at penalty under factor (a) as "circumstances of the crimes. And that's not dependent on whether we have charged those or not. It is an actual circumstance. Her at the crime scene [sic] is a circumstance of the crime." (*Ibid.*) After the court examined the photographs, defense counsel confirmed the court's understanding that, "your argument, Ms. Snodgrass, is based on the fact that the special allegation -- or special circumstance in regards to attempted rape was never litigated during the guilt phase, that you think that the probative value is substantially outweighed by the prejudicial effect." (13RT 2870.) Likewise, the prosecutor confirmed the court's understanding that, "And, Mr. Mazurek, your argument is it was a circumstance of the crime regardless of whether it was argued or not." (*Ibid.*)

The court ruled that Exhibit 24 – the photograph of the victim's exposed genital area – "is not merely being used to solely invoke a sympathetic reaction at the penalty phase and I believe the photograph is relevant to support the aggravating nature of the crime for penalty purposes[.]" (13RT 2870-2871.) In support of the ruling, the court cited the proposition that "photos depicting any aspect of the crime, including gruesome depictions of a dead body, are admissible and may not generally be precluded unless cumulative, and that is based on *People v. Davenport*, Cal.App.4th 1171 [sic]." (13RT 2870.)

The hearing thus focused exclusively on the photographs themselves and not the permissible inferences to be drawn therefrom. The court, the

prosecutor, and defense counsel never mentioned anything in the hearing about uncharged sexual crimes or about whether the prosecutor could argue or the jurors could infer the commission of such crimes in aggravation based on the condition of the victim's body as depicted in the photographs.

The court was certainly correct that in the penalty phase, in contrast to the guilt phase, the trial court has little discretion to exclude photographs depicting the victim's dead body under Evidence Code section 352 due to their gruesome nature. "The prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a))" with photographic evidence of the victim's dead body. (*People v. Bonilla* (2007) 41 Cal.4th 313, 352-353, and authorities cited therein.)

However, the critical issue was not whether it was appropriate for the jury to view photographs of the victim's body at the scene as a depiction of the capital murder, or the "crime of conviction." (§ 190.3, factor (a).) As defense counsel explained in their written motion, the critical issue was whether the jurors could *infer* from the fact that the victim's body was partially clothed, as illustrated in the photographs, that Mr. Morales committed an *unadjudicated* attempted rape or other kind of sexual assault. But defense counsel failed to pursue that point at the hearing; the prosecutor failed to offer any written or oral response to it; and the trial court failed to acknowledge or rule upon it. By failing to press the written objections they did make and obtain a ruling thereon at the hearing, defense counsel effectively abandoned those objections. (See *People v. Lewis* (2008) 43 Cal.4th 415, 481.)

At bottom, for all of the reasons set forth in Parts C & D, *ante*, the jurors should not have been permitted to consider, and the prosecutor should not have been permitted to encourage them to consider, the erroneously admitted guilt phase or other evidence for the purpose of demonstrating the commission of unadjudicated sexual crimes against the victim as a reason to sentence Mr. Morales to death. Defense counsel's failure to make meritorious motions and

objections to that effect, and seek a jury admonition to disregard any evidence or suggestion of uncharged sexual crimes for any purpose, fell below objective standards of reasonably competent assistance. (See, e.g., 2003 ABA Guidelines, *supra*, Guideline 10.11, Commentary; *Rompilla v. Beard*, *supra*, 545 U.S. at pp. 384-388 & *id*. at pp. 394-395 (conc. opn. of O'Connor, J.); *People v. Nation*, *supra*, 26 Cal.3d at p. 179; *People v. Roberts*, *supra*, 195 Cal.App.4th at pp. 1130-1131; *People v. Valencia*, *supra*, 146 Cal.App.4th at pp. 103-104.)

The record belies any hypothesis that counsel eschewed making a motion that would entail juror admonitions to disregard evidence, argument, or the suggestion of uncharged sexual offenses for fear that they might backfire and highlight the objectionable matter in favor of a strategy that would mitigate the harmful effects of the guilt phase errors and prevent the prosecutor from exploiting them at penalty through other means. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 675; *People v. Frierson* (1991) 53 Cal.3d 730, 749.) This is not a case wherein defense counsel chose to forgo such admonitions in favor of trusting the jurors to disregard the improper aggravation under standard instructions on the proof beyond a reasonable doubt standard applicable to factor (b) evidence: as set forth in Part F, *ante*, and subpart 3, *post*, the trial court did not provide any such instructions nor did defense counsel request them. Nor is this a case wherein counsel was avoiding strategies that might "highlight" the objectionable evidence and inferences in the minds of the jurors: as set forth in Part E, *ante*, and subpart 3, *post*, defense counsel did repeatedly object to, and request jury admonitions to disregard, the prosecutor's penalty phase summation concerning the putative unadjudicated sexual crimes. Finally, this is not a case wherein any reasonable capital defense attorney could – or wherein these attorneys actually did – make a decision to forgo admonitions from the court in favor of presenting argument to the jurors concerning the supportable inferences that could be drawn from the evidence

they heard: as set forth in Part 4 *post*, even after the prosecutor explicitly argued – over defense counsel's objections – the putative unadjudicated sexual crimes against the victim as reasons to sentence Mr. Morales to death, defense counsel did not address that argument at all in their own summation. (Compare *People v. Frierson*, *supra*, 53 Cal.3d at p. 749 [in some circumstances, counsel might make reasonable tactical decision not to request jury admonition to disregard objectionable matter in favor of countering prosecutor's argument in his or her own argument].) On this record, and given the objections they did make, it is clear that defense counsel's failure to make meritorious in limine objections to prevent the jurors from considering, and the prosecution from arguing, any unadjudicated sexual crimes based on the erroneously admitted guilt phase evidence was the result of inexcusable neglect, not sound trial strategy. (See, e.g., *People v. Landau* (2016) 246 Cal.App.4th 850, 863 [fact that counsel does object to evidence demonstrates that she had no tactical reason to fail to raise meritorious objections to the same evidence]; accord, *People v. Roberts*, *supra*, 195 Cal.App.4th at pp. 1130-1131; *People v. Asbury* (1985) 173 Cal.App.3d 362, 365-366; *People v. Farley*, *supra*, 90 Cal.App.3d at p. 866.)

2. Defense counsel's failure to correct the trial court's misimpression of the law and elaborate on the objections they did make to the prosecutor's penalty phase summation fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

As set forth in Part E, *ante*, defense counsel did object to the prosecutor's misstatement of the evidence in his penalty phase summation and request a corresponding admonition to the jury. Although the trial court sustained those objections during the argument, the court erroneously refused to assign the prosecutor's argument as misconduct, or admonish the jurors accordingly, based on its mistaken understanding that misstatements based on honest mistakes do not constitute misconduct. (14RT 3189-3190.)

Defense counsel's objections were sufficient to *preserve* the claims of misconduct and trial court error in refusing to admonish the jurors for purposes of appellate review. But that does not necessarily mean that counsel's performance in making and arguing those objections amounted to the "'extraordinary efforts'" demanded of defense counsel in a capital murder trial. (*Smith v. Mullen*, *supra*, 379 F.3d at pp. 938-939, quoting from ABA Standards for Criminal Justice, Standard 4-1.2(c).) To the contrary, those efforts demand more from counsel than simply making a motion or objection and sitting on his or her hands when the judge denies it based on a patent misunderstanding of the facts or law. Absent an indication of futility, counsel must *advocate* their position on their client's behalf by at least attempting to correct the judge's misunderstanding. (See *Kimmelman v. Morrison*, *supra*, 477 U.S. at p. 385 [defense counsel has duty to know basic legal principles governing case].)

Here, as set forth in Part E, *ante*, the trial court's remarks clearly revealed that its refusal to assign the prosecutor's remarks as misconduct and admonish the jury accordingly was based on two mistakes, one of law and one of fact, that defense counsel made no effort to correct. First, the court was laboring under a mistaken understanding of the law that reasonably competent capital defense counsel would know: it has been black letter law in this state since 1979 that misconduct does not require a showing of bad faith or intentionality. (*People v. Bolton*, *supra*, 23 Cal.3d at pp. 213-214; *People v. Hill*, *supra*, 17 Cal.4th 800, 822-827.) Since the trial judge had sustained defense counsel's objections that the prosecutor had misstated the evidence as a matter of fact, reasonably competent counsel under the circumstances would have sought to correct the court's misapplication of the law to its rulings. Second, although bad faith is not necessary to establish misconduct, the factual premise of the court's ruling – that the prosecutor's misstatements were simply innocent mistakes of recollection – was also faulty. As set forth in Part E and Argument III, *ante*, the prosecutor's ongoing misrepresentations concerning the

evidence were irreconcilable with innocence or honesty. But again, defense counsel said nothing when the trial court dismissed the import and effect of the prosecutor's misconduct, and refused to admonish the jurors to disregard his remarks, on that ground.

Finally, the prosecutor's misstatements of the evidence were inextricably linked to the more fundamental problem that the evidence was insufficient for a juror to find Mr. Morales was liable for a specific unadjudicated sexual crime beyond a reasonable doubt, as required under factor (b). Reasonably competent counsel would have added to their objections that the unadjudicated criminal activity to which the prosecutor's argument referred did not qualify as factor (a) evidence, could not be proved or found beyond a reasonable doubt as required under factor (b), and that an undifferentiated "sexual assault" is not proper aggravation under factor (b). (Parts B through E, *ante*, and authorities cited therein.) Specific objections on those grounds would have clarified for the court that the prosecutor's argument was not only factually incorrect but rested on a legally invalid theory of aggravation. Defense counsel obviously had no tactical reason for withholding those objections. (See, e.g., *People v. Landau*, *supra*, 246 Cal.App.4th at p. 863; *In re Jones* (1996) 13 Cal.4th 552, 571-573 [there can be no tactical reason for objecting on the wrong grounds].)

In sum, while the objections defense counsel did make were adequate to preserve for appeal the claim of prosecutorial misconduct in misstating the evidence and the trial court's error in refusing to admonish the jurors to disregard his remarks, reasonably competent counsel would have elaborated on, and made more forceful and pointed argument in support of, their objections in order to prevent the trial errors in the first place. Their deficient failure to do so underscores their constitutionally inadequate response as a whole to the prosecutor's offer, introduction, and use of evidence to encourage

the jurors to consider unfounded, irrelevant, and inflammatory uncharged sexual crimes against Mr. Morales in both the guilt and penalty phases.

3. Defense counsel's failure to invoke the trial court's sua sponte duty to instruct on the proof beyond a reasonable doubt standard and to request instructions on the elements of the crimes the jurors could consider under that standard fell below objective standards of reasonably competent assistance at the penalty phase of a capital murder trial

Because the trial court had a sua sponte duty to instruct the jurors that they were to disregard any evidence or argument concerning unadjudicated violent crimes unless they were persuaded beyond a reasonable doubt that Mr. Morales was directly or vicariously liable for a specific Penal Code violation, Mr. Morales is entitled to challenge the court's violation of that duty notwithstanding the absence of a request from defense counsel. (See Part F, *ante*.) But, as discussed in the previous section, the fact that defense counsel's omissions did not *forfeit* Mr. Morales's right to challenge the trial court's instructional error on appeal is not the same thing as vigorous advocacy to *prevent* the trial error in the first place.

As previously discussed, this Court has recognized that the reasonable doubt instruction required under the principles set forth in Part B-2, *ante*, is "vital" to channeling and limiting the jury's consideration of aggravating evidence on death's side of the scale. (*People v. Robertson, supra*, 33 Cal.3d at pp. 53-54; accord, e.g., *People v. Ashmus, supra*, 54 Cal.3d at pp. 1000-1001.) As set forth in Part F, *ante*, complete instruction on that principle by specifying the Penal Code violations that the jurors could (and, by necessary implication, could not) consider under that standard was necessary to prevent the jurors' consideration of improper aggravation based on the prosecutor's guilt and penalty phase arguments, the erroneously admitted guilt phase evidence, and the trial court's other instructions. (See *People v. Yeoman, supra*, 31 Cal.4th at p. 151, citing *People v. Robertson, supra*, 33 Cal.3d at p. 55, fn. 19.) The trial

court having failed to fulfill its own sua sponte duties to instruct on those principles, it was incumbent upon defense counsel advocating for their client's life to request them.

Furthermore, given the unique circumstances of this case, objective standards of reasonable competence demanded that counsel request instructions on the *elements* of the specific crimes the jurors could consider if proved beyond a reasonable doubt. In this regard, this Court has held although the trial court is under no sua sponte obligation to instruct on the elements of specific other crimes on which the prosecution relies in aggravation, the defendant is "entitled to have the jury so instructed" on request. (*People v. Hardy* (1992) 2 Cal.4th 86, 207; accord, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 571; Use Notes to CALJIC No. 8.87; Bench Notes to CALCRIM No. 764.)

The rule that such instruction need only be given on request is based on the "recognition that, as [a] tactical matter, the defendant may . . . fear that such instructions could lead the jury to place undue emphasis on the crimes rather than on the central question of whether he should live or die. [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 588, internal quotation marks omitted, and authorities cited therein; accord, e.g., *People v. Carter*, *supra*, 30 Cal.4th at pp. 1227-1228 [counsel might tactically decide that such instructions will cause the "the jury to focus unduly on a defendant's other alleged offenses"].) The Court in *Anderson* held that the particular facts of that case well-illustrated that rationale and the uniquely tactical nature of the decision. The jurors there were given the reasonable doubt instruction, which specified the other crimes the jurors could consider if the evidence satisfied that standard. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 587.) Defense counsel informed the trial court that he was not requesting instructions on the elements of the other crimes and agreed that they did not need to be given, which "suggest[ed] he made a tactical choice to forgo them." (*Id*. at pp. 587-588.) On that record, this Court could not "say as a matter of law that [counsel's] decision was

unreasonable. Defendant had little to gain by such instructions because the evidence raised no substantial doubt" – but to the contrary was "ample" – that the defendant committed the listed crimes. (*Ibid*.) "Under these circumstances, counsel could reasonably wish to avoid focusing the sentencer's attention on the ample evidence that the elements of those offenses were satisfied." (*Ibid.*) Furthermore, given the reasonable doubt instructions the jurors were given and the strength of the evidence satisfying the elements of the specific crimes they listed, the Court concluded that further instruction on the elements of the specified crimes "were not vital to a proper consideration of the evidence on the issue of penalty." (*Ibid.*; accord, e.g., *People v. Becerrada* (2017) 2 Cal.5th 1009, 1035 [under reasoning of *Anderson*, counsel's request to omit instructions on elements of listed crimes given the strength of the evidence "that the various crimes the court listed were satisfied" was reasonable and trial court had no duty to override it].)

Here, the record as a whole indicates that counsel's omissions in failing to request instructions on (or make motions or objections based on) the law governing the jurors' consideration of unadjudicated crimes in aggravation at penalty were not "tactical" at all but rather the result of inexcusable inattention or ignorance of the law vital to the defense of their client's life. In any event, even assuming they knew and understood the law and made a tactical decision not to request such instructions for fear that they would cause the jurors to put "undue emphasis" on the unadjudicated sexual crimes, that decision would *not* have been a reasonable one in this case. (See, e.g., *People v. Centeno*, *supra*, 60 Cal.4th at p. 675; *Washington v. Hofbauer*, *supra*, 228 F.3d at p. 706; *Zapata v. Vasquez*, *supra*, 788 F.3d at pp. 1115-1116; see also Argument II-L, *ante*.)

As a preliminary matter, in stark contrast to *Anderson*, the jurors were not given *any* instructions on the reasonable doubt standard applicable to factor (b) aggravation. (Part F, *ante*.) Also unlike *Anderson*, there was not "ample"

evidence that Mr. Morales committed a specific violent sexual crime. (Part D, *ante*.) Also in contrast to *Anderson*, the prosecutor here explicitly told the jurors to give considerable aggravating weight to criminal activity – a "sexual assault" – which is not a specific Penal Code violation and hence not proper aggravation – something the jurors would not understand absent appropriate instructions. (Part E, *ante*.) Moreover, as set forth above and in Argument III, *ante*, the putative unadjudicated violent sexual crimes permeated the trial from beginning (in voir dire) through the end (in the prosecutor's penalty phase summation) and thus the jurors' "undue emphasis" on them was a fait accompli before the point at which instructions should have been requested. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 588.) Under all of these circumstances, the danger in this case was not that the *instructions* would cause the jurors to "focus unduly" on those crimes. (*People v. Carter*, *supra*, 30 Cal.4th at pp. 1227-1228.) Rather, the danger was that in the *absence* of the instructions, the jurors would place too much emphasis on the prosecutor's arguments and evidence that the victim had been "sexually assaulted" by *not* focusing on the essential elements necessary to prove a specific sexual crime and the dearth of evidence to prove beyond a reasonable doubt that Mr. Morales committed one. (See Part D, *ante*.)

For all of these reasons, reasonably competent defense counsel would have invoked the court's (1) sua sponte duties to instruct the jurors that they could not consider unadjudicated "criminal activity" involving force or violence in aggravation unless and until the prosecution proved beyond a reasonable doubt that Mr. Morales was criminally liable for a specific Penal Code violation; and (2) its duty to provide further instructions on the essential elements of the identified Penal Code violation upon request. Counsel's failure to do so fell below objective standards of reasonably competent assistance in the penalty phase of a capital murder trial.

4. Defense counsel's failure to respond to the prosecutor's penalty phase summation in their own argument fell below objective standards of reasonably competent assistance in the penalty phase of a capital case

Finally, despite their repeated objections to the prosecutor's remarks in his summation concerning Mr. Morales's putative commission of unadjudicated sexual crimes and the trial court's refusal to admonish the jurors to disregard them, defense counsel did not acknowledge or attempt to dispute or counter the prosecutor's remarks in their own summation. It is, of course, true that defense counsel's own argument would not have substituted for instructions from the court to disregard the evidence and the prosecutor's remarks and to hold the prosecution to a burden of proving beyond a reasonable doubt Mr. Morales's liability for a specific violation of the Penal Code governing "sexual assault." (See Argument III-G-4 *ante*, citing, *Taylor v. Kentucky, supra*, 436 U.S. at pp. 488-489; *Carter v. Kentucky* (1981) 450 U.S. 288, 303-304.) Nevertheless, given the objections counsel did make to the prosecutor's remarks in summation and their unsuccessful request to admonish the jurors to disregard them, reasonably competent counsel at the very least would have alerted the jurors that Mr. Morales was disputing the prosecutor's representations and highlighted the evidence that contradicted or otherwise failed to support them, as outlined in Parts D and E, *ante*. (See *Herring v. New York* (1975) 422 U.S. 853, 862 [emphasizing the critical nature of closing argument to marshal the evidence from both sides].) While such an argument would not have cured the harm from defense counsel's other omissions, their failure to present one only exacerbated the degree and effect of their deficient performance overall. Defense counsel's failure to dispute the prosecutor's argued aggravation in their own penalty phase summation – particularly considered together with their failure to object or effectively respond to the prosecutor's improper guilt phase argument – conveyed to the jurors that Mr. Morales was *not* disputing that the jurors could find and consider in

aggravation his commission of uncharged, unadjudicated sexual crimes against the victim. (See, e.g., *Correll v. Ryan* (9th Cir. 2008) 539 F.3d 938, 947-948 [defense counsel's penalty phase closing argument that did not attempt to rebut three of the five aggravating factors relied on by the state amounted to "virtual concession of" those factors and fell below objective standards of reasonably competent assistance]; see also Argument III-I, *ante*.) For these and all of the other reasons set forth in this section, as well as in Argument III-I, *ante*, defense counsel's performance fell below objective standards of reasonably competent assistance in a capital murder trial.

H. The Death Judgment Must be Reversed Because the Cumulative Effect of the Foregoing Errors, Particularly in Combination with the Guilt Phase Errors on the Same Subject, Was Prejudicial and Violated Mr. Morales's State and Federal Constitutional Rights to A Fair Penalty Trial and a Highly Reliable Death Verdict Under the Sixth, Eighth and Fourteenth Amendments

1. Applicable standards of prejudice

Violations of the federal Constitution demand reversal unless the state can prove them harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Violations of state law require reversal of a death judgment if there is "reasonable *possibility* the error affected the [death] verdict." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, original italics; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.) "Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* . . . ." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11, and authorities cited therein.)

In determining whether reversible error occurred under these standards, the reviewing court's inquiry is not "whether, in a trial that occurred without the error, a [death] verdict would surely have been rendered" based upon the strength of the evidence. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Rather, the reviewing court must determine "whether the [death] verdict actually rendered in this trial was surely unattributable to the error." (*Ibid*.)

The prejudicial effect of the preserved penalty phase errors set forth in Parts E and F, *ante*, as well as the preserved guilt phase errors set forth in Argument III, *ante*, on the death verdict are subject to the "reasonable possibility," or *Chapman*, standard of prejudice. As set forth below, the death judgment must be reversed under this standard because respondent cannot disprove the reasonable possibility that the cumulative effect of any or all of those errors influenced the jury's death verdict. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial]; *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 301-302 [error that was harmless at guilt phase was prejudicial at penalty]; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

Defense counsel's errors at both the guilt and the penalty phases are subject to the "reasonable probability" test for prejudice to make out a Sixth Amendment violation. (See, e.g., *Wiggins v. Smith*, *supra*, 539 U.S. at p. 534 *Strickland v. Washington*, *supra*, 466 U.S. at p. 694; see also Argument III-J, *ante*.) Pursuant to the principles set forth in Argument III-J *ante*, which are incorporated herein by this reference, the same test applies to determining whether the cumulative effect of errors resulted in a fundamentally unfair trial under the totality of the circumstances in violation of the Fourteenth Amendment. (Argument III-J, *ante*, citing, inter alia, *Kyles v. Whitley* (1995) 514 U.S. 419, 434 and *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399-1402 & fn. 28 (en banc), vacated on other grounds, 478 U.S. 1016 (1986), reinstated (11th Cir. 1987) 809 F.2d 700; see also *Romano v. Oklahoma* (2004) 512 U.S. 1, 11-13 [admission of irrelevant and inadmissible evidence at penalty phase of capital murder trial can result in fundamentally unfair trial based upon record as a whole].) Because a death verdict must be unanimous in California, if it is "reasonably probable" – or there is a "reasonable chance" (*Richardson v.*

Superior Court (2008) 43 Cal.4th 1040, 1050, and authorities cited therein) – that even a single juror would have voted differently absent the error or errors, the death verdict resists the confidence demanded by California law as well as the Sixth, Fourteenth, and Eighth Amendments and must be reversed. (See, e.g., *Buck v. Davis* (2017) ___ U.S. ___, 137 S.Ct. 759, 776; *Wiggins v. Smith*, *supra*, 539 U.S. at p. 537; *Cone v. Bell* (2009) 556 U.S. 449, 452, 475.) As set forth below, even if the properly preserved guilt and penalty phase errors were not alone sufficiently prejudicial to demand reversal, their cumulative effect together with defense counsel's inexcusable errors in both the guilt and the penalty phases undermines confidence in the death judgment to a constitutionally intolerable degree. (See, e.g., *Cargle v. Mullin*, *supra,* 317 F.3d at pp. 1206-1207, 1220-1221, and authorities cited therein [cumulative effect of defense counsel's errors and prosecutor's misconduct prejudicial]; *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1226-1229 [state court's erroneous admission of highly inflammatory evidence that was irrelevant and far more prejudicial than probative of a state statutory aggravating factor resulted in a fundamentally unfair penalty trial in violation of clearly established Supreme Court precedent under, inter alia, *Romano v. Oklahoma*, *supra,* 512 U.S. at pp. 11-13]; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 484-490 & fn. 15 [cumulative effect of adverse trial events resulted in fundamentally unfair trial]; *Antwine v. Delo*, *supra,* 54 F.3d at p. 1368 [defense counsel's deficient performance was harmless at guilt phase but prejudicial at penalty].)

2. The death verdict was a close one

The penalty phase was a close case that nearly resulted in a mistrial due to jury deadlock. The evidentiary phase, including opening and closing arguments, totaled only about three days and did not present any unusually complicated issues. The jurors deliberated for nearly two days before reaching

their verdict. (28CT 8041, 8044-8045, 8097; see, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 365 [finding prejudice from error where "the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner"]; *People v. Cardenas*, *supra*, 31 Cal.3d at p. 907 [12-hour deliberations "graphic demonstration of the closeness of the case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [almost six hours]; compare *People v. Cooper* (1991) 53 Cal.3d 771, 837 [whether length of deliberations demonstrates close case should be assessed in light of relative complexity of legal issues and complexity and amount of evidence presented; 27 hours of deliberations did not indicate close case where "trial lasted over three months[,] [d]ozens of witnesses testified, some about complex scientific testing[,] [and w]ell over 700 exhibits were admitted into evidence"].)[71]

On the second day of their deliberations, the jurors declared themselves deadlocked and "frustrated and angry" because one juror "would not budge" and asked the court to intervene. (28CT 8041-8042, 8044-8045, 8097; 14RT

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[71] The evidentiary portion of the penalty phase – from opening statements to closing arguments – was spread out over five court sessions on October 27 and 28 and November 1 through 3, 2004. (13RT 2910-3023; 14RT 3024-3220.) However, some of those sessions were very brief. For instance, the jurors were convened for only the afternoon sessions on November 1 through 3. And even then, on the afternoon of November 1, they were convened to view a video recording of interviews that were in Spanish, the audio of which was transcribed in English (14RT 3073-3074); on the afternoon of November 2, they heard from the testimony of a single witness, which comprised only 30 pages of reporter's transcript (14RT 3080-3109). In total, then, the evidentiary phase consumed only about three total days that were spread over five sessions. The jurors deliberated for a full day on November 4. After an hour of deliberation on the morning of November 5, the jurors sent their first note requesting assistance due to deadlock. (28CT 8044-8045.) After further deliberations, they returned the death verdict on the afternoon of November 5. (28CT 8044-8045.)

3222-3223.) After recessing for lunch, the jury returned its unanimous death verdict. (28CT 8044-8045, 8097; see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [expression of deadlock indicates close case]; accord, *United States v. Harbor* (9th Cir. 1995) 53 F.3d 236, 243.)

Apart from the unadjudicated sexual crimes and a prior domestic violence conviction, the prosecutor's only aggravation rested entirely on the circumstances of the crimes of conviction. Certainly, the evidence that the victim's children were present in the house when the crimes were committed, and that they found her dead body, was a significant aggravating circumstance. But otherwise, the crimes had no greater dimension than would be found in any noncapital robbery or burglary.

As discussed in Argument III-J, *ante*, the prosecutor effectively conceded at the guilt phase that the murder was not premeditated and deliberated when he asked that the jury receive no instructions on that theory of liability. He also effectively conceded that the plan to burglarize the houses did not include any intent to harm anyone inside, as evidenced by the burglary charge and instructions which identified only theft as the intended crime. (27 CT 7708; 12RT 2530; § 459.) According to the prosecution's own evidence of Mr. Morales's surreptitiously recorded "confession" to his mother, he and his companions did not even expect to encounter a family inside of the house. Someone else – "the guy that took us" – had organized and planned the burglary and led Mr. Morales to believe that the house was a front for a drug dealer who "cooked" and sold drugs at that location, where they could steal drugs and cash. (29CT 8319-8320.) He only realized later that they had unwittingly targeted the wrong house. (29CT 8319-8321.)

As Mr. Morales later told his mother, "nothing would have happened" to the victim herself if she had "kept quiet and she could have called the police after." (29CT 8325.) She was shot once in an arguably unpremeditated reflex only when she recognized him by name. (29CT 8325; see also 29CT 8310.)

Mayra Lopez testified that when the felons entered her house, one of them – likely Mr. Morales himself – assured her that they had no intention of hurting her or her family; their only intent was to steal. (8RT 1547, 1581.) And although the neighbors and the victim's children were all now witnesses not only to burglary and robbery but also to murder, neither Mr. Morales nor any of his co-felons injured them.

Although Jennifer and Joe reported after the crimes, and Jennifer testified at trial, that one of the men dragged the victim out of the bedroom and down the hallway by her hair and inflicted a bleeding injury to her neck (9RT 1720-11072721, 1741-1742, 938-1939; 3 SCT 719-721), the medical examiner examined the victim's entire body for any sign of injury, trauma, bruising or abrasions, and found none other than those associated with the single gunshot that killed her (12RT 2463-2465, 2469-2470, 2472-2474, 2477-2478, 2483-2485, 2492). Thus, Jennifer and Joe's memory of a bleeding injury was clearly mistaken. Similarly, given the physical impossibility of dragging an adult body by the hair for any distance without leaving some kind of injury, it seems equally clear that this memory was also unreliable, distorted no doubt by the trauma the children endured. Again, while the trauma the children suffered that night was certainly relevant aggravation, it by no means rendered the death penalty a foregone conclusion. (See, e.g., *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1072 [felony murder involving child victims resulted in life without parole sentence]; *People v. Pock* (1993) 19 Cal.App.4th 1263, 1269-1271 [burglary and robbery felony murder involving young child victims resulted in life without parole sentence].) The totality of the circumstances otherwise indicates that this was, in essence, an intended burglary gone horribly wrong. (See, e.g., *Harris v. Dugger* (11th Cir. 1989) 874 F.2d 756, 763-764 [penalty phase error required reversal where, inter alia, evidence showed "a burglary gone horribly awry as opposed to one involving murder as the intended goal"].) The victim's death by single gunshot wound, while tragic,

simply was not the model of the "worst of the worst" in which death was a foregone conclusion without regard to the presence or absence of the inflammatory unadjudicated sexual crime aggravation. (See, e.g., *Jackson v. Herring* (11th Cir. 1995) 42 F.3d 1350, 1369 [circumstances of crime were not aggravating as compared to "many death penalty cases (which) involve murders that are carefully planned or accompanied by torture, rape, or kidnapping"]; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1081 [aggravating evidence was "scant" where based on circumstances of underlying crimes – two first degree murders and assault with deadly weapon on third person in two separate incidents – along with prior felony burglary conviction and prior violent assault in which defendant fired gun]; see also *Williams v. Taylor, supra,* 529 U.S. at p. 418 (dis. opn. of Rehnquist, J.) [emphasizing that majority reversed for penalty phase errors under Strickland standard despite aggravating evidence that appellant had "savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a prisoner's jaw"]; *In re Lucas* (2004) 33 Cal.4th 682, 735 [penalty phase error required reversal under *Strickland* standard despite aggravating evidence based on crimes in which defendant "brutal[ly]" killed two elderly and "vulnerable" neighbors in their home, and on defendant's prior violent assault]; *People v. Sturm, supra,* 37 Cal.4th at p, 1244 [penalty phase errors required reversal despite fact defendant murdered three friends, after he bound them and even as they "cried or begged for mercy," in order to rob store in which they worked; "although the crime committed was undeniably heinous, a death sentence in this case was by no means a foregone conclusion"]; *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 918-919, 929-932 [same – reversal required despite "strong" aggravating evidence based on current crimes in which defendant carefully planned and committed murders of three people in two separate incidents, and on defendant's prior violent assaults]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d

614, 619-622 [same – despite defendant having been convicted of thirteen counts of aggravated first degree murder].)

Weighed against the circumstances of the crimes, potent mitigating evidence was presented that painted a stark portrayal of Mr. Morales's childhood in Honduras, marked by poverty, physical abuse, and childhood abandonment. The family of six lived in a one-room house with barely enough food to eat. (14RT 3025-3027, 3043-3047; 29CT 8365, 8377, 8390-8392.) Family members and school records described a young Mr. Morales as a very good, respectful, and well-behaved boy. (29CT 8368, 8396, 8400, 8405, 8411-8413, 8418, 8420, 8422, 8424, 8426, 8428.) Despite his sweetness, both his mother and his father regularly and brutally beat him with a variety of weapons, as well as their hands, for normal childhood behavior like "messing" his clothes. (14RT 3032-3035, 3053-3055.) He also grew up witnessing his father inflict horrific physical abuse on his mother, as well. (14RT 3029-3030, 3045, 3048-3049, 3053-3055.) Indeed, his first exposure to his father's violence was in utero. (14RT 3048-3049.) Due to their poverty, Mr. Morales was forced to leave school as a child to go to work in the fields for eight to nine hours a day. (14RT 3038-3039; 29CT 8371, 8384-8395.) When he was only a year old, his family sent him away for three to four years. (14RT 3025-3028, 3050, 3052; 29CT 8369, 8393.) When he was about eight or nine years old, his mother abandoned him for good, leaving him bereft and in the care of his abusive, impoverished father. (14RT 3031, 3035, 3056-3057; 29CT 8371-8374, 8396-8397, 8406.)

An expert explained the life-long impact that experiencing and witnessing physical abuse, poverty, a lack of education, and childhood abandonment can have on children. (14RT 3081, 3086, 3092-3096.) The kind of instability and abuse Mr. Morales experienced as a child prevents a child from developing normally. (14RT 3092-3093.) The more of these "risk factors" that exist, the more vulnerable the child becomes to violence and

criminality in adulthood. (14RT 3086, 3089-3096.) Responding to stressful situations with violence becomes learned behavior that is more automatic and unthinking than conscious. (14RT 3088-3090, 3099-3101.)

It is well-recognized that such evidence is "forceful" mitigation. (*In re Lucas, supra*, 33 Cal.4th at p. 734; accord, e.g., *Williams v. Taylor, supra*, 529 U.S. at pp. 397-398 ["graphic description of (appellant's) childhood, filled with abuse and privation" was sufficiently mitigating to require reversal due to counsel's failure to present it despite existence of strong aggravating evidence]; *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1163 [same – childhood marked by neglect and instability].) As demonstrated by the length of their deliberations and expression of deadlock, the jurors certainly were not of the view that the circumstances overwhelmingly called for Mr. Morales's death. Indeed, it is apparent that even the prosecution and the trial court were of the same view. As detailed in Argument I, *ante*, it took the prosecution *over two years* to decide to exercise its option of seeking the death penalty. The trial prosecutor was also willing to forgo *both* the death penalty *and* the penalty of life without parole in exchange for Mr. Morales's guilty plea and imprisonment for life *with* the possibility of parole. As further discussed in Argument I, *ante*, after the guilty verdicts and before the penalty phase commenced, the trial court recommended that the prosecution exercise its discretion *not* to move forward to a penalty phase and seek the death penalty in light of the errors that occurred pre-trial. The trial court made this recommendation after having heard virtually all of the aggravation – which was grounded in the guilt phase evidence but for a single prior felony conviction – and none of the mitigation. At bottom, by all objective and subjective criteria, the decision to sentence Mr. Morales to death was a close and difficult one.

3. Respondent cannot disprove the reasonable possibility that at least one juror would have voted to spare Mr. Morales's life in the absence of the preserved errors

Into this close case was injected extraordinarily inflammatory and influential aggravation. As discussed in Argument III-J, *ante*, as a result of the guilt phase errors, it is reasonably probable that the jurors had already accepted as fact that Mr. Morales attempted to rape, or commit a similarly heinous sexual crime against, the victim even before the penalty phase commenced. Certainly, the prosecutor's penalty phase summation, the trial court's refusal to admonish the jurors to disregard his misstatements, and the trial court's instructional errors all combined to create at least a reasonable possibility that the jurors believed Mr. Morales was responsible for at least one "sexual assault" – probably attempted rape – against the victim before she was killed. (See, e.g., *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [in the eyes of jurors, "[e]vidence matters; closing argument matters; statements from the prosecutor matter a great deal"]; *People v. Bolton, supra*, 23 Cal.3d at p. 213; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance on inaccurate, impermissible evidence in argument compounded its prejudicial impact and resulted in Eighth Amendment violation].)

The commission of putative uncharged sexual crimes against the victim was the leitmotif of the prosecution's guilt and penalty phase cases, thus signaling to the jurors the "overriding importance" of that "evidence" and argument on the question of the appropriate punishment for Mr. Morales. (*People v. Robertson, supra*, 33 Cal.3d at p. 54; accord, e.g., *People v. McClellan, supra*, 71 Cal.2d at p. 804.) Indeed, rape and similar sexual crimes have always been regarded as the worst violent crimes "[s]hort of homicide . . . ." (See, e.g., *Coker v. Georgia* (1977) 433 U.S. 584, 597.) A violent sexual crime "is the 'ultimate violation of self.' . . . Because it undermines the community's sense of security, there is public injury as well." (*Ibid*.; see also

Id. at pp. 611-615 (dis. opn by Burger, J, joined by Rehnquist, J.) [dissenting from plurality opinion that death is cruel and unusual for crime of rape given both that it is "inherently one of the most egregiously brutal acts one human being can inflict on another" and "the profound suffering the crime imposes on the victims and their loved ones," and that, prior to *Furman*, "more than one third of American jurisdictions" made rape punishable by death].)

Accordingly, allegations that the defendant has committed sexual crimes are some of the most inflammatory and significant factors in the penalty determination of a capital case. Empirical evidence demonstrates that death sentences are much more likely to result in the face of allegations that the defendant raped or sexually assaulted the victim than they are in other cases. (P. Crocker, *Is the Death Penalty Good for Women?* (2001) 4 Buffalo Crim. L. Rev. 917, 929-933, 939-942, 956 [in study of several states, murders accompanied by allegations of rape in aggravation "comprise a disproportionately large segment of the crimes for which men are on death row," illustrating the "emotional laden nature of such crimes"]; accord, Shatz, S., *The Meaning of Meaningful Appellate Review in Capital Cases: Lessons from California* (Winter 2016) 56 Santa Clara L. Rev. 79, 113-114; Shatz, S., *Chivalry is not Dead: Murder, Gender, and the Death Penalty* (Winter 2012) 27 Berkeley J Gender L. & Just. 64, 99; P. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty* (2000) 26 Ohio N. U. L. Rev. 689, 692, 702-717.)

In accord with these realities, the prosecutor's machinations from the beginning of trial through the end certainly reveal that he believed the allegations were critical to obtaining a unanimous death judgement. (*People v. Powell* (1967) 67 Cal.2d 32, 56-57.) "'There is no reason why [the Court] should treat this [strategy] as any less crucial than the prosecutor – and so presumably the jury – treated it.' [Citation.]" (*Ibid*.)

Certainly, absent the combined effect of the prosecutor's penalty phase summation and the trial court's erroneous instructional omission, it is "reasonably possible" that at least one juror would not have considered any unadjudicated sexual crimes in aggravation. (See *People v. Davenport* (1985) 41 Cal.3d 247, 280-281 [instructional omission prejudicial in light of prosecutor's argument]; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 & fn. 14 [combined effect of prosecutor's argument and instructional omission deprived defendant of right to fair trial].) For the reasons set forth in Parts D through F, *ante*, even assuming the evidence were sufficient to support an inference that Mr. Morales had committed or aided a "sexual assault," it must be presumed that the jurors would have followed the court's instructions – had they been given – and rejected that inference as an aggravating factor in the absence of proof that he violated a specific Penal Code provision. (See, e.g., *People v. Smith* (2007) 40 Cal.4th 483, 517-518, and authorities cites therein [presumption that jurors follow court's instructions].) Even assuming the circumstantial evidence were susceptible of one interpretation consistent with Mr. Morales's guilt of a specific sexual crime, it was undoubtedly susceptible of innocent interpretations, as well. (Part D, *ante;* Argument III-G, *ante.*) Hence, it is reasonably possible that at least one juror would have had adopted those innocent interpretations over the guilty one had the jurors received appropriate instructions. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933 [where circumstantial evidence is susceptible of more than one reasonable interpretation – one consistent with innocence and one with guilt – reasonable doubt standard demands that jurors adopt the former].) Respondent cannot disprove the reasonable possibility that the same juror – like the holdout juror who nearly deadlocked the jury – would have voted to spare Mr. Morales's life absent that seemingly powerful aggravation. (See, e.g., *People v. Hernandez, supra*, 30 Cal.4th at pp. 851-853, 877 [penalty phase errors going to "most important aggravating evidence" under factor (b) required reversal where other

aggravation consisted of circumstances of capital murder for financial gain, a prior robbery in which the defendant fired a weapon at one of the victims and which resulted in conviction, and a second prior conviction for murder and the mitigation included evidence of the defendant's positive childhood and drug addiction]; *People v. Horton* (1995) 11 Cal.4th 1068, 1140 [reversal required where only aggravation offered apart from the circumstances of the crimes was erroneously admitted].) On this record and for all of the reasons set forth in the preceding sections, the record resists a determination that the jurors' close death "verdict actually rendered in this trial was surely unattributable to the" the preserved guilt and penalty phase errors. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279; see also *People v. Jones, supra*, 29 Cal.4th at p. 1264, fn. 11.)

4. Because there is a reasonable chance that at least one juror would have voted to spare Mr. Morales's life absent the cumulative effect of the guilt and the penalty phase errors, Mr. Morales was deprived of his state and federal constitutional rights to a fair penalty trial and the effective assistance of counsel and the death judgment must be reversed

In any event, for all of the reasons set forth in the preceding sections and Argument III, *ante,* there is a reasonable probability – or a "reasonable chance" – that at least one juror would have voted to spare Mr. Morales's life absent the combined effect of any or all of the guilt and penalty phase errors, including defense counsel's own deficient performance throughout both phases of the trial. (See, e.g., *Richardson v. Superior* Court, *supra*, 43 Cal.4th at p. 1050; accord, *Strickland, supra,* 466 U.S. at p. 693; *Kyles v. Whitley, supra,* 514 U.S. at p. 434.) Absent the combination of prosecutorial, trial court, and defense counsel errors at the guilt and penalty phases, the jurors would never have heard the sexual assault evidence and argument at either phase of the trial. (See Argument III, Parts F, G &, I, *ante*; Parts D & G, *ante*.) At the very least, there is a reasonable chance that at least one juror would have disregarded any evidence or suggestion of unadjudicated sexual crimes against the victim in the

absence of the errors outlined in Argument III and above. In such a closely decided death case, this Court cannot be confident that the holdout juror – at the very least – still would have capitulated to the majority absent the potent influence of Mr. Morales's putative unadjudicated sexual crimes against the victim weighing heavily on death's side of the scale. Pursuant to the authorities set forth in subpart 1, *ante*, the cumulative effect of any or all of the guilt and penalty phase errors thereby deprived Mr. Morales of his Sixth Amendment right to the effective assistance of counsel, his Fourteenth Amendment right to a fundamentally fair penalty phase trial, and his Eighth Amendment right to a highly reliable death verdict, as well as California's constitutional counterparts. (See, e.g., *Romano v. Oklahoma*, *supra*, 512 U.S. at pp. 11-13; *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 484-490 & fn. 15; *Spears v. Mullin*, *supra*, 343 F.3d at pp. 1226-1229.) The death judgment must be reversed.

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POST-TRIAL DEFECTS IN THE PROCEEDINGS

V.

THE TRIAL COURT VIOLATED STATE LAW AND MR. MORALES'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY DENYING HIS PETITION FOR A HEARING UNDER CODE OF CIVIL PROCEDURE SECTIONS 206 AND 237 AND THUS REFUSING HIM ACCESS TO INFORMATION NECESSARY TO INVESTIGATE AND PRESENT A MOTION FOR NEW TRIAL BASED ON JUROR MISCONDUCT

A. The Relevant Facts

The jurors were repeatedly instructed, both during jury selection and in the penalty phase, that mercy could be considered only as a mitigating factor and could not be considered as an aggravating factor. (See Part D-2-a, *post*.) A cornerstone of defense counsel's penalty phase summation – indeed, the last words the jurors heard from *any* attorney before commencing their penalty phase deliberations – was an impassioned plea to exercise mercy for Mr. Morales by sparing his life. (14RT 3208-3214.)

The jurors deliberated the issue of penalty for a full day on November 4, 2004. (28CT 8041.) On the second day of their deliberations, the jurors submitted two notes stating that they were deadlocked, one juror "would not budge," the other jurors were getting "frustrated and angry," and they needed the court's "help." (28CT 8042, 8044-8045; 14RT 3222-3223.)[72] Rather than responding directly to the jury's request or inquiring into the problem, the trial court released the jurors for a lunch recess. (14RT 3222-

[72] The first note, signed by the foreperson, stated: "[W]e the jury are at dead lock with a decision. One juror has made it known that they won't budge. Please advise." (CT 8042; see also RT 3222.) The second note, from an unidentified juror, stated: "'We need help. We cannot come to a decision. The jurors are getting frustrated and angry.'" (RT 3222.)

3223; 28CT 8097.) When they returned, the foreperson informed the bailiff that, contrary to their position before the lunch break, they no longer needed the court's assistance and wished to continue deliberations. (14RT 3223.) Some minutes later (28CT 8044-8045, 8097), the jurors announced that they had reached their death verdict (28CT 8044-8045, 8097; 14RT 3223).

Following the reading of the death verdict on November 5, 2004, the trial court discharged the jurors and, pursuant to Code of Civil Procedure section 237, ordered that all personal juror identifying information, "including names, addresses, and telephone numbers," be sealed. (14RT 3228.) The court admonished the jurors that they had the absolute right to refuse to discuss or discuss the deliberations and verdict. (*Ibid*.) Finally, the court invited any jurors who wished to speak with the attorneys that afternoon to remain behind and gather in the jury room. (14RT 3227-3228.) At the prosecutor's request, and in order to accommodate the court's schedule, hearings on various post- verdict motions and imposition of judgment and sentencing were set for August 12, 2005. (14RT 3231-3248.)

On December 14, 2004, defense counsel filed a petition for a hearing pursuant to Code of Civil Procedure sections 206 and 237 to gain access to the sealed personal juror identification information for Juror Numbers 5 and 10 in order to investigate the possibility of jury misconduct during deliberations for purposes of a new trial motion. (28CT 8094-8102.)[73] In support of the petition, defense counsel filed a declaration making factual allegations on information and belief based upon the substance of

[73] All statutory references in this argument are to the Code of Civil Procedure unless otherwise specified.

conversations the defense team had with some of the other jurors. (28CT 8096-8100.)

According to counsel's declaration, after being discharged following their death verdict on November 5, ten of the jurors had remained in the jury room to discuss the case with the attorneys. (28CT 8096.) However, two of the jurors – Juror Numbers 5 and 10 – were smokers and left the court immediately after being discharged. (28CT 8096-8097, 8099.)

The ten jurors who remained behind discussed their mid-deliberations announcements of deadlock. They identified Juror Number 5 – one of the absent jurors – as the "holdout" juror who had refused to vote for death throughout the deliberations on November 4 and before lunch on November 5. (28CT 8097.) Evidently, during this post- verdict discussion, several of the jurors left. (28CT 8097.) At the close of the discussion and at defense counsel's request, "the three remaining jurors" – Juror Numbers 2 (the foreperson), 3, and 7 – consented to further discussions with the defense team and provided counsel with their contact information. (28CT 8097-8098.)

According to defense counsel's declaration, Juror Numbers 2, 3, and 7, reiterated that Juror Number 5 voted for life rather than death throughout the first day and a half of their deliberations. (28CT 8098-8099.) On the second day of deliberations, Juror Number 5 finally declared that her mind was made up and nothing more would change it; she wanted to exercise mercy for Mr. Morales and therefore was steadfast in her vote for life. (*Ibid*.) After "loudly arguing" with Juror Number 5 and "heated[ly]" accusing her of violating her oath, the other jurors announced that they were deadlocked because Juror number 5 would not "budge" and requested assistance from the court. (28CT 8096-8099; see also 28CT 8042, 8044-8045; 14RT 3222-3223.) As noted above, rather than responding directly

to the jury's request or inquiring into the problem, the trial court released the jurors for lunch. (14RT 3222-3223; 28CT 8097.)

Upon returning from the lunch recess, Juror Number 5 informed the other jurors that she "had changed her mind" and "would agree to vote with the majority for death." (28CT 8099.) According to Juror Numbers 3 and 7, although Juror Number 5 had been adamant in her decision to grant Mr. Morales mercy by voting *for life* – or to treat mercy as mitigating only – before the lunch recess, when she returned from the recess, she announced that she had made a startling about-face.

Juror Number 5 stated that she was still insistent on granting Mr. Morales mercy and voting for the most merciful sentence. (28CT 8099-8100.) However, she stated that in this particular case, she believed that death was the more merciful and lenient sentence for Mr. Morales than a life in prison without parole, given that he was alone in the world without family who would visit or care for him. (*Ibid*.) Therefore, she would now treat mercy for Mr. Morales as the basis for a death sentence (or in aggravation). (*Ibid*.) Accordingly, after announcing deadlock immediately before the lunch recess, the jurors reached and announced their death verdict within minutes of returning from the recess. (28CT 8097.)

Defense counsel contended that the foregoing information supported an inference that the death verdict may have been improperly influenced by juror misconduct. (28CT 8102, 8171, 8176; see also 28CT 8111 [motion for new trial filed three days after initial petition and before state's opposition and reply thereto, that it was necessary to investigate possible juror misconduct under Penal Code section 1181(2), (3), and (4) for purposes of developing evidence for a new trial motion].) In order to investigate and determine whether misconduct actually occurred, and to develop evidence on which to bring a motion for new trial on that basis, it was necessary to contact Juror number 5, with whom the defense team had

not had the opportunity to speak after the verdicts. (28CT 8094-8095, 8100-8102.) Similarly, the defense team did not have the opportunity to speak to Juror Number 10, who – like Juror Number 5 – was a smoker and left immediately after being discharged. (28CT 8099-8100.) Indeed, Juror Numbers 5 and 10 were described as "smoking buddies" who regularly had contact during their smoking breaks outside of the deliberation process. (28CT 8099.) Having been present during the deliberations and with Juror Number 5 outside of the deliberations, Juror Number 10 likely possessed information relevant to their inquiry. (28CT 8099-8100.)

For all of these reasons, defense counsel submitted that it would be necessary to contact both jurors in order to investigate and develop evidence relating to the possible jury misconduct suggested by the other jurors and the circumstances under which Juror Number 5 abruptly changed her vote. (28CT 8099-8102.) To that end, counsel petitioned the court to hold a hearing pursuant to Code of Civil Procedure section 237 at which Juror numbers 5 and 10 would have an opportunity to object or consent to the unsealing of their personal identifying information and discussing the deliberations and verdict with the defense team. (28CT 8102, 8179.)

The prosecution opposed the petition on two grounds. First, relying on cases addressing the admissibility of evidence to *impeach* a verdict by *proving* jury misconduct, the prosecution contended that the facts contained in defense counsel's declaration were inadmissible hearsay under Evidence Code section 1200. Similarly, because the juror statements contained in counsel's declaration "reveal the jurors' mental processes" they were inadmissible under Evidence Code section 1150. (29CT 8131, 8142-8143, citing, inter alia, *People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419 and *People v. Keenan* (1988) 46 Cal.3d 478, 541-542.)

Second, again relying on cases addressing the sufficiency of evidence to *prove* jury misconduct, or obtain an evidentiary hearing into

juror misconduct to impeach the verdict, as well as cases that predated the relevant amendments to Code of Civil Procedure sections 206 and 237, the prosecution contended that even if the evidence in defense counsel's petition were admissible, it failed to demonstrate that juror misconduct had actually occurred. On that premise, the prosecution contended that counsel had failed to demonstrate good cause for access to the jurors' personal identification information (or, more accurately, for a section 237 *hearing* as the first hurdle to obtaining such access). (29CT 8142-8145, citing, inter alia, *People v. Keenan*, *supra*, 46 Cal.3d at pp. 541-542 [addressing standard of evidence sufficient to *prove* "prejudicial misconduct which impeaches the verdict" on motion for new trial], *People v. Hedgecock*, *supra*, 51 Cal.3d at p. 419 [addressing standard of evidence sufficient to "demonstrat[e] a strong possibility that prejudicial misconduct has occurred" to warrant evidentiary hearing on motion for new trial based on jury misconduct], and *People v. Rhodes* (1989) 212 Cal.App.3d 541, 552 [addressing showing necessary to actually obtain juror information prior to adoption of, and amendments to, sections 206 and 237].)

Finally, according to the prosecutor, in the absence of a judicial determination of good cause supporting the petition, any defense attempt to contact the jurors would be unreasonable and violate section 206. (29CT 8146-8148.)

In reply, defense counsel argued that it was not necessary to prove that misconduct actually occurred in order to obtain a hearing on a request for access to sealed juror information under Code of Civil Procedure sections 206 and 237. (29CT 8170-8177.) Therefore, Evidence Code sections 1200 and 1150, and the authorities on which the prosecution relied in its opposition, were inapplicable to the petition. (29CT 8175-8177.) In any event, defense counsel was not offering the jurors' statements to *prove* "their mental processing in reaching a verdict . . . ." (29CT 8177.) Rather,

counsel offered those statements made during deliberations and the surrounding circumstances of Juror Number 5's abrupt abandonment after the lunch recess of the vote to which she had held firm over nearly two days of deliberations as objective evidence supporting an inference of "possible undue influence or juror misconduct." (29CT 8176-8177.) Finally, given the court's order sealing the juror's names and other identifying information, the provisions of section 206, and the prosecution's own position that any attempt to contact the jurors would be unreasonable without a judicial finding of "good cause" to do so, defense counsel explained that the only means by which to attempt to contact Juror Numbers 5 and 10 was through the petition and hearing process delineated in section 237. (29CT 8176-8178.)

On August 1, 2005, and at defense counsel's request, the trial court provided an indicated ruling denying the petition. (1 SCT 163.) On August 12, 2005, the court adopted its indicated ruling and formally denied the petition, stating:

> I believe that preliminary showing of misconduct had not been made. Most of the information in support of the motion was based upon inadmissible information pursuant to Evidence Code 1150, evidence regarding alleged juror misconduct in this case relates solely to mental process and subjective reasoning of the juror regarding the penalty deliberations and, hence, cannot be considered.
>
> The Court is prohibited from considering the reasons a juror votes for the death penalty. There was no indication that the jury forced a vote before the jury decided the evidence. There's no indication that the jury used coercive tactics to force the juror to vote for the death penalty. The jurors were polled, all jurors expressed agreements with the agreement. . . . [O]ne of the primary cases that I relied upon was People versus Danks, 32 Ca.4th 269, that indicates the Court -- specifically indicated that the Court could not consider the juror's statement one of the reasons that she voted for death was the defendant, quote/unquote, "Did not have much to live for." That was very

> particular to information supplied to this Court through Ms. Snodgrass and her definition -- of the juror's definition.
>
> I'll indicate too, based on my review of People versus Dank [sic] and motions supplied to the Court through moving papers in support and against, I'm going to deny disclosure of juror identifying information [] [b]ased on the fact I didn't think the defense established the threshold requirement of juror misconduct.

(14RT 3274-3275.)

As Mr. Morales will demonstrate below, the trial court's ruling that he had not established good cause for a section 237 hearing because he had not provided the court with admissible evidence to prove that misconduct actually occurred was an abuse of discretion. The petition and supporting declaration alleged facts sufficient to support a reasonable inference of possible juror misconduct, the necessity for further investigation into that possibility by speaking to the affected jurors, and to attempt to obtain admissible evidence of actual misconduct for purposes of a new trial motion. That showing satisfied the "good cause" standard to obtain a hearing under section 237 as the first step necessary to investigate possible misconduct. The court's refusal to hold a hearing under section 237 violated state law, as well as Mr. Morales's rights to the effective assistance of counsel in investigating and bringing a motion for new trial and a fair trial by an impartial jury as guaranteed by the due process clause of the Fourteenth Amendment and the Sixth Amendment.

The case must be remanded with directions to the superior court to conduct a hearing pursuant to section 237, subdivision (c), in order to allow affected jury members the opportunity to object to disclosing their personal contact information. (§ 237, subd. (b).) If no juror objects and the information is disclosed, Mr. Morales must be given the opportunity to investigate, move for a new trial if appropriate, and have the trial court decide the motion on its merits.

B. Because Juror Misconduct Violates a Defendant's State and Federal Constitutional Rights to A Fair Trial by an Impartial Jury, a Defendant is Entitled to Impeach the Verdict on the Ground of Jury Misconduct by Way of Motion for a New Trial and to the Effective Assistance of Counsel in Bringing Such a Motion

The Eighth Amendment to the United States Constitution imposes a "heightened need for reliability in the determination that death is the appropriate punishment in a specific case.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Moreover, all criminal defendants are entitled to an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (See, e.g. *Morgan v. Illinois* (1992) 504 U.S. 719, 727, and authorities cited therein; *People v. Wheeler* (1978) 22 Cal.3d 258, 272.) These guarantees apply equally to the guilt and penalty phases of a capital trial. (See, e.g., *Morgan v. Illinois*, *supra*, at p. 729; *People v. Earp* (1999) 20 Cal.4th 826, 852.)

An impartial jury in a criminal case is one in which every member is sworn to decide and does decide the case based solely on the evidence presented to them in court and the law as stated in the court's instructions. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 822; *Wainwright v. Witt* (1985) 469 U.S. 412, 423.) Jury misconduct implicates these guarantees. (See, e.g., *Smith v. Philips* (1981) 455 U.S. 209, 220-222; *Parker v. Gladden* (1966) 385 U.S. 363, 364-365.) "'Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced.' [Citations.]" (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

Consistent with these principles, a motion for new trial must be granted, inter alia, "when the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented" (Pen. Code, § 1181(3), or "when the verdict has been decided . . . by any means other than a fair expression of opinion on the part of all the jurors" (Pen. Code, § 1181(4)).

Furthermore, the Sixth Amendment guarantees defendants the right to effective assistance of counsel at every "critical stage" of a criminal proceeding. (See, e.g., *Bell v. Cone* (2002) 535 U.S. 685, 695-696.) Pursuant to this guarantee, "a defendant is entitled to competent representation at all times, *including presentation of a new trial motion . . . .*" (*People v. Smith* (1993) 6 Cal.4th 684, 694, italics added; accord, e.g., *United States v. Muro* (9th Cir. 1996) 87 F.3d 1078, 1080; *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, 699.) State action, such as trial court rulings, may prevent the effective assistance of counsel in violation of the Sixth Amendment. (*United States v. Cronic* (1984) 466 U.S. 648, 659-660 and fn. 25; *Strickland v. Washington* (1984) 466 U.S. 668, 692.) Hence, improperly hindering counsel's ability to investigate and bring such a motion may prevent counsel from effectively representing his client in violation of the state and federal Constitutions. (Cf. *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 [right to counsel includes right to tools reasonably necessary for effective representation, including tools necessary to investigate]; accord, *Ake v. Oklahoma* (1985) 470 U.S. 68, 76-85; *Mason v. Arizona* (9th Cir. 1974) 504 F.2d 1345, 1351, 1352; see also *Remmer v. United States* (1956) 350 U.S. 377, 379 [when reasonable grounds exist to believe that jurors may have engaged in misconduct that violates right to impartial jury, "the entire picture should be explored"].)

C. California's Statutory Scheme Protecting Personal Juror Identifying Information and Delineating the Procedure by Which to Investigate Possible Juror Misconduct Post Verdict by Obtaining a Hearing to Determine Whether the Affected Jurors Will Consent to be Interviewed and Unseal Their Personal Identifying Information for that Purpose

Sections 206 and 237 govern access to personal juror identification information. Under the amended statutes as they existed at the time of Mr. Morales's 2004 trial and through today, the trial court is required to seal all personal identifying information of the jurors, including their names, telephone numbers and addresses, and prohibit the disclosure of such information until further order of the court. (§ 237, subds. (a)(2), (a)(3), and (f).) Section 206 provides in relevant part that jurors have an "absolute right to discuss or not discuss" their deliberations or verdict with anyone; following discharge, the parties or their representatives may discuss the deliberations or verdict with a juror only if, inter alia, the juror consents to contact, the party representatives inform the juror of his or her right to refuse to discuss the case, and the contact and discussion "is at a reasonable time and place." Any "unreasonable" contact with a juror without the juror's consent must be reported to the trial judge and is considered a violation of a lawful court order. Hence, under these provisions, it is virtually impossible to contact jurors after they have been discharged and left the courthouse without order of the court or unless the juror initiates the contact.

Section 206, subdivision (g), provides the only avenue by which to locate and contact the jurors after discharge without their prior consent. It provides:

> Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of

> developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237.

As to the petition itself, section 237, subdivision (b), provides that:

> Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The *court shall set the matter for hearing* if the petition and supporting declaration establish *a prima facie showing of good cause* for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.

(Italics added.)

As this Court has explained, under the current statutory framework, "'Any person' seeking [sealed personal juror] information must petition the court and show good cause for disclosure. [§ 206, subd. (b).] More specifically, a criminal defendant or defense counsel may obtain this information if he or she petitions the court and demonstrates such information is 'necessary' for a new trial motion or 'any other lawful purpose.'" (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1087; see also *People v. Jones* (1998) 17 Cal.4th 279, 316.) "*Investigating the possibility* of jury misconduct" is a "lawful purpose" within the meaning of the statute. (*Townsel v. Superior Court, supra,* at p. 1097, italics added.)

Once this showing is made, the defendant is entitled to a hearing as described in section 237. The primary purpose of that hearing (hereafter

"section 237 hearing") is to permit the affected juror or jurors to protest the disclosure. Section 237, subdivision (c), provides in relevant part that the court shall provide notice of the hearing to the affected jurors who may "appear in person, in writing, by telephone, or by counsel to protest the granting of the petition." Subdivision (d) provides in relevant part, "[a]fter the hearing, the records shall be made available as requested in the petition, unless a former juror's protest to granting of the petition is sustained. The court shall sustain the protest of the former juror if, in the discretion of the court, the petitioner fails to establish good cause, the record establishes the presence of a compelling interest against disclosure as defined in subdivision (b), or the juror is unwilling to be contacted by the petitioner." On the other hand, "once a juror consents to an interview, no more need be shown, as section 206, subdivision (a), provides that jurors enjoy 'an absolute right to discuss . . . the deliberation or verdict with anyone.' If a juror does consent to an interview, respondent court would abuse its discretion by requiring counsel to make a showing of need or 'good cause' greater than the desire to interview the juror for a lawful purpose. [Citation.]" (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1097.)

Thus, a showing of good cause is only the first hurdle in the discovery or disclosure process. It does not automatically result in the release of the sealed personal juror information, but rather merely results in a section 237 hearing. Before that hearing, it is the court who contacts the affected jurors; at the hearing, those jurors may – either in person, or by telephone or writing, or through counsel – protest disclosure or refuse to discuss the verdict or deliberations. The jurors' protest "shall be sustained" and disclosure denied if, inter alia, they refuse to be contacted by counsel.

In this way, the Legislature has struck a balance between the jurors' right to be free of unwanted intrusion by the losing party against "'the strong competing public interest in ascertaining the truth in judicial

proceedings, including jury deliberations.' [Citation.]" (*Townsel v. Superior Court, supra*, 20 Cal.4th at p. 1093.) Or as the Legislature explained in amending section 206 and enacting section 237 in 1995: "It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system." (Stats. 1995, ch. 964, § 1, Historical and Statutory Notes to § 206.)

1. A declaration sufficient to make a prima facie showing of good cause does not require admissible evidence of juror misconduct sufficient to impeach the verdict

Once a defendant actually moves to impeach the verdict based on juror misconduct by way of a motion for new trial, he or she must prove with admissible evidence that juror misconduct actually occurred. With respect to the admissibility of evidence to impeach the verdict, Evidence Code section 1150, subdivision (a), provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Section 1150 permits evidence from jurors regarding "'overt acts' – that is, such *statements*, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' – [but jurors] may not testify to 'the subjective reasoning processes of the

individual juror . . . .'" (*In re Stankewitz* (1985) 40 Cal.3d 391, 398, italics added, quoting *People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350.)

Similarly, Evidence Code section 1200 defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." It further declares hearsay evidence inadmissible "except as provided by law."

While a post- verdict proceeding to *impeach* the verdict on the basis of jury misconduct must prove as much with admissible evidence, the relevant statutes impose no such requirement to satisfy the "good cause" showing to obtain a section 237 hearing as the first hurdle to "*[i]nvestigat[e] the possibility* of jury misconduct . . . ." (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1097, italics added.) To the contrary, on its face, section 237, subdivision (b), allows a showing of good cause to be based on hearsay: "The petition shall be supported *by a declaration that includes facts* sufficient to establish good cause for the release of the juror's personal identifying information." (Italics added; see, e.g., *Malatka v. Helm* (2010) 188 Cal.App.4th 1074, 1085 & fn. 5 ["the general rule is that a written declaration, though it has the evidentiary force of a sworn affidavit [citation] is archetypical hearsay"].)

Moreover, the statute does not require that the declaration's allegations of fact be based on the declarant's personal knowledge, rather than on information and belief. (Compare § 437c, subd. (d) [affidavits in support of summary judgment motion "shall be made . . . on personal knowledge"].) If the Legislature intended to impose such a requirement, it certainly knew how to do so. (*Ibid*.; accord, *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86-88.) As this Court has recognized, "[i]t is simply incorrect to suggest that a statute which requires the filing of an 'affidavit' [or 'declaration'] necessarily implies a

requirement of personal knowledge on the part of the affiant. On the contrary, it is a common legislative as well as judicial practice to allow the filing of affidavits on information and belief." (*City of Santa Cruz v. Municipal Court*, *supra*, at p. 88.) Hence, in the absence of an express statement to the contrary in the statute, a statute requiring a "good cause" showing by affidavit for discovery of protected information does not require personal knowledge or prohibit allegations of fact based on information and belief or hearsay. (*Id*. at pp. 86-88 [good cause showing necessary to obtain protected police officer personnel files]; *Humphrey v. Appellate Division* (2002) 29 Cal.4th 569, 573-575 [same, construing Penal Code section 1524.1]; *People v. Smith* (1976) 17 Cal.3d 845, 850 [affidavit on information and belief may establish probable cause sufficient to overcome person's constitutionally protected right of privacy under the Fourth Amendment].) For all of these reasons, the declaration required under section 237 need not allege the material facts based on personal knowledge, but rather may allege them on information and belief. (See, e.g., *People v. Johnson* (2013) 222 Cal.App.4th 486, 493-494 [section 237 petition and supporting declaration may allege facts that would otherwise be inadmissible as hearsay].)

It is equally well recognized that a showing of "good cause" for discovery or access to protected information need not be supported by evidence that would necessarily be admissible in the proceeding for which the information is sought. A showing of good cause may be established with otherwise inadmissible evidence, so long as it may, in turn, lead to the discovery of admissible evidence. (See, e.g. *City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at p. 87 [good cause for access to statutorily protected police personnel files may be based on otherwise inadmissible information]; *People v. Memro* (1985) 38 Cal.3d 658, 681-682 [same]; *People v. Roberts* (1992) 2 Cal.4th 271, 308 [trial court erred in

refusing to disclose witness's prior convictions on ground that they would be inadmissible at trial; regardless of whether they would be admissible, investigating them may have led to admissible evidence and hence defendant showed good cause for disclosure]; § 2017, subds. (a) & (d) [governing right to discovery of admissible matter *or* matter reasonably calculated to lead to admissible evidence]; *People v. Smith*, *supra*, 17 Cal.3d at p. 850 [probable cause sufficient to search or seize persons, places, or things protected by Fourth Amendment may be established with otherwise inadmissible evidence].) The same principles logically apply to petitions for section 237 hearings. (*People v. Johnson*, *supra*, 222 Cal.App.4th at pp. 493-494.)

Hence, the "good cause" requirement under section 237 may be based on evidence that might otherwise be inadmissible hearsay to prove misconduct. It also may be based on juror statements regardless of whether the statements themselves would be admissible to "impeach the verdict" in a motion for new trial (or similar vehicle) under Evidence Code section 1150.

Indeed, Evidence Code section 1150 on its face is entitled "Evidence to *test the verdict*" and is made applicable to "an inquiry into the *validity of a verdict* . . . ." (Italics added.) As this Court has recognized, section 1150 is limited "[b]y its very language" (*People v. Cooper* (1991) 53 Cal.3d 771, 838) and "applies *only* '[u]pon an inquiry into the validity of a verdict . . . .'" (*People v. Haskett* (1990) 52 Cal.3d 210, 240, fn. 11, italics added). (Accord, e.g., *People v. Cleveland* (2001) 25 Cal.4th 466, 485 [section 1150 is limited by its language to challenges to verdict and not other inquiries into possible juror misconduct].) A section 237 petition, of course, does not itself challenge, seek to impeach, or "test the validity of a verdict." Rather, as previously discussed, the petition is to obtain a section 237 hearing, which, in turn, only gives defense counsel a *possible*

opportunity to obtain "information within the court's records necessary for the defendant to communicate with jurors for the purpose of *developing* a motion for a new trial or any other lawful purpose" (§ 206, subd. (g), italics added), which includes "investigating the possibility of juror misconduct . . . ." (*Townsel v. Superior Court, supra*, 20 Cal.4th at p. 1097.) In other words, the purpose of the hearing, from the defense perspective, is to investigate possible misconduct and *attempt to obtain admissible* evidence thereof to test the validity of the verdict by way of a motion for new trial (or other proceeding to "test the validity of the verdict").

Thus, a section 237 petition may attribute to a juror a statement that reflects his or her subjective reasoning processes in reaching a verdict. That statement, in and of itself, would be inadmissible under Evidence Code section 1150 as *proof* of the juror's subjective thought processes in a motion for a new trial. Nevertheless, nothing in that statute or in sections 206 and 237 prohibits the court from considering the statement for the purpose of determining whether it supports a reasonable inference of possible juror misconduct; or put another way, to consider whether it suggests that the juror's thought processes may have been the result of actionable juror misconduct.

In any event, as set forth in more detail below, even if Evidence Code section 1150 applied to section 237 petitions, juror statements are not rendered inadmissible simply because they reflect a juror's internal thought processes. To the extent that juror statements during deliberations are overt acts supporting an inference of possible misconduct, they are relevant and admissible under Evidence Code section 1150 for all purposes.

2. A prima facie showing of good cause is satisfied by allegations of fact, on information and belief, sufficient to support a reasonable belief that juror misconduct may have occurred and that investigation is necessary to resolve that possibility

In 1995, the Legislature amended section 237 to explicitly require that the petition and supporting declaration include facts "sufficient to establish *good cause* for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a *prima facie showing of good cause* for the release of the personal juror identifying information." (Italics added.)

Although "good cause" is not explicitly defined in the statutes, this Court has held that the "good cause" showing required under section 237 is reflected in section 206, subdivision (g). Under these statutes and as mentioned above, good cause is shown and "a criminal defendant or defense counsel may obtain this [personal juror identification] information if he or she petitions the court and demonstrates such information is 'necessary' for a new trial motion *or* 'any other lawful purpose,'" which includes "[i]nvestigating the *possibility* of jury misconduct." (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1087; accord, e.g., *People v. Granish* (1996) 41 Cal.App.4th 1117, 1126; *People v. Duran* (1996) 50 Cal.App.4th 103, 121; *People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) If the section 237 petition and supporting declaration demonstrate "the possibility of jury misconduct" and that speaking to all or some of the jurors is necessary to investigate that possibility and obtain admissible evidence of misconduct for purposes of bringing a new trial motion, the good cause standard is satisfied.

The meaning of "good cause" under current law is thus partly consistent and partly inconsistent with the test for obtaining access to the court's records of personal juror identification information under the law pre-dating the enactment of and amendments to sections 237 and 206 – first

articulated in *People v. Rhodes* (1989) 212 Cal.App.3d 541, and later adopted by this Court (*People v. Jones, supra*, 17 Cal.4th at p. 317 ["Because the verdict was returned before section 237 was enacted . . . the substantive rule of *People v. Rhodes* . . . applies"]). Upon a showing of "good cause" under the *Rhodes* standard, a defendant was actually "entitled to the list of jurors who served in the case, including addresses and telephone numbers" – as opposed to simply being entitled to a hearing under current law. (*People v. Rhodes*, *supra*, at pp. 551-552.) "Good cause" in that context was defined as a "preliminary showing of *possible* juror misconduct" (*Id*. at pp. 554-555, italics added), or a showing sufficient "to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial" (*id*. at pp. 551-552).

At the time of the *Rhodes* decision, and prior to the current statutory scheme, the law did not require the sealing of such juror information as their names; the only limitation on contact was the ethical prohibition against "harass[ing] and "embarrassing" jurors. (*People v. Rhodes*, *supra*, 212 Cal.App.3d at pp. 546-547, 552-554, fn. 6, citing Rules Prof. Conduct of State Bar, rule 7-106, subd. (D).) Against that background, the *Rhodes* standard required a showing that "diligent efforts were made to contact the jurors by other means . . . . " (*Id*. at p. 552.) The "diligent efforts" prong thus presupposed that counsel already had the jurors' names or ways to obtain them and was free to contact them by other means, such as an ordinary telephone directory, without violating the letter or the spirit of the law or a court order. (*Id*. at pp. 551-554.)

In stark contrast, the current statutory framework requires that all juror personal identification, including their names, be sealed, severely restricts juror contact, and prohibits contact without juror consent. Indeed,

as the prosecutor in this case argued, in the absence of a judicial determination of good cause supporting a section 237 petition, any defense attempt to contact the jurors would be unreasonable and violate section 206. (29CT 8146-8148.) Thus, as defense counsel argued (29CT 8176-8178), imposing the pre-statutory "diligent efforts" prong of the *Rhodes* good cause standard under the current statutory scheme would unfairly and unethically "forc[e] counsel to try to find ways around the seal." (*People v. Johnson*, *supra*, 222 Cal.App.3d at p. 497.) Under the current statutory scheme, it is therefore clear that the Legislature "did not intend to require a defendant to show diligent efforts to obtain the sealed information as a condition of unsealing it." (*Ibid*.) Hence, the "diligent efforts" prong of the *Rhodes* good cause test did not survive the enactment of and amendments to sections 237 and 206.

However, to the extent that *Rhodes* held that a showing or allegation of "possible" misconduct, or a showing sufficient to support a "reasonable belief" that misconduct may have occurred, constitutes "good cause" for access to juror personal identification information, that definition of the term has arguably survived the current statutory scheme. (*People v. Rhodes*, *supra*, 212 Cal.App.3d at pp. 552, 554-555; see, e.g., *People v. Jones*, 17 Cal.4th at pp. 316-317 [adopting and applying *Rhodes*' "reasonable belief" component of good cause standard in case pre-dating current statutory scheme]; *People v. Johnson* (2015) 242 Cal.App.4th 1155, 1161-1162 [same under current sections 206 and 237].) As that definition implies, the allegations of a section 237 petition or declaration need not be sufficient to show that misconduct *actually* occurred or the only inference of which they are susceptible is actual misconduct.

In *People v. Jones*, *supra*, for instance, this Court recognized that although the facts alleged in a petition or declaration may not themselves demonstrate that misconduct actually occurred, they may nevertheless

"provide[] a basis for permitting defendant to investigate whether" misconduct has occurred under the *Rhodes* standard. (*People v. Jones*, *supra*, 17 Cal.4th at pp. 316-317.) If the factual allegations are susceptible of a reasonable inference that misconduct *may* have occurred – even if they are also susceptible of innocent inferences – they provide a "'sufficient showing to support a reasonable belief that jury misconduct occurred'" and satisfy good cause to support a petition for access to juror information even under the pre-statutory *Rhodes* standard. (*Id*. at p. 317, quoting from *People v. Rhodes*, *supra*, 212 Cal.App.3d at p. 552; accord, *Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1087 [access should be granted upon showing it is necessary to "[i]nvestigat[e] the *possibility* of jury misconduct"]; *People v. Johnson* (2015) 242 Cal.App.4th 1155, 1163-1164 [same under current statutory framework – "reasonable belief" standard satisfied even if factual allegations are skeptical or contradicted].)

This Court has similarly defined the analogous "reasonable belief" component of the "good cause" showing necessary for limited access to protected police personnel files. (*City of Santa Cruz v. Municipal Court* *supra*, 49 Cal.3d at pp. 90-91.) The appellate court in that case had held that the requirement demanded a declaration containing evidence that the sought-after information – i.e., complaints against the arresting officers for excessive force or other misconduct that would be relevant and admissible in the defendant's trial based on his defense – *actually* existed. (*Id*. at pp. 81, 86-87, 89-90.) This Court rejected such a rigorous showing to satisfy the good cause standard for the trial court's limited intrusion into a peace officer's otherwise confidential personnel files by examining them in-camera for relevant and discoverable information. (*Id*. at pp. 86-92.)

In so doing, the Court focused in part on the meaning of "reasonable belief":

> [I]t is manifest that a showing of "reasonable belief" does not require personal knowledge, but may be premised upon a rational inference from known or reasonably assumed facts. Black's Law Dictionary defines "reasonable" as "fair, proper, just, . . . rational." (Black's Law Dict. (5th ed. 1979) p. 1138.) Black's further defines "belief" as a "[c]onviction of the mind, *arising not from actual perception or knowledge, but by way of inference*, or from evidence or information derived from others." (Black's Law Dict., supra, at p. 141, italics added.) "The words 'reasonably believes' . . . denote the fact that the actor believes that a given fact or combination of facts exists, and that the circumstances which he knows . . . are such as to cause a reasonable man so to believe." (Black's Law Dict., supra, at p. 1138; accord, Ballantine's Law Dict. (3d ed. 1969) p. 1060 [A reasonable belief is "a belief begotten by attendant circumstances fairly creating it, and honestly entertained."].)

(*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at p. 90.)

The Court concluded that the "good cause" showing upon "reasonable belief" does not require proof or even allegations that, if true, would demonstrate that relevant complaints actually exist. It is sufficient if the declaration contains factual allegations, on information and belief, supporting a reasonable belief or a reasonable inference that material complaints "may have" been filed against the affected officers. (*City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at pp. 89-90.) Indeed, the Court emphasized, to impose a more rigorous standard of presenting evidence that the sought-after information actually exists would thwart the very purpose of the statutory scheme: "'if the petitioner already had the particulars of the records, he would not need to use discovery.'" (*Id.* at p. 89, quoting Assembly Committee's Commission on Criminal Justice's analysis of bill enacting section 1043.)

The same holds true in the analogous section 237 petition and hearing context. As one appellate court has succinctly put it: "[T]he whole point of moving for the disclosure of jurors' identifying information is to talk to the jurors; and the whole point of talking to the jurors is to obtain

evidence of juror misconduct that will support a motion for new trial. . . . Thus, it would be absurd to require a defendant seeking disclosure to introduce, at that preliminary stage, *admissible* evidence that juror misconduct *actually* occurred." (*People v. Johnson*, *supra*, 222 Cal.App.4th at p. 493, italics added.)

In sum, the "good cause" showing required for a section 237 hearing may be satisfied with a petition and declaration: (1) containing allegations of fact, on information and belief, sufficient to support a reasonable inference of "possible juror misconduct," or that misconduct *may* have occurred; and (2) demonstrating that speaking to the affected jurors is "necessary" to investigate that possibility and obtain admissible evidence thereof for purposes of moving for a new trial. It does not demand proof or evidence of misconduct that would be admissible to actually impeach the verdict in a motion for new trial (or similar vehicle to challenge the validity of the verdict). It does not demand allegations that misconduct actually occurred or a showing that misconduct is the *only* inference that can be drawn from the factual allegations contained in the declaration. Nor does it demand that counsel first violate the spirit of existing law and attempt to go around the seal by obtaining the jurors' names and contacting them through extrajudicial measures before petitioning the court for a section 237 hearing, which ultimately allows the *jurors* to decide whether they are willing to be contacted by counsel.

Applying that standard here, Mr. Morales's section 237 petition and declaration was sufficient to satisfy the "good cause" standard for a section 237 hearing. The court violated state law by denying his petition, as well as Mr. Morales's state and federal constitutional rights under the Sixth, Eighth, and Fourteenth Amendments by denying him access to the tools and critical resources necessary for him to secure the effective assistance of counsel in

preparing a motion for new trial and a heightened degree of reliability that the death judgment was the result of a fair trial by an impartial jury.

D. The Trial Court's Denial of Mr. Morales's Petition Without Holding a Hearing Constituted an Abuse of Discretion, Improperly Infringed upon His Sixth and Fourteenth Amendment Rights to Trial by a Fair and Impartial Jury and the Effective Assistance of Counsel in Moving for a New Trial, and Requires Remand

1. Standard of review

This Court has held that a trial court's denial of a petition for access to juror information is subject to an abuse of discretion standard of review. (*People v. Jones*, *supra*, 17 Cal.4th at p. 317 [petition pre-dating enactment of section 237].) It is well settled that a court's application of an incorrect legal standard to its exercise of discretion amounts to an abuse of discretion. (See, e.g., *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436; *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Lara* (2001) 86 Cal.App.4th 139, 165.) This is just such a case.

As discussed in Part A, *ante*, the trial court denied the petition because it concluded that it was prohibited from considering most of the facts alleged in the petition under Evidence Code section 1150. (14RT 3274-3275.) In support of its ruling, the court cited *People v. Danks* (2004) 32 Cal.4th 269, wherein this Court held that evidence of a juror's mental processes in arriving at her verdict is inadmissible under section 1150 *to impeach the verdict by way of a motion for new trial*. (14RT 3274-3275.)

The court's limited view of the proffered allegations was that they were only relevant insofar as they showed the subjective thought processes underlying Juror Number 5's death vote but the law "prohibited [the court] from considering the reasons a juror votes for the death penalty." (14RT 3274.) Otherwise, the court reasoned, there was no indication that

misconduct actually occurred in the form of admissible evidence that Juror Number 5 was improperly coerced or pressured into reaching her verdict. (14RT 3274-3275.) Hence, the defense failed to "establish[] the threshold requirement of juror misconduct." (14RT 3275.)

For the reasons set forth in Part B, *ante*, the court's understanding of the "good cause" standard was fatally flawed. Mr. Morales was not required to introduce admissible evidence that juror misconduct *actually* occurred in order to establish good cause for a section 237 hearing as the first hurdle necessary to investigate that possibility and, if so, to obtain admissible evidence thereof for purposes of a new trial motion. (See, e.g., *People v. Johnson*, *supra*, 222 Cal.App.4th at p. 493, italics added; cf. *City of Santa Cruz v. Municipal Court*, *supra*, 49 Cal.3d at p. 89.) Under the correct "good cause" test, the critical question for the court to determine, which it did not, was whether the factual allegations contained in Mr. Morales petition and declaration, if true, were sufficient to support a reasonable inference or inferences of "possible juror misconduct" (*People. Rhodes*, *supra*, 212 Cal.App.3d at pp. 554-555) or that misconduct "may have" occurred (*City of Santa Cruz v. Municipal Court*, *supra*, at pp. 89-90), such that talking to the affected jurors was necessary to "investigat[e] the *possibility* of jury misconduct" and, if so, *obtain* admissible evidence thereof to support a motion for new trial (*Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1087; accord, *People v. Jones*, *supra*, 17 Cal.4th at pp. 316-317).

Furthermore, as set forth in Part D-2-b, *post*, even if Evidence Code section 1150 did apply to the section 237 petition, the juror statements contained in the declaration were admissible as objective evidence of what occurred both inside and, circumstantially, outside of the jury room, which supported reasonable inferences that juror misconduct may have occurred. The suggestion of misconduct was not limited to juror coercion. To the

contrary, from the face of the declaration, the possibility that at least Juror Number 5 had committed misconduct by disregarding the trial court's instructions was patent. The declarations also suggested the possibility that Juror Number 5 was improperly exposed to some influence external to the deliberations over the lunch recess. Under the correct legal standards, Mr. Morales's section 237 petition and declaration established good cause to investigate that possibility by talking to the jurors and attempting to obtain admissible evidence that misconduct had actually occurred for purposes of a new trial motion.

Because the trial court's denial of Mr. Morales's petition was based upon a misunderstanding of the applicable legal standards guiding its discretion, it was an abuse of discretion. Under the correct governing principles, the petition and declaration alleged facts sufficient to satisfy "good cause" to warrant a section 237 hearing.

2. A juror who disregards the law as stated in the instructions is guilty of misconduct under state law and violates the defendant's Sixth and Fourteenth Amendment rights to a fair trial by an impartial jury and, in capital cases, his Eighth Amendment right to a highly reliable death judgment

As set forth in Part B, *ante*, the Sixth, Eighth, and Fourteenth Amendments, as well as state statutory law, demand that jurors follow their oaths and decide the case based solely on the evidence the trial court admits and the law as stated in its instructions. (*Morgan v. Illinois*, *supra*, 504 U.S. at pp. 725-728, 730; see also § 232, subd. (d).) "Jury adherence to the trial court's instructions . . . is essential to a fair trial." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1119; accord, *In re Stankewitz*, *supra*, 40 Cal.3d at pp. 397-399; see also Pen. Code, §§ 1126, 1089.) The importance of following instructions is particularly great in the penalty phase of a capital case given the vital role of the instructions in ensuring that the jurors

make "individualized assessment of the appropriateness of the death penalty" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319) and serving "the heightened need for reliability in the determination that death is the appropriate punishment in a specific case" (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 340). (See also, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 382-384 [recognizing importance of jury instructions in penalty phase on factors guiding sentence selection]; *Boyde v. California* (1990) 494 U.S. 370, 380, 383; *In re Stankewitz*, *supra*, 40 Cal.3d at p. 397 [juror's duty to follow, and be guided only by, law as stated in court's instructions is particularly important in capital cases].)

In accord with these principles, the jurors in this case were explicitly instructed during jury selection and in the penalty phase that they "must accept and follow the law that [the court] shall state to you," and they swore their oath to do so. (7RT 1263; 28CT 8002; see also, e.g., 3RT 340.) A juror who disregards the law as stated in the instructions deprives the defendant of his state and federal constitutional rights, violates his or her oath, and commits misconduct which raises a presumption of prejudice. (See, e.g., *People v. Leonard* (2007) 40 Cal.4th 1370, 1424; *In re Stankewitz*, *supra*, 40 Cal.3d at pp. 397-399; see also *People v. Cleveland* (2001) 25 Cal.4th 466, 485 [juror who expresses "intention to disregard the court's instructions" commits misconduct, violates oath as juror, and must be discharged]; accord, *People v. Engelman* (2002) 28 Cal.4th 436, 442; *People v. Williams* (2001) 25 Cal.4th 441, 448-449.)

a. The jurors were clearly instructed that the law only permitted them to consider mercy in mitigation in favor of a life verdict, which is more lenient than death as a matter of law, and prohibited them from considering mercy as a basis for the more severe sentence of death

Penal Code section 190.3 enumerates the aggravating and mitigating factors that a jury must consider on the issue of penalty, if relevant. *Only* statutory factors (a), (b), (c), and (i) may be considered in aggravation – i.e., as bases for a death verdict. Jurors are prohibiting from relying on any other factors or evidence in aggravation. (See, e.g., *People v. Edelbacher* (1989) 47 Cal.3d 983, 1033; *People v. Boyd* (1985) 38 Cal.3d 762, 773.)

Factor (k) is a broad, catch-all mitigating factor and includes "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" (Pen. Code, § 190.3, factor (k)) and "any other 'aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death'" (*People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [construing factor (k) to comply with federal constitutional requirements]). This Court has repeatedly held that mercy for the defendant falls within the broad scope of factor (k) and thus may serve as a basis for a life sentence. (See, e.g., *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1026-1027; *People v. Easley* (1983) 34 Cal.3d 858, 877-880; *People v. Ervine* (2009) 47 Cal.4th 745, 801-802.)

Factor (k) considerations, like mercy, may *only* be considered in mitigation, or as a basis for a sentence less than death. A juror's reliance on factor (k) considerations as a basis for a death sentence violates not only state law (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1033; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776), but a death sentence based in any part on "factors . . .that actually should militate in favor of a lesser penalty,"

such as mercy, also violates due process. (*Zant v. Stephens* (1983) 462 U.S. 862, 885; accord, *Brown v. Sanders* (2006) 546 U.S. 212, 220 & fn. 6.)

Similarly, this Court has consistently recognized that life without parole is a more lenient sentence than death *as a matter of law*. (*People v. Harris* (2005) 37 Cal.4th 310, 361; accord, e.g., *People v. Tate* (2010) 49 Cal.4th 635, 706-707.) Like any other law, jurors are bound to follow this law no matter their personal beliefs. (*United States v. Wilson* (E.D. N.Y. 2006) 493 F.Supp.2d 446, 447, 450 [jurors who personally believed that death was more lenient sentence and life more severe and would not follow law to the contrary, were not impartial, could not follow oaths, and demanded discharge].) "[T]he jurors 'are not allowed either to determine what the law is or what the law *should* be.' (*In re Stankewitz*, *supra*, 40 Cal.3d at p. 399.)" (*People v. Haskett*, *supra*, 52 Cal.3d at p. 240, fn. 11, original italics.)

The trial court in this case instructed the jurors consistent with the foregoing legal principles. First, the court instructed the jurors on factor (k) with CALJIC No. 8.85, which directed in relevant part that they could consider in mitigation "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers, or anything else that is mitigating, as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (28CT 8029 [internal brackets omitted]; 13RT 3134-3136.) This Court has repeatedly held that this instruction on factor (k) considerations clearly informs jurors that they may return a life verdict based upon mercy for the defendant, without the need for further instruction. (See, e.g., *People v. Ervine*, *supra*, 47 Cal.4th at pp. 801-802, and authorities cited therein; *People v. Griffin* (2004) 33 Cal.4th 536, 590-

591, and authorities cited therein; *People v. Andrews*, *supra*, 49 Cal.3d at pp. 227-228.)

Moreover, the jurors here were *explicitly* instructed on the permissive use of "mercy" for the defendant as a basis for a life sentence:

> In this part of the trial, you may consider pity, sympathy or *mercy* for the defendant in deciding on the appropriate penalty for him. If a mitigating circumstance or an aspect of the defendant's background or character called to your attention by the evidence arouses sympathy, compassion, or *mercy*, such as to persuade you that *death is not the appropriate penalty*, you may act in response thereto and impose a punishment of *life without parole on that basis*.

(28CT 8033, italics added; 14RT 3138.)

Next, the trial court instructed the jurors with CALJIC No. 8.88, defining "aggravating" and "mitigating" factors. (28CT 8035-8036; 13RT 3139-3140.) This Court has consistently held that this standard instruction clearly informs lay jurors that life is the more lenient sentence than death as a matter of law. (See, e.g., *People v. Tate*, *supra*, 49 Cal.4th at pp. 706-707; *People v. Harris*, *supra*, 37 Cal.4th at p. 361.) That instruction, moreover, served to reinforce the same directive the jurors were given during jury selection.

The questionnaire asked the prospective jurors to answer which of the two possible punishments – death or life without the possibility of parole – "is worse for a defendant[]" (see, e.g., 10CT 2798) and which of those two sentences "is the most severe" (see, e.g., 10CT 2799). On voir dire, the potential jurors were told that, whatever their personal beliefs, death is the more severe penalty and life without parole the more lenient as a matter of law and they were bound to follow the law. (See, e.g., 5RT 820-821; 6RT 1059, 1140.) These instructions related directly to the appropriate use of "mercy," the ordinary, commonsense definition of which in the sentencing or punishment context is imposition of the more *lenient*

sentence. (See, e.g., *Merriam Webster's Collegiate Dictionary* (10th ed.) at p. 727 [defining "mercy," inter alia, as "lenient or compassionate treatment" and "imprisonment rather than death imposed as penalty for first-degree murder"].) No matter a juror's personal beliefs, life is the more lenient sentence as a matter of law and hence the only sentence that could be imposed based on mercy for the defendant. Indeed, in his penalty phase summation, the prosecutor reminded the jurors that they must consider life as the less severe sentence as a matter of law – even highlighting the point in his powerpoint presentation – notwithstanding their expressions of personal views to the contrary in their questionnaires. (14RT 3148; 2 SCT 486.)

Other instructions made the restrictive use of mercy even more explicit. The trial court's instruction to the jurors with CALJIC No. 8.85 set out the relevant factors – (a) through (k) – for the jurors to consider and, as previously noted, its instruction with CALJIC No. 8.88 defined the meaning of "aggravating" and "mitigating" "factors." (28CT 8028-8029, 8035-8036; 13RT 3134-3136, 3139-3140.) This Court has repeatedly held that together these instructions make the aggravating and mitigating nature of the factors listed in CALJIC No. 8.85 "clear" (*People v. Frye* (1998) 18 Cal.4th 894, 1026-1027, and authorities cited therein) and "self-evident" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 506). As such, they clearly inform jurors that the criteria on which they may base a death verdict are limited to factors (a), (b), (c), and (i), that all other listed factors may be used only to support a life verdict, and thus that they are prohibited from considering any of the other factors (or any non-statutory or non-specified factors) as bases for a death verdict. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 659-662; *People v. Taylor* (2001) 26 Cal.4th 1155, 1180; *People v. Lucero* (2000) 23 Cal.4th 692, 728, and authorities cited therein.) In other words, from jury selection through the penalty phase, the jurors

were clearly instructed that mercy for the defendant, which was both implicitly and explicitly included under factor (k), and excluded from the aggravating factors the jurors were limited to considering, could not serve as a basis for a death sentence.

Furthermore, the notion of mercy played a central role in Mr. Morales's penalty phase defense. Defense counsel requested the special mercy instruction and their closing arguments rested in substantial part on a plea for mercy to spare Mr. Morales's life. (See 14RT 3118, 3204-3211, 3214.) For his part, the prosecutor recognized in his own summation that mercy was relevant only to whether Mr. Morales's life should be spared, arguing only that he was undeserving of mercy and therefore should be sentenced to death. (14RT 3179-3180.)

In sum, under the precedents of this Court and the plain language of the instructions, the jurors were repeatedly and unequivocally instructed on the permissive use of mercy as a basis for a life verdict through the use of CALJIC Nos. 8.85 and 8.88, as well as more explicit instructions. The arguments of counsel similarly explained that mercy for Mr. Morales could only be considered in favor of life, or as "mitigating." The jurors were likewise clearly instructed on the prohibited use of mercy as a basis for a death verdict. If any of the jurors disregarded the legal principles as stated in the court's instructions, or encouraged other jurors to disregard them, they were guilty of serious misconduct.

b. Mr. Morales made a prima facie showing of good cause to hold a section 237 hearing to determine whether he should be granted access to Juror Numbers 5 and 10's personal identifying information as necessary to investigate the inference that at least one of the jurors committed misconduct by disregarding the law, and obtain any evidence thereof for the lawful purpose of bringing a new trial motion

It is black letter law that jurors are presumed to be intelligent people capable of understanding the plain meaning of instructions. (See, e.g., *People v. Carey* (2007) 41 Cal.4th 109, and authorities cited therein.) From this presumption, this Court's consistent holdings that the standard instructions clearly convey the law to lay jurors, and the fact that this particular jury was provided even more explicit supplemental instructions on the permissible use of mercy, it must be presumed that Juror Number 5 – as well as the other jurors – understood that the law as stated in the court's instructions prohibited the use of mercy as a basis for a death sentence. The conduct described by juror statements contained in defense counsel's declaration in support of the section 237 petition supported a compelling inference that Juror Number 5 – at the least – disregarded those instructions.

According to defense counsel's section 237 declaration based on the defense team's interviews with other jurors, for the first day and a half of deliberations, Juror Number 5 expressed her insistence on granting mercy to Mr. Morales and – consistent with the court's instructions on the law – was therefore voting for life as an act of mercy. (28CT 8097-8100.) In other words, her statements were objective evidence that she was following the court's instructions. Although all of the other jurors voted for death, she held fast to her position to the point of finally declaring on the second day that further deliberations would be fruitless because nothing could change her mind. (*Ibid*.) Other jurors "heated[ly]" accused her of violating her oath as a juror and notified the trial court that the jurors were

deadlocked because one of the jurors would "not budge," and asked for the court's "help." (28CT 8042, 8044-8045; 14RT 3222-3223.) Of course, had the court intervened at that time, and had the real problem been communicated to it, the jurors presumably would have been instructed that Juror Number 5 was *not* violating but rather *abiding by* her oath: "[T]he circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts . . . does not constitute a refusal to deliberate . . . . A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.)

However, the court's preliminary response was to order a recess from the deliberations. (14RT 3222-3223; 28CT 8097.) According to the interviewed jurors, immediately after that recess – and without the benefit of further deliberations – Juror Number 5 announced that she would change her vote to death. She told the other jurors that her *position* that mercy for Mr. Morales was the decisive factor in her selection of punishment had remained unchanged. (28CT 8099-8100.) However, she told the jurors that she personally believed that *death* – not life – was the more merciful sentence for Mr. Morales given that he would spend his life alone in the world and without family to care for him. (*Ibid*.) This statement about the severity of life for Mr. Morales particularly echoed remarks defense counsel made in summation that life without parole was still an extremely harsh sentence in which, inter alia, Mr. Morales would not "be embrac[ed]" in his family's "love. There's not going to be that relationship." (14RT 3192.) It was also consistent with the guilt and penalty phase evidence that Mr. Morales had always had a very strained relationship with his mother, who subjected him to horrific physical abuse as a child, abandoned him,

and ultimately acted as an agent of the police to lie to her son and elicit a confession from him that they would use to seek his execution. His abusive father and the surviving paternal side of his family lived in Honduras and could not or did not travel to the United States even to plead for his life at trial and therefore could not be expected to do so to visit him behind bars for the rest of his life. (29CT 8363-8417.)

Therefore, Juror Number 5 stated that she would change her vote accordingly, from life to death because she believed death was the more merciful sentence for him. (*Ibid*.) Consistent with this account, the record shows that after the jurors returned from recess, they informed the bailiff that they no longer needed the court's assistance, resumed their deliberations on their own, and shortly thereafter announced that they had reached their unanimous death verdict. (28CT 8044-8045, 8097; 14RT 3223.)

Given the presumption that the jurors understood from the court's instructions that they could consider mercy *only* in favor of life, or as "mitigating," and were prohibited from considering it in favor of death, or as "aggravation," the allegations in defense counsel's section 237 petition supported a reasonable inference of possible (and indeed prejudicial) misconduct at least on the part of Juror Number 5. That is, her post recess, pre verdict statements that she would now treat mercy for Mr. Morales as the basis for a death sentence, or in aggravation, in contravention of the court's instruction were, in effect, objective evidence that at least she committed misconduct. Even assuming that Evidence Code section 1150 applied (but see Part D-1, *ante*), the juror statements in defense counsel's declaration were admissible for that purpose.

Evidence Code section 1150 distinguishes between "proof of overt acts, objectively ascertainable," which is admissible, and "proof of the subjective reasoning processes of the individual juror, which can be neither

corroborated nor disproved," which is inadmissible. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 379; accord, e.g., *In re Stankewitz*, *supra*, 40 Cal.3d at p. 398.) Hence, the statute expressly *permits* the use of juror "*statements* made . . . either within or without the jury room, of such character as likely to have influenced the verdict improperly." (Evid. Code, § 1150.) In contrast, the statute prohibits evidence to prove "the *effect* of such statement . . . upon a juror either in influencing him to assent or dissent from the verdict or concerning the mental processes by which it is determined. (*Ibid*., italics added.) Put another way, the statute distinguishes between the use of juror statements to prove "*whether* misconduct occurred," which is permissible, and the use of such statements to prove "*the effect of* misconduct on" a juror or jurors, which is impermissible. (*People v. Haskett*, *supra*, 52 Cal.3d at p. 240, fn. 11, original italics.)

Under these principles, it is well-settled that jurors' statements are not inadmissible simply because they happen to reflect their subjective thought processes. While such statements are inadmissible for *that* purpose, they can be admissible as overt acts tending to show, for instance, that a juror or jurors disregarded the court's instructions and hence committed misconduct. A number of this Court's decisions are instructive.

In *People v. Jones*, *supra*, 17 Cal.4th at p. 316, for example, this Court held that the trial court "misapprehended the scope" of Evidence Code section 1150 by ruling that a juror's statement to the media about the verdict, "we need a deterrent," was inadmissible under section 1150 simply because it tended to reveal the juror's thought processes in reaching his verdict. (*Id*. at p. 316.) While the statement was inadmissible for *that* purpose, it was admissible for a different purpose: as objective evidence tending to show that the juror may have disregarded the court's instructions not to consider deterrence and thereby possibly committed misconduct.

(*Ibid*.) Furthermore, although the statement did not conclusively prove that misconduct had occurred because it was susceptible of other inferences, it was sufficient to support a reasonable belief that jury misconduct *may* have occurred and thus be a basis for permitting the defendant to investigate that possibility for purposes of a petition for access to jury information. (*Id*. at pp. 316-317.)

Likewise, in *In re Stankewitz*, *supra*, 40 Cal.3d 391, two of the jurors reported after the verdict that a third juror made several statements during deliberations to the effect that he was a former police officer, he knew the law, that a robbery occurs as soon as someone forcibly takes property whether or not he intends to keep it, and that the defendant was therefore guilty of robbery as soon as he took two wallets, regardless of whether or not he intended to keep them. (*Id*. at p. 396.) Although the third juror's statements during deliberations did reflect his own thought processes in reaching his guilty verdict and were inadmissible for *that* purpose, they were nevertheless admissible under Evidence Code section 1150 as overt acts tending to prove that the jurors had disregarded the court's instructions by interjecting or receiving law from a source other than the court's instructions. (*Id*. at pp. 397-398; accord, e.g., *People v. Perez* (1992) 4 Cal.App.4th 893, 907 [juror comments during deliberations on the defendant's failure to testify are admissible under section 1150 to the extent that they tend to show that the juror or jurors disregarded the court's instructions to the contrary]; *People v. Hord* (1993) 15 Cal.App.4th 711, 725; *People v. Johnson*, *supra*, 222 Cal.App.4th at p. 495; see also *People v. Leonard*, *supra*, 40 Cal.4th at pp. 1424-1425 [juror statements during penalty deliberations that they would have liked the defendant to testify so that they could better understand his reasons for killing established actual misconduct in disregarding court's instructions not to consider defendant's failure to testify].)

This Court's decision in *People v. Haskett, supra*, 52 Cal.3d 210, is particularly illustrative for purposes of this case. In that case, the Court recognized that inquiry into "whether [a juror] is following [or followed] the court's instructions" in deliberations is entirely appropriate, and taking statements or testimony from the jurors on that question is admissible under Evidence Code section 1150 to determine whether misconduct occurred. (*People v. Haskett, supra*, 52 Cal.3d at p. 240 & fn. 11.) The trial court in that case had instructed the jurors that they could not consider whether the defendant was insane as a mitigating fact. In response to the complaints of other jurors, the trial court inquired into possible juror misconduct during deliberations by asking a juror and taking testimony into whether she was considering insanity as a mitigating "fact," which would contravene the court's instructions. This Court held that this inquiry, and the juror's answers thereto, were entirely appropriate notwithstanding Evidence Code section 1150. A juror's statements concerning whether he or she is treating a particular consideration as a mitigating factor as an aggravating fact "in contravention of the court's instructions – does not implicate the juror's reasoning process" in violation of section 1150, but rather are proper and admissible as overt acts on the question of "whether" the jury committed misconduct by disregarding the court's instructions. (*People v. Haskett, supra*, at p. 240, fn. 11; accord, e.g., *People v. Cleveland*, *supra*, 25 Cal.4th at p. 484 [inquiry into whether juror statements "expressed an intention to disregard the court's instructions," and thereby committed misconduct, is appropriate and statements admissible for that purpose under section 1150].)

Here, the statements attributed to Juror Number 5 are analytically indistinguishable from those this Court approved in *Haskett* and other cases as permissible evidence on the question of whether a juror has committed misconduct by disregarding the court's instructions. Just as the jurors in

Haskett were instructed that they could not consider the defendant's insanity as a mitigating factor, the jurors in this case were instructed and presumably understood that they could not consider mercy for the defendant as an aggravating factor, or a factor weighing in favor of death, but could only consider it as mitigating, or a factor weighing in favor of life. As in *Haskett*, Juror Number 5's statements were admissible for the purpose of showing whether she had treated mercy for Mr. Morales as aggravating (or a basis on which to sentence him to death) and treated death as the more lenient sentence than life in this case "in contravention of the court's instructions" and thus properly could be considered as overt acts on the question of whether she committed misconduct. Indeed, Juror Number 5's statements prior to the announcement of deadlock indicated that she appropriately considered mercy for Mr. Morales only as mitigating and thereby constituted evidence that she was *following* the court's instructions for the first day and a half of deliberations. Yet her otherwise inexplicable and abrupt announcement immediately following the recess – and without the benefit of further deliberations with the other jurors – that she would now treat mercy for Mr. Morales in aggravation, or as a basis for a death verdict, was, in effect, a statement of her intent to disregard the court's instructions she had so assiduously followed before the recess. As in *Haskett* and the many other cases cited above, while Juror Number 5's statements were (or, more accurately, on a new trial motion *would have been*) inadmissible to prove the "*effect*" of disregarding the court's instructions on her subjective thought processes (such as the subjective basis of her death vote), they were entirely appropriate as objective evidence on the question of whether she had thereby committed misconduct. Certainly, pursuant to the authorities cited above, a more than reasonable inference from the evidence of Juror Number 5's statement is that misconduct may have occurred and thereby "provided a basis for

permitting defendant to investigate whether" misconduct actually occurred by contacting and talking to Juror Number 5, at the very least. (*People v. Jones*, *supra*, 17 Cal.4th at pp. 316-317.)

This truth applies with even greater force in capital cases, in which state law and the federal Constitution demand a heightened degree of reliability in death judgments. Pursuant to this principle, this Court has recognized that the law requires a greater degree of certainty that jury misconduct did not influence the verdict in a capital case. (See, e.g., *In re Stankewitz*, *supra*, 40 Cal.3d at p. 402.) The factual allegations in defense counsel's declaration provided a basis on which to question the reliability of the death judgment. Without permitting counsel the opportunity to investigate that possibility and resolve that question, there could not be a heightened degree of certainty that the death judgment was the reliable result of a fair trial by an impartial jury that honored its oath to follow the law governing the penalty determination as stated in the court's instructions. For these reasons alone, the petition and declaration established good cause to hold a section 237 hearing and the trial court abused its discretion by refusing to hold one.

Although the inference that Juror Number 5 disregarded the law was alone enough to warrant a section 237 hearing, the factual allegations in defense counsel's declaration raised legitimate concerns that the deliberations may have been tainted by other improprieties. The circumstances under which Juror Number 5 abruptly changed her vote immediately after the lunch recess were enough to arouse suspicion that she was exposed to an improper influence over the recess and outside of the deliberative process and permit counsel at least the chance to try to investigate that possibility by speaking to her, as well as her "smoking buddy," Juror Number 10. (See, e.g., *People v. Hensley* (2014) 59 Cal.4th

788, 818-828; *People v. Nesler* (1997) 16 Cal.4th 561, 578.) In this regard, the facts of *People v. Hensley*, *supra*, 59 Cal.4th 788 are illustrative.

In *Hensley*, the jurors sent the trial judge a note during deliberations asking for clarification of the role of mercy and empathy in voting for life or death. (*People v. Hensley*, *supra*, 59 Cal.4th at pp. 818-819.) The trial judge called the jurors in and attempted to determine precisely what they were grappling with. He had a colloquy with the foreperson in which she expressed that "certain jurors" were confused over the instructions, found them to be contradictory in some ways, and needed guidance over "how to come to a conclusion" about which penalty to choose. (*Id.* at p. 819.) The court said it would adjourn for the night and give further instructions the next day. The foreperson replied that the "'matter's been solved. We don't need clarification now. . . . I have been advised it [is no longer confusing]. I'm just going on what I have been told.'" The court sent the jury out for further deliberations. Less than half an hour later, the jury returned a death verdict, which was read in court but not entered. The trial court excused the jurors, but ordered them to return that afternoon for further questioning. (*Ibid*.) The court explained to counsel that the circumstances under which the verdict was reached raised a concern that "deliberations had occurred outside of the jury room" and investigation into possible misconduct was warranted before the verdict was entered. (*Id.* at pp. 819-820.) Upon inquiry of the foreperson, the trial court learned that the jury's note of the previous day reflected the confusion of only one juror. Upon the court's inquiry of that juror, the juror explained that it was no longer necessary to respond to the note the following morning because he had resolved his concerns by consulting with his pastor that night for spiritual advice about the role of mercy and sympathy in making the penalty decision. (*Id*. at pp. 820-821.) Of course, the Attorney General conceded and this Court held

that the juror had committed misconduct by consulting sources external to the jury instructions and the deliberative process. (*Id*. at pp. 825-828.)

The circumstances under which the verdict was reached in this case are remarkably similar to those with which the trial court was confronted in *Hensley*, which were sufficiently suggestive of improper deliberations outside of the jury room to warrant the trial court's sua sponte investigation into possible misconduct. Like the juror note asking for the judge's help in *Hensley*, the jurors here sent a note to the judge asking for "help" because one juror "would not budge" and they were deadlocked. (28CT 8042, 8044-8045; 14RT 3222-3223.) Like the trial judge's ordered recess as an initial response to the note in *Hensley*, the judge here ordered the jurors to recess for lunch while she prepared to respond to their note. (14RT 3222-3223; 28CT 8097.) Like the jurors in *Hensley*, who reported immediately after the recess that they no longer needed the court's assistance and returned a death verdict half an hour later, the jurors here reported immediately after the recess that they no longer needed the court's assistance to resume deliberations and reached a death verdict some minutes later. (14RT 3223; 28CT 8044-8045, 8097.) If these circumstances were sufficiently suggestive that "deliberations had occurred outside of the jury room" to the trial court in *Hensley* to warrant the court's own, post- verdict investigation into possible misconduct sua sponte, it stands to reason that the circumstances here were equally susceptible of an inference that "deliberations" may have occurred outside of the jury room over the recess, to warrant defense counsel's investigation into that possibility. The inference of possible misconduct from the circumstances under which the death verdict was reached was strengthened in this case by the factual allegations regarding what actually occurred inside of the jury room both before and after the recess.

From the evidence that Juror Number 5 declared immediately before the lunch recess that no further deliberations could change her steadfast vote for life as an act of mercy, then declared immediately after the recess – and without the benefit of further deliberations – that mercy for Mr. Morales called for his death, not life in prison, after which the jurors immediately returned their unanimous death verdict, it seems reasonable to infer that *something* occurred over the recess to influence Juror Number 5. To be sure, it is possible that the influence was the result of her own private contemplation over the recess and decision to disregard the court's instructions. But, just as the *Hensley* trial court rightly suspected, it is also possible that the influence was *external*, the result of improper consultation with someone over the recess and outside of the deliberative process – perhaps a spiritual advisor, a friend, or even her "smoking buddy," Juror Number 10. While the source of the external influence is necessarily speculative without talking to Juror Number 5, or Juror Number 10, the inference that *something* external to the deliberative process improperly occurred over the lunch recess to abruptly cause Juror Number 5 to change her vote, in contravention of the court's instructions, was as reasonable here as it was to the trial judge in *Hensley*. The difference, of course, is that the trial court in *Hensley did* talk to the affected juror to investigate the possibility of misconduct (and confirmed his suspicions by uncovering actual misconduct), while defense counsel in this case was summarily denied that opportunity by the trial court.

For any or all of the foregoing reasons, the section 237 petition and declaration were sufficient to support a reasonable belief that juror misconduct may have occurred and hence good cause to hold a section 237 hearing as the first hurdle to investigate that possibility, talk to the jurors, and attempt to obtain admissible evidence thereof to support a motion for

new trial. Because the trial court misunderstood the applicable legal principles, it abused its discretion in denying Mr. Morales's petition.

In so doing, the trial court also denied defense counsel the tools necessary to investigate the merits of a motion for new trial based upon juror misconduct, hindered counsel's ability to effectively represent his client at that critical stage of the proceedings, and therefore infringed upon Mr. Morales's right to the effective assistance of counsel. (See, e.g., *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320 [right to counsel includes right to tools reasonably necessary for effective representation, including tools necessary to investigate]; *Ake v. Oklahoma*, *supra*, 470 U.S. at pp. 76-85; *People v. Smith*, *supra*, 6 Cal.4th at p. 694.) The court's denial of the petition likewise left legitimate concerns over the validity of the death judgment unanswered and thereby violated Mr. Morales's Eighth and Fourteenth Amendment rights to a heightened degree of reliability in that judgment.

E. The Case Must Be Remanded to the Trial Court with Directions to Hold a Section 237 Hearing; If Such a Hearing or Further Investigation is Impossible Due to the Passage of Time, Mr. Morales Must be Given the Opportunity to Submit Further Briefing on the Inadequacy of the Remand to Remedy the Trial Court's Error and Its Impact on Mr. Morales's State and Federal Constitutional Rights

The case must be remanded with directions to the trial court to set the matter for a hearing to allow Juror Numbers 5 and 10 the opportunity to object to disclosing their personal identifying information and/or to being contacted by Mr. Morales's representatives. (§ 237, subd. (b).) If they do not object, the information must be disclosed and Mr. Morales must be given the opportunity to investigate, move for a new trial if the results of his investigation produces evidence sufficient to support such a motion, and have the trial court decide the motion on its merits.

In the event that the passage of time since the court's ruling results in the jurors' unavailability (e.g., due to death or relocation) or their inability to recall the pertinent events despite their willingness to be contacted, Mr. Morales must be given the opportunity to submit further briefing before this Court addressing the inadequacy of the remand procedure to remedy the violation of his rights under state law and the federal Constitution and to a fair and meaningful appeal and the appropriate remedy. (Cf. *People v. Braxton* (2004) 34 Cal.4th 798, 818-819 [trial court's erroneous refusal to consider defendant's oral motion for new trial and supporting evidence of juror declarations first required remand for trial court to attempt to hold hearing on motion; however, should meaningful, remedial hearing prove to be impossible due to passage of time, judgment must be vacated and new trial ordered].)

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VI.

BECAUSE THE CALIFORNIA PENALTY PHASE PROCEEDING IS A TRIAL ON ISSUES OF FACT, STATE AND FEDERAL LAW REQUIRE THAT THE PROPRIETY OF THE SENTENCE OF DEATH AND THE AGGRAVATING FACTORS BE PROVEN BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

No maxim of the old law "has been more carefully preserved in its integrity under our system" than that of "*[a]d qu[a]estionem juris respondent judices, ad qu[a]estionem facti respondent juratores.*"[74] (*People v. Durrant* (1897) 116 Cal. 179, 200.) The principle that juries decide all issues of fact undergirds the entire common law jury trial system.[75] Therefore, the touchstone for whether state and federal jury right protections attach to a particular proceeding must rest on whether "issues of fact" are resolved by a "jury" at a "trial" as those terms were understood at common law. (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296 [common law jury trial

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[74] "Judges answer to a question of law, jurors to a question of fact." (1 Burrill, A New Law Dictionary and Glossary (1850) p. 35.)

[75] See 1 Coke, Institutes 155b (1628); Wynne, Eunomus, or Dialogues Concerning The Law And Constitution Of England (1768) § 53, p. 207 ("[T]he Province of Judge and Jury [are] distinct, the facts are left altogether to the jury, and the law does not control the fact, but arises from it"); *Ex parte U. S.* (7th Cir.1939) 101 F.2d 870, 874) ["Th[is] guiding principle was later enshrined in our American Constitution"], citing U.S. Const. Art. III, § 2; U.S. Const. 6th Amend; Report of the Debates from in the Convention of California on the Formation of the Constitution (1849), p. 236 (statement of Mr. Botts) ["every lawyer and every gentleman understands" the "object of the great common law of England" to separate issues of law and fact and "turn them over to the consideration of two distinct and separate tribunals"]; *Johnson v. Louisiana* (1972) 406 U.S. 366, 371 (conc. opn. of Powell, J.) [noting that the "historical approach to the Sixth Amendment" had long ago led the Supreme Court to decide that the jury has the power to decide only "questions of fact"]; see generally *Sparf v. U.S.* (1895) 156 U.S. 51 (*Sparf*).

rights derived from the shared principle of "submission of issues of fact to a jury"].) California law has long recognized this fundamental premise. Penal Code section 1042, enacted in 1872, dictates that "[i]ssues of fact shall be tried in the manner provided in Article I, Section 16 of the Constitution of this state."[76] Yet this foundational provision of the Penal Code—and the jury trial right it incorporates—has not been fully addressed by this Court in decades of litigation regarding whether the basic requirements of a jury trial (particularly unanimity and proof beyond a reasonable doubt) apply to the aggravating factors and the verdict at the penalty phase of a capital trial. Nor have the implications of these state law provisions for the application of the Sixth Amendment jury trial right been subjected to any scrutiny.

This is hardly to say that claims regarding jury trial rights at the penalty phase have not been raised and discussed at length. Much ink has been spilled over the question of whether aggravating factors in our capital scheme increase the permissible punishment, triggering Sixth Amendment protections under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. Although Mr. Morales disagrees, this Court has concluded that *Apprendi* does not apply at the penalty phase of a California capital trial. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Ochoa* (2001) 26 Cal.4th 398, 454.) As a result, the current law is a strange hodgepodge: unanimity (but not reasonable doubt) protection applies to the ultimate verdict, and reasonable doubt (but not unanimity) applies to the aggravating factors. This counterintuitive result stems in part from this Court's continued rejection of

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[76] When first enacted, Penal Code section 1042 read, "Issues of fact must be tried by a jury." (Former section 1042, enacted by Stats. 1872.) This language is nearly identical to language from the earliest criminal statutes adopted in 1850, that "[a]n issue of fact must be tried by a jury. . . ." (Stats. 1850, Ch. 119, § 337, p. 299.)

jury rights under the framework articulated in *Apprendi*. But an exclusive focus on *Apprendi* asks and answers the wrong question.

Analysis under Penal Code section 1042, and the state jury trial right it references, is not irrevocably tethered to the *Apprendi* test. (See *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1077 [nothing suggests that the drafters of the state Constitution even "had the Sixth Amendment in mind" when incorporating the jury right into the state Constitution].) Instead, the proper question under the state constitution is *not* simply whether the range of punishment is increased as dictated by *Apprendi*. Instead, the question is whether an "issue of fact" is "tried" (Pen. Code, § 1042), thus implicating the state and federal right of "trial by jury." (Cal. Const. art. 1, section 6; see also U.S. Const., 6th Amend.) Focusing on "issues" under the common law, and not simply the *Apprendi* formulation, is the most historically accurate method for understanding when, and to what, jury rights attach. The burden of reasonable doubt has long been understood "as governing all issues of fact." (*People v. Chessman* (1951) 38 Cal.2d 166, 182.) And the substance of the California jury right has long required that in criminal cases "[e]ach *issue* must . . . be tried by a jury of 12 impartial persons, and the verdict must be unanimous." (*People v. Troche* (1928) 206 Cal. 35, 44, italics added.)

Mr. Morales is aware of the long line of cases denying the rights to unanimity and proof beyond a reasonable doubt to various components of a capital trial. However, traced to their origins, these holdings derive not from any considered analysis of the current California death penalty statute or the California Constitution, but from an uncritical acceptance of litigation positions *taken by capital defendants* hoping to mount facial attacks to the California death penalty under the 8th Amendment. These original decisions, and the many subsequent decisions reaffirming them, ignore the unambiguous holding of this Court, unquestioned by this Court or the Legislature for nearly a century, that the state jury trial right *does* apply to penalty determinations in capital

cases. (*People v. Hall* (1926) 199 Cal. 451, 458 (*Hall*) [failure to secure jury's unanimous agreement on penalty was "denial of a trial by jury"].) There is no basis in logic or history to apply simply the unanimity requirement or the beyond a reasonable doubt requirement—but not both—to the ultimate penalty determination or factually disputed aggravating factors. Piecemeal application of these bedrock jury requirements runs contrary to the expressed intent of the delegates who adopted the California Constitution's jury trial provision.

If the California penalty phase involves the "trial" of "issues of fact" by a "jury" these facts must be tried in the accordance with the protections of our state Constitution, including the rights of unanimity and proof beyond a reasonable doubt (hereafter "jury trial rights" or "jury trial protections"). Thus, the ultimate penalty determination must be made beyond a reasonable doubt, and the aggravating factors must be found unanimously. And if the resolution of the questions presented to the jury during the penalty phase are "issues of fact" under *state* law, then they are likewise protected by the federal jury trial rights in the same manner. In fact, the United States Supreme Court has said that the Sixth Amendment jury protections apply to "issues" including "punishment" that are left to juries at a capital trial. (*Andres v. U.S.* (1948) 333 U.S. 740, 747 (*Andres*).)

This Court has repeatedly rested its rule that the Sixth Amendment jury right protections do not apply to the capital penalty phase on two United States Supreme Court Cases—*Spaziano v. Florida* (1984) 468 U.S. 447 (*Spaziano*) and *Hildwin v. Florida* (1989) 490 U.S. 638 (*Hildwin*). (See, e.g., *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; *In re Carpenter* (1995) 9 Cal.4th 634, 676; *People v. Lewis* (2008) 43 Cal.4th 415, 521.) But those cases have now been overruled. (*Hurst v. Florida* (2016) ___ U.S. ___; 136 S.Ct. 616, 624 (*Hurst*) ["Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*"].) This Court should therefore reconsider its holdings regarding

the application of both Article I, Section 16 and the Sixth Amendment to the penalty phase of a capital trial.

A. Issues of Fact Undergird the Scope of Sixth Amendment Jury Protections

Apprendi and its progeny rest on the Sixth Amendment right, in all criminal cases, to a "trial, by an impartial jury." (U.S. Const. 6th Amend.) But more broadly, the essential feature of the right to a "trial[] by . . . jury," which underlies *Apprendi* and which had been recognized for hundreds of years, is the understanding that the jury decides all "issues of fact." (Thayer, *A Preliminary Treatise On Evidence At The Common Law* (1898) 183-189 ("Treatise On Evidence At The Common Law"); Mitchell, *Apprendi's Domain* (2006) 2006 Sup. Ct. Rev. 297, 302-303 [citing William Blackstone, Edward Coke, the Judiciary Act of 1789, and numerous early state criminal codes and cases all of which "described the criminal jury's role . . . to include all disputed questions of fact"]; see also fn. 2, *ante*.)

Critically, at common law, "issues of fact" *did not simply mean factual issues*, it was merely a shorthand to reference "questions raised by the pleadings" or "ultimate issues of fact." (Treatise On Evidence at the Common Law, *supra*, at p. 187; *In re Javier A.* (1984) 159 Cal.App.3d 913, 930, fn. 9 [earliest California cases guaranteed jury trial to "issue of fact [] made by the pleadings"]; *People v. Pantages* (1931) 212 Cal. 237, 267 ["issue of fact" arises "from an allegation of ultimate fact made by one of the parties which is denied by the other"]; 4 Blackstone's Commentaries 333 ["when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact"]; *Dale v. City Court of City of Merced* (1951) 105 Cal.App.2d 602, 607 [the "constitutional [jury right] guarantee has to do with the *trial of issues that are made by the pleadings*"], italics added.) The precise form or title of the accusatory pleading was not important: "whether preferred

in the shape of indictment, information, or appeal" the key was that the "truth of every accusation" was subject to the "unanimous suffrage" of a jury. (4 Blackstone's Commentaries 343.)

Although the distinction between questions of fact and questions of law is occasionally blurry, in their most basic sense "issues of fact" are defined by the trial itself, which is in turn guided by the Legislature's designation: "issues of fact, and only issues of fact, are to be tried by a jury. When they are so tried, the jury, and not the court, are to find the facts." (Treatise on Evidence at the Common Law, *supra*, at p. 189.) In other words "[i]n the maxim, 'Ad quaestionem juris respondent judices, ad quaestionem facti respondent juratores,' the word 'quaestio' denotes an issue joined by the pleadings of the parties, or otherwise stated on the record, for decision by the appropriate tribunal. Issues of law, so joined or stated, are to be decided by the judge; issues of fact, by the jury." (*Sparf, supra,* 156 U.S. at p. 170 (dis. opn. of Gray, J.); see also Isaacs, *The Law and the Facts* (1922) 22 Colum. L. Rev. 1, 4 [criticizing the concept of a conclusive distinction between questions of law and fact and suggesting that "a great deal of confusion would be avoided if we frankly used some such expression as 'judicial questions' and 'jury questions'"].) The maxim therefore expresses the "general rule of proceeding on trials before a jury" where "it is the office of the judge to instruct the jury on points of law, and of the jury to decide on matters of fact." (1 Burrill, A New Law Dictionary and Glossary, *supra*, p. 36.)

The Legislature's decision to create a penalty *trial* necessarily creates "issues of fact," for providing a verdict on issues of fact is what a jury determines in all trials. (See 3 Blackstone 330 ["Trial then is the examination of the matter of fact in issue; of which there are many different species, according to the difference of the subject, or thing to be tried"]; see also Stats. 1850, Ch. 119, § 348, p. 300 [defining "jury" as "twelve men accepted and sworn to try the issue"].)

Nor does the characterization that the penalty phase trial answers "normative" issues alter the calculus. The central distinction at common law was not between "factual" and "non-factual" questions, but "jury questions" and "judicial questions." (*People v. Lynch* (1875) 51 Cal. 15, 26 [phrase "beyond all reasonable doubt" appropriately refers to "the action of a jury upon an issue of fact" not the "action of a court upon any issue of law"].) As between questions of fact and questions of law "[i]t is the *process* by which the result is attained which is or may be different, and *the tribunal through which such result is reached that differs*, rather than the result itself." (*Levins v. Rovegno* (1886) 71 Cal. 273, 276, second italics added.) And it did not matter that the question involved some form of reasoning, inference, or personal judgment: jury questions ("issues of fact") are those issues that result in an answer (verdict) from the jury. (Thayer, *"Law and Fact" in Jury Trials* (1890) 4 Harv. L. Rev. 147, 150, citing *Littleton's Case*, 10 Coke 56b (1612); see also *Franzen v. Shenk* (1923) 192 Cal. 572, 589 [jury's province includes not merely to determine facts proven but "the justice of the inferences to be drawn from [] facts"].) As Blackstone explained, although the questions varied (3 Blackstone 330) the answering of the "issue" by the verdict marked when "trial by jury" was complete. (3 Blackstone 379 ["when the jury have delivered their verdict and it is recorded in court, they are discharged; and so ends the *trial by jury*."], italics added.)

B. The Existence of Aggravating Factors and the Ultimate Penalty Phase Determination Are Issues of Fact

"The essence of trial by jury is that controverted facts shall be decided by a jury." (*People v. Hickman* (1928) 204 Cal. 470, 476.) This is precisely what occurs at the penalty phase proceeding, at least with respect to aggravating factors whose truth is contested. For all its moral complexity, the questions in a California capital trial are nearly identical to those in a common

law capital trial: did the defendant commit 1) the capital crime charged ("factor (a)"); 2) the unadjudicated crimes charged ("factor (b)"); 3) the adjudicated prior crimes ("factor (c)"); and, in light of these accusations and the mitigation case,[77]) what is the ultimate verdict on the issue of penalty?

The existence of aggravating factors (accusations of criminal conduct) pled by the prosecution in its notice of aggravation are the facts whose truth is "at issue." (See *People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236 ["despite the 'normative nature' of the penalty decision itself," the prosecution's aggravating evidence may raise "disputed factual issues"]; § 190.3 [requiring notice of aggravation]; 4 Blackstone's Commentaries 343 [precise form or title of accusatory pleading immaterial for purposes of the jury right].) And, as this Court has repeatedly noted, the "ultimate issue" in a capital sentencing trial "is the appropriate penalty." (*People v. Anderson* (2001) 25 Cal.4th 543, 588; Treatise on Evidence at the Common Law, *supra*, at p. 187 ["issue of fact" includes "questions raised by the pleadings" and "ultimate issue" determined by a jury].)

This is not to say that every contested fact during the penalty phase (or the guilt phase) is an "issue of fact." As the United States Supreme Court has explained "'ultimate' or 'elemental' fact[s]" are premised on the existence of "'evidentiary' or 'basic' facts," and the jury right protections simply ensure that the "factfinder's responsibility at trial, based on evidence adduced by the State, [is] to find the ultimate facts beyond a reasonable doubt." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 156; cf. *The Evergreens v. Nunan* (2d Cir. 1944) 141 F.2d 927, 928 (Learned Hand, J.) ["ultimate" facts are limited to

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[77] The Sixth Amendment protects defendants' rights and the jury protections therefore do not apply to, or limit, mitigation. (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 435 [Eighth Amendment prohibits requiring unanimity as to mitigating factors].)

those "which the law makes the occasion for imposing its sanctions"].) But as to those issues necessarily embraced in the jury's verdict—those to which the law attaches effect—the jury rights apply.

The analytic error, introduced in flawed dictum in the now-overruled *Spaziano* and discussed in detail below, is the conclusion that that because the penalty phase trial relates to sentencing, it is simply a sentencing hearing and therefore does not implicate the right of trial by jury. There is truth to the major premise that sentencing hearings do not normally constitute trials and are not subject to many of the procedural constraints mandated by the state and federal constitution for trials. As this Court has noted, jury rights do not apply to sentencing hearings because "[f]rom the earliest days of statehood, trial courts in California have made factual determinations relating to the nature of the crime and the defendant's background in arriving at discretionary decisions in the sentencing process." (*People v. Wiley* (1995) 9 Cal.4th 580, 586; see also *Williams v. New York* (1949) 337 U.S. 241, 246 [evidentiary standards for trials not constitutionally imposed at sentencing because "courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law"].)

But the minor premise—that the capital penalty phase is simply a sentencing hearing—flies in the face of both form and history. The California penalty phase does *not* derive from discretionary sentencing hearings; it is instead an outgrowth of the 19th century capital trial. (See *Hall*, *supra*, 199 Cal. at p. 456 [the guilt and penalty determinations are "two necessary constituent elements" of the unitary capital trial verdict and must both be found unanimously].) That the California penalty phase proceeding has always been a trial, and not a mere sentencing hearing, is undebatable.

The 1957 death penalty statute, which first created the bifurcated proceeding, specifically referred to the penalty phase as a "trial on the issue of penalty" (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509) and this Court continues to refer to the penalty phase proceedings as a "trial." (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 113; *People v. Harris* (1989) 47 Cal.3d 1047, 1102 [ordering "new trial on the issue of penalty"]; *People v. Horning* (2004) 34 Cal.4th 871, 912 [discussing the necessity of a § 190.4, subd. (e), hearing when the defendant has waived his "jury trial on the issue of penalty"].) Indeed, as this Court has explained repeatedly, the guilt and penalty phases are just two "part[s] of a unitary trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; *People v. Hamilton* (1988) 45 Cal.3d 351, 369 ["the penalty phase has no separate formal existence but is merely a stage in a unitary capital trial"].)

Even when the old unitary sentencing scheme was bifurcated (due to appellate reversal on penalty only), this Court explained that it regarded the sentencing component of a capital proceeding as a "trial on the issue of penalty." (*People v. Green* (1956) 47 Cal.2d 209, 212.) In other words, "[w]here the matter is to be determined by a jury, . . . the proceeding should be 'a trial in the full technical sense, and . . . governed by the same . . . rules of procedure' as the trial of the issue of guilt." (*Id.* at p. 236.) Of course, the most fundamental procedure of any trial is "submission of issues of fact to a jury." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 296; see also § 1042.)

In keeping with this concept, when "[i]n 1957 the Legislature replaced th[e] unitary proceeding with a bifurcated system" (*Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 9), it specifically noted that the "determination of the penalty" was held before the jury "trying the issue of fact on the evidence presented." (Former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509). And while the current statute does not adopt this precise phrase—instead

describing the jury as the "trier of fact"—that the jury is to decide "issues of fact" is nonetheless clear. (See Black's Law Dictionary (10th ed. 2014) p. 711 [defining "fact-finder" as "[o]ne or more persons who hear testimony and review evidence to rule on a *factual issue*"], italics added; see also *id*. at p. 959 [defining "issue of fact" as "[a] point supported by one party's evidence and controverted by another's"].)

The current statute requires the penalty-phase jury to render a "verdict as to what the penalty shall be." (§ 190.4, subd. (b); see also subd. (d) [describing jury sentence as "verdict"].) A "verdict," in turn, has long been understood as the jury's resolution of the "issue of fact" before it. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 514 ["a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case"]; Black's Law Dictionary (10th ed. 2014) p. 1791 [verdict is a "jury's finding or decision on the factual issues of a case"]; 2 Burrill, A New Law Dictionary and Glossary, *supra*, at p. 1032 [*verdit*, or verdict, is "a declaration by a jury of the truth of a matter in issue, submitted to them for trial"].)

Like any common law trial, the current statute requires a unanimous verdict. (§ 190.4, subd. (b); *People v. Hall*, *supra*, 199 Cal. at pp. 456-457 [unanimous verdict on penalty required under state Constitution].) And the aggravating factors plead must be found beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [factor (b) determination found beyond a reasonable doubt]; *People v. Williams* (2010) 49 Cal.4th 405, 459 [factor (c) found beyond a reasonable doubt]; *People v. Prieto* (2003) 30 Cal.4th 226, 256 [main component of factor (a), the existence of special circumstance murder, must be found beyond reasonable doubt].)

In sum, under California law, the penalty phase involves the resolution of 1) issues of fact, 2) by a jury, 3) at a trial. The question is whether the mere

fact that the penalty phase proceeding involves a determination of sentence—a task traditionally assigned to judges in many non-capital proceedings—defeats the application of the Article I, section 16 and the Sixth Amendment. Prior to the unfortunate dicta in *Spaziono*, both this Court and the United States Supreme Court held to the contrary.

C. *People v. Hall*[78] and *Andres v. U.S.*[79] Dictate That the Legislative Choice to Create a Jury Trial on the Issue of Penalty Makes These Trials Subject To Jury Trial Protections

Apprendi, and all of the cases in the *Apprendi* line, involve legislative determinations that *judges* were to answer certain factual questions relevant to sentencing. This is not what occurs during California capital cases, nor is it what occurs in the overwhelming majority of capital schemes throughout the country. Instead, California assigns to a *jury* the task of determining the issues at a capital trial. This decision has a profound impact on the application of the jury trial rights, both as a matter of textualism and history.

In keeping with the premise that the penalty determination was an "issue of fact" protected by the traditional jury trial guarantees, the courts of California have long required that the penalty verdict in a capital case "must be the result of the unanimous agreement of the jurors." (*Hall, supra,* 199 Cal. at p. 456; see also *People v. Green*, *supra*, 47 Cal.2d at p. 224 ["There is nothing in the statute which authorizes holding that the jurors are not required to agree *unanimously on the penalty* just as they must agree unanimously on the questions of guilt and class and degree of offense"], italics added.)

In *Hall*, although the jury unanimously convicted the defendant of first degree murder, the verdict indicated "we . . . cannot come to an [sic]

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[78] (1926) 199 Cal. 451

[79] (1948) 333 U.S. 740

unanimous agreement as to degree of punishment." (*Hall, supra*, 199 Cal. at p. 453.) The judge nonetheless sentenced the defendant to death. (*Ibid*.) The *Hall* court was unequivocal: because the law entrusted the finding to a jury, the verdict "in such a case must be the result of the unanimous agreement of the jurors and the verdict is incomplete unless, as returned, it embraces the two necessary constituent elements" of guilt and penalty. (*Id.* at p. 456.) A death sentence absent a unanimous penalty finding by a jury violated the California Constitution's jury right. (*Id.* at p. 459 [death sentence issued by non-unanimous jury was "in effect the denial of a trial by jury," and "however degraded and hardened a criminal the evidence may disclose an accused to be, he is entitled under the Constitution to trial by jury"].)

Some early California cases also concluded that the reasonable doubt protection applied to the jury's determination of penalty. For instance, in *People v. Cancino* (1937) 10 Cal.2d 223, although finding no error, the Court approved the instruction to jurors "that if they entertain a reasonable doubt as to which one of two or more punishments should be imposed, it is their duty to impose the lesser." (*Id.* at p. 230.) It said that "[t]his rule should prevail in every case where the punishment is divided into degrees and the jury is given discretion as to the punishment." (*Ibid*; see also *People v. Sampsell* (1950) 34 Cal.2d 757, 760 [jury given the instruction approved in *People v. Cancino*, *supra*, 10 Cal.2d 223].) Similarly, in the earlier case of *People v. Perry* (1925) 195 Cal. 623 the Court approved instructing that "'[i]f the jury should be in doubt as to the proper penalty to inflict the jury should resolve that doubt in favor of the defendant and fix the lesser penalty, that is, confinement in the state prison for life.'" (*Id.* at p. 640.) This accurately described the jury's "duty" to determine penalty such that the jury was under "no misapprehension" based on other challenged instructions. (*Ibid*.)

This is not to say that decisions from this Court were always consistent on the application of the reasonable doubt burden to penalty determinations.

There are contrary cases explicitly rejecting the reasonable doubt burden. (See, e.g., *People v. Purvis* (1961) 56 Cal.2d 93, 95, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631 [rejecting claimed error that instructions should require jury's penalty determination to only consider facts proven beyond a reasonable doubt and that reasonable doubt burden should apply to choice of penalty].) But cases such as *Purvis*—which deny any reasonable doubt burden as to the verdict or the aggravating evidence—set up an irreconcilable conflict that persists to this day: if unanimity is constitutionally required (see *Hall*, *supra*, 199 Cal. at p. 456), how can the reasonable doubt burden somehow not apply?

The conclusion that the jury right of unanimity—but not reasonable doubt—could apply to a proceeding is manifestly contradicted by the intent of the drafters of article I, section 16. The framers of the state jury right believed that the unanimity requirement and the beyond a reasonable doubt burden were inextricably intertwined. (See 3 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 1175 (statement of Mr. Reddy) [proposal to limit unanimity requirement to felony cases would upset the "fundamental principle of criminal jurisprudence" that defendants are "entitled to the benefit of all reasonable doubts" and would therefore require not only change in juror unanimity but also a shift to a "preponderance of the evidence" standard]; see also *Hibdon v. United States* (6th Cir. 1953) 204 F.2d 834, 838 ["The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof"]; *United States v. Correa-Ventura* (5th Cir. 1993) 6 F.3d 1070, 1076) [discussing common law origins of unanimity and beyond a reasonable doubt requirements and concluding that "[t]he unanimity rule is a corollary to the reasonable-doubt standard" and is "employed to give substance to the reasonable-doubt standard"].) Severing the two rights is not only a historical anomaly, but violates this Court's modern understanding of the interrelationship of the two rights. This Court has repeatedly and "explicitly

recognized that jury unanimity and the standard of proof beyond a reasonable doubt are slices of the same due process pie." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231.)

In *Andres, supra,* 333 U.S. 740, the United States Supreme Court embraced the same approach that this Court took in *Hall*. *Andres* dealt with a federal death penalty statute under a unitary regime. The federal statute provided the death penalty for certain murder offenses, but Congress had amended it to allow the jury to "qualify their verdict by adding thereto 'without capital punishment.'" (*Andres, supra*, 333 U.S. at p. 747.) At issue was whether this statute required a unanimous jury determination in favor of death, and, if so, whether the instructions properly conveyed this requirement to the jury. (*Id.* at pp. 748-752.) The Court's analysis was straightforward and in harmony with the common law tradition that "issues" tried by the jury were protected:

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. *In criminal cases* this requirement of unanimity extends to *all issues*—character or degree of the crime, guilt *and punishment—which are left to the jury.*

(*Id.* at p. 748, italics added.)

Similar to this Court's decision in *Hall*, the high court explained that the Sixth Amendment right of unanimity applied because a "verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it." (*Andres, supra,* 333 U.S. at p. 748; see also *Stone v. Superior Court, supra*, 31 Cal.3d at 514 ["a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case"]; 2 Burrill, A New Law Dictionary and Glossary, *supra,* at p. 1032 [verdict is "a declaration by a jury of the truth of a matter in issue"].) In other words, under *Andres*, if the legislature assigns the jury the task of rendering its verdict on an issue of fact at a trial, *even on the issue of penalty*, Sixth Amendment protection applies.

The next United States Supreme Court decision touching on the significance of the existence of a jury trial on the issue of penalty was *Bullington v. Missouri* (1981) 451 U.S. 430 (*Bullington*), a double jeopardy case.[80] The court in *Bullington* recognized the existence of a traditional trial-sentencing distinction with respect to double jeopardy protections. But the court explained that a capital sentencing *trial* "differs significantly" from traditional judicial sentencing hearings, honing in on the marked similarities between a capital penalty phase and a common law trial. (See *id*. at p. 438 [noting absence of unbounded jury discretion, binary choice between two alternatives, and proof beyond reasonable doubt standard, and concluding the penalty phase "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence"].) The *Bullington* Court noted that the penalty phase was "itself a trial on the issue of punishment so precisely defined by the Missouri statutes." (*Ibid*; see also *id*. at p. 438, fn. 10 [finding it not "without significance" that state law referred to the penalty hearing as a "trial"].)

[80] Although *Bullington* involved double jeopardy, and not the Sixth Amendment, "the high court has indicated that the principles underlying the double jeopardy clause on the one hand, and the reasonable doubt burden of proof and right to jury trial on the other, are not wholly distinct." (*People v. Seel* (2004) 34 Cal.4th 535, 547, citing *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 247.) After all, like the Sixth Amendment, application of the double jeopardy clause hinges in part on whether a prior jury found "an issue of fact" or the "ultimate fact" in favor of the defendant. (*Bobby v. Bies* (2009) 556 U.S. 825, 834, 836.)

D. The United States Supreme Court Takes a Wrong Turn: The Expansive Dicta of *Spaziano* Undermines the Historical Understanding of the Jury Right as Applying To Trials on Issues of Fact, Including Punishment

Despite the clear focus of *Andres* and *Bullington* on issues of fact designated by the Legislature for trial by jury—even on the issue of punishment—the United States Supreme Court cast unnecessary doubt on this precedent in a series of decisions beginning with *Spaziano, supra*, 468 U.S. 447. The statements in *Spaziano,* discussed in more detail below, were repeated and cited in various other Supreme Court cases, several of which, like *Spaziano,* have now been overruled. (See, e.g., *Hildwin, supra*, 490 U.S. at p. 639, overruled by *Hurst v. Florida, supra*, ___ U.S. ___136 S.Ct. 616; *Walton v. Arizona* (1990) 497 U.S. 639, 647, overruled by *Ring v. Arizona* (2002) 536 U.S. 584.)

In *Spaziano,* the defendant challenged the Florida practice of judicial override of a jury penalty recommendation. (*Spaziano, supra*, 468 U.S. at p. 457.) Although the issue in *Spaziano* was thus narrowly framed, the court decided to make several expansive statements about arguments that the appellant "did not urge," namely whether "capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana,* 391 U.S. 145 [] (1968)." (*Spaziano, supra*, 468 U.S. at p. 458.)

Without the benefit of briefing on the topic, the Court distinguished *Bullington* and announced in dicta that "[t]he fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." (*Spaziano, supra*, 468 U.S. at p. 459.) After noting the obvious difference that double jeopardy protects against "wear[ing] a defendant down" in retrials, the Court identified the "most

important" reason to distinguish between the Sixth Amendment and double jeopardy in this respect:

> [A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. [citations]. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.

(*Spaziano, supra*, 468 U.S. at p. 459)

Notably absent from *Spaziano* is any mention of the Supreme Court's decision in *Andres, supra*, 333 U.S. at p. 747, which said that Sixth Amendment jury rights *do* apply when a jury is tasked by the Legislature with rendering a verdict after a trial, including a trial on the issue of punishment. (See *Rauf v. State* (Del. 2016) 145 A.3d 430, 450 (conc. opn. of Shrine, J.) [finding Sixth Amendment applies to capital selection phase and criticizing the Sixth Amendment reasoning in *Spaziano* as "cursory"].) Given that the *Spaziano* Court intended to distinguish application of *Duncan v. Louisiana, supra*, 391 U.S. 145, this oversight is telling. Justice Harlan's opinion in *Duncan* referred to the *Andres* holding that "trial by jury [in that case, on the issue of punishment] has been held to require a unanimous verdict of jurors." (*Id.* at p. 182 & fn. 21 (dis. opn. of Harlan, J.), citing *Andres, supra*, 333 U.S. 740; see also *Johnson v. Louisiana* (1972) 406 U.S. 380, 383 (dis. opn. of Douglas, J.) ["We held unanimously in 1948" in *Andres* that Sixth Amendment unanimity right "extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury"].)

The most likely explanation for the failure to account for *Andres* is that the discussion in *Spaziano* was *not* intended to apply to a jury "trial" on the "issue of punishment." The Florida law examined in *Spaziano* did not create such a proceeding: the Florida legislature had created a "sentencing hearing" at which the "majority" of the jury provided a "sentencing recommendation,"

which was "merely advisory." (*Spaziano, supra,* 468 U.S. at p. 451; *Hurst, supra,* 136 S.Ct. at p. 620 [Florida law creates an "evidentiary hearing" at which the jury renders an "advisory sentence"]; cf. *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 337, fn. 24 ["an advisory jury . . . would not in any event have been a Seventh Amendment jury"].)[81]

The cursory reasoning of *Spaziano,* suggesting that a capital sentencing proceeding is never "like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial," is incorrect. Historical analysis of the Sixth Amendment demonstrates that a jury trial was understood at the time of the founding to encompass jury determinations on "issues of fact." Regardless, the sentencing proceeding in California is not "like a trial," as discussed in *Spaziano,* it *is* a trial. However, this Court has nevertheless invoked *Spaziano* for the proposition that the Sixth Amendment is satisfied regardless of whether its jury protections are applied, because there is no need for a penalty phase jury trial in the first place. (See *People v. Lewis* (2008) 43 Cal.4th 415, 521 [rejecting Sixth amendment challenge because "the high court in *Apprendi* and *Ring* did not purport to overrule its holding in *Spaziano v. Florida* (1984) 468 U.S. 447, 465"].)

Now is the time to reconsider this position. The reasoning of *Spaziano* has been repudiated by the United States Supreme Court. Beginning with *Apprendi,* the high court has repeatedly reasserted the historical understanding that the Sixth Amendment is concerned with jury determinations of factual issues that affect punishment, in particular at capital sentencing proceedings. (*Ring v. Arizona, supra,* 536 U.S. 584; *Hurst v. Florida, supra,* 136 S.Ct. 616;

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[81] The scheme in Arizona, upheld in *Walton,* likewise did not create a jury trial on the issue of punishment. (*Walton v. Arizona, supra,* 497 U.S. at pp. 643, 651 [Arizona law creates a "separate sentencing hearing" which is "conducted before the court alone," and thus complaints about jury protections are "beside the point"].)

see also *Walton v. Arizona, supra,* 497 U.S. at p. 713 (dis. opn. of Stevens, J.) [decisions such as *Spaziano* "encroached upon the factfinding function that has so long been entrusted to the jury"].) The appropriate question is *not* whether every defendant has the constitutional right to a penalty phase jury trial. The question is whether, when a jury trial *is* provided under state law, do constitutional "jury trial" protections attach. Both this Court and the United States Supreme Court have held that they do.

E. Because the Doctrine of 'In Favorem Vitae' Underlies Application of both Reasonable Doubt and Unanimity Requirements in the United States, These Protections Unquestionably Should Apply To a Capital Trial on the Issue of Penalty

Assuming that Mr. Morales is correct that the California penalty phase is a "trial[] by . . . jury" on issues of fact as understood under the Sixth Amendment and Article I, section 16, this Court must answer a final question: do the jury right protections apply to all determinations of issues of fact in a capital trial? Given the history of the reasonable doubt and unanimity requirements and their longstanding application as a protection to defendants in capital trials, the answer must be yes.

Under English Common law at the time of the founding "in favorem vitae ('in favor of life'), indictments, statutes and procedural rules in capital cases had to be 'construed literally and strictly.'" (Thurschwell, *Federal Courts, The Death Penalty, and the Due Process Clause* (2001) 14 Fed.Sent.R. 14, 17; see also, Miller, *The System of Trial by Jury* (1887) 21 Am. L. Rev. 859, 866 ["The heaviness and severity of the penalty, . . . have infused into the spirit of the English law the general proposition that a defendant under such circumstances should be dealt with in such a manner as to secure all his rights and protect him from possible injustice"].) And history indicates that both the burden of proof beyond a reasonable doubt and the requirement of unanimity

were, as a result of the doctrine of in favorem vitae, intended to safeguard capital defendants.

One of the earliest references to the reasonable doubt standard in American jurisprudence made the connection explicit, repeating the trial court's instruction that "where reasonable doubts exist, the jury, particularly in capital cases, should incline to acquit rather than condemn" and that "doubts should be determined in favor of life." (*State v. Wilson* (1793) 1 N.J.L. 439, 442; see also Jonakait, *Finding the Original Meaning of American Criminal Procedure Rights: Lessons from Reasonable Doubt's Development* (2012) 10 U. N.H. L. Rev. 97, 154, fn. 233 [*State v. Wilson* was the "third known use of the reasonable doubt [standard] by an American court"].) That reasonable doubt was understood as a protection "in favorem vitae" created at least some early debate as to whether the doctrine of reasonable doubt applied outside the capital context. (See *State v. Turner* (Ohio 1831) Wright 20, 29 overruled by *Fuller v State* (1861) 12 Ohio St. 433) [reasonable doubt rule adopted "in favor of *life*" and was inapplicable to non-capital charges]; *State v. Sears* (1867) 61 N.C. 146, 147 ["Whether the doctrine of reasonable doubt, as it is commonly called, applies to misdemeanors, or only to capital cases in favorem vitae, seems not to be settled in this State. There are dicta on both sides of the question"]; see also Note, *Proof Beyond A Reasonable Doubt in Juvenile Proceedings* (1970) 84 Harv. L. Rev. 156, 157 [the reasonable doubt rule was originally applied "only in capital cases"].) The early debate was resolved in favor of extending the reasonable doubt protection to non-capital trials. But it would be incongruous for jury protections that originated out of unique concern for capital defendants to have no application to the ultimate questions in a jury trial on the issue of the death penalty. (*Cf.* Thurschwell, *supra*, at pp. 17-18 [tracing doctrine of "in favorem vitae" in the United States and illustrating how that doctrine served as a partial basis for the *Apprendi* line of cases]; see also 4

Blackstone 344 [encroachment on jury right threatened jury resolution of "questions of the most momentous concern," i.e. capital trials].)

Similarly, there is "strong reason" to believe that the common law requirement of unanimity also grew of out of the doctrine of *in favorem vitae*. (See A History of the English Judicature, in The Law Journal (1882), p. 537; Hans and Vidmar, Judging the Jury (1986), pp. 171-772 [arguing that unanimity requirement may have derived from the harshness of common law penalties]; see also 4 Blackstone 306 ["no man can be convicted . . . of any capital offense" absent unanimity].) But whatever the precise origins of the unanimity requirement, the nation's founders certainly believed that unanimity was "particularly" important in capital cases. (Jonakait, *supra*, at p. 122 citing James Wilson in 1 McCloskey, The Works of James Wilson (1967) p. 503.) And nowhere did the early American courts express greater concern for unanimity than in capital cases. (See, e.g., *United States v. Perez* (1824) 22 U.S. 579, 580 (Story, J.) [stating regarding hung juries that "in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"].)[82]

Nor is there any hint in the historical record that jury unanimity was intended to be limited to the issue of guilt. As one treatise read by the founding

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[82] See also *Atkins v. State* (1855) 16 Ark. 568, 578 [encouraging caution before discharge of hung juries and quoting Justice Story in *Perez*]; *Monroe v. State* (1848) 5 Ga. 85, 148 [reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted"]; *Nomaque v. People* (1825) 1 Ill. 145, 148-50 [similar concern about practice promoting non-unanimous verdict in capital case]; *Ned v. State* (Ala. 1838) 7 Port. 187, 216; *Commonwealth v. Roby* (1832) 29 Mass. 496, 519-20; *State v. Garrigues* (Super. L. & Eq. 1795) 2 N.C. 241, 241-42; *Commonwealth v. Cook* (Pa. 1822) 6 Serg. & Rawle 577, 585; *State v. McLemore* (Ct. App. L. & Eq. 1835) 20 S.C.L. 680, 683.

fathers[83] framed the issue: "And any thing now which any jury can be said to do, must have the joint consent of twelve." (John Maynard, A Guide To Juries: Setting Forth Their Antiquity, Power, and Duty, from the Common Law and Statutes (1699) at p. 9.)

Unsurprisingly, in light of this historical understanding, "[a]t no time before *Furman* was it the general practice in the United States for someone to be put to death without a unanimous jury verdict." (*Rauf v. State*, *supra*, 145 A.3d at p. 477; see also see also *Hurst v. State* (Fla. 2016) 202 So.3d 40, 57 [according state constitutional unanimity protection during penalty phase due to "a longstanding history requiring unanimous jury verdicts"].)

In *Apodaca v. Oregon* (1972) 406 U.S. 404 (*Apodaca*) the Court held that the Sixth Amendment jury unanimity requirement was not incorporated against the states in non-capital criminal trials. In light of the centuries long history of requiring unanimity in capital cases, the holding of the four-judge plurality should not prevent this Court from recognizing a right of unanimity for a jury's determination of aggravating factors in California's death penalty scheme. The holding of *Apodaca*, which rests on the incorporation doctrine, has no bearing on the application of Article I, section 16. Moreover, the plurality in *Apodaca* acknowledged that it was not deciding a capital case. (406 U.S. at p. 406, fn.1 [quoting Oregon Constitution limiting non-unanimous juries to non-capital cases].) Further, the United States Supreme Court has since called Justice Powell's concurrence—in which no other justice concurred

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[83] See Letter from Thomas Jefferson to the Abbé Arnoux, 19 July 1789, *Founders Online*, National Archives, last modified February 1, 2018, http://founders.archives.gov/documents/Jefferson/01-15-02-0275. (Original source: *The Papers of Thomas Jefferson*, vol. 15, *27 March 1789–30 November 1789*, ed. Julian P. Boyd. Princeton: Princeton University Press, 1958, pp. 282–283) [listing all treatises on juries that Jefferson could recollect and praising juries as the body that determines "all matters of fact, leaving to the permanent judges to decide the law resulting from those facts"].

and which provided the fifth vote for the judgment—into question. (See *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 766, fn.14 [identifying *Apodaca* as the sole exception in a long line of cases holding that incorporated Bill of Rights protections are to be enforced under the Fourteenth Amendment equally against the states and the federal government and noting the decision was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation"].)

Finally, in light of *Hurst*, the *Apprendi* line of cases has repeatedly assumed the applicability of the unanimity rule to state criminal prosecutions. (See *Apprendi*, *supra*, 530 U.S. at p. 477 [noting requirement of facts "confirmed by the unanimous suffrage of twelve of [accused's] equals and neighbours" and quoting Blackstone]; *Blakely v. Washington* (2004) 542 U.S. 296, 303 [quoting *Apprendi* and Blackstone]; *S. Union Co. v. United States* (2012) 567 U.S. 343, 356 [same]; see also *Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

As noted above, and as this Court has long recognized, jury unanimity and the standard of proof beyond a reasonable doubt go hand in hand. (*Conservatorship of Roulet*, *supra*, 23 Cal.3d at p. 231.) As the United States Supreme Court has recognized that unanimity applies to issues including punishment (*Andres*, 333 U.S. at p. 748) there is no basis in doctrine or history to apply the jury right protections, piecemeal, to the issues of fact addressed in a capital penalty phase trial.

F. The Reasoning in this Court's Prior Decisions Rejecting Application of the Jury Trial Rights Warrants Reconsideration

This Court has not hesitated to overrule opinions—even those long entrenched—when they rested on "uncritical" analysis of the key doctrine that supported their holdings. (See, e.g., *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 528 [overruling *People v. Elliot* (1960) 54 Cal.2d 498 based on

"uncritical" analysis of the term "jurisdiction" as it applied to preliminary hearings].) This reflects the policy that "[a]lthough the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction." (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504, internal citations omitted.) This Court's holdings regarding the absence of unanimity and beyond reasonable doubt requirements in the penalty phase originate in part from historical accident rather than critical analysis, and therefore warrant reconsideration.

Equally important, "[t]he force of stare decisis is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections." (*Alleyne v. United States* (2013) 570 U.S. 99, 116, fn. 5 [overruling *Harris v. United States* (2002) 536 U.S. 545].) The Sixth Amendment's jury protections, hinging upon the basic right of a criminal defendant to have issues of fact found by a jury, are just such fundamental rights. (*Ibid*.) And the state jury trial right, intended to stay "inviolate forever," (Art. I, sec. 16) embraces the most sacrosanct values of our criminal system. (*People v. Durrant, supra,* 116 Cal. at p. 200 [no rule of the old law "more carefully preserved in its integrity under our system" than the division between judge and jury on issues of fact].)

The foundation for the logic of this Court's precedent rejecting application of the Sixth Amendment and the state jury right has been "washed away" with the overruling of several opinions on which they rested. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1141 [overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131 because "one of the bases of *Carlos* has proved to be unsound"].) *Spaziano*, *Hildwin*, and *Walton*—all relied upon by this Court in denying jury protections at the penalty phase—have all been overruled. What remains is state and federal Supreme Court precedent holding that the Sixth Amendment and the state jury right apply to issues, including punishment, when decided by a jury at trial. (*Andres, supra*, 333 U.S. at p. 747; *Hall, supra,*

199 Cal. atp p. 456-458.) For these reasons, the force of stare decisis should not restrain this Court from correcting its past errors.

1. This Court's View That There Is No Requirement of Unanimity or Findings Beyond a Reasonable Doubt Stems From Uncritical Acceptance of Legal Positions Taken by Defendants Attacking California's Death Penalty

a. This Court Initially Held That the Jury Trial Protections Could Be Imputed into the 1977 Statute

In the first decision interpreting the 1977 death penalty statute, *People v. Frierson* (1979) 25 Cal.3d 142 (*Frierson*), the defendant mounted a facial attack on the California death penalty scheme based on the absence of adequate constitutional safeguards. Critically, hoping to show that the statute was unreliable, the *defendant* assumed that California law did not require the trier of fact to find "beyond a reasonable doubt the existence of aggravating circumstances which outweigh the mitigating circumstances," and claimed this deficiency in the statute violated the state and federal Constitutions. (*Id.* at p. 180 (plur. opn. of Richardson, J.).) The plurality, in rejecting the facial challenge, concluded that the 1977 statute was "not constitutionally vulnerable because of its failure to provide a different method of proving or weighing the relevant statutory considerations specified therein." (*Ibid*.) However, it did so without analyzing the defendant's assumption that the California scheme did not require proof beyond a reasonable doubt as to the ultimate sentencing determination, or engaging in any state-law analysis with respect to burden of proof or unanimity.

In his concurrence (which provided the necessary majority for the plurality), Justice Mosk, joined by Justice Newman, more accurately noted that the statute did not require the "sentencing authority to expressly find that at least one of the statutory aggravating factors is proved beyond a reasonable doubt, as in Georgia." (*Frierson, supra*, 25 Cal.3d at p. 192 (conc. opn. of

Mosk, J.).) He noted that "numerous [] questions were left unanswered by *Gregg* [*v. Georgia* (1976) 428 U.S. 153]" including (1) whether "the jury [must] unanimously agree on which aggravating factors are established by the evidence"; (2) whether they must make these "find[ings] beyond a reasonable doubt"; and (3) whether before imposing a sentence of death, the jury must "unanimously agree that the aggravating factors outweigh the mitigating factors" and "[m]ust that finding also be beyond a reasonable doubt[.]" (*Frierson, supra,* 25 Cal.3d at p. 193 & fn. 8 (conc. opn. of Mosk, J.).)

Given that the judgment was reversed on other grounds, Justice Mosk noted that it would be "prudent to refrain from unnecessary advisory opinions on what are the precise constitutional requirements of *Furman* and *Gregg* et al. and whether the 1977 death penalty legislation in California complies with those requirements." (*Frierson, supra*, 25 Cal.3d at p. 194 (conc. opn. of Mosk, J.).) However, he did find that the 1977 statute was not facially unconstitutional under *federal* law and therefore allowed retrial of the defendant. (*Id.* at p. 196.)

Soon thereafter, in *People v. Jackson* (1980) 28 Cal.3d 264, the plurality again rejected various facial constitutional attacks to the 1977 death penalty statute. (*Id*. at pp. 315-317 (plur. opn. of Richardson, J.).) The plurality noted that "[m]ost of the arguments advanced by defendant were discussed at considerable length in *People v. Frierson*, supra, 25 Cal.3d 142, 172-188, 191-195, and we do not repeat them here." (*Id.* at p. 315.) Although addressing the challenge to a lack of written findings, *Jackson* did not separately address facial attacks based on the alleged lack of unanimity and beyond a reasonable doubt requirements other than to conclude that the lack of "adequate safeguards" was addressed in *Frierson.* (*Id.* at p. 316.)

The dissenters complained that, among various procedural deficiencies in the 1977 statute, there was no express requirement that "the sentencing authority [] find that at least one of the statutory aggravating factors is proved

beyond a reasonable doubt" or any express "requirement that the jury be unanimous in finding the statutory aggravating factor or factors upon which it bases its decision on penalty." (*People v. Jackson*, *supra*, 28 Cal.3d at p. 337 (dis. opn. of Mosk, J.); see also *id.* at pp. 357, 363 (dis. opn. of Bird, C.J.) [complaining that the statute did not explicitly provide for written findings indicating unanimity as to aggravating factors or provide evidence that jury reached determinations on aggravating factors beyond a reasonable doubt].)

In a brief concurrence, Justice Newman (whose vote was necessary for the affirmance) wrote to explain why he did not "subscribe fully to any colleague's views." (See *People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.).) In particular, Justice Newman expressed concern that legislative drafters could not anticipate every procedural issue applicable to complex death penalty procedures. (*Ibid*.) He explained that the concerns voiced by the dissenters were therefore insufficient to facially invalidate the statute because:

> California courts . . . are not timid in reading into legislation various procedural and other rules deemed constitutionally required that the draftsmen may have overlooked or rejected. That is demonstrably true as to countless requirements on matters *such as unanimous verdict, proof beyond a reasonable doubt and jury or judge findings*.

(*Id.* at p. 319 (conc. opn. of Newman, J.), italics added.)

In sum, the 1977 law was first affirmed as constitutional only with respect to federal requirements in *Frierson*. (See *Frierson*, *supra*, 25 Cal.3d 142 at p. 196 (conc. opn. of Mosk, J.).) In *Jackson*, it was upheld against facial attack with the *specific caveat* that beyond a reasonable doubt and unanimity requirements could be read into the existing statute. (*People v. Jackson*, *supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.); see also *id.* at p. 338 (dis. opn. of Bird, C.J.) ["Justice Newman explicitly claims it would be proper for this court to read into the death penalty statute all present and future constitutional

requirements omitted by the Legislature"].) However, because capital defendants repeatedly took the position that the procedural safeguards were absent in order to mount facial attacks to the death penalty statutes—rather than asserting that the protection should be read into the statute—defense assertions in *Frierson* and *Jackson* were uncritically repeated by later Courts. This superficial analysis ultimately read out fundamental jury requirements firmly entrenched in the California and federal constitutions and mandated by Penal Code section 1042.

b. The Holdings Under the 1977 Statute Were Applied To the 1978 Briggs Initiative

This Court's first substantive discussion of the unanimity issue under the 1978 death penalty statute was in *People v. Rodriguez* (1986) 42 Cal.3d 730.[84] There, the Court upheld, in a four to three decision, the 1978 initiative against facial attacks, explaining with relatively brief analysis that "[m]ost of these challenges were rejected as to the 1977 law." (*Id.* at p. 777 [citing the plurality opinions in *People v. Jackson, supra*, 28 Cal.3d 264, 315-317 and *People v. Frierson, supra*, 25 Cal.3d at pp. 176-184].) As in *Frierson*, the Court accepted without analysis the defendant's contentions that the 1978 death

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[84] The court also discussed the unanimity issue under the 1978 death penalty statute in *People v. Easley* (1982) 187 Cal.Rptr. 745, but that decision has no force or effect as it was later reheard due to inadequate briefing. (*People v. Easley* (1982) 33 Cal.3d 65; *People v. Easley* (1983) 34 Cal.3d 858, 863.) The analysis in the vacated *Easley* opinion was extremely cursory. Rejecting the claimed error in failing to instruct on unanimity with regard to aggravating factors, the Court stated that "we find no authority for the proposition that a more specific instruction [on unanimity] must be given sua sponte" and separately noted that the "defendant cites no cases or statutory provisions which suggest that the penalty phase jurors are forbidden to consider evidence of the defendant's prior crimes unless they unanimously find the defendant guilty of those crimes." (*People v. Easley, supra*, 33 Cal.3d 65; 187 Cal.Rptr. 745 at p. 760.)

penalty statute did not require "jury unanimity on the dispositive aggravating factors, a finding that aggravating factors outweigh mitigating beyond a reasonable doubt," or "a finding beyond a reasonable doubt that death is the appropriate penalty." (*Id.* at p. 777.) These contentions—assumed correct—did not render the California death penalty facially unconstitutional. (*Id.* at 777-779.)

The *Rodriguez* opinion contained no specific state-law analysis as to the correctness of the defendant's assumptions, only a conclusion that "the 1978 statute is similar in all relevant respects" to the 1977 law. (*People v. Rodriguez, supra*, 42 Cal.3d at p. 778; see also *People v. Allen* (1986) 42 Cal.3d 1222, 1285-1286 [rejecting similar facial attacks].) Critically, *Rodriguez* cited for its authority on these matters the Court's earlier decision in *Jackson*, which, as noted above, provided that reasonable doubt burdens and unanimity requirements could be read into the statute. (*People v. Jackson, supra*, 28 Cal.3d at p. 318 (conc. opn. of Newman, J.); see also *id.* at p. 338 (dis. opn. of Bird, C.J.).)

c. Uncritical Application of Prior Cases Resulted in the Jury Right Protections Being Read Out of the 1978 Briggs Initiative

While this Court's initial cases uncritically accepted defendants' positions that there was no unanimity or beyond a reasonable doubt requirement under state law, later cases affirmatively held that to be true. However, the decisions in those cases often provided no citation for the principles articulated or simply cited *People v. Rodriguez, supra*, 42 Cal.3d 730 or other cases. (See, e.g., *People v. Gates* (1987) 43 Cal.3d 1168, 1201 [no requirement that weighing decision be found beyond a reasonable doubt]*;* *People v. Ghent* (1987) 43 Cal.3d 739, 773-774 [no unanimity required for aggravating evidence under section 190.3, factor (b), despite reasonable doubt burden applying]; *People v. Miranda* (1987) 44 Cal.3d 57, 99, 107 [no

unanimity required for factor (b) or beyond reasonable doubt requirement as to ultimate penalty determination]; *People v. Jennings* (1988) 46 Cal.3d 963, 988 [accord]; *People v. Williams* (1988) 44 Cal.3d 883, 960 [approving instruction that the prosecution has "no burden of proof" under the 1978 statute with respect to the penalty phase determination].)

None of these cases cited or mentioned article I, section 16 specifically. However, their holdings have been repeated countless times, including in cases with some reference to the state Constitution. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1102 [noting that previous decisions rejecting unanimity requirement spoke "impliedly and generally of U.S. Const. and Cal. Const."]; *People v. Duff* (2014) 58 Cal.4th 527, 569 [nothing in the "state or federal Constitutions" requires a jury to "unanimously agree on any particular aggravating circumstances, [] find true beyond a reasonable doubt any particular aggravating circumstances, or [] find that aggravating factors outweigh mitigating factors beyond a reasonable doubt"].)

2. This Court Should Reexamine the Logic Behind Its Rejection of the Unanimity and the Beyond a Reasonable Doubt Burden to Factually Disputed Aggravating Evidence and the Ultimate Penalty Determination

To counsel's knowledge, there are no capital decisions by this Court directly addressing the application of article I, section 16 or Penal Code section 1042 to unanimity and beyond a reasonable doubt requirements for factually disputed aggravating evidence or the ultimate penalty determination. And this Court has so far failed to adopt the view expressed in Justice Newman's concurrence in *People v. Jackson*, *supra*, 28 Cal.3d 264—that these jury trial rights could be read into the statute to comport with constitutional requirements. (See *id.* at p. 318 (conc. opn. of Newman, J.).) However, this Court has spoken numerous times on the topic in rejecting similar challenges under other state and federal constitutional amendments, particularly the

analogous right to a jury trial under the Sixth Amendment. In these discussions, this Court has provided several justifications for rejecting the reasonable doubt burden and unanimity requirements, none of which defeat application of the California constitutional jury rights to issues of fact.

a. Attaching the Label 'Normative' Does Not Render Issues of Fact Any Less Issues of Fact

One often-repeated argument is that determinations made at the penalty phase "do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment [citations] that is outside the scope of *Apprendi* [*v. New Jersey*, *supra*, 530 U.S. 466] and its progeny. [Citation.]" (*People v. Duff*, *supra*, 58 Cal.4th at p. 569.) As noted above, even when the penalty phase determination under the late 19th century scheme was *entirely* discretionary and did not require subsidiary determinations of factually disputed crimes, this Court said that the California jury right applied. (*Hall*, *supra*, 199 Cal. at p. 458.) A large component of the modern capital trial is now almost identical to a common law trial: determining whether the defendant committed a predicate crime (factor (a)) and a series of other crimes (the aggravating felonies considered under factors (b) & (c)).

Perhaps most importantly, that a proceeding determines "normative" instead of "factual" issues is simply a label attached to the process the jury uses to reach a conclusion. Any number of issues a jury decides (for instance, various degrees of culpability in mental states) could be labeled as "normative." (See *People v. Gibson* (1861) 17 Cal. 283, 285 [separation between first and second degree murder was intended to show that the murder was "peculiarly atrocious"].) Indeed, early cases considered "guilt" and "degree" of murder as distinct determinations, both of which necessitated a reasonable doubt burden. (See, e.g. *People v. West* (1875) 49 Cal. 610, 612 [reasonable doubts as to murderer's "guilt, *or of the grade of his offense*, should be resolved in his

favor"], italics added.) The requirements of the California Constitution cannot be negated by labeling as "normative" a question traditionally reserved to the jury. This would contradict the expressed intent of the drafters of the jury right. (See 1 Debates and Proceedings, Cal. Const. Convention, *supra*, p. 302 (statement of Mr. Barbour) [warning that labels assigned to statutes may be easily changed]; *Mitchell v. Superior Court* (1988) 49 Cal.3d 1230, 1243 ["the delegates disagreed with the notion that the right to jury trial should depend on the legislative characterization of an offense"].) And in fact, the common law specifically required jury protections for what they deemed "special aggravations" when they constituted the "matter in issue." (See Hawles, An Englishman's Right (1680), at p. 21 [providing examples of crimes that were more highly culpable because a specific *mens rea*].) The "issues of fact" embodied in aggravating circumstances under the California capital scheme are no more directed at vague degrees of "normative" culpability than the common law "special aggravation." They simply ask whether the defendant committed a prior crime. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [under factor (b) "the question whether the acts occurred" is a "factual matter for the jury"].)

Regardless, the question of whether the jury right is triggered is not a question of malleable labels such as "normative," but "a purely historical question, a fact which is to be ascertained like any other social, political or legal fact.' [Citations.]" (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010.) Since the dawn of non-mandatory capital sentencing in California, the questions answered regarding penalty have been questions of fact reserved in the first instance to the jury. (*In re Anderson* (1968) 69 Cal.2d 613, 621 [discussing how, under the amendments of 1873–1874,[85] Penal Code section

[85] At the time of the 1873 amendments, which first created jury sentencing in capital cases, the *only* trier of fact available was a jury. It was not

190 "vest[ed] in the trier of fact discretion to fix the penalty at death or life imprisonment"].) Although subsequent amendments added subsidiary determinations labeled "aggravation" to the "issues of fact" tried (former § 190.1, enacted by Stats.1957, ch. 1968, § 2, p. 3509), this does not change whether the jury right and burden of proof protections apply.

The question is simply whether the proceeding is "of the same class" of action which would have called for a jury trial at common law. (*People v. One 1941 Chevrolet Coupe*, *supra*, 37 Cal.2d at p. 300.) If it is, "the right is carried over to the new statute." (*People v. Anderson* (1987) 191 Cal.App.3d 207, 219.) The current scheme is of the "same class" as prior schemes to which the jury right attached. (*Hall*, *supra*, 199 Cal. at p. 459.) Under every capital scheme ever adopted in California, juries have made the factual determinations that condemn defendants to death. Therefore, the "normative" label cannot defeat application of the jury trial right.

b. This Court's Conclusion that Application of the Reasonable Doubt Standard at Penalty Is Impossible Because the Questions at Issue Are "Not Susceptible to a Burden-of-Proof Quantification" Should Be Reconsidered

In addition to concluding that the penalty phase issues are "normative," this Court has frequently rejected application of the reasonable doubt standard to the ultimate penalty phase determination and certain aggravating facts because they are "not susceptible to a burden-of-proof quantification." (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1366.) This justification rests on an in complete view of "reasonable doubt."

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possible for a judge to try a case, as bench trials in felony cases were not permitted until later. (See *People v. Smith* (1933) 218 Cal. 484, 488 [discussing 1928 amendment to constitutional jury right to permit waiver of jury].)

As explained by the Supreme Court of Connecticut in applying a reasonable doubt burden to the outcome of weighing of aggravating and mitigating evidence:

> We disagree with the dissent . . . suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. . . . the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238 fn. 37; see also *U.S. v. Correa-Ventura*, *supra*, 6 F.3d at p. 1076-1077 [both unanimity and reasonable doubt were "conceived as a means of guaranteeing that each of the jurors 'reach [ ] a subjective state of certitude' with respect to a criminal defendant's culpability. [Citation]"].)

Connecticut is not alone in applying the reasonable doubt standard to the weighing of aggravating and mitigating factors, the proof of aggravating evidence, or both. Many states, even in the absence of explicit textual requirements, have read the reasonable doubt burden into their death penalty schemes. (See, e.g, *People v. Tenneson* (Colo. 1990) 788 P.2d 786, 795, citations omitted ["qualitatively unique and irretrievably final nature of the death penalty make it unthinkable for jurors to impose the death penalty when they harbor a reasonable doubt as to its justness"]; *State v. Biegenwald* (1987)

106 N.J. 13, 62 ["If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt"]; *State v. Wood* (Utah 1982) 648 P.2d 71, 81, 83 [to impose the death penalty "notwithstanding serious doubt as to its appropriateness" would create unacceptable risk of arbitrariness and disproportionality]; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888 disapproved on other grounds by *State v. Reeves* (Neb. 1990) 453 N.W.2d 359 [reading reasonable doubt burden into silent statute].)

And many states explicitly require that either the ultimate determination or the aggravating circumstances be proven beyond a reasonable doubt.[86] This Court should reconsider its conclusion that the penalty phase is "not susceptible" to reasonable doubt burdens (*People v. McKinzie*, *supra*, 54 Cal.4th at p. 1366), given that numerous jurisdictions have been applying the reasonable doubt burden for years.

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[86] See, e.g., Ark.Code Ann. § 5–4–603 [aggravating circumstance must be found unanimously and beyond a reasonable doubt and must outweigh mitigating circumstances beyond a reasonable doubt]; Former N.J. Stat. Ann. § 2C:11–3(c)(3) (2006) [aggravating circumstance must be found beyond a reasonable doubt]; N.Y.Crim. Proc. Law § 400.27(3) & (11)(a) [jury must find aggravating factors unanimously and beyond a reasonable doubt, and must find aggravators outweigh mitigation beyond a reasonable doubt]; Ohio Rev.Code Ann. § 2929.03(D)(1) [beyond reasonable doubt burden applies to weighing of aggravating and mitigating factors]; Tenn.Code Ann. § 39–13–204(g)(1) (A) & (B) [aggravating circumstances and weighing must be beyond a reasonable doubt].

c. This Court's Rule that There Is No Requirement of Unanimity for "Foundational Facts" Is Inconsistent with the Rule that Juries Must Be Unanimous as To Discrete Criminal Acts

One of this Court's earliest decisions rejecting the question of unanimity with respect to other criminal acts that are disputed at the penalty phase was *People v. Miranda*, *supra*, 44 Cal.3d 57. There, the court held that "unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding. A defendant is, of course, entitled to a unanimous jury verdict in the final determination as to penalty." (*Id.* at p. 99.) But there is no principled reason to distinguish a jury's conclusion, beyond a reasonable doubt, that a defendant is guilty of a crime when that determination is made in a capital sentencing proceeding rather than a trial to determine guilt or innocence.

In the latter "the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that, when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, citing Cal. Const., art. I, § 16.) This is precisely the analysis required by factors (b) and (c) of Penal Code section 190.3: jury determination of multiple "discrete crimes." (Cf. *People v. Russo*, *supra*, 25 Cal.4th at pp. 1134-1135. [overt acts in furtherance of a conspiracy are not discrete crimes].)

This is not to say that the requirements of unanimity and reasonable doubt extend to the "minute details of how a single, agreed-upon act was committed." (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) They do not. (*Ibid.*)[87] But the constitutional guarantee encompasses "the trial of issues that

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[87] This should assuage the concern voiced in *People v. Ghent* (1987) 43 Cal.3d 739, that jurors would become mired in "lengthy and complicated

are made by the pleadings." (*Dale v. City Court of City of Merced*, *supra*, 105 Cal.App.2d at p. 607; *Koppikus v. State Capitol Comrs.* (1860) 16 Cal. 249, 254 ["It is a right . . . which can only be claimed in . . . criminal actions, where an issue of fact is made by the pleadings"].) Because the aggravating factors and the punishment of death must be raised in pleadings (see § 190.3 [notice of aggravating evidence required]; *Lankford v. Idaho* (1991) 500 U.S. 110, 127 [notice of capital punishment required]), they are issues of fact that must be determined unanimously and beyond a reasonable doubt.

G. Failure to Instruct that the Ultimate Penalty Determination Must Be Made Beyond a Reasonable Doubt and that Section 190.3, Factor (b) Must Be Found Unanimously Requires Reversal

California courts have long held that violation of the state constitutional right to unanimity is structural error under the state Constitution. (*People v. Hall*, *supra*, 199 Cal. at p. 456; *People v. Traugott* (2010) 184 Cal.App.4th 492, 505 [11-person verdict is structural error].) And the concept of beyond a reasonable doubt is so basic to the administration of criminal law that failure to instruct on it at the guilt phase violates the right to a fair trial and is also not subject to harmless error analysis. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280-281.)

Mr. Morales's claim, however, brings the Court into uncharted territory. This Court has never held that unanimity is required as to the finding of particular aggravating circumstances, nor has it held that reasonable doubt burden is applicable to the ultimate verdict. Therefore, it has obviously never expressed a view on the appropriate test for assessing error.

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discussions of matters wholly collateral to the penalty determination which confronts them." (*Id.* at pp. 773-774.)

As to failure to instruct on unanimity for particular incidents in aggravation, the appropriate test must be that of *Chapman v. California* for the Sixth Amendment error and *People v. Brown* (1988) 46 Cal.3d 432, 447 for the state constitutional error. This Court has indicated that these two standards are equivalent. (See, e.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11, and authorities cited therein.)

As to the failure to instruct on reasonable doubt for the verdict itself, it should be assessed as structural error. Failure to instruct on reasonable doubt as to one component of the prosecution case is one thing. (See *People v. Avena* (1996) 13 Cal.4th 394, 429 ["*Robertson* error" subject to harmlessness analysis].) But failure to subject the ultimate decision on sentence to the crucible of reasonable doubt is quite another. (See *People v. O'Neill* (Colo. 1990) 803 P.2d 164, 179 [failure to instruct on reasonable doubt burden subject to automatic reversal because the burden is intended to "ensure the reliability of any jury decision sentencing a defendant to death"]; *State v. Rizzo* (2003) 266 Conn. 171, 242 [failure to instruct on reasonable doubt burden warrants automatic reversal].) In fact, failure to require each juror to find the death verdict warranted beyond a reasonable doubt is much like failure to require unanimity in a death verdict, which this Court has already held requires automatic reversal. (*Hall*, *supra*, 199 Cal. at p. 459.) And, as explained in *Sullivan*, when the required burden of beyond a reasonable doubt has not been satisfied "there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman* review is simply absent." (*Sullivan*, *supra*, 508 U.S. at p. 280.)

VII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT MR. MORALES'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

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

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

A. Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting these criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers

eligible for the death penalty. At the time of the offense charged against Mr. Morales, section 190.2 contained 33 special circumstances including 12 kinds of felony-murder. (§ 190.2, subd. (a)(17).)

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALCRIM No. 763; 20RT:4296.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749, disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and

freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Morales is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Romero* (2008) 44 Cal.4th 386, 428; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Mr. Morales urges the Court to reconsider this holding.

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

1. Mr. Morales's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt.

Mr. Morales urges this Court to reconsider its holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (see *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14) and does not require factual findings within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584, 602, 609 (see *People v. Merriman* (2014) 60 Cal.4th 1, 106). Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Mr. Morales contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Mr. Morales's claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating

factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Mr. Morales requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof.

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

CALCRIM Nos. 763 and 766, the instructions given here (20RT:4296-4300), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Mr. Morales is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

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

3. Mr. Morales's Death Verdict Was Not Premised on Unanimous Jury Findings.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto* (2003) 30 Cal.4th at p. 275.)

Mr. Morales asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.); see *Hurst v. Florida* (2016) ___ U.S. [136 S.Ct. 616, 622] [indicating that determinations that aggravating circumstances exist and that they outweigh the mitigating circumstances are factual findings under *Ring*].)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

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

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard.

The question of whether to impose the death penalty upon Mr. Morales hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of

parole." (20RT:4299-4300.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

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

5. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole.

Section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALCRIM No. 766 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of section 190.3, the instruction violated Mr. Morales's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Mr. Morales submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See

People v. Moore (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Instructions Violated the Sixth, Eighth, and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S.286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation. The decision in *Kansas v. Carr* (2016) ___ U.S. ___ [136 S.Ct. 633] does not control this claim because the Kansas statute, unlike California's law, provides a burden of proof. (*Id*. at p. 643 [that one or more aggravating circumstance exist and that they are not outweighed by any mitigating circumstances must be found beyond a reasonable doubt, but mitigating circumstances must simply be found to exist].)

A similar problem is presented by the lack of instruction regarding jury unanimity. Mr. Morales's jury was told in the guilt phase that unanimity was required in order to acquit Mr. Morales of any charge or special circumstance.

In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid*.; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

Kansas v. Carr, *supra*, 136 S.Ct. 633 is not applicable because it did not address the unanimity question. In any event, the jury in *Carr* unanimously found that aggravating circumstances existed and outweighed the mitigating circumstances (*id*. at pp. 640, 643), and under Kansas law, the jury is instructed that unanimity is not required for consideration of mitigating circumstances (*State v. Carr* (Kan. 2014) 331 P.3d 544, 732, revd on other grounds, *Kansas v. Carr* (2016) 136 S.Ct. 633). In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Mr. Morales's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

7. The Penalty Jury Should Be Instructed on the Presumption of Life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence.

Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272.)

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

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

D. Failing to Require That the Jury Make Written Findings Violates Mr. Morales's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Mr. Morales's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Mr. Morales of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not

capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. Morales urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Mr. Morales's Constitutional Rights.

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALCRIM No. 763; § 190.3, factors (d) and (g); 20RT:4297) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Mr. Morales is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614) but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALCRIM No. 763 were inapplicable to Mr. Morales's case. (See CALCRIM No. 763, factors (b), (c).) The trial court failed to omit those factors from the jury instructions (20RT:4296-4297), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Mr. Morales asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALCRIM No. 763 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALCRIM No. 763 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Consequently, the jury was invited to aggravate Mr. Morales's sentence based on non-existent or irrational aggravating factors, precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, Mr. Morales asks the Court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 359.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate

equal protection or due process. For this reason, Mr. Morales urges the court to reconsider its failure to require intercase proportionality review in capital cases.

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

California's death penalty scheme violates the equal protection clause by providing significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and have been found to be true beyond a reasonable doubt. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) Additionally, a trial court must state on the record its specific reasons for choosing the term of imprisonment it may be imposing. (Cal. Rules of Court, rule 4.420(e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any statement of reasons to justify the defendant's sentence. Mr. Morales acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of

the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Mr. Morales urges the Court to reconsider its previous decisions.

I. California's Death Penalty Statute and Instructions Violate the United States Constitution by Not Requiring that the Jury's Weighing Determination Be Found Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), *Ring v. Arizona* (2002) 536 U.S. 584, 602, 609 (*Ring*) and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 (*Blakely*) require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi* and *Blakely* require that each of these findings be made beyond a reasonable

doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of Apprendi (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). Appellant urges the Court to reconsider these decisions in light of subsequent developments in the law.

The United States Supreme Court recently held Florida's death penalty statute unconstitutional under *Apprendi* and *Ring* because the sentencing judge, not the jury, made a factual finding—the existence of an aggravating circumstance—that is required before the death penalty can be imposed. (*Hurst v. Florida* (2016) ___ U.S. ___, 136 S.Ct. 616, 624 (*Hurst*).) *Hurst* supports appellant's request for reconsideration of this Court's holdings that imposition of the death penalty does not constitute an increased sentence within the meaning of Apprendi (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), does not require factual findings within the meaning of Ring (*People v. Merriman* (2014) 60 Cal.4th 1, 106) and therefore does not require the jury to find unanimously and beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances before the jury can impose a sentence of death (*People v. Prieto* (2003) 30 Cal.4th 226, 275). Appellant recognizes that this Court has ruled that the Hurst opinion does not require reexamination of this challenge. (*People v. Powell* (2018) 6 Cal.5th 136, 193, fn. 36; *People v. Rangel* (2016) 62 Cal.4th 1192, 1235.)

Still: in California, the finding that aggravating factors outweigh mitigating factors is a necessary predicate for the imposition of the death penalty. Apprendi, Ring, and Hurst require that this finding be made by a jury

and beyond a reasonable doubt. Because appellant's jury was not required to make this finding under the proper standard, his death sentence violates the Sixth, Eighth, and Fourteenth Amendments and must be reversed.

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CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

Dated: May 10, 2019

Respectfully Submitted,
MARY K. MCCOMB
State Public Defender

/s/ C. Delaine Renard
C. DELAINE RENARD
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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(A))

I, C. DELAINE RENARD, am a Senior Deputy State Public Defender, and am appellate counsel for JOHNNY MORALES in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 178,476 words in length.

DATED: May 10, 2019

/s/ C. Delaine Renard

C. DELAINE RENARD
Attorney

DECLARATION OF SERVICE

Re: PEOPLE v. JOHNNY MORALES Supreme Court No. S137307
(Superior Court No. FVA015456)

I, Kecia Bailey, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607; I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

JOHNNY MORALES, V-94083	CLERK OF THE COURT
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CSP-SQ	247 West 3rd Street
San Quentin, CA 94974	San Bernardino, CA 92415-0063

Each said envelope was then, on, June 21, 2019 sealed and deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

ELECTRONIC SERVICE

AMANDA LLOYD
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
VIA TRUEFILING @ Amanda.Lloyd@doj.ca.gov on June 21, 2019

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this June 21, 2019 at Oakland, California.

/s/ Kecia Bailey

Kecia Bailey

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/19/2019 by Larry Blake, Jr., Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/21/2019
Date

/s/C. Delaine Renard
Signature

Renard, C. Delaine (169893)
Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm