IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent,

v.

SONNY ENRACA

Defendant/Appellant

Supreme Court No.
Crim. S080947

Riverside County
Superior Court
No. CR-60333

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
Riverside County
Honorable W. Charles Morgan, Judge

DEATH PENALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONVENTIONS AND TREATIES AND RELATED MATERIALS

JURY INSTRUCTIONS:

OTHER AUTHORITIES

I.

SONNY ENRACA DID NOT MAKE A KNOWING, INTELLIGENT OR VOLUNTARY WAIVER OF HIS RIGHT TO COUNSEL AS REQUIRED BY *EDWARDS v. ARIZONA* BEFORE MAKING INCRIMINATING STATEMENTS BECAUSE HE WAS INTERROGATED AND MANIPULATED AFTER HE INVOKED HIS *MIRANDA* RIGHTS AND MISADVISED ABOUT HIS RIGHT TO COUNSEL AND THE LEGAL PROCESS, AND WAS NOT INFORMED OF HIS RIGHT TO CONSULT WITH THE PHILIPPINE CONSUL

The issue before this Court is whether the trial judge erred in ruling that Sonny had knowingly, intelligently and voluntarily waived his rights under *Edwards v. Arizona* when immediately *after* he invoked his *Miranda* rights, he was pressured by Detective Schultz to talk during "the period of time when Mr. Enraca would be able to speak to...law enforcement without a lawyer being present" (IV RT 735: 3-8); he was led to believe that it represented his "only chance in life" that he get his story to the DA before arraignment; he was twice told that he could only obtain appointed counsel at arraignment which would not occur for at least 48 hours; and he was not told of his right to consult with the Philippine Consulate (nor was the Consulate notified of Sonny's arrest).

Respondent seeks to treat this as a case involving whether the text of the advisements was constitutionally adequate. Respondent neglects to consider the advisements in the overall context of the officers' statements to Sonny, a context which makes clear that Sonny was badly misled and coerced into an uninformed waiver of his rights to counsel and to remain silent. As discussed below, the trial judge prejudicially erred in denying the motion to suppress because: (A) the record establishes that Sonny was manipulated into making a statement by misleading him about the legal process and the consequences of waiting for appointed counsel; (B) the

interrogation did not cease when Sonny invoked his *Miranda* rights; C) the totality of the circumstances suggest that Sonny was misled into believing that he had to choose between his right to counsel and "his only chance in life" – getting his side of the story to the DA so the charges could be reduced; and (D) any doubt about whether Sonny's purported waiver of his rights was knowing, intelligent and voluntary should be resolved against the waiver where Sonny was a twenty-two-year-old Philippine national with no prior experience with the law who was not informed of his right to consult with the Philippine consulate; the lack of knowledge of these treaty-based rights added to the pressure created by being informed that he could not see a lawyer for at least 48 hours when "his only chance in life" was to speak to law enforcement *prior* to the expiration of that period; and (E) the error in failing to suppress Sonny's statements was prejudicial.

A. The Record Establishes that Sonny was Manipulated into Making a Statement by Misleading Him About The Legal Process and the Consequences of Waiting for Appointed Counsel.

The key points in the time line of the interrogation were as follows:

1. When Sonny was arrested and brought in for questioning by Detectives Schultz and Horton, his handcuffs were removed and he was told that he would be beaten up if he tried to escape (Your gonna think the WWF [World Wrestling Federation]'s Santa Claus" (21 CT 5598A) and then given a *Miranda* warning. (21 CT 5602; IV RT 713.)
2. Neither as part of that warning or at any other time was he told of his right to consult with the Philippine consulate, nor was the consulate told of his arrest (IV RT 727:17 to 728:1),

both failures in violation of treaties between the United States and the Philippines.

3. The trial judge assumed that had the Philippine Consulate been notified, "they would have ... gotten him counsel or helped ... *and would have advised him not to do anything until counsel spoke with him.*" (IV RT 700:19-22. [emphasis added].)

4. Initially, Sonny waived his *Miranda* rights and began answering the interrogators' questions, denying involvement. (21 CT 5602; IV RT 717.)

5. When Sonny denied involvement, he was confronted with assertions that the interrogators had evidence that he was the shooter and told that "*your only chance in life is to come up with exactly what happened* so we could make sense of what happened.... to explain to us why so we have some idea of what happened." (21 CT 5612 [emphasis added].)

6. Sonny was then told that "*you need to have some type of explanation so we could go to the DA and talk about either manslaughter* or I don't know" (21 CT 5613 [emphasis added].)

7. After being further badgered and cursed at (Schultz told Sonny that "I'm about had it up to here with you cuz you're full of shit."), Sonny invoked his *Miranda* rights. (21 CT 5616; IV CT 719:26 to 720:3.)

8. In response to his invocation of his right to counsel, he was told that "*you're going to jail for double homicides* and "shut your mouth" (21 CT 5616 [emphasis added].)

9. When he then asked when he could see his lawyer, Detective Schultz first told him he would have to pay for a lawyer and then when Sonny asked about appointed counsel Schultz told him "when you go to court and get arraigned, one will be appointed to represent you that's when you can see your lawyer. *Now I suggested [sic] for the next 48 hours, that you deeply consider that.*" (21 CT 5617 [emphasis added].)

10. Detective Schultz testified that when he suggested that Sonny "for the next 48 hours, that you deeply consider that," he was referring to "the period of time when Mr. Enraca would *be able to speak to...law enforcement without a lawyer being present*" (IV RT 735: 3-8) and that he made the statement to Sonny in the way he would when you are *"talking to your kids when they do something wrong*" (IV RT 735:21-22.[emphasis added].)

11. When, having invoked his rights and been turned over to the Detective Spidle, ostensibly for booking, Spidle began the booking procedure. Sonny was photographed and he then asked whether he could call his girlfriend; after checking with Detective Schultz, Spidle dialed the number for Sonny and allowed him to talk to her. (IV RT 743).

12. After he got off the phone, the first thing Sonny did was to ask Spidle when he would get to see his lawyer (IV RT 744:8-11), the detective "explained to him -- took a minute or two and explained to him the process under which he would be assigned a lawyer relative to a criminal Complaint being filed by the District Attorney's Office:

if he's charged with a crime. Formal arraignment. At

> his arraignment, how the charges against him are read to him. He's advised of the charges. And how, *at that point in the formal arraignment process*, that -- *if he's charged formally with the crime, that at that point they would make a determination to assign him a lawyer."*

(IV RT 744:13-21 [emphasis added].)

13. Sonny was then told that it "approximated 48 to 72 hours" before an attorney would be appointed to represent him. (IV RT 744:26.)

14. Sonny then continued to engage Spidle in conversation, asking whether there was a reward in the case and suggesting that was why people were saying he was "involved in this." (IV RT 745:1 to 746:16.)

15. Sonny then told Spidle, as if "making a plea to" Spidle, "You know, it's not how it went down." (IV RT 746:20-21) and rather than administer a *Edwards-Sims* warning, Spidle instead told him that when a number of people are involved, there are going to be different versions of what happened and went back to asking questions related to the booking. (IV RT 746:26 to 747:3.) Spidle thought that agreeing with Sonny would help him get along with Sonny and not agitate him. (IV RT 824:7-18.)

16. After Spidle asked Sonny about the meaning of his tattoo, Sonny said "No one has any honor anymore. No one has any respect, you, know." (IV RT 748:12-14.)

17. He was then told because he had invoked his right to counsel, Spidle could not question him, but that Spidle would tape record a statement made by Sonny and *take it to the District Attorney*. (IV RT 749:26 to 750:6 [emphasis added].)

18. Sonny was then asked "did they read you your *damn* rights" and he replied that they had and declined a further reading. (21 CT 5631-5632 [emphasis added].)

19. Sonny then stated that he agreed to talk, "knowing [his] rights." (21 CT 5632.)

20. When Spidle asked Sonny why he talked to Spidle, Sonny replied that Detectives Schultz and Horton were "assholes" (IV RT 761:23-762:6), but Spidle gave him "a lot of respect." (IV RT 762:15-25.)

To respondent, the only significant facts in this 20-point sequence are: (1) Sonny received a *Miranda* warning; (4) he waived his right; (7) he then invoked his *Miranda* rights and Schultz asked no additional questions; (15) Sonny began the conversation with Detective Spidle about how it happened; (17) he was told because he invoked his rights, Spidle could not question him; (18) he declined a re-reading of his rights; and (19) he agreed to talk further stating that he was "knowing [his] rights." (See RB 29-30.)

But respondent ignores critical law and facts. First, respondent ignores that Detective Schultz misleadingly pressured Sonny to waive his rights and continued to do so even after Sonny invoked his rights. (See facts 5, 6, 8, 9, and10). Once Sonny invoked his rights, law enforcement were barred from any further questioning of Sonny unless he initiated the discussions and made a knowing, intelligent and voluntary waiver of those rights. (See *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1042; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.) But, as discussed below, Schultz's direction (talking to Sonny as he would to "to your kids when they do something wrong"(IV RT 735)) that Sonny "deeply consider" talking to law enforcement during "the period of time when Mr. Enraca would *be able to speak to...law enforcement without a lawyer being present.*" (IV RT

735: 3-8) amounted to continued interrogation and for that reason alone the failure to suppress Sonny's statements was error.

Moreover, although the applicable law requires the trial court to look at the "totality of the circumstances surrounding the interrogation" to determine whether they reveal both an uncoerced choice and the requisite level of comprehension before the court may properly conclude that *Miranda* rights have been waived (*Fare v. Michael C.* (1979) 442 U.S. 707, 725), respondent ignores 14 of the 20 circumstances that led up to Sonny's statements to Spidle, particularly the consistent line that Sonny was handed by the detectives who questioned him – designed to get him to believe that it was crucial for him to speak to the detectives so that they could bring his story to the district attorney before the charges were set and that his only chance to do that was in the next 48 hours before he was arraigned and thus before he could get counsel. Prior to invoking his rights, Sonny was told (5) "*your only chance in life is to come up with exactly what happened* so we could make sense of what happened.... to explain to us why so we could make sense of what happened" (21 CT 5612 [emphasis added]); and (6) "*you need to have some type of explanation so we could go the DA and talk about either manslaughter* or I don't know" (21 CT 5613 [emphasis added]). When he invoked his rights (8) he was angrily told by Detective Schultz "*you're going to jail for double homicides*" and to "shut your mouth" (21 CT 5616) and (9) when he asked when he could see a lawyer he was told "when you go to court and get arraigned, one will be appointed to represent you that's when you can see your lawyer. *Now I suggest... for the next 48 hours, that you deeply consider that.*" (21 CT 5617 [emphasis added].) (10) Significantly, Detective Schultz admitted that when he used the words "for the next 48 hours, that you deeply consider that," he intended to refer to "the period of time when Mr. Enraca *would be able to speak to...law enforcement without a lawyer being present.*" (IV RT 735: 3-8)

[emphasis added]) and that he did so in the way he would talk to his kids when they did something wrong. (IV CT 735:21-22.)

When Sonny was passed on to "good cop" Detective Spidle (11) after asking and be allowed to call his girlfriend (IV RT 743), (12) the first thing he asked was when he could see a lawyer and Spidle told him he would be assigned a lawyer *if he's charged formally with the crime, that at that point they would make a determination to assign him a lawyer.* (IV RT 744:13-21 [emphasis added]. (13) He was then told that it "approximated 48 to 72 hours" before an attorney would be appointed to represent him. (IV RT 744:26.) In essence, Sonny was told that he would be held for at least two days without the chance to speak to a lawyer. (14, 15 and 16), Spidle continued to court Sonny and respond to him with supportive comments trying to agree with Sonny to maintain calm.. (20) The contrast between the "good cop" demeanor of Spidle who "showed him a lot of respect" and the "bad cop" behavior of Schultz and Horton who Sonny said were "assholes" worked, driving Sonny to talk with Spidle – (15) Sonny suggested that "it's not how it went down " (IV RT 746:20-21) and Spidle then told him that because he had invoked his right to counsel, Spidle could not question him, but (17) Spidle would tape record a statement made by Sonny and *take it to the District Attorney* (IV RT 749:26 to 750:6.) This was after Sonny had been forcefully told that his only chance in life was to get his version of the facts to the District Attorney before the charges were filed.

Appellant shows below that it was error to fail to suppress Sonny's statements because the interrogation of Sonny did not cease when he invoked his rights and because respondent cannot meet the burden of demonstrating that the totality of the circumstances prove a knowing, intelligent and voluntary waiver. Any doubts about the invalidity of the waiver must be resolved against the waiver where the police not only made misleading and coercive statements, but also denied Sonny his rights under

the Vienna Convention and the 1948 Treaty on Consular Relations, which left Sonny all the more vulnerable to the officers' misleading and coercive tactics.

B. It Was Error Not to Suppress Sonny's Statements to Spidle Because After Sonny Invoked His Rights, Interrogation Continued In Another Form.

It is undisputed that Sonny invoked his *Miranda* rights and accordingly that law enforcement were barred from any further questioning of Sonny unless he initiated the discussions and made a knowing and intelligent waiver of those rights. (See *Oregon v. Bradshaw*, *supra*, 462 U.S. at 1042; *Edwards v. Arizona, supra*, 451 U.S. at 484-485.) Respondent claims that law enforcement complied with the requirements of *Edwards v. Arizona* because Detective Schultz stopped questioning Sonny when he invoked his rights. But respondent is wrong because the interrogation of Sonny merely took another form. Although Schultz stopped asking questions of Sonny when he invoked his rights, the interrogation of Sonny did *not* cease when he invoked those rights and Schultz told him that he was "going to jail for double homicides" and to "shut your mouth." Then, when Sonny asked when he could see his lawyer, Schultz made statements *which he admitted were calculated to get Sonny to "speak with law enforcement without a lawyer being present*." (IV RT 735: 3-8 [emphasis added].) This pressure alone violated *Edwards* command that interrogation cease when a suspect invokes his *Miranda* rights: the case falls squarely within the rule that interrogation includes any words or conduct which the officers "should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301; *Edwards v. Arizona*, *supra* 451 U.S. at 486, n. 9.) As

the United States Supreme Court has stated:

> *Edwards* set forth a "bright-line" rule that *all* questioning must cease after an accused requests counsel....In the absence of such a bright-line prohibition, the authorities through 'badger[ing] or 'overreaching' - explicit or subtle, deliberate or unintentional - might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.

(*Smith v. Illinois* (1984) 469 U.S. 91, 98 [emphasis in original; internal citations omitted].)

Detective Shultz's candid admissions at the evidentiary hearing make it clear that he crossed the "bright line" drawn by *Edwards* and *Smith.* Schultz admitted that his post-invocation words to Sonny were intended to get Sonny to speak without a lawyer being present (IV RT 735:3-8) and he analogized what he said to "talking with your kids when they do something wrong" (IV RT 735:21-22), essentially putting Sonny in a corner like a naughty child and suggesting that invoking his rights was doing something wrong for which he should atone by fessing up to the police before he was arraigned. And Schultz's tactics succeeded – within a short time of Schultz's post-invocation parental warning to Sonny to "deeply consider" talking to the police, Sonny was telling another parental figure, "good cop" Detective Spidle about the crime without a lawyer present. *Edwards* was clearly violated by Schultz's post-invocation pressure on Sonny and Sonny's subsequent statements to Spidle should be suppressed for that reason alone.

But the incursions across the bright line did not end with Schultz's admonition to Sonny. "Bad cop" Schultz passed Sonny on to "good cop" Spidle. Spidle's actions whether "explicit or subtle, deliberate or unintentional" (*Smith v. Illinois*, *supra*) softened Sonny up by allowing him to call his girlfriend and by continuing to engage him in conversation about rewards, the meaning of his tattoo, and honor; he could have stayed on the

right side of the bright line by ceasing all non-booking discussions with Sonny and re-administering a *Miranda* warning as required by this Court in *People v. Sims* (1993) 5 Cal.4th 405, 438- 444. But Spidle did not limit himself to booking questions. *Cf. Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (allowing questions that fall within a "routine booking question" exception which exempts from *Miranda* coverage questions to secure biographical data necessary to complete booking or pretrial services). In this case, however, Spidle asked extraneous questions regarding the meaning of Sonny's tattoo (IV RT 819:2-5), and volunteered statements about: (1) the possibility of a reward in the case (that it was possible that the parents had offered one) (IV RT 811:4-5); (2) the parents of the victim "were extremely upset" (*Id.* at 811:8-13)[1]; (3) the likelihood that different versions of the events in question would be offered and there are "two sides to every story" (*id.* at 819:21-28) and (4) the absence of honor and allegiance among friends:

> I just wanted to tell him , "Hey look, you know. We know friends will tell on you to stay out of trouble. And that's the way it is nowadays, Okay? That is the way it is. So that's the way it is nowadays."

(V RT 824:1-5.) Thus, contrary to respondent's argument that when "Sonny began to raise the shootings, Spidle tried to cut him off," (RB 29), the record demonstrates that Spidle crossed the bright line by prolonging the conversations rather than re-advising Sonny of his rights, particularly of the fact that anything Sonny said could be used against him. And the record establishes that Sonny responded to the "bad-cop, good-cop" technique: he

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[1] Spidle admitted that this discussion had nothing to do with the procedure of filling out a booking sheet. IV RT 811:14-18. The trial judge then erroneously sustained a prosecution objection to whether techniques like speaking about parents of victims was a known technique designed to elicit a response from a suspect. (*Id.* at lines 19-28.)

told Spidle that he talked to Spidle because Spidle gave him "a lot of respect" (IV RT 762:15-25) whereas Schultz and Horton were "assholes." (IV RT 761:23 to 762:15-25.)

Nor did Spidle ever actually advise Sonny of rights as required by *Sims*. Rather, the evidence suggests that his reference to whether they had read Sonny "your damn rights" was designed to belittle those rights and get Sonny to waive them as unimportant and without considering their full extent. Moreover, although Spidle did say that he could not ask Sonny any questions, he promised to take anything Sonny said to the District Attorney – which Schultz had forcefully (and misleadingly) conveyed provided Sonny's "only chance in life." Thus, Spidle's role as the "good cop" to Schultz's "bad cop" placed added psychological pressure on Sonny to talk and was another part of the continuing interrogation techniques "explicit or subtle, deliberate or unintentional" which violated *Edwards*. Suppression is required by *Smith*, *Innis* and *Edwards*.

C. Respondent Cannot Meets Its Burden to Demonstrate That Sonny's Waiver Was Knowing, Voluntary and Intelligent

Even if the continued interrogation by Schultz and Spidle were not enough to invalidate Sonny's waiver by themselves, the totality of circumstances make it clear that Sonny was manipulated by Shultz and Spidle into believing that he had to choose between exercising his right to counsel and "his only chance in life" – to talk with law enforcement without a lawyer during the 48 hours before arraignment. And the invalidity of the waiver becomes all the clearer when it is considered that Schultz and Spidle violated Sonny's and the Philippine Government's rights to have Sonny notified of his right to consult the Philippine Consulate and the Consulate's right to be informed of Sonny's arrest so that they could counsel him.

1. The circumstances establish that Sonny was manipulated into making statements which were neither knowing, voluntary nor intelligent. As the Court in *Bradshaw* pointed out:

> But even if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, *the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.*

(462 U.S. at 1044 [emphasis added].) It is well settled that such a waiver must be "knowing and intelligent."(*Bradshaw*, 462 U.S. at 1046; *Edwards,* 451 U.S. at 486, n.9.) In assessing whether the prosecution's burden of showing a knowing and intelligent waiver has been met, the Court must consider "the totality of the circumstances." (*Bradshaw*, 462 U.S. at 1045, quoting *Edwards*, 451 U.S. at 486.) The government's burden to make such a showing "is great," and the court will "indulge every reasonable presumption against waiver of fundamental constitutional rights." *(United States v. Heldt* (9th Cir. 1984) 745 F.2d 1275, 1277 [citing *Johnson v. Zerbst* (1938) 304 U.S. 458, 464]; *North Carolina v. Butler* (1966) 441 U.S. 369, 373 [courts "must presume that a defendant did not waive his rights"].)

Here the totality of circumstances points to the conclusion that the detectives' statements led Sonny to believe that during "the period of time when [he] would be able to speak to...law enforcement without a lawyer being present." (IV RT 735: 3-8), he had to choose between talking to the detectives or "going to jail for double homicides" and that his "only chance in life [was] to come up with exactly what happened" (21 CT 5612) "so [the officers] could go the DA and talk about either manslaughter ... or I don't know ... ." (21 CT 5613) After Sonny invoked his rights, rather than ceasing interrogation, Schultz pressured him to "deeply consider"...

"speak[ing] to ... law enforcement without a lawyer being present." (21 CT 5617 ["deeply consider" language]; IV RT 735:3-8 [what Schultz meant by it].). And then Detective Spidle reinforced this line by telling Sonny that he would get a lawyer only "if he's formally charged with a crime," this would not be for "48 to 72 hours" and that Spidle would tape record a statement made by Sonny and *take it to the District Attorney* (IV RT 749:26 to 750:6.) These circumstances establish that Sonny was pressured into waiving his rights by statements that took advantage of his inexperience with the legal system, which Schultz and Spidle used to pressure him to talk before he could he could get a lawyer appointed. Certainly, respondent has not met its burden of demonstrating that Sonny's waiver was knowing, intelligent and voluntary.

To respondent, there was no conflict between the detectives' statements that Sonny was entitled to appointed counsel before questioning and their statement that he could not get a lawyer appointed for at least 48 hours because they "simply indicated that if appointed counsel was requested, no questioning would occur until counsel was appointed and requested." (RB 30.) In respondent's view, as long as nothing the detectives said was technically inaccurate, their campaign to use his inability to talk with counsel for at least 48 hours to pressure him to waive in order to pursue "his only chance in life" was irrelevant.

Other than citing the Court's dictum in *Miranda* that it was not requiring that "each police station must have a 'station house lawyer' present at all times to advise prisoners" (*Miranda v. Arizona* (1966) 384 U.S. 436, 474; RB 31), respondent cites no authority in support of its invitation to this Court to ignore the crucial circumstances surrounding Sonny's making a statement. Instead, respondent attempts to distinguish cases which support appellant. (See RB 30-31; AOB 67: *United States v. Vasquez-Lopez* (9th Cir. 1968) 400 F.2d 593, 594 [detainee must

"understand that he has a right to an attorney 'now' before speaking" with law enforcement officers]; *United States v. Garcia* (9th Cir. 1970) 431 F.2d 134, 134. [upholding the requirement that the accused understand that she had a "right to counsel before she said a word"].) According to respondent, there is a difference in the facts of those cases and the instant case: in *Vasquez-Lopez,* the Spanish words used to give the *Miranda* warning failed to convey the right to consult with an attorney before questioning and in *Garcia*, there were clear conflicts about whether the right to counsel attached in the station house or at arraignment, whereas in the present case "Enraca was clearly advised that right to counsel arose prior to questioning and continued during questioning." (RB 31.)

Respondent's argument misses the point. The issue here is not whether the words of the *Miranda* warnings, viewed in isolation, passed constitutional muster, but whether the prosecution met its burden of demonstrating from the totality of circumstances that Sonny waived his rights knowingly, intelligently and voluntarily. Here, the "bad cop," Detective Schultz, intended to pressure Sonny into talking after he invoked his *Miranda* rights by leading him to "deeply consider" (21 CT 5617) that he would benefit from talking with law enforcement during that "period of time when [he] would be able to speak to...law enforcement without a lawyer being present." IV RT 735: 3-8) And Schultz succeeded in sending him into the waiting arms of the "good cop," Detective Spidle, who not only reiterated that Sonny could not see a lawyer for 48 to 72 hours and told Sonny that counsel would be appointed only if and when Sonny was formally charged with a crime, but also promised to take any statement Sonny made to the District Attorney. In the circumstances, Sonny was given a misleading picture of this rights and was not effectively informed that he had a right to speak with a lawyer "'now' before speaking with law enforcement." (*United States v. Garcia, supra.*)

But more important than the text of the warning is the critical question of whether the offer of appointed counsel was "effective and express." *(Miranda,* 384 U.S. at 473.) Here the offer was clouded by the repeated suggestions by Detective Schultz that Sonny would lose a vital advantage — indeed, "his only chance in life" – if he did not talk with law enforcement prior to arraignment (and the appointment of counsel) so that they, the officers, could help prevent the charges from being as severe as they would otherwise be. Although respondent contends that "the detectives made it clear that to Enraca that he did have a right to counsel, but that the requested appointment would occur at the arraignment and the detective could not question Enraca *until after counsel been provided*" (RB 30 [emphasis added]), respondent provides no citation to the record for any place where they made any such thing clear to Sonny. This is because there is no place in the record where this was done – they told Sonny that they had to stop questioning him after he invoked his rights, *but never told him that he could speak with them after counsel was provided.*

Respondent appears to be arguing that because the detectives "had repeatedly told Enraca that since he had asked for counsel, neither Spidle nor any of the detectives could ask Enraca questions" (RB 30), Sonny could infer that he could wait until arraignment, speak to an appointed attorney and then talk with law enforcement officers with counsel present. But at no time did the officers say that Sonny could speak with them *after* arraignment. Respondent is apparently arguing that a 22 year-old Filipino with no prior experience with the law could make inferences that depended on a sophisticated understanding of the criminal process. And it would take a sophisticated understanding of that process to understand that there was no rush to talk with the police because he could always do so after formal charges were filed and that charges could be reduced even after they were filed. Thus, Schultz's pitch was particularly likely to have confused Sonny

about the legal process and the consequences of waiting to talk with police until after he had counsel. As discussed below, the failure to advise Sonny of his right to consult the Philippine Consul deprived Sonny of the ability to get advice that would allow him to make such an inference and is part of the totality of the circumstances which makes it clear that Sonny did not knowingly and intelligently or voluntarily waive his rights.

Moreover, the inference that respondent is attempting to impute to Sonny – that he had the option of deferring questioning until after a lawyer was appointed – was at odds with what Detective Schultz said was his intention to get Enraca to "deeply consider" talking during that 48-hour "period of time when Mr. Enraca would be able to speak to...law enforcement without a lawyer being present." (IV RT 735: 3-8.) Thus, respondent is asking this Court to impute an inference to Sonny that the interrogating officers neither made, nor intended. To the contrary, the record demonstrates that they intended that Sonny feel the pressure of not being able to talk with counsel for at least 48 hours when "his only chance in life" was to speak with officers before then and without counsel.

In addition, the totality of the circumstances in which Sonny was induced to speak with Spidle includes the four factors discussed extensively point B above: (1) *after* Sonny invoked his *Miranda* rights, Schultz violated *Edwards by* speaking to Sonny as a parent to a naughty child, encouraging Sonny to "deeply consider" talking to law enforcement without a lawyer present; (2) the "bad cop" confrontation, cursing, and threats engaged in by Schultz dovetailed perfectly with the "good cop" soothing engaged in by Spidle, (a strategy that worked – Sonny specifically cited the respect Spidle had given him (See IV RT 762:15-25) and contrasted it with the behavior of Schultz and Horton who acted like "assholes" (IV RT 761:23 to 762:6 (3).) Spidle conversed with Sonny about rewards, how the families of the victim

felt, honor, and respect, matters not related to booking in violation of *Pennsylvania v. Muniz*, *supra*. 496 U.S. at 601; and (4) when Sonny began talking with Spidle about matters outside of the booking process, instead of re-advising Sonny that statements made to Spidle could be used against him as required by *People v. Sims*, *supra*, 5 Cal.4th at 438-444, Spidle continued to converse with Sonny until he had reeled him in, only then making a perfunctory reference whether "have they read you your damn rights" (21 CT 5631-5632), rather giving him a clear and accurate warning that his statements could be used against him. Section B, immediately above, made the strong case that these four factors required a finding that *Edwards* was violated. But even if this Court does not agree, they are factors which are part of the totality of the circumstances pointing inexorably in the direction that Sonny's waiver was not voluntary, knowing or intelligent.

Even if this Court had any doubt in the matter, the law is clear that the burden is on respondent to demonstrate that Sonny, in "waiving" his *Miranda-Edwards* rights, did so with "full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Given the inadeqaute warnings given Sonny, the coordinated message that Sonny received that it was vitally important to Sonny's future that Sonny speak with police during "the period of time when Mr. Enraca would *be able to speak to...law enforcement without a lawyer being present*" (IV RT 735: 3-8), the bad-cop-good-cop tactics used before *and after* Sonny invoked his rights, and the suggestion that "his only chance in life" was to talk with law enforcement so that they could go to the district attorney to get the charges reduced, respondent has not come close to meeting that burden. Rather, the record establishes that the words and actions of Schultz and Spidle led Sonny to believe that he had to choose between his right to counsel and telling his side to the police when it might still matter – *before* arraignment.

Putting Sonny to this false and misleading choice in the context of improper post-invocation contact and a coercive bad-cop, good-cop interrogation technique clearly violated his rights under *Edwards*, *Bradshaw* and *Miranda*.

2. The undisputed violations of the Vienna Convention and 1948 Treaty Between the United States and the Philippines on Consular Relations are part of the totality of circumstances which prevent respondent from meeting its burden.

a. The undisputed violations. Were there any doubt about the invalidity of the waiver, the violations of the Vienna Convention and the 1948 Treaty resolve the issue in favor of invalidity. It is clear and undisputed that law enforcement never told Sonny of his rights to see consular officials and that they failed to notify the Philippine Consulate as required by the Vienna Convention and the 1948 Treaty between the Philippines and the United States. The trial judge found a violation of Article 36(1)(b) of the Vienna Convention requirement that law enforcement "inform the person concerned without delay of his rights under this sub-paragraph." (See IV RT 898:26.) It is also incontrovertible from the record that Detective Schultz was aware that Sonny was a Philippine national and gave Sonny a *Miranda* advisement, but did not advise him of his consular rights at that time or ever.(IV RT 727:20-27 (Schultz); 21 CT 5618-5674 [no mention of consulate in entire transcript of interrogation].) Similarly, Detective Spidle was fully aware of that Sonny was a Filipino, born and raised (21 CT 5633; IV RT 803), but never advised Sonny of his right to consult the Philippine consulate when he asked "did they read you your damn rights." (21 CT 5631-5632.)

Moreover, it is also clear that because law enforcement never notified the Philippine consulate of Sonny's arrest, they violated Article

VII.2. of the 1948 Treaty which requires that "Consular officers *shall be informed immediately* whenever nationals of their country are under detention or arrest or in prison."[2] Thus, the right under the 1948 Treaty to immediate notification goes beyond the rights conferred by the Vienna convention and was all the more clearly violated. Finally, law enforcement officers violated State Department instructions which required them to notify Sonny of his right to have consular officials notified and to notify the Philippine Consulate that Sonny had been arrested. (See AOB 72, fn. 18.) Respondent does not contest any of this.

b. Impact of the violations on Sonny. Respondent and appellant also agree that appellant can raise these undisputed violations of the Vienna Convention and the 1948 Treaty "as part of a broader challenge to the voluntariness of his statements to police." *(Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 126 S.Ct. 2669, 2682; see RB 31; AOB 73.) Appellant contends that these violations eliminate any doubt that respondent has failed to meet its burden of showing that Sonny's waiver was voluntary, knowing and intelligent. Respondent's only defenses are (1) "there was no conflicting or erroneous advice given" (RB 32), a meritless argument which ignores the overall context of the officers' statements to Sonny and which appellant has already addressed and refuted immediately above, and (2) the argument that appellant "relies on speculation and unsupported assertions." (RB 32.)

But there is nothing speculative about believing that if either Schultz

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[2] See AOB 73: The "Mandatory Notification Provisions" section of the State Department's 1998 manual (*Consular Notification and Access*) quotes the "shall be informed immediately" language from the bilateral consular convention with the Philippines on page 48. The same language is quoted in the on-line version, at http://travel.state.gov/law/consular/consular_744.html#provisions.

or Spidle had complied with their treaty-based obligations, Sonny would have been far less vulnerable to the officers' misleading and coercive interrogation. The record makes clear that Sonny was anxious to obtain legal advice, twice asking when he would get appointed counsel; and further that the officers had fed this anxiety by misleadingly suggesting that it was urgently important to talk with them before charges were filed and before counsel could be appointed. Hence, informing Sonny of his consular rights and thus his access to an *alternative* source of timely advice from persons concerned with his welfare would itself have likely led Sonny to refrain from further discussions with the police. The trial judge specifically stated that consular officials:

> would have ... gotten him counsel or helped ... and would have advised him not to do anything until counsel spoke with him first, just like you and I would have. And I assume that."

(IV RT 700: 19-22). Moreover, consular personnel could have corrected the officers' misleading message that it was crucially important for him to speak with officers before arraignment *(Cf. United States v. Doe* (9th Cir. 1988) 862 F.2d 776, 781 (9th Cir. 1988) (remanding foreign juvenile's case for prejudice determination where failure to notify the consulate of his custody "deprived him of support and counsel during the pre-arraignment period. . . . and may have led directly to his post-arrest confessions"); Consular personnel could also have assisted in Sonny's obtaining access to at least provisional counsel until the time of arraignment. Further, there is no reason to doubt that Sonny – or anyone in his situation – would have followed such consular advice. It is thus very reasonable to conclude – and not at all speculative – that the officers' violation of their treaty-based obligations served to reinforce the coercive and misleading impact of their improper interrogation tactics and thus further undermined the voluntariness of Sonny's "waiver" of his rights to counsel and to remain silent.

Indeed, in light of the record, respondent's argument about speculation is an odd one. Law enforcement violated the law by failing to notify Sonny or the Philippine Consulate and created any uncertainties about what would have happened had they not violated the law. Sonny's trial lawyers offered declarations from the Philippine Consul and Sonny. The Philippine Consul submitted a declaration, which stated that had the Philippine Consulate been notified, they would have conferred with Sonny upon notice and advised Sonny about his rights to counsel under *Miranda*. (Exhibit C, 5 CT 1249-1250.) Sonny's declaration stated that had he been informed of his right to consult the Philippine Consulate, he (1) "would have waited to speak with" his consular representatives before making any statements to the police and (2) would have "followed the advice of my Philippine consulate had I been notified about my right to their access, and would have not listened to or more assuredly talked to" the police detectives. (5 CT 1258-1259.)

c. The legal effect of the violations. While the issues of the voluntariness of a waiver under *Miranda* and *Edwards* and the prejudice relevant in an immigration proceedings are certainly different, the record below would be sufficient to establish a *prima facie* showing of prejudice in immigration proceedings where a foreign national has the burden to show that a failure of notification was prejudicial. (See *United States v. Rangel-Gonzales* (9th Cir. 1980) 617 F.2d 529, 531-532.) In the proceedings below, the burden was on the respondent to demonstrate that Sonny voluntarily waived his right to counsel with "full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, *supra*, 475 U.S. at 421 . In these circumstances, the trial judge erred in ignoring the impact of the Vienna Convention and 1948 Treaty violations on the issue of whether Sonny knowingly and voluntarily waived, apparently because he didn't "see that

there is any case authority or any logical proposition that a violation of the Vienna Convention means you can't introduce a statement." (4 RT 899:21-26.) The trial judge anticipated the U.S. Supreme Court's ruling that violations of the Vienna Convention were not independent grounds for suppression of evidence in the way that violations of *Miranda* are. But he erred in failing to understand that the violations can be raised "as part of a broader challenge to the voluntariness of his statements to police." *(Sanchez-Llamas v. Oregon, supra* 126 S.Ct. at, 2682.) Although the trial judge also said "I don't see how it is been shown that there is a linkage with any statements given" (4 RT 899:16-18), it appears from the subsequent statement about the unavailability of an independent suppression remedy for Vienna Convention violations that when he referred to "linkage" he was discussing the unavailability of a suppression remedy:

> You've equated it with *Miranda*, almost. In *Miranda,* it's a very specific area in criminal procedure about the statements. There's *linkage,* something flows from that directly, and I don't see there is any case authority or any logical proposition that a violation of the Vienna Convention means you can't introduce a statement.

(4 RT 899:19-26 [emphasis added].)

Indeed, the trial judge's refusal to hear the testimony of the Philippine Consul demonstrates that he decided the issue as a matter of law – that violations of the Vienna Convention do not give rise to an independent suppression remedy. If a suppression remedy for the violation is not available, the trial judge apparently reasoned, then the testimony of the Consul would be irrelevant.[3] Where the trial judge erred was in failing

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[3] As respondent notes (RB 3 citing 4 RT 847), the trial court also excluded Sonny's declaration. The question of the declaration's admissibility arose not in connection with its use as evidence concerning the impact of the treaty violation on Sonny's thought processes, but rather when the declaration was offered as evidence of Sonny's citizenship. The trial judge stated "The declaration doesn't come in as evidence ... it has to be

to consider what effect the violations of the Vienna Convention and 1948 Treaty had on Sonny's "broader challenge to the voluntariness of his statements to the police"(*Sanchez-Llamas, supra.* See also ; *State v. Morales-Mulato* (Minn. App. 2008) 744 N.W.2d 679 (holding that suppression is not an appropriate remedy for violation of a foreign detainee's rights under article 36 of the Vienna Convention, but may be considered in assessing whether a statement was voluntary, knowing, and intelligent); *Anaya-Plasencia v. State* (Ga. Ct. App. 2007) 642 S.E.2d 401, 404 (defendant's opportunity to cross-examine interrogating detective regarding failure to provide Article 36 advisement falls under "broader challenge" requirements of *Sanchez-Llamas*); *State v. Banda* (S.C. 2006) 639 S.E.2d 36, 43 fn.11 (interpreting *Sanchez-Llamas* as indicating that a defendant "may successfully move for a *Jackson v. Denno* hearing to suppress a statement by asserting a violation of the consular notification provisions of a treaty, along with other factors indicating the involuntariness of a statement").

d. The totality of the circumstances establishes that Sonny did not knowingly, voluntarily or intelligently waive his rights. Had the trial judge properly considered the Vienna Convention violations as part of the totality of the circumstances in deciding whether Sonny's statements to

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subject to cross examination unless the People agree to it." (4 RT 847:8-11.) The impasse over Sonny's citizenship was resolved when defense counsel produced Sonny's birth certificate. (IV RT 850-52) There is little reason to think, however, that an offer of testimony by Sonny concerning the impact of advisement of his consular rights and/or of the consular advise he likely would have gotten, would have been treated any differently than the proffer of testimony by the Philippine Consul. The trial judge simply saw no connection — no linkage – between the treaty violations and the admissibility of Sonny's statements to the police.

Further, of course, with or without the declaration, it is reasonable to believe that the treaty violations impaired Sonny's ability to resist the officers' misleading and coercive interrogation tactics.

police were given knowingly, intelligently and voluntarily, he would have concluded that the officers' improper conduct – their misleading and coercive interrogation tactics and their denial to Sonny of his treaty-based protections – precluded a knowing and voluntary waiver of Sonny's *Edwards* and *Miranda* rights. Although Sonny was originally willing to talk with Detective Shultz, when the interrogation became harsh, accusatory and used abusive language, Sonny invoked his constitutional rights under *Miranda*. ((21 CT 5616; IV CT 719:26 to 720:3.) When Sonny invoked these rights, Schultz told Sonny "*you're going to jail for double homicides* and "shut your mouth" (21 CT 5616), Sonny immediately inquired about when he would get to see his attorney, and Schultz told him "when you go to court and get arraigned, one will be appointed to represent you that's when you can see your lawyer. *Now I suggested [sic] for the next 48 hours, that you deeply consider that.*" (21 CT 5617 [emphasis added].)

Schultz later testified stated that when he suggested that Sonny "for the next 48 hours, that you deeply consider that," he was referring to "the period of time when Mr. Enraca would *be able to speak to... law enforcement without a lawyer being present.*" (IV RT 735: 3-8 [emphasis added].) Instead of responding to Sonny's desire to speak with an advocate with the highly relevant fact that he had a right to contact the Philippine consulate, Schultz chose to use the delay in getting counsel appointed until Sonny was arraigned to pressure Sonny into talking. The trial judge found that had Schultz done what he was legally required to do – notify Sonny of his right to consult with the Philippine Consulate and notify the consulate of Sonny's arrest – we know that the Consulate "would have ... gotten him counsel or helped ... and would have advised him not to do anything until counsel spoke with him first, just like you and I would have." (IV RT 700: 19-22). We also know that Sonny submitted a sworn declaration which stated that had he been informed of his right to consult the Philippine

Consulate, he would have "would have waited to speak with" his consular representatives before making any statements to the police and would have "followed the advice of my Philippine consulate had I been notified about my right to their access, and would have not listened to or more assuredly talked to" the police detectives. (5 CT 1258-1259.) Thus, the record supports that but for the failure of Schultz to notify Sonny of his right to consult the Consulate and/or the Consulate of Sonny's arrest, Sonny would not have made the statements he did. Certainly that failure contributed to the misleading and coercive force of the improper interrogation.

Moreover, there were second and third chances to advise Sonny of his right to consult with consular officials before Sonny made any incriminating statements: when Sonny asked Spidle when he would see a lawyer and when Spidle asked Sonny whether they had read him his "damn rights." Sonny's questions about when he could see counsel to both Schultz and Spidle strongly suggest that he was looking for someone less hostile than Detective Schultz to talk with in order to decide how to deal with what he was told was "his only chance in life" — telling his side of the story so the police could talk to the District Attorney before the charges were filed.

When Schultz told Sonny that he could not get counsel appointed for 48 hours, he passed him along to Detective Spidle, the waiting "good cop." And there is evidence that Sonny was shaken in exactly the way that Schultz intended. Sonny felt caught and wanted to talk to someone supportive. Sonny's first question to Spidle was whether he could call his girlfriend for support, which, after checking with Detective Schultz, Spidle allowed, even dialing the number for him. (IV RT 743). After Sonny got off the phone, the first thing Sonny did was to ask Spidle when he would get to see his lawyer (IV RT 744:8-11) – a strong indication that he was still looking for some friendly advice and would have preferred to speak to an ally than

the police. Spidle's answer made the right to an appointment conditional on Sonny being charged: *if he's charged formally with the crime,* that at that point they would make a determination to assign him a lawyer. (IV RT 744:13-21 [emphasis added].) Thus, Spidle made the possibility of Sonny getting to talk with counsel even more remote. There was no right to appointed counsel until after formal charges were filed, i.e., until after Sonny's "only chance in life" would have been missed. In this crucial period when Sonny was deciding whether to talk with police or wait to talk with counsel, Spidle twice failed to inform Sonny of his right to consult with the Philippine Consulate when it would have mattered: as part of his discussion about when Sonny would get to see his lawyer and when Spidle later asked him if they read him his "damn rights." Under the circumstances, had such an advisement been given, it is certainly likely that Sonny would have chosen to consult with the Consulate rather than continue speaking with Spidle.

Instead of advising Sonny of the legitimate options that he had to consult counsel and/or the Philippine Consulate and instead of merely playing the role of booking officer, Spidle did what he could to be the friend that Sonny was looking for – he not only allowed Sonny to call his girlfriend (IV RT 743), but he responded to Sonny's comments by continuing conversations in a supportive manner, volunteering statements about the possibility of a reward in the case (that it was possible that the parents had offered one) (IV RT 811:4-5), the likelihood that different versions of the events in question would be offered and there are "two sides to every story" (*id.* at 819:21-28) and the absence of honor and allegiance among friends ("We know friends will tell on you to stay out of trouble. And that's the way it is nowadays"). (V RT 824:1-5.) Sonny specifically cited the respect that Spidle showed him as the reason Sonny spoke with Spidle. (See IV RT 762:15-25.) The evidence thus suggests Spidle's

tactics in befriending Sonny provided Sonny with the outlet he was seeking and that had Spidle instead informed Sonny of his right to consult the Consulate, that is likely what he would have done, rather then talking to Spidle.

e. The trial judge erred when he failed to suppress Sonny's statements. Given that the burden is on the respondent to demonstrate that the waiver was voluntary, the trial court should have found that Sonny did not voluntarily, knowingly and intelligently waive. He was deliberately placed in a situation where he was led to believe that he had to choose quickly between pursuing "his only chance in life" to avoid the most severe charges by talking to law enforcement without counsel present and waiting to speak with an attorney. Psychological pressure was placed on him (in violation of *Edwards*) by "bad cop" Schultz to "deeply consider" talking without counsel present *after* Sonny invoked his rights and then by "good cop" Spidle who went far beyond normal booking procedures, commiserated with Sonny and failed to re-advise Sonny that any statements he made could be used against him (in violation of *Sims*). In the midst of this coordinated effort to get him to talk after he had invoked his rights at the crucial moments when he was likely considering what to do about the evidence with which Schultz had confronted him, Sonny was also denied information about his right to consult a supportive Philippine Consulate which would have helped him sort through the false choice imposed upon him by Schultz and Spidle. In all of these circumstances, his waiver was not knowing, intelligent or voluntary. Certainly the prosecution below and respondent here have failed to meet their burden. It was error to suppress Sonny's initial statement to Spidle or the two subsequent statements he

made to Spidle.[4]

D. Respondent Does Not Even Attempt to Meets its Burden of Demonstrating that the Error Was Harmless Beyond a Reasonable Doubt.

It is clear that an error involving denial of constitutional rights requires reversal unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 385 U.S. 18, 24.) The admission of Sonny's three recorded statements – the initial statement to Spidle on December 12, 1994, the statements in the police car on December 12, 1994, and the videotaped re-enactment on December 13, 1994 – obtained in violation of his rights under *Miranda* and *Edwards* is clearly a violation of his Fifth Amendment rights requiring *Chapman* analysis.

As discussed in detail in Appellant's Opening Brief (AOB 76-82), because it is clear that Sonny's three recorded statements were critical to his conviction, there is no way that the prosecution can establish that they were harmless beyond a reasonable doubt. Respondent does not even attempt to try. On this record, there can be no doubt that the trial judge's error in denying the motion to suppress was highly prejudicial; certainly it was not

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[4] The same night he made the statement to Spidle, he rode in a squad car to show the officers where he had discarded the gun. (21 CT 5618-5628 [introduced at trial as Exhibit 55A].) The next day, he went to the scene of the crime with Detectives Spidle and Schultz and reenacted the shootings. (VII RT 1457; XXVII RT 3795 [introduced at trial as Exhibit 3 and played twice for the jury].). Appellant contends that all three statements should be suppressed on the rationale discussed above and in the AOB, pp. 58-81. Respondent has made no argument that the two later statements which were part of Spidle's continuing interrogation of Sonny should be treated any differently than his initial statement to Spidle.

harmless beyond a reasonable doubt. [5]

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[5] Appellant believes that the arguments raised herein are responsive to the contentions made by respondent to support the trial judge's finding that appellant's waiver of his right was knowing, intelligent and voluntary. Appellant is concerned, however, that some of his responses might be deemed to go beyond a mere reply and be deemed new arguments that could and should have been raised in the AOB. As is not uncommon, consideration of opposing counsel's contentions has led appellant to see additional facets of the overall issue and to place emphasis on different facts. There was no tactical reason for failing to discuss these facets earlier; they simply did not come into focus at the time. Accordingly, in order to give respondent a full opportunity to respond to any points that may be deemed new and to ensure that the issue is fully and properly before the Court, appellant will be requesting leave to file a supplemental opening brief on the issue of the admissibility of his statements to the police.

II.

GIVEN THE EXTENSIVE EVIDENCE OF PROVOCATION, THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO INSTRUCT ON (1) HEAT OF PASSION AND SUDDEN QUARREL AND (2)THE IMPACT OF PROVOCATION ON WHETHER A HOMICIDE WAS DELIBERATE AND PREMEDITATED.

A. The Record of Extensive Evidence of Provocation,

There was no evidence that Sonny knew Dedrick Gobert or Ignacio Hernandez before Gobert confronted Sonny's friends in front of the pizza parlor. According to witnesses, both Gobert and Hernandez were shot within in a minute or two of when that confrontation turned violent in response to Gobert's going to his waistband as if he had a gun. (See XVII RT 2847 [testimony of Arnold Belamide]; XXIII RT 3442 [testimony of Herman Flores].) Thus, any "deliberation" occurred within less than that one-to-two-minute period. So this is not a case where there was evidence of planning or preparation. These were spur-of-the-moment shootings which the prosecutor could only argue were premeditated and deliberate in the sense that a driver's decision to go through a yellow light could be considered premeditated. (XXVII RT 3943-3944.)

In the face of what was a very weak prosecution case for premeditated first-degree murder, there was extensive evidence of provocation by Dedrick Gobert: he strutted with a "gangsterly walk" (XX RT 3274 [Testimony of Daryl Arquero]); was ready to take on a whole group by himself; and uttered gang insults, gang signs and identifications of himself as a Crips gang member. Gobert made gestures with his hands, including stretching his arms out with his palms up and making the letter "C" (for Crips) with his fingers (IX RT 2030-31, 2042-43 [Lester Maliwat]); he was very angry and yelled that he was "not afraid to die" (XVII RT 3084-85 [John Frick]), asked "What's up cuz?" (VIII RT 1709 [Gilleres]), yelled at the ABC group (that identified itself as Bloods) that

he, Gobert, was a Mafia Crip (XIV RT 2446 (Roger Boring]; XVI RT 2622 (Investigator Bernie Skiles testifying to what Roger Boring had said during an interrogation]) and then told them "fuck you slobs"[6] and "fuck Bloods." (See XI RT 1972-73, 2004 [Lester Maliwat].) Alfred Belamide testified that Gobert was dressed like a gang member and had a blue rag bandana. (XVII RT 2818.)

There was evidence that Dedrick's conduct and language had particularly provocative significance in street language. Lester Maliwat testified that saying "What's up cuz?" is a sign of disrespect for ABC. (XI RT 1972-1973; 2004, 2047.) Prosecution gang expert Michael Martin testified that when the phrase "What's up Blood?" was used by ABC,

> it is a way of identifying themselves as Bloods and it is also a derogatory statement to any Crips around. And normally the response back would be "What's up cuz?" whatever. And if those two statements go on, the verbal confrontation can then become violent.
>
> ....
>
> And by saying "what up, slob?"it's derogatory towards the Blood set or that particular Blood gang member. And by showing the C, he's saying, you know, "I am a Crip." And more than likely they're going to fight.

(XI RT 2072-73).

And it is undisputed that Gobert escalated the incident beyond provocative language and gang insults when he acted as if he was going for a gun: he put his hands to his waistband in a gesture that made many witnesses believe Gobert had a gun. (XV RT 2513-2514, 2531 [Roger Boring]); XIX RT 3110 [John Frick]); XX RT 3168 [Cedrick Lopez]); XXIII RT 3460 [Detective John Schultz testifying to what Lester Maliwat told him during an interrogation]); XVII RT 2820 [Alfred Belamide]); XIV

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[6] In gang parlance, "Slobs" is a derogatory term used by Crips members to insult Bloods. (IX RT 1846:9-22; XIV RT 2446.)

RT 2450 [Roger Boring].) Officer Michael Martin, the prosecution's expert witness on gangs testified that it would have been reasonable to infer from Gobert's gang signs, the fact that he was claiming to be a member of Crips and his gestures that Gobert had a gun and/or that he wanted the others he was confronting to think that he had a gun. (XII RT 2143-2146.) The trial judge found that Sonny and his group "had a belief that they were going to get shot at." (XXVI RT 3722:2.)

Gobert's overt threat to use a gun on the group was understandably met with a physical reaction from the ABC group: they rushed him and beat him and Hernandez to the ground in a melee involving at least ten and possibly as many as 30 people. Respondent concedes, but does not otherwise address the fact, that there was testimony that Sonny was in the midst of that melee. (See RB 35; XXIII RT 3459 [Testimony of Detective Schultz concerning what Lester Maliwat told him]; also testimony of Marcus Freeman – shooter was involved in the fight. (XXIII RT 3484).) The shooting took place within one or two minutes of the time Gobert gestured as if he was going for a gun. Because the fighting occupied most of that period, a jury could find that the shootings took place within a few seconds of the time Gobert and Hernandez were on the ground and the brawling had subsided. And Sonny's statement to the police provided evidence of additional provocation of Sonny, i.e., just before Sonny shot Gobert, Gobert yelled "fuck you asshole" at Sonny and appeared to be going for a gun. (21 CT 5653) Sonny also told police that Hernandez slapped at his hand and Sonny thought he was going for Gobert's gun just before Sonny shot Hernandez. (21 CT 5651-5652)

There was substantial evidence that Sonny reacted to the provocation in a rash, angry manner. First, there were his own statements that he had used methamphetamine twice the night of the shootings, was coming down from it and was jittery and on edge. (21 CT 5638 [on speed at the time ...

already coming down and so that was making me ... sketchy ... kind of scared and nervous"], 5644 ["I was already nervous cuz I was coming down from speed"][statement of Sonny Enraca to Detective Spidle]; XIV RT 2500-2501 [testimony of Roger Boring]; XVII RT 2720-24 [testimony of Dale Toguchi].) Defense expert Dr. Rosenberg testified that typical symptoms of methamphetamine intoxication include loss of impulse control, easy loss of temper, things done in an explosive way, outbursts of anger or physical outbursts. (XVIII RT 2881.) Dr. Rosenberg testified that "if you have someone who is agitated, on edge, and paranoid ....[then] commotion or the sense of ... impending danger going on around them is only going to aggravate it." (XVIII RT 2887.) He further testified that Sonny's description of himself in the statements to Detective Spidle – that he was jittery and on the edge – "would be absolutely classic for methamphetamine." (XVIII RT 2888.).

Second, there was the testimony from Lester Maliwat that as they drove away, Sonny was still angry– when asked why he shot the girl, Sonny said "Fuck them, they deserved it." (X RT 1926 [testimony of Lester Maliwat about a conversation immediately after the shooting.) Moreover, Eric Garcia testified that in a conversation later that night, when Garcia asked Sonny about why he shot, Sonny responded with "silence and rage ... more than just being angry." (XIII RT 2622.).

Given the extensive record of provocation and Sonny's reaction to it, both prosecution and defense requested instructions on manslaughter as a result of a sudden quarrel or heat of passion and for CALJIC No 8.73 which instructs the jury that "where provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation or premeditation.." (XXVI RT 3728-3730.) The defense also requested a special instruction that "evidence of provocation may by itself

raise a reasonable doubt in your mind that the killing was first-degree," which was refused. (22 CT 5937.)

All of these instructions appear amply justified by the extensive evidence of provocation in the record. There was plenty of evidence from which a jury could find that Gobert acted in a way that could cause an ordinary person to react rashly, violently and without deliberation: a belligerent drunk yelled that he was "not afraid to die," flashed gang signs and went for a gun. There is no doubt that Sonny shot in response to Gobert's behavior that night: there was no evidence that he had ever seen Gobert before that night and the shootings occurred within a minute or two of Gobert's undisputedly provocative act of reaching for, or making it appear he was reaching for, a gun. There was evidence that Sonny was jittery, jumpy and explosive as a result of coming down from amphetamines used earlier and that he was out of control, surprised by his own actions and in a rage about the shootings even hours later.

B. The Issue is Whether Factual Findings About Provocation Were For the Judge or Jury

The issue is before this Court because the trial judge, acting more as a finder of fact than a judge, concluded that no one took Gobert's extremely provocative behavior seriously until he went to his waistband apparently reaching for a gun, and the provocation which preceded the move for the gun was therefore irrelevant. (XXVI RT 3721- 3722) . Following mechanistic reasoning divorced from common experience, the trial judge ruled that in effect all of the provocation prior to the Gobert's move for the gun should not be considered; instead, the only defenses that the jury should consider regarding Gobert's actions were whether Sonny acted in self-defense or unreasonable self-defense. In doing so, the trial judge deprived the jury of its crucial role in assessing what crimes, if any, were committed in confrontations such this. As this Court has stated "[i]n the

present condition of our law *it is left to the jurors* to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion." (*People v. Valentine* (1946) 28 Cal.2d 121, 139, quoting with approval from *People v. Logan* (1917) 175 Cal. 45, 48-49 [italics added by *Valentine* court].)

Had the assessment of the evidence of provocation been "*left to the jurors,*" they could have used common sense to evaluate the evidence and concluded that when Gobert appeared to reach for a gun, the significance of his earlier belligerent words and conduct dramatically changed. What may have seemed idle threats and even possibly comic, impotent bravado before the move for the gun was made, took on a whole new meaning when backed up by an imminent threat of deadly harm. As an old Spanish saying wisely puts it, "as one moves from the stands to the arena, the aspect of the bull changes." (Laurence B. McCullough, James Wilson Jones, Baruch A. Brody, *Surgical Ethics* (1998) 180.) Such folk wisdom is precisely why we have juries – to infuse the abstract and detached analysis of the law and judges with the concrete wisdom, common sense, and community values which a group of twelve lay people bring. As we discuss below, the trial judge erred both in taking the issue of whether Gobert's actions were sufficient to make a reasonable person act rashly (and other issues related to voluntary manslaughter in the heat of passion or as a result of a sudden quarrel) away from the jury and in failing to assist the jury in its deliberations by making clear the inverse relationship between provocation and deliberation. The errors were highly prejudicial, depriving Sonny of a substantial defense to the charge of murder and depriving the jury of crucial guidance on the impact of provocation on the degree of murder. Each of

these points is discussed in turn below.

C. The Trial Judge Erred in Not Allowing the Jury to Decide Whether Gobert's Behavior Provoked Manslaughter.

In responding to appellant's claim that the trial judge erred by refusing to instruct the jury on manslaughter as a result of the heat of passion or a sudden quarrel, respondent does not dispute that there was clear evidence of provocation by Gobert. Indeed, Respondent concedes that there was evidence that Gobert's behavior during the confrontation with ABC was "belligerent, challenging and insulting" (RB 35, 36), that Gobert acted as though he had a gun at that confrontation and immediately prior to the shooting (RB 35) , and that there was evidence Enraca "was involved in the fight prior to the shooting." (RB 35.)

Nonetheless, respondent argues that it was not error to refuse instructions on heat of passion or sudden quarrel, relying on its own reading of the facts. Respondent's analytical approach appears to be to take the metaphorical film footage of an incident that itself lasted only minutes and segregate out from those minutes a few frames in isolation from the context of the other footage. While such an approach may facilitate its arguments and may present one interpretation of the facts which a jury might consider, it is hardly determinative of an issue that should have been put to this jury – whether Gobert's conduct "was sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Lee* (1999) 20 Cal.4th 47, 59 .) That is an issue which should have been put to this jury. And no amount of cutting the film into isolated frames can distort this reality.

In attempting to do so, respondent repeats and extends the error made by the trial judge by ignoring the crucial role of the jury in determining

what constitutes sufficient provocation to raise a reasonable doubt about whether an intentional killing was done with malice as opposed to in the heat of passion or as a result of a sudden quarrel. Respondent forgets that when assessing what instructions are appropriate, the question is what could a reasonable jury find, not what did the jury which did not receive the instructions actually find. Respondent offers six arguments to defend the trial judge's refusal to give heat of passion instructions. As discussed below, none of them have merit.

1. Contrary to respondent's contention, there was evidence that Sonny shot in response to Gobert's provocation Respondent, though acknowledging Gobert's provocative behavior prior to being rushed by ABC gang members, argues that "it is undisputed that Enraca did not shoot Gobert in response to that behavior." (RB 35.) Respondent is wrong; there was evidence from which a jury could find that Sonny shot as a direct result of that provocative behavior.. Respondent reaches its contrary conclusion based on its assertion without citation to the record, that Enraca shot only after "Gobert was on the ground *semi-conscious* and some of the gang members were walking away" (RB 35 [emphasis added].) But this assertion involves an interpretation of the facts that *Valentine* and the Sixth Amendment right to trial by jury commits to the jury, not to the judge, or even this Court. According to two witnesses, it was only between 60 and 120 seconds after Gobert's belligerent words and gang threats escalated into an apparent move for a gun that he was shot. From the evidence, a reasonable jury could find that almost all of that time was taken up in a brawl between Gobert and Hernandez (and some other members of their group) and a group estimated variously as between 8 and 25 ABC members (VIII RT 1626 [Gilleres: 25]); (IX RT 1922 [Maliwat: 8 or 10]); (XIX RT

3059, 3093 [Frick: 10-15]); (XVII RT 2795 [Madrid: 12 or 13]); and that it was only seconds after Gobert and Hernandez were on the ground that the fatal shots were fired. (IX RT 1989 [Maliwat testimony]; see also testimony of Jenny Hyon (IX RT 1989) [entire incident took only one to two minutes].). On these facts, a reasonable jury could have found that the brawl and shootings were all part of the same transaction stemming from Gobert's belligerent conduct. To be sure, the prosecutor did a creative job of arguing that the jury should see the facts as though everything had quieted down and there was plenty of time for Sonny to calm down from the excitement of Gobert's gang threats, his move for the gun and the brawl; but this creative advocacy did not make it "indisputable" that Sonny's shooting was after he had recovered from Gobert's numerous provocations: the evidence showed the shootings may have been only 60 seconds after Gobert went for his apparent gun and perhaps as little as a few seconds from the time Gobert went to the ground and Hernandez covered him. It was clearly a question for the jury whether to see the situation as a continuous transaction still animated by Gobert's provocations or two separate events. On the weight of the evidence, particularly the short period from Gobert's threat to use a gun to Sonny's shooting, this was a single transaction. Certainly, a reasonable jury could have so found.

Thus, Respondent's reliance on *People v. Daniels* (1991) 52 Cal.3d 815, 868 is entirely misplaced. In *Daniels*, the appellant contended that he was still in the heat of passion caused by police gunshots which had paralyzed him two years and three months prior to the time he shot the police victims in that case. This Court noted that "the rule is that, if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter." (*Ibid.*) The Court

held that "[t]he period of over two years and three months between defendant's injury and the killing of the police is, as a matter of law, sufficient to allow passions to cool." (*Ibid.*) In the present case, it was clearly a question of fact whether passions from Gobert's belligerent behavior, gun threat, and the fight had cooled in the seconds from the first motion by Gobert for his apparent weapon to Sonny's use of his gun. And that issue of fact – whether a sufficient time had elapsed for an ordinarily reasonable person to cool and whether Sonny had cooled – is allocated to the jury. The trial judge's refusal to instruct the jury on heat of passion or sudden quarrel manslaughter usurped the jury's function and was clear error.

2. Contrary to respondent's argument, instructions on both heat of passion and reasonable self-defense are appropriate where, as here, there is evidence of both. Respondent maintains that evidence that immediately before Sonny shot Gobert, Gobert cursed Sonny and Sonny thought he was going for a gun could not justify a heat of passion manslaughter instruction because "'a trial court should not instruct on heat of passion voluntary manslaughter, where the same facts would give rise to a finding of reasonable self-defense.'" (RB 35-36 citing *People v. Wickersham* (1982) 32 Cal.3d 307, 328.) Respondent quotes *Wickersham* accurately, but the facts in *Wickersham* are totally different from the facts here. In *Wickersham*, immediately prior to enunciating this principle, the Court specifically noted that in that case there was "virtually no evidence of provocation, even under a view of the evidence most favorable to appellant." (*Id* at 327.) In contrast, in the instant case, as respondent concedes, there was extensive evidence of provocation by Gobert prior to the shootings. Thus, *Wickersham* actually supports the giving of heat of

passion manslaughter instructions in this present case because of the extensive provocation by Gobert which preceded the shootings. Moreover, *Wickersham* involved a trial court's duty to give *sua sponte* instructions on lesser included offenses and this Court has pointed out that in *Wickersham* reluctance to give such instructions was based on its faulty reasoning that voluntary manslaughter was a defense when in fact it is a lesser included offense. (See *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn.10.) Given the clear provocation in the instant case and the faulty premises of *Wickersham*, respondent's argument that it would have been inappropriate to instruct on manslaughter on the basis of both unreasonable self-defense and heat of passion is wholly without support.

3. Contrary to respondent's contention, Gobert's belligerence and threats, including the threat to use a gun, were enough to support a finding of provocation that could have caused a reasonable person to react rashly and without deliberation. Next, respondent contends that "Gobert's belligerent challenging and insulting behavior would not cause an objectively reasonable person to act in a violent, intense, high-wrought emotional state." (RB 36.) In support, respondent cites *People v Humphrey* (1996) 13 Cal.4th 1073, 1087 and argues that although Sonny, as a gang member, might have been "especially sensitive to Gobert's insults, the standard for heat of passion is that of reasonable person, not a "reasonable gang member." (RB 36.) Once again, respondent chooses to edit the film to pick out a few select frames; Gobert did not simply utter gang threats, his gang threats were part of a whole pattern of conduct which also included visible drunkenness and belligerence, a statement that he was "not afraid to die," and his acting as if he was about to pull a gun. The full footage, as opposed to the isolated snippets on which respondent chooses to rely,

indicates that there was abundant evidence from which a jury could find that a reasonable person would have reacted rashly and without deliberation to these provocations. And the *Humphrey* case, which held that it was erroneous and prejudicial to instruct a jury that battered woman's syndrome evidence should not be considered in deciding whether defendant's actions were reasonable for purposes of self-defense, provides no support for respondent's contention. *Humphrey* notes that in deciding the question of reasonableness of self-defense, "the jury must consider defendant's situation and knowledge, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm." (13 Cal.4th at 1087.) In holding that the defendant was entitled to present and the jury entitled to consider "battered women's syndrome" evidence, the Court was not "replacing the reasonable 'person' standard with a reasonable 'battered woman' standard ... [and] would not in, another context, compel adoption of a 'reasonable gang member standard.'" (*Ibid.*) To the extent that the reasoning of *Humphrey* with regard to the reasonableness of self-defense is applicable to the issue in the present case – whether Gobert's conduct was sufficiently provocative that it would cause a reasonable person to act rashly and without deliberation – *Humphrey*'s approach supports appellant here. Appellant is not asking that this Court rule that the standard be changed to how a reasonable gang member would react to this provocation, only that the jury be allowed to decide the question of sufficiency of provocation and in doing so, be allowed to consider the "defendant's situation and knowledge." In this case that "situation and knowledge" would certainly include the fact that a belligerent drunk who purported to be a member of a rival gang was making threats and going for a gun. It is hard to comprehend respondent's

contention that this volume of evidence was insufficient for a jury to consider finding that it could cause a reasonable person to react with fear and anger and thus rashly and without deliberation.

Respondent also attempts to distinguish the *Breverman* case on the grounds that the evidence of intimidation and panic in that case was more extreme than it was in the instant case. Respondent offers a difference that is not a legally significant distinction. Appellant cited *Breverman* for the proposition that it was proper to give both heat of passion and unreasonable self-defense instructions where the evidence supported both and for the proposition that heat of passion/sudden quarrel instructions were appropriate even where the imminent threat from the brandishing of weapons had passed and thus that it was for the jury to decide if defendant acted in the heat of passion.. (See AOB 91-92.) . Because, as discussed above, there was considerable evidence from which a jury could find that Gobert's actions could cause a reasonable person to react with fear and anger, and thus rashly and without deliberation, the issues about what actually occurred should have been submitted to the jury on proper instructions. The only question before this Court is whether that evidence was sufficient to justify the heat of passion instructions, not whether the provocation in this case is more or less extreme than it was in *Breverman.*

4. Contrary to respondent's view, there was evidence that Sonny himself was provoked. Next, respondent maintains that there was no evidence that Sonny was emotionally aroused by Gobert's confrontational behavior until Gobert acted as if he had a gun. (RB 36.) This is but another attempt by respondent to isolate specific frames of the "film" from one another. Respondent relies primarily here on evidence that before Gobert appeared to go for a gun, he was not taken very seriously. As discussed

above, while it is true that there were a number of statements indicating that neither Sonny, nor other ABC members took Gobert's provocative gang threats and bravado very seriously until he appeared to go for a gun, the instantaneous reaction of the ABC group to rush Gobert once he made that gesture suggests that those earlier threats took on a whole new meaning once Gobert appeared ready to back them up with a firearm. A jury could find that this provocative behavior was all part of the same transaction and should have been given the opportunity to decide whether the whole pattern of provocation was sufficient to raise a reasonable doubt over whether Sonny acted in the heat of passion or as result of a sudden quarrel.

Moreover, respondent concedes by its failure to address appellant's argument that a jury could find that:

> reasonable people who are in a confrontation with someone who gestures as if he has a gun can become frightened, angry, and act rashly. (See e.g. Aaron T. Beck, Gary Emery, Ruth L. Greenberg (2005) Anxiety Disorders and Phobias: A Cognitive Perspective 42-43 [Anger is commonly associated with a physical threat].) Their reasonable reactions include not only defending themselves from an imminent threat of danger, but also anger at being threatened.

(AOB 91.) Thus, there can be little doubt that there was evidence from which a jury could find sufficient provocation to arouse heat of passion in Sonny and that same evidence could lead the jury to conclude – and certainly to at least entertain a reasonable doubt as to whether – Sonny was in fact in such a state when he shot.

People v. Moye (2009) 47 Cal.4th 537 (decided August 24, 2009) is not to the contrary. In *Moye*, the court found that there was no evidence that the defendant was subjectively provoked by his victim:

> The only testimonial evidence on the point, substantial or otherwise, came from defendant himself given his decision to

> take the stand and testify in his own defense. His only claim was that he acted out of self-defense in using the bat to thwart Mark's continuing advances. He provided a blow-by-blow recounting of events in which he characterized every swing he took with the bat as a defensive response to each of Mark's successive advances.

47 Cal.4th at 553. In contrast, in the instant case there was substantial evidence that Sonny was subjectively provoked by Gobert.

In his statement to the police that Sonny stated that he was "scared and nervous" when he went to the races because there had been a prior shooting of an ABC member by a rival gang and he was coming down from a dose of speed taken earlier that evening (21 CT 5638); he said that when he shot Hernandez he did so as a result of Gobert's prior actions – he thought Hernandez was trying to get Gobert's gun (21 CT 5653) – and then was confused about what he had done, saying "fuck, what the fuck did I do?" (*Ibid.*); and with respect to the shooting of Gobert, "I didn't know what was going on by this time after I shot the first shot (21 CT 5654); and he noted his consternation at his own loss of control because he was always preaching to his own colleagues: "I didn't want them to get into a fight and get suspended or even hurt you know" (21 CT 5633) and "why put each other in jail or why put each other in graves" (21 CT 5634) and he was "embarrassed when this happened ... because here I am always preaching to these young kids that you know that's not the way, that's not how you do it just use the law, you know turn around, be smart, play the better man all the time." (21 CT 5634.) Detective Spidle responded to these statements by saying "but sometimes anger can get the best of you right?" – a conclusion in which Sonny acquiesced. (21 CT 5634.)

Thus, not only was there evidence from which the jury could find that a reasonable person could be provoked into rash, un-deliberated

behavior, there was specific evidence that Sonny was scared, upset and angry as a result of the events of that night. Indeed, there was evidence that even after the shootings Sonny was still angry – when asked why he shot the girl, Sonny said "Fuck them, they deserved it." (X RT 1926 [testimony of Lester Maliwat about a conversation immediately after the shooting].) Moreover Eric Garcia testified that in a conversation later that night, when Garcia asked Sonny about why he shot, Sonny responded with "silence and rage ... more than just being angry." (XIII RT 2622.). Thus, this is not a case like *Moye* where the only evidence concerning defendant's behavior was that he was defending himself and absolutely no evidence that he was angered or otherwise provoked by the actions of his victim. Moreover, unlike the present case where Gobert's extensive provocation preceded the killing by only a minute or two and a reasonable juror could find that Sonny was still in heat of passion from that provocation, in *Moye* the prior provocative behavior by the victim had occurred the previous day and this Court reasoned that no reasonable juror could find the defendant was still in the heat of passion from the previous day. (47 Cal.4th at 651.)

5. Respondent's "undue advantage" argument overlooks that there was not only evidence of a sudden quarrel, but also uncontroverted evidence that Gobert initiated the quarrel and the gunplay, and that hence the issue of whether Sonny took undue advantage was a question for the jury. It is undisputed that the violent portion of the confrontation began when Gobert acted as if he was going for a gun and that there was evidence that Sonny was involved in the fight that preceded the shooting. Nonetheless, respondent argues that because Gobert had been overwhelmed by gang members and that he and Hernandez were beaten to the ground and disabled at the time Sonny shot, Sonny's use of a gun constituted an undue

advantage and which deprived him of the right to sudden quarrel instructions even though this may have been a sudden quarrel at the outset. (RB 37 citing *People v. Lee, supra,* 20 Cal.4th at 60, fn.6.) Respondent once again accurately quotes a legal principle, but gets its application to the facts wrong. In *Lee*, an angered husband engaged in a mutual shoving match with his wife, ended the shoving match, went to another room and returned with a gun with which he shot her in the head at close range. (20 Cal.4th at 60.). In these circumstances, introducing a gun was an undue advantage which deprived the defendant of the right to sudden quarrel instructions. In contrast, in the instant case, it was Gobert who introduced the specter of gun play into what had been a verbal quarrel. Sonny's use of a gun was responsive to Gobert's actions in appearing to reach for a weapon, and a reasonable jury could have so found As to respondent's argument that Gobert and Hernandez were disabled at the time Sonny shot, this was an appropriate argument to the jury after proper instructions, because there was conflicting evidence. Sonny stated to Detective Spidle that he believed Gobert had a gun and that Hernandez and Gobert were each reaching for a gun at the time he shot. Given the conflicting evidence, the issue of whether Sonny took undue advantage of a sudden quarrel was for a properly instructed jury. Once again, respondent seeks to replace Sonny's right to have a jury decide this issue with a *post-hoc* determination by this Court. This Court should reject respondent's invitation to compound the trial court's error.

6. Contrary to respondent's contention, the trial judge's instructional errors on the issue of provocation taint the Hernandez murder conviction, as well the Gobert murder conviction. Respondent argues that there was no evidence of any provocation by Hernandez and

therefore "no basis for any error impacting the Hernandez murder conviction." Respondent's contention is wrong for two reasons: (a) there was evidence of provocation by Hernandez; and (b) Gobert's provocative behavior was enough to call into question whether Sonny deliberated in shooting Hernandez as well (see point II.B. immediately below). Moreover, even if respondent were right, the reversal of Sonny's conviction for the Gobert murder alone would negate the special circumstance in this case – multiple murder within the meaning of Penal Code section 190.2(a)(3).

a. *Evidence of provocation by Hernandez.* There was evidence that Hernandez was highly intoxicated (XVII RT 2742 [blood alcohol level was .14) and belligerent: he had been in two confrontations with Asians that evening shortly before the incident that gave rise to the shootings. When they first got to Riverside, Hernandez was in a race and was cut off by another car; Hernandez got into a physical confrontation with the driver of the car that cut him off and then a number of that driver's friends, all Asian, joined in; Gilleres testified that there were 10 of them fighting with Hernandez. (VIII RT 1606-1608; see also XVII RT 2790-2793 [Testimony of Charles Madrid: Hernandez was confronted by 12 or 13 Asians and whites and Madrid pulled him away].) According to Gilleres, Hernandez had won the fight and when police sirens were heard, they all left the scene to avoid getting into trouble. (VIII RT 1609.) Hernandez left in his car with Jenny Hyon; Gilleres left in Dedrick Gobert's car with Gobert and Flores. (VIII RT 1609-1610.)

After that, they went to Etiwanda Avenue and on the sidewalk in front of the pizza parlor, they encountered a group of Asians, whom Gilleres recognized as having been involved in the previous confrontation with Hernandez. (VIII RT 1612.) They came up to Hernandez and started

arguing and yelling. (VIII RT 1613.) The incident escalated to the point that the Asians drew a gun on Hernandez' group. The confrontation ended when an older Asian man came along and apparently told the guy with the gun to put the gun away, because the young man with the gun nodded and put the gun away. (VIII RT 1666-1667.) The yelling back and forth continued for a short time after the gun was put away and then both sides backed away. (VIII RT 1669.) Sonny witnessed this confrontation. (21 CT 5639, 5642.)

These incidents were the immediate precursor to the confrontation between Gobert, Hernandez and Sonny and his group. Gobert apparently mistook Sonny and his group for the gang that Hernandez and their group had confronted earlier. (XVI RT 2514 [Testimony of Roger Boring]; XIX RT 3063, 3084 [John Frick]; XX RT 3233-3234 [Daryl Arquero].) Gobert's provocative behavior precipitated the melee which escalated into a physical fight when Gobert appeared to go for a gun. Hernandez joined the fight (VIII RT 1626 [Christine Gilleres]), was fighting with some members of the ABC group (IX RT 1979 [Lester Maliwat) and eventually jumped on top of Gobert to protect Gobert from further blows. (XV RT 2534 [Roger Boring]; VIII RT 1627-1628[Christine Gilleres].) When Sonny went over and picked up Hernandez by the hair to try to identify him, he shot Hernandez when Hernandez slapped Sonny's hand (in which he held a gun) and then turned and got to one knee and Sonny thought Hernandez was reaching for Gobert's gun. (21 CT 5652-5653.)

Beyond the direct provocation of apparently reaching for a gun, Hernandez' violent recent history and his conduct in joining Gobert in the fight were sufficient provocation to justify a manslaughter instruction here. When one joins a fight on the side of the initiator, he adopts the provocative

behavior of the initiator; Gobert's provocations thus became part of the context in which Sonny acted against both.

b. Provocation by Gobert and Hernandez' participation in the fight negated deliberation. Even if the circumstances leading up to the shooting of Hernandez were not sufficient to constitute provocation justifying a voluntary manslaughter instruction as to him, as discussed immediately below in Section II.B., there was more than sufficient evidence to justify instructions under CALJIC No. 8.73 directing the jury to consider the provocation as bearing on deliberation. A properly instructed jury could have found that the shooting of Hernandez, like that of Gobert, was without deliberation because of the provocation by Gobert and Hernandez' conduct in joining the fight.

c. Special Circumstances Negated if shooting of either Hernandez or Gobert was not first- or second-degree murder. Even if the shooting of Hernandez is assumed to be first degree murder, any finding of error tainting the conviction for the shooting of Gobert would negate the special circumstance here which was based on Penal Code section 190.2(a)(3) – conviction "of more than one offense of murder in the first or second degree." Thus, if the Court finds as argued above that the trial judge prejudicially erred by failing to give an instruction on voluntary manslaughter in the heat of passion or as a result of a sudden quarrel as to Gobert, then the special circumstance must be vacated. Moreover, if the Court finds, as argued below, that the trial court prejudicially erred in failing to give CALJIC No. 8.73 as to both Gobert and Hernandez, then the special circumstance finding must be vacated as this would taint the finding that either was first-degree murder.

D. It was Error to Fail to Instruct on the Effect of Provocation On Deliberation.

Even assuming that there was merit to respondent's arguments concerning whether there was adequate evidence to support an instruction on voluntary manslaughter based on heat of passion or sudden quarrel, there is simply no credible argument that the surrounding circumstances were not sufficient to justify instruction under CALJIC No. 8.73 that the jury should consider whether the evidence of provocation negated deliberation and premeditation, and so precluded first-degree murder verdicts for both the Gobert and Hernandez homicides. Nor was there a basis for refusing the defense's request for a special instruction to the jury that "Evidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree." (22 CT 5937.) The question discussed above with regard to the manslaughter issue is whether the substantial evidence of provocation was enough to cause an objectively reasonable person to act in a violent, intense, high-wrought emotional state; there was never any legitimate dispute that Gobert's behavior was highly provocative. Thus, there can be no dispute on this record that Gobert's behavior was provocative enough to justify instructions under CALJIC No. 8.73 and the special instruction requested by the defense.

Indeed, respondent does not contest that there was evidence of provocation sufficient to justify these instructions. Rather, respondent argues that despite the evidence of provocation sufficient to raise reasonable doubt about whether an ordinary person could deliberate in the face of this provocation, the "only evidence of Enraca's emotional response to Gobert's actions ...was amusement, nothing that would support the requested instruction." (RB 39) and that therefore the evidence adduced

failed to meet the additional requirement that there be evidence of how Sonny actually reacted to the provocation. *(See People v. Ward* (2005) 36 Cal.4th 186, 214-215 cited in RB at 38-39.)

In *Ward*, this Court described the confrontation which preceded the shootings as following a brief verbal encounter in which a confederate of defendant issued a territorial gang challenge ("This is neighborhood") several times to which one of the victims eventually responded "'This is neighborhood' as if he agreed; at that point, the defendant pulled a gun from his jacket and began shooting." (36 Cal.4th at 196.) In analyzing the applicable law, this Court stated that "[t]he evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (36 Cal.4th at 215 [quoted at RB 38.) As respondent states, on these facts, this Court found that where there was no evidence of the defendant's reaction to the victim's "agreement" that was this was his gang's territory, it was not necessary to give CALJIC No.8.73 because "the record contains no evidence of what, if any, response defendant had to the purported challenges." (36 Cal.4th at 215 [quoted at RB 38.]).

Respondent's reliance on *Ward* is misplaced for two reasons: (1) the provocations in the instant case were so extreme that it is doubtful that anything more was necessary to justify an instruction under CALJIC No. 8.73; and (2) there was more than sufficient evidence of Sonny's response to the provocation to require an instruction under CALJIC 8.73 and the special instruction that "Evidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree."

1. The provocation here was sufficient to justify instructions on its effect on Sonny's ability to premeditate or deliberate. *Ward* states, as respondent notes, that "[t]he evidentiary premise of a provocation defense is the defendant's emotional reaction to the conduct of another, which emotion may negate a requisite mental state." (36 Cal.4th at 215.) In other words, there there must be some basis for an inference as to defendant's emotional response. The evidence in *Ward* – that the victims agreed with defendant's confederate that this was the victims' neighborhood -- seems questionable as provocation of any kind. Certainly the actual pre-shooting interaction in *Ward* was just too mild and ambiguous to permit, without more, any inference that the defendant responded emotionally, and the Court rejected the defendant's argument that a provocation instruction was required.

The record in the present case is quite different. Indeed, given that here the victim engaged in extensive conduct that was insulting, threatening and initiated gun violence, the two cases are different in kind, not just in degree. Here, the evidence of provocation was so extensive that the jury should have been told that they could consider that behavior in deciding whether Sonny shot with the premeditation and deliberation required for first-degree murder even without specific evidence of the precise emotional impact on Sonny.

2. The evidence of Sonny's response to the provocation was more than sufficient to justify the requested instructions. Further, in addition to the clear and obvious evidence of very provocative behavior, the record is replete with direct evidence of Sonny's emotional reaction to that behavior. There was substantial evidence that Sonny was upset by Gobert's actions and the brawl that ensued. As discussed on page above, Sonny stated to the police that he was "scared and nervous" when he went

to the races because there had been a prior shooting of an ABC member by a rival gang and he was coming down from a dose of speed taken earlier that evening (21 CT 5638); he said that when he shot Hernandez he did so as a result of Gobert's prior actions – he thought Hernandez was trying to get Gobert's gun (21 CT 5653) – and then was confused about what he had done, saying "fuck, what the fuck did I do?" (*Ibid.*) With respect to the shooting of Gobert, he said "I didn't know what was going on by this time after I shot the first shot" (21 CT 5654) and he noted his consternation at his own loss of control because he was always preaching to his own colleagues: "I didn't want them to get into a fight and get suspended or even hurt you know" (21 CT 5633) and "why put each other in jail or why put each other in graves." (21 CT 5634.) He was "embarrassed when this happened ... because here I am always preaching to these young kids that you know that's not the way, that's not how you do it just use the law, you know turn around, be smart, play the better man all the time." (21 CT 5634.) Detective Spidle responded to these statements by saying "but sometimes anger can get the best of you right?" – a conclusion in which Sonny acquiesced. (21 CT 5634.)

Moreover, the prosecution introduced evidence that demonstrated that even after the shootings that Sonny was angry at the victims – when asked why he shot the girl, Sonny said "Fuck them, they deserved it." (X RT 1926 [testimony of Lester Maliwat about a conversation immediately after the shooting].) And, Eric Garcia testified that in a conversation later that night, when Garcia asked Sonny about why he shot, Sonny responded with "silence and rage ... more than just being angry." (XIII RT 2622.). The evidence from Maliwat and Garcia by itself was sufficient for the jury to conclude that Sonny had reacted emotionally to the incident and therefore,

with all the other evidence of provocation and reaction by Sonny, required the giving of CALJIC 8.73 when requested by the defense. This evidence also fully justified the defense request for a pinpoint instruction that "Evidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree." (22 CT 5937.) In these circumstances, it was clear error to deny the instructions requested by the defense.

E. The Errors Were Prejudicial.

1. The error in failing to instruct on voluntary manslaughter in the heat of passion was prejudicial.

a. There was a reasonable possibility that jury would find that the provocation was sufficient to affect an ordinary reasonable person.

Respondent argues that any error in failing to instruct on voluntary manslaughter did not prejudice Sonny because "there is no reasonable probability the jury would find a gang-member's hyper sensitivity to be objectively reasonable." (RB 39.) In doing so, respondent seriously mis-characterizes the evidence and the law. As discussed above, there was extensive evidence of insults, belligerence, and threats that culminated in Gobert's apparently going for a gun; this was not some minor gang insult as in *Ward*. Indeed, respondent's argument here is really to repackage its unconvincing argument that this Court should endorse the trial judge's erroneous approach in failing to let the jury decide this issue. The trial judge erred by failing to instruct on voluntary manslaughter refusing to allow the jury to decide whether the shooting was (1) a separate act to be viewed in isolation from the extensive provocation in which Gobert had engaged only 60 to 120 seconds before or (2) whether Gobert's provocative actions and the shooting were part of one continuous transaction.

By erroneously refusing to instruct the jury on voluntary manslaughter as a result of a sudden quarrel or in the heat of passion, the trial judge deprived Sonny of his constitutional right to trial by jury and by accurate instructions on all elements of the charged offense and any lesser included offense supported by the evidence (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523, *Mullaney v. Wilbur* (1975) 421 U.S. 684, *Beck v. Alabama* (1980) 447 U.S. 625, *People v. Breverman, supra,* 19 Cal.4th at 188-190 (Kennard, J., dissenting)), as well as his constitutional rights to have the jury adequately instructed on the defendant's factually supported theory of the case (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740), to a jury determination of all elements of the charged offense (*Mullaney v. Wilbur, supra.*), to reliable capital guilt and sentencing determinations (*Beck v. Alabama, supra,* 447 U.S. 625, *Zant v. Stephens* (1983) 462 U.S. 862, 879)), and to fundamental fairness under the due process clause, in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Accordingly, he is entitled to reversal unless the state can demonstrate that this error was harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 385 U.S. 18, 24.)

The issue is, then, whether respondent can show the failure to properly instruct the jury and allow the jury to decide the was harmless beyond a reasonable doubt. To state the question is to answer it: Sonny was denied a trial by jury on this issue, and the weight of the evidence was that it was a single transaction. To segment the tragic narrative into discrete sections when the whole incident took by some testimony as little as one minute from the time Gobert aggressively confronted Sonny's group first with words and gestures and then with an apparent move for a gun stretches credulity; and thus, to say that no reasonable juror, properly instructed,

could have seen this as one continuous transaction – from Gobert's provocation and move for a gun to the shootings – is utterly unsupportable. The trial court's error in failing to instruct on voluntary manslaughter in the heat of passion or as result of a sudden quarrel was clearly prejudicial. Not only has respondent failed to demonstrate that it was harmless beyond a reasonable doubt, but there is more than a reasonable possibility that the result would have reached a different verdict but for this error.

b. The jury's rejection of unreasonable self-defense did not decide the issue of provocation. Nor does the fact that the jury was instructed on voluntary manslaughter as result of unreasonable self-defense change this conclusion. A reasonable jury properly instructed could reject unreasonable self-defense, but still find that the shootings were manslaughter in the heat of passion. This is true for two reasons. First, the jury was instructed under CALJIC No. 5.17 that self-defense or unreasonable self-defense is "not available and malice aforethought is not negated if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force" and under CALJIC No. 5.55 that "[t]he right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self defense." As discussed in argument III.B. below, the jury could have found that it was unnecessary to consider the claims of self-defense because of either of these two instructions (and done so on erroneous grounds). Thus, there is no necessary implication that the jury rejected Sonny's explanation of what happened in the final seconds before the shooting. But even if they had, that does not make it unlikely that properly instructed they would have recognized, on the basis of the evidence concerning the entire incident, that there was a least a reasonable doubt whether Sonny acted in

the heat of passion or as a result of sudden quarrel. This is why this Court has required that instructions on both theories of manslaughter be given where as here the evidence justifies both . (*People v. Breverman, supra,* 19 Cal.4th at 163-164.)

Second, to the extent that any argument of harmless error is based on the notion that the jury's rejection of the self-defense arguments is inconsistent with the jury finding the shootings were as a result of provocation, it flies in the face of well-settled principles that assume that jurors follow instructions as given and vote according to the law given them by the trial judge:

> We presume that jurors comprehend and accept the court's directions. (E.g., *People v. Bonin* (1988) 46 Cal.3d 659, 699.) We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. (*Francis v. Franklin* [(1985)] 471 U.S. [307] at p. 325, fn. 9.)

(*People v. Mickey* (1991) 54 Cal.3d 612, 690, fn. 17.) The jury's verdict on a totally separate issue thus cannot be the basis for harmless error on the current issue, nor does their verdict on unreasonable self-defense without proper instructions on heat of passion make a different finding on the totally separate issue of provocation less likely. To the contrary it is reasonably likely a properly instructed jury could have found that Gobert's conduct was provocative enough to cause a reasonable person in general and Sonny in particular to act rashly. Indeed, given Gobert's very provocative conduct, the quickness of the entire incident, and Sonny's methamphetamine intoxication and continued anger even after the shooting, this is likely what actually happened. The failure to instruct the jury they could so find was clearly prejudicial. Certainly, respondent cannot show that it was harmless beyond a reasonable doubt.

2. It was prejudicial to fail to instruct that evidence of provocation may negate the element of deliberation necessary for first-degree murder. Respondent's argument that it was harmless when the trial judge erred by failing to instruct the jury under CALJIC No. 8.73 (or with the defense special instruction that provocation by itself could create a reasonable doubt as to premeditation and deliberation) is also without merit. Respondent argues that trial judge's error was not prejudicial because the jury was instructed under CALJIC No. 8.20 that deliberation required the "careful thought and weighing of considerations"; that "intent to kill must have been arrived at 'upon pre-existing reflection' and not 'under a sudden heat of passion'; and distinguished between '[a] cold, calculated judgment and decision' and 'a mere unconsidered impulse'" (RB 39-40 citing CALJIC No. 8.20). Respondent's contends that CALJIC No. 8.73 was "implicit" in these instructions. However, because the trial judge also failed to give CALJIC No. 8.42 which defines "sudden heat of passion," the jury had no guidelines for applying CALJIC No.8.20 to the specific facts of this case. (Cf. *Ward, supra* at 214-215 [Court found no error in failing to give CALJIC No. 8.73 *but only where CALJIC No. 8.42 was also given*.)

Contrary to respondent, general instructions defining the elements of a crime like CALJIC No. 8.20 are not sufficient to fully instruct the jury when defendant has a specific theory of the case and the jury is left to infer the law relating to the defense theory of the case. As this Court stated in *People v. Sears,* "a defendant, upon proper request, has a right to an instruction that directs attention to evidence from a consideration of which reasonable doubt of his guilt could be engendered."*People v. Sears* (1970) 2 Cal.3d 180, 190.) And the Court in *Ward* agreed that the trial court "must

give" CALJIC 8.73 "if it is supported by substantial evidence." (36 Cal.4th at 214 [as discussed above *Ward* found no error because there was not substantial evidence to support giving CALJIC 8.73].) In reversing a trial court which had refused to give a pinpoint instruction on alibi creating a reasonable doubt, this Court has said "'[i]t is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with more importance.'" *People v. Kane* (1946) 27 Cal.2d 693, 700 quoting *People v. Cook* (1905) 148 Cal. 334, 347.) See also *People v. Mayo* (1961) 194 CA2d 527, 537 [prosecution for failure to render aid to persons injured in an automobile accident: prejudicial error to fail to give requested specific instruction on the effect of defendant's mental condition at the time of the accident on the requirement of knowledge, despite the fact that ordinarily sufficient general instructions incorporating the words "knowingly" and "wilful" were given.].)

The Ninth Circuit has consistently stated that if a defendant's theory of the case is supported by the law, and if there is some foundation for the theory in the evidence, the failure to give the defendant's proposed jury instruction concerning his or her theory is "reversible error." *(United States v. Escobar de Bright* (9th Cir. 1984) 742 F2d 1196, 1201; *United States. v. Lesina* (9th Cir. 1987) 833 F2d 156, 159-60; *United States. v. Sotelo-Murillo* (9th Cir. 1989) 887 F2d 176, 178-79.) In *Escobar de Bright,* the court held that the right to have the jury instructed as to the defendant's theory of the case is one of those constitutional rights whose infraction can never be treated as harmless error. (742 F2d at 1202.) In so holding the court stated that:

> Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charges against him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

(Escobar de Bright 742 F2d at 1201-02.) Hence, the failure to give such an instruction prejudicially infringes the defendant's constitutional entitlement to present a defense and violated Sonny's Sixth and Fourteenth Amendment right to have the jury adequately instructed on the defendant's factually supported theory of the case (*Conde v. Henry*, *supra,* 198 F.3d at 739-740) and deprived Sonny of his Eighth and Fourteenth Amendment right to reliable guilt and sentencing verdicts in a capital case (*Beck v. Alabama*, *supra,* 447 U.S. 625; *Zant v. Stephens*, *supra* 462 U.S. at 879);` *Cf. People v. Tilehkooh* (2003) 113 Cal.App.4th 1433 [finding due process violation in trial court's refusal to allow defendant to rely on medical marijuana defense to probation violation allegation].) Thus, at the least, the *Chapman* standard placing the burden on the prosecution to show that the error was harmless beyond a reasonable doubt applies.

The key, practical, real-world point is this: the jury was given no guidance on how to evaluate the evidence if it believed that Sonny was angered by Gobert's extensive provocation and shot him in retaliation for those provocative actions. Absent any definition of "sudden heat of passion," the jury could have concluded that Sonny's anger was his motive for the shootings without focusing on whether the victims' actions within a one-minute time span provoked the anger and negated deliberation. Had the jury been advised either that:

(1) "you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation or premeditation,"

(22 CT 5924 [CALJIC No.8.73] or that:

(2) "[e]vidence of provocation may by itself raise a reasonable doubt in your mind that the killing was first degree."

(22 CT 5937 [Defense Requested Instruction No.3]), there is more than a reasonable possibility that they would have found Sonny guilty of no more than murder in the second degree. Certainly, given the extensive evidence of provocation, the prosecution cannot show that the error was harmless beyond a reasonable doubt.

III.

CALJIC No. 5.17 AND 5.55 WERE AMBIGUOUS AS APPLIED TO THE EVIDENCE THAT SONNY ENTERED THE FIGHT SCENE AND, WHEN COMBINED WITH THE PROSECUTOR'S CLOSING ARGUMENT, DENIED SONNY A FAIR TRIAL ON HIS DEFENSES OF SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

A. It Was Error to Instruct the Jury with CALJIC No. 5.55 Where There Was No Evidence That Sonny Approached Gobert or Hernandez with With the Intention of Creating A Need for Self-Defense.

CALJIC No. 5.55 states that:

> The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.

CALJIC No. 5.55 (6th ed. 1996). There was absolutely no evidence that Sonny either sought "a quarrel" or did so "with the intent to create the real or apparent necessity of exercising self-defense." At trial, the prosecutor argued that "a defendant who forces his way through people to get to two guys, that's putting yourself in a situation where you can claim you need to use self-defense" (XXVII RT 3938:5-11.) He later argued that "the only way to fashion a threat to himself is to get in there. And that's what they want you to believe is self-defense." (XXVIII RT 3946:4-6). Not even respondent tries to justify this stretch of the language of CALJIC No. 5.55. This is because there was no evidence that Sonny sought any quarrel with either Hernandez or Gobert. Even if there were, there is not an iota of evidence that Sonny's intent in coming up to Hernandez or Gobert was to create a need for self-defense. The prosecution's theory was that Sonny went up to them with the intent to kill them. Sonny's statement to the police was that he was trying to break up the fight. Neither the evidence supporting the prosecution nor defense theory, nor any other evidence in the

record, supports any finding that Sonny was there to create the need for self-defense. It was error to give CALJIC No. 5.55 because there was simply no evidence to support the notion that Sonny either approached them to "quarrel" or did so with intent to create the need for self defense.

B. It Was Error to Give The Last Sentence of CALJIC No. 5.17 Because The Language Was Ambiguous And Permitted The Jury To Reject the Defenses of Self-Defense or Unreasonable Self-Defense Without The Required Showing Of A Physical Assault Or The Commission of A Felony.

CALJIC No.5.17 instructs the jury that "a person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury" is not guilty of murder, but manslaughter. The last sentence of that instruction restricts the defense:

> However, this principle is not available, and malice aforethought is not negated, if the defendant by his unlawful or wrongful conduct created the circumstances which legally justified his adversary's use of force.

(22 CT 5863.)[7]

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[7]CALJIC No. 5.17 (6th ed. 1996), in full unmodified form, reads as follows:

> A person, who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.
>
> As used in this instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]

As discussed in Appellant's Opening Brief, it is clear that under *In re Christian S.* ((1994) 7 Cal.4th 768, 773, fn. 1), the only behavior which deprives a defendant of the right to self-defense under either CALJIC No.5.17 for unreasonable self-defense or under settled principles of actual self-defense is "his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony)." And prior cases have made clear that to disqualify a defendant from claiming self-defense, the defendant's conduct must be a direct provocation which would justify self-defense by his adversary. (See *People v. Barton* (1995) 12 Cal.4th 186, 191-192 202-203 [fact that defendant carried a concealed weapon to an aggressive encounter, threatened to damage the victim's car and waited for the victim did not deprive defendant of right to imperfect self-defense instruction]. See also *People v. Randle* (2005) 35 Cal.4th 987, 1002 [fact that defendant had engaged in car burglary which set in motion a chain of circumstances which led to his shooting the owner of the car, did not deprive him of the right to assert imperfect self-defense of others when he had retreated from the scene and victims were no longer justified in using force].) (AOB 105-106.)

The instructions as given allowed the jury to find that defendant's conduct was "wrongful" without regard to whether it constituted a physical assault or a felony. Respondent argues that because Sonny "approached with his gun drawn and he demanded to know where Hernandez was from — a typical gang challenge which is often a prelude to violence ...., the jury could reasonably infer that any movement by Hernandez was provoked by Enraca's aggressive and threatening conduct [and] .... reach a similar inference with respect to Gobert". (RB 43.) In respondent's theory, Sonny's having his gun visible was the "wrongful conduct" required to make the last sentence of CALJIC No. 5.17 applicable. But the undisputed evidence was that it was Gobert's gesturing as if he had a gun that initiated

the melee at most two minutes earlier and the gun in Sonny's hand was clearly there because of this threat by Gobert; there was nothing in the record to suggest that having a gun out in response to Gobert's clear indications that he was going for his gun constituted either an assault or felony as required by *Christian S.* It was rather a reasonable and permissible response to Gobert's threat which could not serve as the basis for justifying the giving of the last sentence of CALJIC No. 5.17, and it was a clear error to do so..

Nor was Sonny's alleged gang challenge (lifting Hernandez by the hair and asking him "where you from") an adequate basis for giving that instruction. Sonny's conduct may have been rude and threatening, but it was certainly not the kind of conduct that would justify Hernandez in resorting to a gun or using deadly force in response by Hernandez. *Cf People v. Ward, supra*, 36 Cal.4th at 196, 214-215 [gang challenge not sufficient to require giving CALJIC No. 8.73].) It was therefore error to give the last sentence of CALJIC No. 5.17 at all.

Indeed, even if the jury could have found on this record that Sonny's conduct toward Hernandez had been sufficiently threatening to be the kind of "wrongful or illegal conduct" contemplated by CALJIC No. 5.17, the instruction as given did not incorporate the requirements of *Christian S.*, provided no guidance on the definition of "wrongful or illegal conduct," and permitted the jury to accept prosecutor's suggestion that Sonny's having a gun out in the proximity of Hernandez and Gobert was the kind of "wrongful conduct" that would deprive him of the right to self-defense (See (XXVII RT 3938:5-20; 3946:4-6). Thus, even if an instruction addressing the subject matter covered by the last sentence of CALJIC No. 5.17 were justified, the instruction given here was erroneous because it did not limit

the jurors to applying it only if they found the kind of "wrongful or unlawful conduct" required by *Christian S.*

C. Error was not invited or waived by the defense.

Respondent contends Sonny's lawyers waived his claim of instructional error, because the defense as well as the prosecution requested that CALJIC No. 5.17 and CALJIC No. 5.55 be given and that during closing argument, "defense counsel also referenced the instruction in arguing support of self-defense that Gobert, and not Enraca, was the person who instigated the confrontation." (RB 41) Respondent's argument ignores the purpose and history of the invited error rule. As has been clear for 40 years,

> [t]he trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction.

(*People v. Graham* (1969) 71 Cal.2d 303, 317-319[; see also *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5].) It is simply not enough that defense counsel jointly with the prosecutor requested instructions which turned out to be confusing; rather, to establish invited error, the record must reflect that defense counsel had a deliberate tactical purpose for doing so -- *'the issue centers on whether counsel deliberately caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result.'* (*People v. Wickersham, supra*, 32 Cal.3d at 334-335 [emphasis added, citations omitted], overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201]; accord: *People v. Oden* (1987) 193 Cal.App.3d 1675, 1683.) As this Court stated in *People v. Bradford* (1997) 14 Cal.4th

1005, 1057, for the doctrine of invited error to apply, it "must be clear that counsel acted for tactical reasons and not out of ignorance or mistake."

In the instant case, there is nothing to suggest that defense counsel acted for "tactical reasons and not out of ignorance or mistake." The only indication that the defense requested the instruction is an "x" in the box "requested by defendant" on each of the two jury instruction forms in question. (See 22 CT 5863, 5671.). The box "requested by People" also has an "x" on it on both of the these instructions. (*Ibid.*) And there is nothing else in the record indicating any tactical choice made by the defense. Thus, this is not a case like *People v. Catlin* (2001) 26 Cal. 4th 81, 150 (RB 41) where the erroneous instruction "was defendant's proposal, with which the prosecutor somewhat reluctantly agreed" or *People v. Wader* (1993) 5 Cal.4th 610, 658 (RB 41) where the record demonstrated that "defense counsel made an equally conscious and deliberate tactical choice to request a particular instruction – such as the instruction defense counsel specifically requested here." Indeed in the instant case, each of these instructions at issue tells the jury how they might reject defenses and there could be no conceivable tactical reason for defense counsel to request either instruction.

Nor is there merit to Respondent's argument that the existence of a tactical reason for requesting these instructions is demonstrated by defense counsel's reference to CALJIC No. 5.17 in arguing in support of self-defense that Gobert, not Sonny, instigated the confrontation.(27 RT 3918 cited in RB at 41.) Certainly once the whole of CALJIC No. 5.17 was given it made sense for defense counsel to comment that the last sentence did not apply to this case. But this a far cry from suggesting that counsel had any reason, tactical or otherwise, for wanting the last sentence of CALJIC No. 5.17 given. There is simply no basis for maintaining that the "x" in the box next to "requested by defense" on the court forms of CALJIC

No. 5.17 or 5.55 was a tactical choice by the defense. There is no conceivable tactical advantage the defense could gain from the giving of either of these instructions. The defense did not invite the errors in this case.

D. The Instructional Errors Were Prejudicial

Respondent does not even attempt to dispute that prejudice resuled from the ambiguities created by the erroneous giving of these two instructions. Instead, respondent relies on arguments that there was no error or that any error was invited. Thus, by its failure to address or rebut, respondent virtually concedes that if there was error and it was not waived, the error was prejudicial.

This is an appropriate concession because, as argued in Appellant's Opening Brief, there is good reason to believe that the giving of these instructions undermined appellant's right to a fair trial. Self-defense, reasonable and/or unreasonable, was an important part of the defense case; and these unsupported instructions, coupled with the prosecutor's interpretative commentary, were likely to have deprived appellant of consideration of the evidence supporting these defense theories. The jury was given no instruction or other guidance by the trial court as to the nature of the "wrongful or illegal conduct" that might trigger the bar to reliance on unreasonable self-defense set forth in CALJIC No. 5.17's final paragraph. But the prosecutor offered a construction which, as a matter of law, precluded reliance on self-defense. Indeed, the prosecutor argued that the law was not so "stupid, . . . ignorant, . . .uncaring [or] irresponsible" as to permit reliance on self-defense in a situation like that described by Sonny and his counsel. (27 RT 3938:5-20) And the prosecutor offered policy reasons why the law would not permit reliance on self-defense in such a situation, where an armed "gangbanger" forced his way into the center of an

altercation. "Ladies and gentlemen, we'd all be dropping like files. The streets would be littered with bodies . . . ." (*Ibid.*)

The combination of the unsupported instructions and the prosecutor's argument was likely to have led the jury to believe that they did not have to even reach the issue of Sonny's belief in his need to defend himself when he fired because, even accepting that he believed (reasonably or unreasonably) that he was about to be shot, he was not entitled to either the defense of self-defense or a finding of manslaughter (based on unreasonable self-defense) because he "fashion[ed] the threat to himself" by forcing himself through people to get to two guys, putting himself "in a situation where you can claim self-defense." (XXVII RT 3938:5-20; 3946:4-6.) A lay jury, encouraged by the prosecutor's argument, was likely to have interpreted CALJIC No. 5.55 to preclude self-defense at all and/or to have concluded that Sonny's drawing of his gun and entering the center of the altercation was "wrongful conduct" which under CALJIC No. 5.17 deprived him of the right to imperfect self-defense. Under *Christian S.*, such a conclusion would have been erroneous since drawing a gun was neither a physical assault nor the kind of felony which would deprive Sonny of self-defense, and certainly would not have "legally justified" Hernandez's apparent resort to lethal force; but the jury was never instructed on the law set forth in *Christian S.*

It is thus reasonably likely[8] that the jury accepted the prosecutor's

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[8]Where an instruction is not *per se* incorrect but is challenged as ambiguous and subject to erroneous interpretation, " the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *(Boyde v. California* (1994) 494 U.S. 370, 380.) A "reasonable likelihood" is something less than "more likely than not," but more than a mere "possibility." (*Ibid.*)

argument as a gloss on CALJIC No. 5.17 and 5.55, and erroneously interpreted those instructions to require rejection of the defense theories of self-defense and unreasonable self-defense without regard to whether Sonny, reasonably or unreasonably, believed that both victims were about to shoot him. Appellant, in violation of the 6th, 8th, and 14th Amendments, was thus deprived of his constitutional rights to jury consideration of his defense, to due process and a fair trial, and to reliable capital guilt and sentencing verdicts. (*Conde v. Henry*, *supra,* 198 F.3d at, 739-740; *Boyde v. California* (1994) 494 U.S. 370, 380; *Beck v. Alabama*, *supra*, 447 U.S. 625; *Zant v. Stephens*, *supra* 462 U.S. at 879.) Further, given the state of the evidence, there is no basis for concluding beyond a reasonable doubt that if the evidence supporting these defenses had been considered by the jury, the result of the trial would have been the same. Accordingly, appellant's convictions and sentence must be set aside.

IV.

THE CONVICTION SHOULD BE REVERSED BECAUSE SONNY WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE

This issue is well presented in the AOB and RB. Appellant and respondent agree that although the defendant has a constitutional right to testify even over the objection of his counsel under *Rock v. Arkansas* 483 U.S. 44, 51-52 and *People v. Bradford* (1997) 15 Cal.4th 1229, 1332), to claim denial of that right on appeal under California law, the defendant must state on the record that he wishes to exercise that right, and further, there is no requirement that the trial court inform him of that right or obtain an explicit waiver of that right (*Bradford, supra).* (AOB 109; RB 43-44.)

In the Opening Brief, appellant argued that the *Bradford* rule allows a defendant to waive a right of which he was unaware and therefore violates fundamental constitutional principles that only waivers which are knowing and voluntary are effective. (See AOB 111-114.) Appellant urged this Court to reconsider *Bradford* and join the Second, Fifth, and D.C. Circuits, the states of Alaska, Colorado, Hawaii, South Carolina and West Virginia and the District of Columbia in requiring the trial judge to conduct an admonition and obtain a waiver on the record. (See AOB 113-115.) Respondent does not dispute on the merits the contention that an unknowing waiver should not be effective; rather respondent simply relies on *Bradford* and other California cases. (See RB 44.)

Respondent's only attempt to address the merits of the unknowing waiver issue is its unconvincing argument that "waiver is not presumed from silence. It is presumed that defense counsel informed the defendant of his right to testify and both agreed that the defendant should exercise his privilege against self-incrimination." (RB 44; Citing *People v. Alcala*

(1992) 4 Cal.4th 805.) Respondent is correct that *Alcala* states this rule, but that doesn't make the rule any less Alice-in-Wonderland. In essence, respondent is arguing that a waiver is not presumed from silence alone, but it is presumed from another presumption – that defense counsel informed him of that right, he understood it, and knowingly decided to remain silent Whatever the circumlocutions, the waiver is being presumed from defendant's silence.

And out of the world of semantics and into the world of reality, the critical issue is not even whether the defendant and his counsel discussed whether the defendant should testify; the critical issue is whether defense counsel properly informed defendant that defendant had the power to override his trial counsel's advice. To presume that trial lawyers are good at ceding power to their clients is contrary to the empirical evidence which finds that lawyers maintain their own power and do not spend adequate time with their clients to engage in such sophisticated discussions. See generally, Douglas E. Rosenthal (1974) *Lawyer and Client: Who's In Charge?*; William L. F. Felstiner, *Justice, Power and Lawyers* in Garth & Sarat (1997) *Justice and Power* 63 ("In criminal defense work, both assigned counsel and public defenders have been found to ration severely the time they spend with clients.") Neither constitutional principles, nor logic, nor experience suggest that we can be confident that a lay client has been informed of and understands his right to testify when the only source of his knowledge is presumed advice from a lawyer whose decision he would be overriding. This Court should reconsider *Bradford* and require on-the-record advisement of the right to testify and on-the-record waiver.

Respondent also contends that "the prospect of litigating an ineffective assistance of counsel claim is not a sufficient basis for

expanding the requirement for express waivers." (RB 44.) As discussed above, the primary reason appellant advances for changing the *Bradford* rule is that it violates constitutional principles and common sense to presume a waiver of a fundamental right from silence. Appellant's argument is not that making a record in the trial court concerning the waiver is the justification for requiring it; appellant's argument is that conforming California law to the sensible constitutional principle that you can not make a valid waiver of a right of which you are unaware would have an added benefit in the administration of justice: if in post-conviction litigation, a defendant claimed that his right to testify was denied, the court would have a contemporaneous record of the defendant's awareness of that right at the time of trial and his express waiver of that right. Such a record would thus not only assure that competent defendants knew their rights and waived them knowingly, but also increase the accuracy and reduce the cost of litigating the issue post-conviction.

For all of these reasons, this Court should reconsider *Bradford* and overrule it, granting relief to appellant here and prospectively only to trials beginning after the date of this Court's decision in the instant case. See *Jenkins v. Delaware* (1969) 395 U.S. 213 [holding *Miranda* inapplicable to retrials of cases that were tried before *Miranda* was decided even though petitioner himself in *Miranda* was granted relief]; *Johnson v. New Jersey* (1966) 384 U.S. 719 [*Miranda* and *Escobedo* to be applied prospectively only].)

V.

THE STRUCTURE OF CALIFORNIA LAW WHICH MAKES VICTIM IMPACT EVIDENCE AN AGGRAVATING "CIRCUMSTANCE OF THE CRIME" AND FAILS TO GIVE THE JURY ANY GUIDELINES ON HOW TO EVALUATE IT DENIED SONNY HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND RELIABLE PENALTY DETERMINATION WHEN EVIDENCE WAS GIVEN BY FAMILY MEMBERS WHO WERE NOT AT THE CRIME SCENE AND TESTIFIED ABOUT ASPECTS OF BOTH THEIR OWN AND THE VICTIMS' LIVES ABOUT WHICH SONNY COULD NOT HAVE KNOWN AT THE TIME OF THE CRIME AND THERE WAS A SUBSTANTIAL RISK THE JURY USED INFORMATION ABOUT THE SOCIAL STATUS OF THE VICTIMS AS AGGRAVATING EVIDENCE

A. This Court Should Reconsider its Victim Impact Rules Because Admitting Victim Impact As a "Circumstance of the Crime" Leads to an Incoherent System In Which the Jury Is Given No Guidance on How to Properly Evaluate It.

Respondent acknowledges that the dissent of Justice Mosk in *People v. Edwards* (1991) 54 Cal.3d. 787, 853-855 and the concurrence of Justice Kennard in *People v. Fierro* (1991) 1 Cal.4th 173, 256-266 raise issues that the majority "did not expressly address," but contends that "those views were clearly considered and rejected .... [and appellant] offers no basis for reconsidering the construction of the statute adopted in *Edwards*. (RB 46.) Contrary to respondent's contention, Appellant's Opening Brief offered clear and cogent reasons for reconsidering the faulty, judicially activist, result-oriented reading of Penal Code Section 190.3, a reading which is out of touch with the language, structure, historical context, and purpose of Proposition 7, the initiative measure through which that statute was enacted. (See AOB 125-131.) These are reasons which neither respondent nor this Court has ever directly addressed. Moreover, as the AOB points out, the

failure to address these issues, in particular the inherent contradiction between a meaningful definition of "circumstances of the crime" and victim impact evidence, has resulted in a penalty phase scheme which gives the jurors so little guidance on the purposes for which victim impact evidence can be used that it creates an unreasonable risk of capricious decision making by the jury in two ways: (1) it allows the jury to use victim impact evidence in ways that are clearly improper; (2) it fails to give the jury any meaningful guidance on how to properly consider victim impact. (AOB 131.) Appellant continues to urge that this Court reconsider its victim impact jurisprudence and conform it to the language of Proposition 7 and the limitations placed on the use of such evidence by *Payne*. Such a revision would require reversal here. However, as discussed in the following section, regardless of whether the Court reconsiders its interpretation of Penal Code section 190.3 or its overall victim impact jurisprudence, the way victim impact was used and argued in this case requires reversal.

B. The Instructions Here Authorized Improper Use of Victim Impact Evidence and the Prosecutor Made Arguments which Exploited that Authorization.

Respondent does not dispute that CALJIC No. 8.88 defines an aggravating factor as "*any* fact, condition, or event which increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88 [emphasis added]; 23 CT 6034) and further instructs that "*you are free to assign whatever moral value you deem appropriate.*" (*Ibid.*) Nor does respondent make any argument that these instructions prevented the jury from improperly considering Dedrick Gobert's success in films or Ignacio Hernandez' acceptance to college as increasing the enormity of the crime

committed or adding to its injurious consequences; nor does respondent deny that each juror was "free to assign whatever moral value you deem appropriate" to the loss of Gobert's movie career or Hernandez' college prospects. Nor does Respondent dispute that if any juror used the victim impact evidence in this way, he or she would be violating *Payne*'s concern that "the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy," as well as *Payne*'s assurance that "victim impact evidence is not offered to encourage comparative judgments of this kind – for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." (*Payne v. Tennessee* (1991) 501 U.S. 808, 823.)

Even accepting *arguendo* that the kind of limiting instructions suggested by appellant here and used by numerous other states are not required in every case, they were particularly necessary here. Contrary to respondent's claim that there was "nothing in the evidence or the argument which might have led the jury to believe the victim impact evidence in this case did anything other than present the victims as individuals" (RB 47), the prosecutor expressly argued Mr. Gobert's cinematic successes, and urged any juror who had not seen Mr. Gobert in "Boyz N the Hood" to "watch it later. It will break your heart." (XXXII RT 4594.) This was not simply a message about the uniqueness of the victims — but rather about their relative successfulness and social status:

> How many kids get off of buses from the Midwest because they think they're going to make it Hollywood? How many do? One in a thousand? One in 10,000? He made it. You heard the films he was in. He wasn't just a flash-in-the-pan success.

(XXXII RT 4594 [prosecution closing argument].)

Unless the Court is willing to say that it is permissible for a jury to deem a murder more aggravated and a defendant more deserving of the death penalty when the victim is a relatively more successful person — regardless of whether the defendant knew anything about the victim's social or professional status — then the Court must recognize that the instructions given in this case, as applied to the evidence and argument presented, authorized improper use of victim impact evidence and imposition of a sentence of death upon the basis of improper considerations. Further, given the nature of the victim impact evidence and the prosecutor's closing argument, it is likely that this is what occurred at appellant's trial, and thus that appellant's death sentence is constitutionally tainted.

Respondent's argument that there is no general *sua sponte* duty to instruct the jury not to engage in making a judgment on the relative worth of the victim's life misses the point. (RB 47 citing *People v. Zumdio* (2008) 43 Cal.4th 327, 369.) Appellant's argument is that the instructions given, as likely understood by the jurors in light of the prosecution evidence and argument, authorized the aggravation of sentence and imposition of death on the basis of impermissible considerations. Regardless of the trial court's duty to have provided further instructions sua sponte, the instructions that were given require reversal.

Furthermore, contrary to respondent's assertion, in the circumstances of this case, given the evidence and the argument, there was a clear duty to explain to the jurors how to use the victim impact evidence. As has been true for at least 40 years:

> [t]he trial court's duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence in a criminal case is so important that it cannot be nullified by

> defense counsel's negligent or mistaken failure to object to an erroneous instruction or the failure to request an appropriate instruction.

(*People v. Graham*, *supra*, 71 Cal.2d at 317-319.) Here, the defense made extensive efforts to limit the use of victim impact evidence to that which is proper under *Payne* and under the California death penalty scheme. (AOB 118-120.) The trial judge was fully aware of the victim impact evidence introduced and of the use to which the prosecutor invited the jury to put it. Under the specific facts of this case, the trial court's "duty to fully and correctly instruct the jury on the basic principles of law relevant to the issues raised by the evidence" (*Graham, supra*) required that it take steps to assure that the jury did not accept the prosecutor's invitation to use victim evidence to put Sonny to death because Dedrick Gobert had a budding movie career or Ignacio Hernandez had the opportunity to go to mechanical engineering school and were not less successful individuals.

C. The Improper Argument and Erroneous Rulings by the Trial Judge were Prejudicial.

Respondent in no way disputes that if the trial court erred in allowing the use of victim impact evidence in this case and in failing to instruct the jury on its proper use, the error was prejudicial. Appellant refers the Court to AOB 137 for the reasons why the error was clearly prejudicial as a structural error and because even under the standard of *Chapman v. California*, *supra*, 386 U.S. at 24, the prosecution cannot demonstrate that the evidence and argument about the social status of the victims, which the instructions improperly permitted the jurors to use as aggravating evidence, was harmless beyond a reasonable doubt.

VI.

THE PROSECUTOR'S ARGUMENT URGING THE JURY TO VOTE FOR DEATH TO ACCOMMODATE THE WISHES OF THE FAMILIES OF THE VICTIMS AND AVOID FURTHER INJURY TO THOSE FAMILIES DENIED SONNY A RELIABLE PENALTY TRIAL AND VIOLATED STATE LAW, THE EIGHTH AMENDMENT, AND DUE PROCESS

Appellant argued in his opening brief that the prosecutor denied Sonny a reliable penalty trial, violating state law and the Eighth and Fourteenth Amendments by urging the jury in closing argument to vote for death because "[i]f this decision is not the appropriate one in this case, it would bring further injury to the shattered lives of three families" (XXXII RT 4585) and later that "these people [victims' survivors] look to you for justice. They have waited patiently for 4 ½ years" (XXXII RT 4595), and that not voting for death would be a "further insult that we'd be adding to theirs *and their families'*." (XXXII RT 4606:20-22 [emphasis added]). These arguments undermined well settled principles established by the United States Supreme Court and repeatedly affirmed by this Court that:

> the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2.

(*People v. Smith* (2003) 30 Cal.4th 581, 622; accord: *People v. Pollock* (2004) 32 Cal. 4th 1153, 1180.) They also clearly exceeded the scope of factor (a) ("the circumstances of the crime") and thereby violated state law, which limits aggravation of sentence to statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775), and also violated due process by undermining appellant's due process liberty interest in not being sentenced to death except upon the basis of prescribed state law standards. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d

512, 522.) Consistent with these principles, the trial judge ruled prior to the penalty trial that "[p]ossible sentence has nothing to do with the impact. .... [n]o one is going to ask what is appropriate" (XXVIII RT 4082:28 to 4083:4), and the victim impact witnesses gave no testimony about their preferences. (See AOB 142.) Nonetheless, the prosecutor made arguments in which he asserted the Sonny should be put to death to avoid "further injury to their shattered lives," "further insult ... to their families," and to give the family members the "justice [t]hey have waited patiently for." Appellant's Opening Brief argued that by doing this, the prosecutor not only violated the prohibition on using the wishes of the victim's family as a sentencing consideration, but also urged the death penalty for a totally impermissible reason – because not giving it would further damage the families of the victims. (See AOB 142-144.) Moreover, appellant argued that because there was no testimony about the wishes of the victims' families or about what sentencing preference they had or what the impact of either sentence would be on them, the prosecutor's argument amounted to urging aggravation on matters not in evidence. (AOB 145-148.)

Respondent agrees with the basic principle that "the prosecution may not elicit the views of the victim's family as to the proper punishment." (RB 48.) Respondent does not dispute that it would be improper for a prosecutor to urge the death penalty to satisfy the wishes of the family or that it would be improper for the prosecutor to argue facts not in evidence. Rather, respondent argues that this did not happen – that there was no "reasonable likelihood that the jury understood the allegedly objectionable remarks in an improper or erroneous manner." (RB 49 citing *People v. Jablonksi* (2006) 37 Cal.4th 774, 835.) Thus, the disagreements between the parties on the issue of arguing the families' wishes as a reason for death are essentially factual – did the prosecutor urge the jury to vote for death because the

families wanted the death penalty? And is there a reasonable likelihood that the jury understood him to do so?

As to the issue of arguing that the jury should vote for death to avoid further injury to the victims' families, respondent appears to concede, as it must, that the prosecutor did argue that "victims would be adversely impacted as a consequence of the jury not imposing the appropriate penalty." (RB 51) But it claims that such argument was legitimate because what the prosecutor was doing was "telling the jury that a lesser sentence would adversely impact the victims by devaluing their loss" (RB 51) and (2) that not "devaluing the loss suffered by the victims and their family, which, as victim impact evidence, was an appropriate consideration." (RB 54.)

Respondent does not address the fact that the prosecutor's arguments were not based on evidence in the record. Respondent does, however, argue that any improper suggestions in the prosecutor's arguments were cured by the trial judge's admonition to not consider "public sentiment or feeling" and that defense counsel waived any objections to the improper argument that jurors should vote for death to avoid injury to the families by failing to object to the first of the instances in which the argument was made, even though objections were made to later versions of the same argument.

Appellant shows below that (A) there is a substantial likelihood that the jury understood the prosecutor was urging them to vote for death because that is what the families wanted; (B) there is little doubt that the prosecutor urged the jury to vote for death in order to avoid further injury to the families or that this what the jury understood him to be urging; (C) the prosecutor's arguments were not based on any evidence in the record; (D) none of these errors was cured by the court's admonition concerning public sentiment; (E) none of these issues were waived by defense counsel; and (F)

the improper arguments, compounded by court errors and inadequate instructions, were prejudicial.

A. There is a substantial likelihood that the jury understood the Prosecutor was urging them to vote for death because that is What the families wanted.

Contrary to respondent's claim that the prosecutor adhered to legitimate victim impact argument, the record is clear that the prosecutor twice made a point of urging that a sentence less than death would injure and insult the victims' families (XXXII RT 4585 [introductory overview] and 4606-4607 [discussion of reasons for a death sentence]), argued that the victims' families looked to the jurors for justice and had been waiting patiently (XXXII RT 4595), and, just before concluding, again alluded to the surviving family members, noting that "[t]heir kids' lives were just as valuable as any one of ours." (XXXII RT 4608.) The clear implication, albeit unsupported by any evidence, was that a death sentence was what the victims' families needed and wanted. It is highly likely (1) that one or more jurors understood the prosecutor as urging the survivors' purported sentencing preference as a reason for returning a death sentence, (2) that one or more jurors in fact considered that purported sentencing preference in reaching his or her decision, and (3) that this is precisely what the prosecutor intended. Further, when defense counsel specifically objected that the surviving victims' "desire" was not a proper sentencing consideration, the trial judge overruled the objection, stating, "Victim impact is a consideration for this jury" (XXXII RT 4606), thereby suggesting that consideration of the victims' purported sentencing preference was entirely proper.

B. There is little doubt that the prosecutor urged the jury to vote for death in order to avoid doing further injury to the families.

Appellant agrees with respondent that telling the jury that "the victims would be adversely affected . . . is not the same as urging the jury to vote for death because the family members wanted it." (RB 51.) To the extent that respondent suggests that urging the jury to vote for death in order to avoid further family injury – in no way a permissible sentencing factor under Penal Code section 190.3 – is proper, respondent is clearly wrong. Indeed, given the absence of any direct assertion by respondent that avoiding injury to the family is a permissible factor in aggravation, it is unlikely that respondent is seriously contending any such thing, The argument would be frivolous. The impact of the *sentence* on the families is clearly not a circumstance of the crime or within the scope of any other permissible aggravating factor. (See Penal Code section 190.3; and AOB 142-144.)

Respondent's only defense on the merits is its flimsy claim that despite what he said, the prosecutor was really only making a permissible victim impact argument. Contrary to respondent's claim that all the prosecutor was doing was "telling the jury that a lesser sentence would adversely impact the victims by devaluing their loss" (RB 51) and urging them not "devalue the loss suffered by the victims and their family" (RB 54), it is clear from the context that the prosecutor was urging the jury to protect the families from further injury:

> Ms. Feiger said this should be as important a decision as getting married. It's more important than that. I'll go them one better. Why do I say that? Because if you blow that decision and you get married, you're ruining your life. *If you blow this decision, you're ruining theirs. . . .* ¶ *If this decision is not the appropriate one in this case, it would bring further injury to the shattered lives of three*

families."

(XXXII RT 4585, line 6-11, 14-16 [emphasis added].)

> These people [victims' survivors] look to you for justice. They have waited patiently for 4 ½ years.

(XXXII RT 4595.)

After arguing that no juror should use his or her "power to stop the State from executing Mr. Enraca," the prosecutor added

> Theirs, not our lives, we would be adding insult to. It's further insult that we'd be adding to theirs *and their families.*

(RT 4606-4607 [emphasis added.])

It's quite clear that the prosecutor was urging the jury to not further injure or insult the victims' families — and clearly implying that a sentence less than death would inflict such injury and insult, despite the absence of any evidence to support such a suggestion. It is also quite clear that the potentially harmful impact of a particular sentence on the victim's family — and avoiding further injury to them – is not a relevant sentencing factor. It is not a circumstance of the crime, and does not bear upon the defendant's relative culpability. But, given the sad testimony by the family member witnesses, it is certainly likely that the prosecutor's improper argument would have had an impact on one or more jurors, who understandably would not have wanted to inflict further injury upon the surviving victims.

C. The Prosecutor's Argument Was Not Based on Any Evidence in the Record.

As discussed above and established in Appellant's Opening Brief (AOB 145-148), there was no evidence in the record on which to base the prosecutor's argument that the family had waited patiently for over four years for a death sentence and that a life sentence would add further injury to their travail. Respondent does not cite to any evidence in the record on

which to base to such an argument, nor does respondent offer any defense of the prosecutor's improper and unsworn testimony. By doing so, respondent appears to concede that the prosecutor became "'his own witness - offering unsworn testimony not subject to cross-examination [and] . . . effectively circumvent[ed] the rules of evidence'" (*People v. Hill* (1998) 17 Cal.4th 800, 827-828, quoting *People v. Bolton* (1979) 23 Cal.3d 208, 213), thereby undermining appellant's rights to confrontation, to due process, and to a fair and reliable sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Crawford v. Washington* (2004) 541 U.S. 36, 69 (testimonial statements cannot be used against a defendant at a criminal trial absent an opportunity for cross-examination); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination).)

D. None of the errors allowing the jury to consider the family's purported wishes and the purported negative impact of a life sentence on the family as circumstances in aggravation were cured by the trial court's admonitions concerning public sentiment; indeed, the prejudice was exacerbated by the trial judge's rulings.

Contrary to respondent's argument that the trial judge's admonitions cured the errors caused by the prosecutor's improper argument (RB 52-55), the sequence of the trial judge's rulings and admonitions actually exacerbated the prejudice from the prosecutor's misconduct. A look at that sequence makes this clear.

As discussed above, a significant part of the prosecutor's argument for death was that a sentence other than death "would bring further injury to the shattered lives of three families" (XXXII RT 4585) and would frustrate the families – " not just the moms. They had whole families. .... These

people look to you for justice. They have waited patiently for 4 ½ years." (XXXII RT 4595:1-4.) When the defense objected, rather than make it clear that the neither the effect of the sentence choice on the victims' survivors, nor the desires of these family members, were relevant considerations for the jury, the trial judge told the jury only that "public feeling or public sentiment" was not to enter into the jury's determination, which was to be made on the basis of the aggravating and mitigating factors. (XXXII RT 4595:7-11.) The prosecutor then explained to the jury that "[v]ictim impact is considered a factor in aggravation under factor (a), the circumstances of the offense. That's the law." (*Id.* at 4595:15-17.) But rather than sticking to the impact of the crimes, the prosecutor continued to push his theme that not giving the death penalty would be "further insult that we'd be adding to theirs *and their families' [lives].*" (XXXII RT 4606:20-22.[emphasis added]) Although the trial judge sustained the defense objection (*id.* at 4606:23-25), the judge's response to the defense's request for an admonition fell far short of advising the jury that the wishes of the survivors or the impact of a non-death sentence would have on them were not permissible aggravating circumstances, instead telling them only that "public sentiment and feeling" should not "come into" the jury's decision. (XXXIII RT 4606:27-4607:1.)

The prosecutor then disavowed any attempt to urge the jury to weigh "public sentiment" in their deliberations, but did urge the jurors to consider only "this defendant, these victims." Though the prosecutor's use of the "these victims" clearly referred back to his immediately preceding argument that jurors should avoid "further insult that we'd be adding to theirs and their families," and the defense objected to this clearly improper argument as using the victims' survivors' "desires" as a basis for a death sentence, the trial judge overruled the defense objection, telling the jury that those desires

were "Victim impact [which] is a consideration for this jury". (XXXII RT 4607:7-16.)

Thus, the conclusion of this interchange was a clear error by the trial judge: overruling a well-taken defense objection to the prosecutor's inviting the jury to base their penalty decision on the desires of the surviving family members and the impact on them of the sentencing choice, considerations clearly beyond the scope of either factor (a) or victim impact as defined by the Supreme Court in *Booth* and *Payne*. Rather than steering the jurors away from these improper considerations, the judge's rulings and admonitions authorized the jurors to consider them: The trial judge's error in overruling defense counsel's objection and permitting argument concerning the wishes of the families and the impact of a sentence other than death on them put the court's seal of approval on an extensive campaign by the prosecutor to influence the jury to choose the death sentence by urging them to weigh the impact *of their sentence* as opposed to the impact *of the crime* on the victims' survivors. Moreover that same campaign included urging jurors to comply with the wishes of the victims' families

These errors are particularly serious because, as discussed more fully in AOB Argument V (see AOB pp. 132 -137), the instructions given to the jury never explained for what purpose victim impact should enter a juror's deliberations and never explained the difference between the permissible use of victim impact evidence to show the victim's uniqueness and the harm caused by the crime and the clearly impermissible consideration of the victims' families' sentencing preferences and/or the impact of a life sentence on them. With some very explicit instructions, perhaps the effect of the prosecutor's misconduct and the court's errors could have been

overcome. But with only the vague, general instructions that the jury should consider "the circumstances of the crime of which defendant was convicted" (CALJIC No. 8.85; 23 CT 6028) and that "an aggravating factor is *any* fact, condition, or event which increases its guilt *or* enormity *or adds to its injurious consequences which is above and beyond the elements of the crime itself*" (CALJIC No. 8.88 [emphasis added]; 23 CT 6034) and that "*you are free to assign whatever moral value you deem appropriate*" (*Ibid.*), the jury was left without any guidelines or tools with which to separate permissible victim impact from the totally improper suggestions of the prosecutor which had been legitimized by the court.

E. None of these issues were waived`

Respondent is correct that defense counsel did not object to the first of the prosecutor's remarks concerning the impact of a sentence other than death on the victims' families (See XXXII RT 4585), but counsel twice objected to similar remarks at XXXII RT 4606-07. The trial court sustained the first objection, but followed up with an admonition cautioning the jury only against consideration of "public sentiment and public feeling," which, as discussed immediately above, the prosecutor interpreted as reason to clarify that his remarks did not refer to public outrage, but rather related solely to the surviving victims in this case. (XXXIII RT 4607.) When defense counsel objected again and pressed for clarification, the objection was overruled and the judge indicated that the prosecutor's argument was within the scope of victim impact considerations. (XXXII RT 4607.) Thus, given the trial judge's ruling, any objection at XXXII RT 4585 would have been futile – the same objection was made two other times; the first time it was sustained but an inadequate admonition was given; the second time it was explicitly rejected by the trial judge – hence the misconduct

claim as to the remarks on XXXXIII RT 4585 was not waived. (See *People v. Hill, supra,* 17 Cal.4th at 821 [objection not required where it would have been futile].)

The purpose of the contemporaneous objection rule is to provide the trial judge with the opportunity to cure the error and limit any prejudice through admonitions during the trial. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1236; *People v. Melton* (1988) 44 Cal.3d 713, 735.) Here, the later defense objections gave the trial judge ample opportunity to cure the error and to properly instruct and admonish the jury concerning the proper role of victim impact evidence. Instead, the trial judge compounded the errors with an erroneous ruling and an admonition which exacerbated rather than cured the effects of the prosecutor's improper arguments. Under these circumstances, finding a waiver would not be appropriate.(*People v. Hill*, supra, 17 Cal.4th at 821.)

Moreover, the objections to the later arguments necessarily called into question how the jury would interpret the prosecutor's remarks that

> "not just the moms. They had whole families. .... these people [victims' survivors] look to you for justice. They have waited patiently for 4 ½ years"

(XXXIII RT 4595), and that not voting for death would be a "further insult that we'd be adding to theirs *and their families'*." (XXXIII RT 4606:20-22 [emphasis added].) Thus, even if this Court were to enforce such a waiver as to the earlier misconduct, the prosecutor's earlier remarks that a sentence other than death "would bring further injury to the shattered lives of three families" (XXXIII RT 4585) were part of the context in which the later arguments were couched and are relevant to this Court's determination of the impact of the remarks that were objected to and the inadequacy of the trial judge's admonition.

F. Respondent Has Not Attempted to and Cannot Show that the Improper Remarks from the Prosecutor, Compounded by Court Errors and Inadequate Admonitions, Were Harmless Beyond A Reasonable Doubt.

As discussed above, it is reasonably likely that at least some jurors understood the prosecutor to be urging them to vote for death in order to give the families the verdict they wanted and had waited for patiently, and to avoid further injury to these families. When the defense objected to these improper grounds for putting someone to death, the trial judge sustained the objection and admonished the jury to not consider "public sentiment and public feeling," but did not direct the jurors to ignore the wishes of the family or the impact of the verdicts on them. And when the prosecutor then followed this admonition with an argument that the jurors should not consider public sentiment, but should weigh the effect of the sentences on the families, the defense objection was overruled. So the jury was left with the impression that considering the impact of the sentence on the victims' families and their wishes was appropriate. As discussed in section D, the language of CALJIC No. 8.85 and No.8.88 did nothing to cure this misimpression.

Given these errors, the burden is therefore on the state to prove that the errors in argument and court rulings were harmless beyond a reasonable doubt. *(Chapman v. California, supra.)* Indeed, even if the misconduct and errors are appraised as errors of state law occurring at the penalty phase of a capital trial, reversal is required if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown* (1988) 46 Cal.3d 432, 448 [emphasis added]) – a test essentially equivalent to the *Chapman* standard (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-

reasonable-doubt standard).

Respondent has neither attempted to, nor could it meet this burden. Reversal is required.

VII.

THE PROSECUTOR'S ARGUMENT THAT LACK OF REMORSE WAS AN AFFIRMATIVE REASON FOR CHOOSING DEATH, REINFORCED BY THE TRIAL JUDGE'S ERRONEOUS OVERRULING OF A TIMELY DEFENSE OBJECTION, WAS MISCONDUCT THAT VIOLATED *BOYD* AND DEPRIVED SONNY OF DUE PROCESS UNDER THE 14TH AMENDMENT

Respondent concedes, as it must, that the prosecutor argued extensively that lack of remorse is "a third reason why death is the only appropriate verdict in this case." (XXXII RT 4597:24-25; see RB 57, 59.) And respondent agrees, as it must, that "a prosecutor may not argue lack of remorse as a factor in aggravation." (RB 56, citing *People v. Bonilla* (2007) 41 Cal.4th 313, 356; AOB 153 citing, *People v. Kennan* (1988) 46 Cal.3d 478, 510.)

Nor does respondent dispute that the prosecutor concluded his seven-page discussion of lack of remorse (XXXII RT 4597:24 - 4604:16), as follows: "That's the case for the most severe punishment of the two available to you." (XXXII RT 4604: 16-17; quoted in AOB at 154.) Nor does respondent dispute that after first discussing the circumstances of the crime, then discussing victim impact and then discussing lack of remorse as the "third reason why death is the only appropriate verdict," the prosecutor then moved on to disparage the mitigation case (4604-4606), introducing those arguments by asking "is there anything that the defense has presented to you which says that you shouldn't do that [vote for death]?" (XXXII RT 4604:18-19; quoted in AOB at 154, but not directly addressed by

respondent.)

Rather, respondent attempts to defend through a series of meritless mental gymnastics, tortured logic and unconvincing claims of forfeiture and lack of prejudice. Specifically, respondent claims that (A) "the prosecutor never stated that remorse was a statutory factor in aggravation" (RB 57) and that in context the arguments were really a response to defense mitigation argument and therefore were not arguments in aggravation at all (RB 59) ; (B) that even if the prosecutor did argue that lack of remorse was aggravating, a colloquy between the judge and defense counsel after the judge overruled a defense objection somehow cleared up the "ambiguity" (see RB 55); (C) that by objecting only once to the improper arguments the defense was "thereby forfeiting his claim of error as to the remaining references" (RB 55); (D) that because some of the prosecutor's remarks related to conduct that was arguably part of the circumstances of the crime, this Court should ignore the references to conduct that clearly was not (RB 55, 58-59); and (E) any error was harmless because the jury would have been outraged by the lack of remorse and considered it aggravating no matter what the instructions said. (RB 59-60.) The reasons why each of these claims is without merit are discussed in turn below.

A. The Context Clearly Shows That The Prosecutor Claimed Lack of Remorse Was Aggravating.

1. Respondent's claim that the failure of the prosecutor to specifically use the magic words "*statutory* aggravating factor" misses the point. Respondent argues that "the prosecutor never stated that remorse was a *statutory* factor in aggravation" (RB 57 [emphasis added].) As stated above, the words and structure of the prosecutor's argument made clear that lack of remorse was the "third reason" for voting for death. Respondent seeks to avoid this clear context by parsing language in a way

divorced from the reality that lay jurors were the audience. Despite the context, respondent argues that because the prosecutor told the jury that "the presence or absence of a defendant's remorse is a factor universally deemed relevant to the jury's determination in a capital sentencing proceedings" (32 RT 4597, lines 26-28), the jury would ignore his arguing that lack of remorse was the "third reason" and understand that they should consider lack of remorse solely as the absence of potential mitigation and not as a factor in aggravation. It is highly improbable to say the least that jurors would have borne in mind a distinction between a statutory aggravating factor and a factor universally deemed relevant, and adhered to that distinction in assigning aggravating and mitigating weight to the factors before them. Jurors would not likely have read the opinion in *People v. Boyd, supra*, 38 Cal.3d 762 (sentence may be aggravated only on the basis of statutory aggravating factors). To the contrary, it is highly likely that they took the prosecutor at his word that lack of remorse was one of the three aggravating factors that pointed to a death verdict.

2. The prosecutor's argument was not merely a rebuttal to the defense's evidence of remorse. Respondent argues that

> [a]lthough the prosecutor referred to lack of remorse as a "third reason" for imposing the death penalty, he did so in the context to imposing death as the "appropriate sentence." (32 RT 4597.) By undermining the defense claim to remorse, the prosecutor was providing a reason – his third reason, factor, thing – supporting his argument that death was the appropriate verdict.

(RB 59.) The problem with this argument is that it is not borne out by the transcript. The prosecutor mentioned defense evidence only twice. The first reference was to briefly state on the second page of his seven-page lack-of-remorse argument that there was no evidence of remorse (XXXII RT 4598:14-17 ["ask yourself, in all of the evidence that you've seen in this

case, all of the evidence that they put on, did you see one ounce of remorse for what he did to that girl or what he did to their sons?"].) But he then went on to spend the next six pages (*id.* at 4598:19 through 4604:17) outlining "what evidence I ... have supporting this." (*Id.* at 4598:18.) The prosecutor's support for his argument that lack of remorse was the third reason for a death sentence included statements made by Lester Maliwat and Eric Garcia that on the night of the shootings, Sonny said the victims "deserved it" and Sonny's initial failure to admit his involvement to the police and then his statements admitting the crime. In the midst of this argument, the prosecutor did attack the defense expert who testified that Sonny showed remorse (See *Id.* at 4600:10 to 4601:3.) To convert these twenty-one lines out of a 161-line transcript (*Id.* 4597:17 to 4604:16) into the thrust of the argument distorts reality. The bottom line is that the prosecutor made clear that lack of remorse was an affirmative "third reason" for executing Sonny and that after giving his case in aggravation, he then went on to attack the defense mitigation case: "is there anything the defense has presented to you , which says you shouldn't do that [vote for death]." (*Id.* at 4604:18-19.) There is no escaping that the prosecutor argued that Sonny's alleged lack of remorse was an aggravating factor.

B. There Was No Admonition and the Prejudice Was Exacerbated by the Judge's Rulings

Respondent argues that "any ambiguity was resolved by the admonition given by the trial court in response to the sole defense objection." (RB 55). As discussed above, there was no ambiguity – the prosecutor argued that lack of remorse was aggravating: the "third reason" reason for putting Sonny to death. More accurately, then, there was improper argument by the prosecutor. But whether the prosecutor's argument was clearly improper or, as respondent contends, ambiguously

improper, the strong likelihood that the jury understood the prosecutor's remarks to mean that lack of remorse was aggravating was in no way changed by the following colloquy:

> MR. RUIZ [the prosecutor]: You see, there's no remorse. And *lack of remorse is the third thing*. And --
>
> MS. FEIGER [defense counsel] : I think -- I think I'm going to object.
>
> THE COURT: I don't know what the third thing is, so --
>
> MR. RUIZ: No. It's -- *lack of remorse is the third thing*.
>
> THE COURT: *Overruled.*
>
> MS. FEIGER: *It's not the law. It's not an aggravated lack of remorse.*
>
> THE COURT: *It is not, and they're not numbered. They're one through -- (a) through (k).*
>
> MS. FEIGER: Right.
>
> THE COURT: Thank you.
>
> MR. RUIZ: He showed no remorse. None.

(XXXII RT 4602:18 -4603:3; emphasis added.)

There is nothing in the above colloquy that could be characterized as an admonition to the jury. The judge's comments were addressed to defense counsel, not the jury; they did not instruct the jury to do anything (somewhat cryptically and confusingly the judge seemed to agree with the defense counsel's argument that "it's not an aggravated lack of remorse" – he said "it is not"). But the trial judge had *overruled* the *defense* objection. In these circumstances, there is no likelihood that the jury would have taken these comments as instructing them to not consider lack of remorse aggravating. Moreover, for the jury to have made inferences from this colloquy would have been improper. In the absence of a formal admonition,

it would be inappropriate for jurors to consider arguments of counsel or comments to counsel by the judge. (*Cf.* CALJIC 1.02.) The likelihood that one or more jurors considered that lack of remorse was an aggravating "third reason" for putting Sonny to death was great and nothing in this colloquy in any way reduced that likelihood.

C. There Was No Waiver.

Respondent argues that because Sonny's lawyer objected to only one of the prosecutor's references to lack of remorse, he forfeited Sonny's claim of error as to the remaining references (RB 55). Respondent's argument lacks merit for two reasons.

First, appellant's claim is not that it's improper for a prosecutor to argue that the evidence fails to show remorse, but rather that it is improper to argue that lack of remorse is an aggravating factor to be weighed on death's side of the scale. The defense did object at the very moment that the prosecutor made most explicit his view that lack of remorse was a factor in aggravation – i.e., that it was the third reason for a death sentence:

> MR. RUIZ [the prosecutor]: You see, there's no remorse. And *lack of remorse is the third thing.* And --
>
> MS. FEIGER [defense counsel] : I think -- I think I'm going to object.
>
> THE COURT: I don't know what the third thing is, so --
>
> MR. RUIZ: No. It's -- *lack of remorse is the third thing.*
>
> THE COURT: ***Overruled.***

(XXXII RT 4602:18-24.)

Second, as set forth in the full colloquy quoted in section VII.B. above, when counsel did object, the objection was overruled – and the prosecutor just continued on with his lack of remorse argument. He continued his discussion of lack of remorse for the next page and a half, and then stated "That's the case for the most severe punishment of the two available to you." (*Id.* at 4604:16-17.)

There's no reason to think any additional objections would have been more fruitful.

This Court does not find waivers where objection would have been futile. (See *People v. Hill, supra,* 17 Cal.4th at 821 [objection not required where it would have been futile].) . The purpose of the contemporaneous objection rule is to provide the trial judge with the opportunity to cure the error and limit any prejudice through admonitions during the trial. See *People v. Johnson, supra*, 47 Cal.3d at 1236; *People v. Melton, supra*, 44 Cal.3d at 735. Here, the defense objection gave the trial judge ample opportunity to cure the error and to properly instruct and admonish the jury concerning the proper role of remorse as a mitigating factor. Instead, the trial judge compounded the improprieties with an erroneous overruling of the objection. Under these circumstances, finding a waiver would not be appropriate. (*People v. Hill*, supra, 17 Cal.4th at 821.)

D. This Court Should Not Ignore the Improper Portions of the Prosecutor's Argument.

Respondent argues that some of the purported lack-of-remorse evidence cited by the prosecutor related to lack of remorse at the time of the offense, and hence was properly considered as aggravation under factor (a) (circumstances of the crime). (RB 58-59, citing *People v. Crew* (2003) 31 Cal.4th, 822, 857; *People v. Cain* (1995) 10 Cal. 4th 1, 77.)

This is respondent's most substantial argument. The testimony by Maliwat and Garcia that Sonny angrily responded to questions about why he shot with the comment that "they deserved it" were allegedly made the night of the shootings close enough to be arguably within the circumstances of the crime and therefore could arguably be considered as aggravation. But the prosecutor did not argue them this way and might have led the jury to double count them: once as circumstances of the crime and once as lack of remorse.

Moreover, because the statements were allegedly made soon after the

shootings, at a time when Sonny was likely still under the influence of whatever emotions (and mind altering substances) he was under when he shot the victims, they were not very good indicators of his remorse or lack thereof. Indeed the prosecutor pointed specifically to testimony that suggested that Sonny was still in a "rage.... more than just being angry." (XXXII RT 4599:8-13.) As such, the statements are far less reflective of his own moral judgment concerning the shootings than statements made later after he had a chance to cool down and think about what he had done. Hence, insofar as the angry statements allegedly made right after the shootings suggested a lack of remorse, they were likely to be given considerably less weight than the post-offense conduct the prosecutor advanced to show that Sonny lacked remorse – conduct which was clearly not within the scope of factor (a) – e.g., his initial refusal to admit involvement, his claiming self-defense, his leading police on a wild goose chase to look for the gun in a place he knew it wouldn't be found. Such behavior was not proper aggravation, but there is a reasonable likelihood that one or more jurors not only believed that post-crime lack of remorse was aggravating, but weighed that evidence more heavily than Sonny's angry remarks the night of the shootings.

E. The Error Was Prejudicial

Thus, there was clearly improper argument by the prosecutor, compounded by an erroneous overruling of the defense objection by the trial judge and a missed opportunity for that judge to cure the mis-impression by giving the jury an explanation of what they could and could not do with evidence of lack of remorse. Moreover, it was reasonably likely that one or more jurors were misled into believing that Sonny's statements to the police one month later were evidence of lack of remorse, which could be weighed as a factor in aggravation. Especially in close case like this one where the defense presented a case in mitigation so substantial that the trial judge agreed that this was "most benign" death case he had

seen in Riverside County. (XXXIII RT 4700:24 to 4701:4), respondent has not and cannot show that there is no reasonable likelihood that even one juror was affected by the improper argument compounded by court error.

1. Respondent's contention that error was harmless because the jury would have reacted to the evidence in the same way if the prosecutor had not made the improper argument lacks merit. In an unconvincing attempt to avoid this inevitable result, respondent argues that even if the prosecutor misled the jury as to the proper use of evidence suggesting a post-crime lack of remorse, the misconduct was harmless because the jurors would likely have responded the same way on their own. (RB 59-60.) This argument appears to assume that the jurors, had they not been misled, would have disregarded the instructions on their own. This is not the usual assumption underlying appellant review:

> We presume that jurors comprehend and accept the court's directions. (E.g., *People v. Bonin* (1988) 46 Cal.3d 659, 699.) We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. (*Francis v. Franklin* [(1985)] 471 U.S. [307] at p. 325, fn. 9.)

(*People v. Mickey*, *supra*, 54 Cal.3d at 690, fn. 17.)

Nor is respondent's reliance on *People v. Cain, supra,* 10 Cal.4th 1 helpful. The situation described by the *Cain* opinion language (RB 59-60) is very different from our case. There the evidence was that defendant "still bloody from the killings, returned to his friends and boasted of what he had just done." (10 Cal.4th at 77) That kind of callousness is a far cry from the evidence of post-crime lack of remorse relied upon as aggravation evidence by the prosecutor in the instant case (initial refusal to admit involvement, claiming self-defense, leading police on a wild goose chase to look for the gun), which did not involve the kind of "overt callousness" that might overcome jurors' ability to adhere to the court's

instructions. As this Court stated in *Cain*, "the defendant's 'mere failure to confess guilt or express remorse' at a later time is not a circumstance of the crime, does not fit within any other statutory sentencing factor, and thus should not be urged as aggravating." (10 Cal.4th at 78, fn.31 [citation omitted].)

2. The jury considering alleged lack of remorse as an aggravator could have tipped the balance in favor of death. Ultimately, there is a very practical difference between (a) weighing lack of remorse as an aggravator and (b) a finding of no remorse to weigh on the side of mitigation. Under California law, a case with no mitigation can lead to a life verdict if the jury finds the aggravating factors are not weighty enough to support a death judgment. *(People v. Duncan*, (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.".) In such a case, given the structure of the California sentencing statute and this Court's opinion in *Boyd*, a lack of remorse should not be permitted to provide the missing aggravating weight. Similarly, in a case like Sonny's in which there was considerable mitigation without regard to the presence of remorse — enough that the jury could well have concluded that the mitigation outweighed or was in equipoise with the aggravation – the alleged lack of remorse should not have been permitted to tip the balance towards a sentence of death. Respondent has not and cannot meet the burden of showing no reasonable likelihood that even one juror's weighing process was affected by the improper argument and court error. These errors were not harmless beyond a reasonable doubt in their own right. Moreover, when combined with the other errors in the penalty phase, the case for reversal is even stronger. See Argument X, below.

VIII.

THE TRIAL COURT VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REFUSING TO GIVE A LINGERING DOUBT INSTRUCTION REQUESTED BY THE DEFENSE, PARTICULARLY AFTER ONE OF THE JURORS WAS REPLACED AND THE PENALTY JURY WAS INSTRUCTED TO ACCEPT THE GUILTY VERDICTS AS HAVING BEEN PROVEN BEYOND A REASONABLE DOUBT

A. Compelling Reasons for this Court to Clarify the Law and Require Instructions on Lingering Doubt.

Appellant's Opening Brief argued that this Court should clarify its crazy-quilt of precedents permitting, but not requiring, lingering doubt instructions in light of its recent decision in *People v. Gay* (2008) 42 Cal.4th 1195.(AOB 162-166.) Although respondent asserts that appellant "offers no persuasive reason for changing the rule regarding instruction lingering doubt" (RB 64), respondent does not explain why this Court should continue to condone a failure to *explicitly* instruct on what the Court has now recognized not only as a legitimate penalty phase defense (*People v. Gay*, 42 Cal.4th at 1221), but also described as "perhaps the most effective strategy to employ at sentencing.'" (42 Cal.4th at 1227 [citations omitted].)

In fact, there are three compelling reasons why this Court should clarify the law to require that the trial judge instruct the jury that they may consider lingering doubt as a mitigating defense, either generally or particularly in the instant case where a lingering doubt instruction was requested, but refused by the trial judge, and where the jury was instructed under CALJIC No. 17.51.1 that "[f]or the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial". (23 CT 6032.)

1. Common Sense. The first reason is straightforward common sense: now that *Gay* has made clear that lingering doubt is a legitimate defense, and often the

best defense, the Court should make sure that the jury understands this and is given guidance on the relevance and role of lingering doubt; indeed such common sense is constitutionally required by by the Sixth and Fourteenth Amendments. (*Holmes v. South Carolina* (2006) 547 U.S. 319; *Crane v. Kentucky* (1986) 476 U.S. 683, *Chambers v. Mississippi* (1973) 410 U.S. 284.) Having established the state-law existence of a lingering doubt defense, a state must ensure that its relevance is conveyed to the trier of fact. (*Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense"]; *U.S. v. Escobar de Bright, supra,* 742 F.2d at 1201-1202 ["[p]ermitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal"].) It violates the Sixth and Fourteenth Amendment right to present a defense to render its exercise empty and valueless. Rather, this Court should implement the right to present a lingering doubt defense by requiring instructions which let the jury know that the right exists as the trial courts did in *People v. Harrison* (2005) 35 Cal.4th 208, 259-260 (approving lingering doubt instruction); *People v. Snow* (2003) 30 Cal.4th 43, 125 (approving similar lingering doubt instruction); and *People v. Cain, supra*, 10 Cal. 4th at 65-66 (upholding similar lingering doubt instruction).

2. Avoiding randomness. The second compelling reason that the Court should require the lingering doubt instruction is that current state of the law is a random pattern of affirmances of trial judges who either give a lingering doubt instruction or refuse to give it, without any explanation of what should guide the trial judge in deciding whether or not to give the instruction, which leaves defendants to a random lottery as to whether the jury receives instructions about a defense which this Court in *Gay* has noted is "perhaps the most effective strategy to employ at sentencing." (42 Cal.4th at 1227.) (*Compare Harrison, supra, Snow, supra,* and

Cain, supra, with People v. DePriest (2007) 42 Cal.4th 1, 60 (no duty to instruct on lingering doubt); *People v. Bonilla, supra,* 41 Cal.4th 313; *People v. Gray* (2005) 37 Cal.4th 168, 231 (no *sua sponte* duty to instruct on lingering doubt when two alternates were substituted at the beginning of the penalty trial); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1272.) Such randomness violates the Eighth Amendment. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.)

3. The need for a lingering doubt instruction when an alternate is seated and instructed to accept the guilty verdict. The third compelling reason for requiring the instruction in this case is that it was requested in circumstances where the jury was instructed that "the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial"(23 CT 6032), and so additional confusion about the relevance of lingering doubt was injected into the case. Only a clear lingering doubt instruction could have cured this confusion.

B. Respondent's Arguments Are Without Merit.

Other than denying such confusion existed, respondent offers nothing to rebut these three compelling reasons for this Court to rule that a lingering doubt instruction was required, certainly in this case, but also in general. Rather, respondent offers two inaccurate and unconvincing arguments that (1) even without any explicit instructions on lingering doubt, the trial court gave instructions which adequately informed the jury that it could consider lingering doubt. (RB 60-62); (2) that the defense "did not argue" lingering doubt and that this in some unarticulated way excuses the error. (RB 61.) Moreover, respondent appears to concede, by not disputing appellant's arguments, that (3) the trial court could not let its unarticulated concerns with the wording of defense counsel's proposed instruction interfere with its duty to accurately instruct on the lingering doubt defense, and (4)

respondent cannot show that the error in failing to instruct on lingering doubt is harmless beyond a reasonable doubt. Each of these points is discussed in turn below.

1. Contrary to respondent, no other instructions adequately informed the jury that they could consider lingering doubt. Respondent contends that even without the defense-requested instruction or any explicit instruction on lingering doubt, the trial court gave instructions which adequately informed the jury that it could consider lingering doubt. (RB 60-62.) Respondent relies upon two other instructions which were given (a) CALJIC No. 8.85 and (b) the last line of CALJIC No. of 17.51.1. That reliance is misplace.

a. CALJIC No. 8.85.does not inform the jury about lingering doubt. Respondent does not attempt to explain how CALJIC No. 8.85's description of the statutory factors in aggravation and mitigation – or any part thereof – conveys that lingering doubt may be weighed as a factor in mitigation. In its opinion in *In re Gay* (1998) 19 Cal.4th 771, 814, this Court, which is certainly familiar with the sentencing factors listed in CALJIC No. 8.85, noted that "[e]vidence intended to create a reasonable doubt as to the defendant's guilt is not relevant to the circumstances of the offense or the defendant's character and record." There's no reason to be confident that a lay jury, hearing that listing of sentencing factors, would on its own discern that evidence supporting lingering doubt of guilt is relevant to the circumstances of the offense, the defendant's character and record, or any of the other more specific sentencing factors. Further, even if it's possible that a juror in the usual case might construe language in factor (k) – "any other circumstance which extenuates the gravity of the crime" or "any other aspect of the defendant's character or record" — to encompass lingering doubt as to guilt, where CALJIC No. 17.51.1 is also given, specifically admonishing a replacement juror (and presumably the rest of the jury as well) to accept the guilt phase verdicts "as

having been proved beyond a reasonable doubt" and to determine the penalty to be imposed "in light of [those] verdicts," it is not likely that jurors would do so.

b. Nor does the last line of CALJIC No. 17.51.1. Respondent also relies on the fact that the last line of CALJIC No. 17.51.1 admonishes jurors that "Each of you must participate fully in deliberations, including any review as may be necessary of the evidence presented in the guilt phase of trial." (RB 63.)

Respondent ignores that this last sentence is preceded by language admonishing that for purposes of the penalty trial the guilt verdicts must be accepted "as having been proved beyond a reasonable doubt" and that the jurors' task was to determine the penalty to be imposed "in light of [those] verdicts." Review of guilt phase evidence was, of course, likely to be relevant and necessary for purposes of appraising aggravating or mitigating aspects of the circumstances of the crime (factor (a)) and the applicability of various potential mitigating factors (factors (d) through (k)). But given the overall thrust of CALJIC No. 17.51.1, and the language preceding its final sentence, the concluding language mandating participation in any needed review of guilt phase evidence in no way suggested that such review might be for purposes of evaluating certainty of guilt (i.e., lingering doubt). It may be that CALJIC No. 17.51.1 did not explicitly bar consideration of lingering doubt. But it's equally true that it in no way suggested that such consideration was appropriate.

2. Contrary to Respondent's Assertion, Defense Counsel Did Argue Lingering Doubt (But Was Handicapped By the Lack of An Instruction Legitimizing the Argument). Respondent also asserts that while defense counsel requested a lingering doubt instruction, counsel did not argue lingering doubt and told the jury that the defense accepted the jury's verdict. (RB 61.) Respondent does not explain the relevance of this assertion. Perhaps respondent's assertion is meant to suggest a waiver or to demonstrate a lack of prejudice. It does neither. Nor is it

accurate.

Given the language of CALJIC No. 17.51.1 (the jurors' task was to determine the penalty to be imposed "in light of [the guilt phase] verdicts"), counsel had little choice but to accept the jury's verdicts. Further, given that language, and the denial of the requested lingering doubt instruction, counsel may have felt unable to expressly argue lingering doubt as a factor in mitigation. But counsel, while not using the phrase "lingering doubt," did nonetheless raise the possibility of such doubt as a reason to not impose a death sentence:

> Since the verdicts came in, I hope -- I do hope -- that each of you are comfortable with the verdicts. It should be that way. I hope that you have never given it a second thought. You did exactly what you thought was right, what you knew was right. And you were convinced beyond a reasonable doubt. This next decision -- and I know. I've been doing trials for several years. Maybe not in the last three, but previous to that I had. And I've spoken to jurors, and they tell me -- and I may see them later at the sushi bar and whatever, and sometimes they tell me, "Well, you know, Ms. Feiger, I have" -- you know, "I have some doubt, you know. Something's still bothering me." Happens all the time. But not now. You can't do that. I hope it doesn't happen to you. But that can happen with your verdicts .... And it might not happen. But now the decision is something that is irrevocable. Right? The decision is life or death. You cannot have any tugging doubt about this crime and this sentence as being appropriate.

(32 RT 4626, line 20 - 4627, line 9.) Had the lingering doubt instruction been given, counsel could and likely would have argued lingering doubt more explicitly and more forcefully. As discussed in Appellant's Opening Brief, there was certainly ample basis for doubt as to whether the killings were deliberate, premeditated murders – There was no evidence that Sonny knew Dedrick Gobert before Gobert confronted Sonny's friends in front of the pizza parlor. According to witnesses, Gobert was shot within in a minute or two of that confrontation. (See XVII RT 2847 [testimony of Arnold Belamide]; XXIII RT 3442 [testimony of Herman Flores].) Thus, any "deliberation" occurred within less than that one-to-

two-minute period. So this is not a case where there was evidence of planning or preparation. This was at most a spur of the moment decision which the prosecutor argued was like deliberately going through a yellow light. (XXVII RT 3943-3944.) The shortness of time by itself could lead to a lingering doubt about whether Sonny premeditated and deliberated.

But there was also substantial evidence of provocation: highly inflammatory behavior by Gobert, including belligerent behavior and words including a statement that "I am not afraid to die" (XVII RT 3084-85), gang threats and taunts by Gobert (AOB Argument II, pp 83-84), and gestures suggesting that Gobert had a gun. (See AOB Argument II, p.85.) And there was evidence that Sonny was under the influence of methamphetamine, which during the confrontation may have caused Sonny to react impulsively, angrily, and/or with paranoia to Gobert's confrontational and provocative behavior in a way that was inconsistent with, or at least would support lingering doubt concerning, premeditation and deliberation. (See AOB, Statement of Facts, pp. 33-36, 39 and Argument II, p. 86.)

3. Respondent does not dispute that the trial court could not let its unarticulated concerns with the wording of defense counsel's proposed instruction interfere with its duty to accurately instruct on the lingering doubt defense. Respondent does not dispute appellant's analysis which demonstrates conclusively that the trial judge was not excused from giving legally warranted instructions on lingering doubt because of his unarticulated concerns with wording of defense counsel's proposed lingering doubt instruction. As stated in the Appellant's Opening Brief, pp. 165-166: The trial judge's error in not instructing on lingering doubt was not excused by the trial judge's dissatisfaction with the instruction proposed by the defense. The language to which the trial judge objected was the same as that given in *Harrison* and *Snow:* "A lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all

possible doubt." (35 Cal.4th at 259-260; 30 Cal.4th at 125.) The trial judge never explained why he thought this legally correct language was problematic. *Moreover, defense counsel twice requested suggestions for modifications to address any concerns the trial judge had.* The trial judge's refusal to suggest modifications, or explain what kind of modifications might help, compounded the trial judge's error in rendering what may be the most effective penalty phase defense "empty" and "of little value." The trial judge had a responsibility to give legally correct instructions on lingering doubt regardless of whether the defense requested instructions had flaws. (*People v. Hall* (1980) 28 Cal.3d 143, 159 [court has a duty to tailor or correct proffered instructions]; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1446 [same]; *People v. Forte* (1988) 204 Cal.App.3d 1317, 1323 [where proposed instruction alerts court to defense theory, court has *sua sponte* duty to give a correctly phrased instruction].) By its silence respondent concedes the obvious: the trial court had a duty to instruct on lingering doubt in the instant case and it was required to do so even if that entailed the trial court's rewording the proposed instruction.

4. Respondent concedes by its silence that it cannot show that the error in failing to instruct on lingering doubt is harmless beyond a reasonable doubt.

Respondent does not dispute that if the trial judge's error in refusing to give the lingering doubt instruction violated the Sixth, Eighth and Fourteenth Amendments, the burden is on the state to prove that the error was harmless beyond a reasonable doubt. *(Chapman v. California, supra.)* Nor does respondent dispute that even if the failure to give the requested instruction is appraised only as an error of state law occurring at the penalty phase of a capital trial, reversal is required if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown, supra,* 46 Cal.3d at 448 [emphasis added]) – a test essentially equivalent to the *Chapman*

standard (*People v. Ashmus*, *supra,* 54 Cal.3d at 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).)

Respondent makes no explicit argument that the instructional error was harmless beyond a reasonable doubt. The only arguments respondent makes are the two untenable arguments discussed above: (1) the unconvincing claim that the instructions were adequate because they did not absolutely prohibit the jury from considering lingering doubt (rebutted in point 1. above); and (2) the factually inaccurate claim that defense counsel did not argue residual doubt (corrected in point B.2. above). Given that there was ample reason for the jury to doubt the deliberate premeditated nature of the shootings, which occurred within a minute or two of blatant provocation by one of the victims, on the heels of a pitched brawl, and may have been committed while Sonny was nervous, jittery and under the explosive influence of methamphetamine, it is understandable why the respondent did not even attempt to argue that the error in failing to instruct on lingering doubt was harmless.

For all of these reasons, there was substantial reason to have a residual doubt about whether Sonny premeditated or deliberated on the shootings, and the trial judge's failure to instruct on lingering doubt cannot be said to be harmless beyond a reasonable doubt. The death penalty verdict must therefore be set aside.

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

The arguments regarding the constitutionality of the California death penalty statute are well presented at AOB 168-200 and RB. 64-65.

X.

CUMULATIVE ERROR

Respondent contends that this was an error-free trial "and thus, [there was] no prejudice to accumulate." (RB 66.) In this reply brief, appellant has demonstrated that at the guilt phase: I. three illegally obtained confessions were erroneously allowed into evidence; II. the trial judge erroneously refused to instruct the jury on manslaughter based on extensive provocation by the victims or under CALJIC No. 8.73 on the effect of provocation on the degree of homicide; III. instructions were given which erroneously allowed the jury to find that Sonny lost the right to defend himself against apparently lethal force when he took out a firearm in response to Dedrick Gobert's threatening and belligerent behavior punctuated by Gobert's apparent move for a gun; and IV. Sonny was erroneously deemed by his silence to have waived his right to testify.

Appellant contends that each of these errors, individually, was prejudicial and requires reversal. But even if the Court does not find any one of them by itself prejudicial, the overall impact of the errors at the guilt phase "cumulatively produce[d] a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959, 963; *People v. Hill, supra,* 17 Cal.4th at 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error].)

Here, error infected each of Sonny's defenses: the admission of his statements to Detective Spidle undermined his defense that someone else was the shooter (which was supported by substantial eyewitness testimony); the denial of instructions on manslaughter as a result of provocation and on the effect of provocation on deliberation and premeditation deprived him of defenses that he did not commit first-degree murder, but rather only voluntary manslaughter or at most second-degree murder; the giving of CALJIC No. 5.55 and the last sentence of

CALJIC No. 5.17, combined with the prosecutor's erroneous argument that by responding to Gobert's threat of deadly force by taking out a gun Sonny lost the right to defend himself, allowed jurors to improperly reject Sonny's defense of self-defense and unreasonable self-defense even though they accepted his subjective belief that he was acting in self-defense; and the failure to assure that Sonny was aware of his right to testify in his own defense deprived him of that basic constitutional right and the opportunity to tell his story to the jury. A guilt trial such as this one in which error affected each of defendant's defenses is fundamentally unfair and violates due process.

At the penalty phase, appellant has demonstrated that improper prosecutorial arguments were made by the prosecutor and compounded by the trial judge's errors: V. in allowing the prosecutor to improperly argue that Sonny should be put to death because one of his victims had appeared in Hollywood movies and the other had been accepted into college (and by failing to instruct the jury that the social status of the victims was not an aggravating circumstance and by otherwise failing to instruct the jury on the limited role of victim impact evidence); VI. in permitting the prosecutor to improperly argue that Sonny should be put to death because a sentence of less than death "would bring further injury to the shattered lives of three families" (XXXIII RT 4585) and by failing to advise jurors that the wishes of the victims' families or the impact of the verdict on them was not a factor in aggravation; VII. in allowing the prosecutor to improperly argue that lack of remorse was an aggravating factor and failing to instruct them that remorse was a mitigating factor (and that the lack of remorse could not be considered aggravating); and VIII. by refusing to give an instruction on lingering doubt even though requested by defense counsel and supported by substantial evidence.

Appellant has demonstrated above why each of these errors, individually, was prejudicial. Even if this Court does not consider any one of these errors prejudicial

by itself, the cumulative impact of these errors was to deprive Sonny of a fundamentally fair penalty trial. This is particularly true because if any one of these four errors influenced one juror to vote for death, the sentence must be overturned. In assessing the impact of such errors, the *Chapman* standard placing the burden on respondent to demonstrate the errors were harmless beyond a reasonable doubt applies even if the errors were only an error of state law: reversal is required if "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error or errors not occurred" (*People v. Brown, supra,* 46 Cal.3d at 448 – a test essentially equivalent to the *Chapman* standard (*People v. Ashmus, supra,* 54 Cal.3d at 965 (equating the reasonable-possibility standard of *Brown* with the federal harmless-beyond-a-reasonable-doubt standard).)

Even ignoring that respondent has utterly failed to even attempt to meet its burden of demonstrating the errors were harmless beyond a reasonable doubt, in assessing the cumulative impact of these four errors, this Court should consider that the likelihood that one of these errors may have affected one juror is greatly enhanced by the fact that these were four *independent* errors. As a matter of common sense, it seems much more likely that prejudice occurred when there are four independent errors than if there were only one single error.

Statistical analysis confirms this. When trying to determine the likelihood that two or more independent events would occur, the "product rule" applies: "the product rule means that the probability of two events occurring together is equal to the probability that event one will occur multiplied by the probability that event two will occur. R. Freund & W.Wilson, Statistical Methods 62 (1993)." *Armstead v. State* (Md. 1996) 673 A.2d 221, 236-237 [upholding use of the product rule in DNA testing].)

In the present case, the independent event is whether any juror was influenced to vote for death by any one of the four separate errors discussed in points V

through VIII above. The power of the statistical logic is substantial: even if the Court found that it was 80% likely that each individual error had *no* influence on a single juror, it would be only 40.96% likely that none of the four errors influenced at least one juror.[9] Thus, even under the assumption that each error was 80% likely to have had no effect on any juror, it would still be 59% likely that one of the four errors affected one of the jurors.

In a related context, the United States Supreme Court has stated that where an instruction is not *per se* incorrect but is challenged as ambiguous and subject to erroneous interpretation, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *(Boyde v. California, supra,* 494 U.S. at 380.) A "reasonable likelihood" is something less than "more likely than not," but more than a mere "possibility." (*Ibid.*) As we have seen, the *Boyde* standard, a "reasonable likelihood" – something less than "more likely than not," but more than a mere possibility – would be more than satisfied even if the Court thought that each of the four errors individually was 80% likely to have had *no* effect on any juror. Furthermore, as explained above in arguments V, VI, VII and VIII, the likelihood that any of the errors would have had *no* improper effect is far less than 80%. Moreover, the multiplicity of errors creates a likelihood that one or more jurors would have been adversely affected in multiple ways.

Stripped of the statistical details, the fact is that given the number of significant errors made, the likelihood that one of the errors affected the verdict is

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[9] The probability that no juror would be influenced by the first error would be 80%, but the probability that no juror would be influenced by either of two errors would be 64% (80% times 80%); the probability that no juror would be influenced by any of three of these errors would be 51.2% (80% times 80% times 80%); and the probability that no juror would be influenced any of the four errors would be 40.96%.

much greater. This is particularly true because the balance of aggravating and mitigating evidence presented what was at best a marginal case for death. Indeed, the trial judge at sentencing agreed with defense counsel that Sonny's was "the most benign [death case] in Riverside.... to my knowledge ." (XXXIII RT 4700:24 to 4701:4.) The only prosecution evidence introduced at the penalty phase was victim impact evidence. Beyond that, the only aggravating circumstances introduced were the circumstances of the crimes for which appellant had been convicted. These crimes were substantial – two young men were dead and a young woman was paralyzed – but other circumstances were less aggravating: the crimes all occurred in the heat of a one-minute to two-minute confrontation initiated by the highly provocative behavior of one of the victims; there was no advance planning or brutality. Morever, Sonny had no prior criminal record of any kind. Weighed against that was a very substantial mitigating case which not only included a powerful case of difficult circumstances beyond Sonny's control which tended to diminish his level of personal responsibility (Sonny was the product of the rape of his mother, was abandoned by her twice, found nurturance with his grandparents in the Philippines, only to be stripped from that home and dragged around to military bases and the United States by a physically and emotionally abusive stepfather, treated as an interloper by his parents and siblings until at age 14 he ran away from the beatings and abuse and found a way to live with families of friends; defense expert, Dr. Nidorf, testified that Sonny's lack of a stable family led him to look to the ABC gang as a substitute family),[10] but also a strong case of positive qualities unusual in a death penalty case (he was loved by the mothers of the families he stayed with; he

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[10]For a more extended summary of the mitigating evidence tending to diminish Sonny's culpability. See AOB pp. 150-151 [difficult childhood]; 152 [expert testimony regarding impact of these circumstances]. For a fuller marshaling of this evidence, see AOB pp. 43-48 [difficult circumstances]; pp. 55-57 [expert testimony on the impact of childhood.]

cooked, cleaned, took care of younger children and was the one the mothers trusted with their kids; he befriended an Alzheimer patient, visiting and consulting with him in a way that showed humanity and compassion; he supported himself from age 14 when he had to run away from home to avoid abuse)[11], Given the number of errors at the penalty phase and the marginal, at best, balance of aggravating and mitigating factors, the cumulative effect of these errors is that "there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the ... errors not occurred." *People v. Brown, supra,*

CONCLUSION

For all of the foregoing reasons, the verdicts of guilty of first-degree murder of Gobert and of Hernandez, the special circumstances findings, and the death penalty verdict should be vacated and the case remanded for a new trial.

Respectfully submitted,

Paul J. Spiegelman
Attorney for Appellant Sonny Enraca

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[11] For a more extended summary of the mitigating evidence showing Sonny's many positive qualities, See AOB pp. 151-152. For a fuller marshaling of this evidence, see AOB pp. 48-50.

CERTIFICATE PURSUANT TO CA. RULE OF COURT 8.630

I hereby certify that, according to my computer's word processing program, this brief, exclusive of tables, is 36,110 words, well within the 47,600-word limit specified in the California Rules of Court.

Paul J. Spiegelman
ATTORNEY FOR APPELLANT

DECLARATION OF SERVICE BY MAIL

Re: *People v. Enraca*, Supreme Court No. S 080947

I, Paul J. Spiegelman, declare that I am over 18 years of age and am not a party to this action. My business address is P.0. Box 22575, San Diego, CA 92192-2575. I served a copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on December 14, 2009, sealed and deposited in the United States mail at San Diego, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Diego, California this 14th day of December, 2009.

PAUL J. SPIEGELMAN, DECLARANT