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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LUMORD JOHNSON,

Defendant and Appellant.

Riverside County Sup.
Ct. No. CR 66248

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Riverside

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. LUMORD JOHNSON, Defendant and Appellant.	Cal. Supreme Ct. No. S10857 Riverside County Sup. Ct. No. CR 66248

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant addresses specific contentions made by respondent, but does not reply to arguments which are adequately addressed in appellant's opening brief. Appellant's decision not to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

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ARGUMENT

I.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO SEVER THE TWO UNRELATED MURDERS, VIOLATING APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE VERDICT

Appellant has argued that the trial court erred in refusing to sever the count charging appellant with the murder of Camerina Lopez from that charging appellant with the first degree murder of Martin Campos. These crimes involved completely different circumstances. The charges should have been severed because the cases were not cross-admissible and both cases were weak, creating a substantial risk that the jury would convict based upon the spillover effect of the aggregate evidence. The trial court abused its discretion in refusing to sever the cases and violated appellant's state and federal constitutional rights to a fair trial and reliable jury verdicts in this capital case. (AOB 47-67; Cal. Const., art. 1, §§ 7, 15, 16; U.S. Const., 8th & 14th Amends.)

A. The Evidence Was Not Cross-Admissible

Respondent argues that the evidence in this case was cross-admissible, which would "dispel any suggestion of prejudice" and justify a trial court's refusal to sever properly joined charges. (RB 48, quoting *People v. Soper* (2009) 45 Cal.4th 759, 774-775.) Respondent contends that both cases were sufficiently similar to make evidence of the crimes cross-admissible to show intent. (RB 50-51.) Respondent specifically points to evidence offered by the prosecutor as being cross-admissible, including appellant's alleged admission before the Campos murder that it was easy to kill in reference to the Lopez shooting. (RB 50.)

In determining whether the trial court abused its discretion in denying a motion for severance, this Court has recognized that "cross-admissibility is the crucial factor affecting prejudice." (*People v. Stitely* (2005) 35 Cal.4th 514, 531.) For evidence to be regarded as cross-admissible, this Court considers "whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315-1316.)

Evidence Code section 1101 allows evidence of other misconduct to be introduced if it is relevant to prove a fact in issue, such as motive, common scheme or plan, preparation, intent, knowledge, identity, or absence of mistake. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400.) In general, evidence of other misconduct must be similar to the charged offense, but the degree of similarity varies according to the purpose for which it is offered. (*Id.* at p. 402.)

Respondent focuses primarily on whether the cases were cross-admissible for the purposes of showing intent, but notes that both identity and intent were at issue. (RB 51.) When evidence is introduced under Evidence Code section 1101 to prove identity, the misconduct offered and the charged offense must share distinctive features that act as a type of signature. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) Here, the two cases bore no similarity that would make them cross-admissible to prove identity. The Lopez shooting involved a fight between appellant and Jose Alvarez, with appellant using a shotgun as a club until he fired it in the course of the struggle. The Campos murder centered around a plan to rob the victim and convince him to leave the area, with appellant allegedly acting as security for Oscar Ross. The type of confrontation did not establish a distinctive signature that was common to both crimes. The type

of weapons also varied between the crimes. Indeed, this Court has held that evidence that the defendant possessed a weapon on one occasion is inadmissible to prove his commission of a crime with a different weapon on another occasion "for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577; see also *People v. Geier* (2007) 41 Cal.4th 555, 577-578 [fact that a knife was used in two crimes did not tend to support any legitimate inference and thus evidence was not cross-admissible; but the fact the *same* handgun was used in two other crimes did tend to support inference defendant was perpetrator of both and thus that evidence was cross-admissible].) Accordingly, the two crimes at issue did not share a distinct signature. The Lopez and Campos cases were not cross-admissible to prove identity.

Respondent argues that the use of a gun in two confrontational encounters was enough to make the crimes cross-admissible on the issue of intent. (RB 50) Respondent notes that in order to establish intent, "the least degree of similarity" is required. (RB 50, quoting *People v. Soper*, *supra*, 45 Cal.4th at p. 776.) Although the similarity required to show intent is less than that to show identity, this does not mean that only the barest similarity will suffice. The difference between similarity for intent and that for identity "is a difference of degree rather than of kind." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) For evidence of a different crime to be admissible on the issue of intent, the uncharged offense must be sufficiently similar to the charged offenses to support the inference that the defendant "probably harbored the same intent" in each event. (*Ibid.*) This threshold requires that there be "factual similarities" between the charges that

demonstrate that the perpetrator harbored the same requisite intent. (*People v. Soper*, *supra*, 45 Cal.4th at pp. 778-779.)

In *Soper*, this Court found that this standard was met because in each case, the victim was a homeless man, killed by a single blow to the head as he slept at his camp, with similar weapons that were found by the perpetrator and discarded at the scene. These kind of similarities established an intent to kill and indicated that the homicides were premeditated. (*People v. Soper*, *supra*, 45 Cal.4th at p. 779, fn. 15.) The similarities at issue in *Soper* contrast with the disparate facts involving the Lopez and Campos shootings.

There is a distinct difference between picking up a shotgun in the Lopez homicide, and using it as a club in an unplanned fight, and the facts alleged in the Campos case – using a small handgun after being asked to provide security during a planned robbery involving drug and gun dealers. The circumstances underlying the homicides, the type of weapons used, and the method of shooting are all distinct and do not support an inference that appellant had the same intent in each. The only similarities between these two cases relate to disposition, which cannot be used to prove either identity or intent. (*People v. Smallwood* (1986) 42 Cal.3d 415, 428 [disposition not admissible to form link connecting uncharged offense with material fact].) Accordingly, this Court should find that the two cases were not sufficiently similar to make them cross-admissible for the purposes advanced by respondent.

Respondent also argues that specific pieces of evidence would have been cross-admissible in separate trials. (RB 51-53.) Contrary to respondent's position (RB 52), this does not create the type of cross-admissibility necessary to dispel prejudice and justify denial of a severance motion. (See *People v. Soper*, *supra*, 45 Cal.4th at p. 779 ["full" cross-

admissibility must be established to join charges without weighing prejudice].) Cross-admissible evidence, however, is relevant to the extent that it is a factor that can be considered in determining whether the potential for prejudice warrants severance. (See *People v. Soper*, *supra*, 55 Cal.4th at 782.)

Respondent cites statements that appellant allegedly made to Oscar Ross before the Campos shooting that it was "easy to kill" in the Lopez case. (RB 50, 52.) To respondent, this statement was cross-admissible because it "strongly evidenced both an intent to kill in the prior Lopez murder as well as intent to kill and premeditation for the ensuring Campos murder." (RB 50.) This Court considers the record before the trial court at the time of its ruling on the motion to sever. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.) According to the prosecutor's offer of proof made at that time, appellant did not state that easy to kill, but rather that it was "easier to kill" the second time.[1/] (1 RT 135.) This distinction is important. Since appellant committed manslaughter in 1983, the Lopez shooting would have been the second time that appellant had killed. Under these circumstances, a statement that it was easier to kill a second time clear would refer to appellant's feelings after the fact and does not mean that he intended to kill in either incident. At most, the statement shows that appellant had a disposition to commit certain acts, which should not have been admissible in the Campos trial. (Evid. Code, § 1101; *People v. Lynch* (2010) 50 Cal.4th 693, 757 [section 1101 prohibits

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[1/] At trial, Ross denied giving a statement to officers about appellant's admission. (19 RT 2877.) George Callow, a Riverside police investigator, testified that Ross told him that Lopez had ended up shot "in some kind of way" and that appellant had made a statement "to the effect that it was easy for him to kill her." (21 RT 3193.)

evidence pertaining to a person's character to prove charged conduct].)

Assuming that the statement could be interpreted to have some bearing on the Lopez shooting, it would not make the full details of the Campos murder admissible. The Campos murder had not occurred when the statement was made and Ross maintained that there were no plans to harm Campos at that time. Respondent does not identify how the facts of the Campos case would have been admissible to bolster Ross's credibility regarding this statement, which was the theory advanced by the prosecutor at trial.[2/] (1 RT 135.) Accordingly, the alleged statement did not support joinder.

Respondent also states the prosecutor had a good faith belief that Ross would testify about appellant's feelings towards Hispanics. (RB 52, citing 3 CT 689 [prosecutor's opposition to motion to sever].) Appellant's feeling towards Hispanics related only to his disposition and was not relevant to prove his intent, identity, or motive for either crime. The prosecutor never alleged that appellant fought with Alvarez or intended to shoot either victim because they were Hispanic, which may be one reason that the proffered testimony was never introduced at trial. Even assuming that it was relevant to some other purpose, it would not have justified admission of evidence relating to either the Lopez or Campos murder in separate trials. Accordingly, the prosecutor's intentions to introduce this testimony did not weigh in favor of joinder.

Respondent states that joinder was proper because the prosecutor proffered that it may be necessary to impeach appellant's wife with evidence

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[2/] Appellant stated that he would not impeach Ross with the Campos murder should Ross testify in a trial that was limited to Lopez, making any crossover effect more tenuous. (1 RT 139.)

that she tried to provide an alibi for appellant in the Lopez murder. (RB 52, citing CT 690 [prosecutor's opposition to motion to sever].) Appellant stated that he was not going to call his wife as a witness in the Lopez case and denied that she had tried to provide an alibi in that case.[3/] (3 CT 758.) Accordingly, at the time of the motion to sever, the record here was far from clear and the prosecutor did not advance this as a reason supporting joinder during the court's hearing on the matter. Moreover, it again does not mean that the full details of the Lopez case would have been admissible had Tina Johnson testified in a separate Campos trial. This Court should find that it does not weigh in favor of joinder.

Respondent also contends that after the Lopez shooting, appellant yelled for Todd Brightmon, making evidence from the Lopez case admissible in Campos to corroborate their friendship. (RB 52, citing 1 RT 136-137, 12 RT 2010-211.) Appellant's friendship with Brightmon was not disputed and was established by other witnesses. Even if the prosecutor needed to further establish the fact of their friendship, this did not allow the admission of the full facts of the Lopez shooting. The credibility of any witness regarding the Campos shooting was not dependent upon appellant's role in the Lopez case, particularly since Brightmon was not involved in the homicide.[4/] Indeed, it is well settled that, "[a]s a general rule, the courts

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[3/] Although Tina Johnson testified during the penalty phase, the prosecutor did not question her about any attempt to manufacture a false alibi for appellant, even though her bias and credibility were at issue.

[4/] At the time of the severance motion, the trial court had no reason to think that Brightmon would testify on appellant's behalf. Even if Brightmon's credibility was at issue, however, there was no reason why facts relating to their friendship should have been established through evidence relating to appellant's role in the shooting itself.

have interpreted Evidence Code section 1101 as not permitting introduction of uncharged prior acts solely to corroborate or bolster the credibility of a witness'" who is not a victim. (*People v. Brown* (1993) 17 Cal.App.4th 1389; see also *People v. Tassell* (1984) 36 Cal.3d 77, 83-89, overruled on other grounds in *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402 [defendant's other crimes are inadmissible solely to corroborate the testimony of a prosecution witness].)

Even if a defendant's other crimes might be admissible to prove a prosecution witness's credibility in some situations, this was not such a case. In *People v. Brown*, *supra*, 17 Cal.App.4th at p. 1397, the reviewing court emphasized that the credibility of a prosecution witness was a collateral issue – the evidence was not being admitted to prove the underlying crime but to show the truthfulness of a witness. (See also *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [witness credibility collateral issue]; *People v. Lavergne* (1971) 4 Cal.3d 735, 742 [collateral nature of evidence "reduces its probative value and increases the possibility that it may prejudice or confuse the jury"].) In *Brown*, evidence of another crime created the risk of undue prejudice because jurors could use the testimony to believe that the defendant was criminally disposed to commit certain crimes. (*People v. Brown*, *supra*, 17 Cal.App.4th at p. 1397.) Here, as in *Brown*, the evidence supporting one murder bore little, if any, probative value to the collateral issue of the credibility of prosecution witnesses. Moreover, just as in *Brown*, admission of evidence supporting one unrelated murder would have resulted in a undue prejudice in the other case. Accordingly, the facts relating to appellant's conduct would not have been admissible in separate trials. This evidence did not weigh in favor of joinder.

B. The Potential for Prejudice Outweighed the Benefits of Joinder

This Court has found that consolidation of charges is generally a preferred method of trial because it promotes efficiency. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) However, this does not mean that charges that may be joined under Penal Code section 954 must inevitably be consolidated. Since joinder will always eliminate the need for separate trials, the issue is whether judicial efficiency alone weighs more than the interests of justice favoring severance. (*People v. Soper*, *supra*, 45 Cal.4th at p. 780.) In this case, the factors supporting severance outweighed judicial efficiency.

1. Joinder likely created a spillover effect

Respondent argues that appellant's assessment of prejudice was flawed because it is based on speculation that joinder was "likely to have created a spillover from one case to another." (RB 58, quoting AOB 61.) The assessment of potential prejudice at the trial level necessarily involves weighing matters that are not completely known. On appeal, when determining whether joinder was an abuse of discretion, this Court considers the record at the time the trial court made its decision. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) The trial court did not have the ability to determine the actual effect of joinder. Thus, it is the "likelihood" of

prejudice at the time of the motion that must be considered.[5] (See *People v. Soper*, *supra*, 45 Cal.4th at p. 780.)

In assessing the likelihood of prejudice, appellant has argued that joinder undoubtedly affected the Lopez case. (AOB 60-61.) In regard to the Lopez shooting, appellant's intent and his actions were very much at issue at the time of the trial court's ruling. Jose Alvarez, who was fighting with appellant when Camerina Lopez was shot, testified at the preliminary hearing that Lopez was off to the side when she was shot and that he did not see appellant pull the trigger. Indeed, he was not certain if appellant was going to strike him or point the gun at him. (1 CT 38, 40, 61.) The jurors could have found that appellant did not have malice necessary for murder. However, testimony from the Campos case alleged that appellant shot the victim after the two of them struggled, while Campos was on the ground. (1CT 98, 101.) Thus, jurors could have used the Campos case to infer that appellant intended to shoot Alvarez because he was disposed to commit murder.

The Lopez case also would have prejudicially affected the juror's deliberations regarding Campos. (AOB 61.) That appellant ran away following the Lopez murder would certainly have affected the jurors'

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[5] Respondent's reliance on *People v. Manriquez* (2005) 37 Cal.4th 547, is misplaced. (RB 58.) In *Manriquez,* this Court found that the defendant's assertion that he "probably" would have been acquitted of the charged crimes was speculative and unconvincing. (*People v. Manriquez*, *supra*, 37 Cal.4th at p. 575.) This Court reached its conclusion after reviewing the various factors affecting severance and finding that the evidence of each homicide established that the crimes had been committed with premeditation and deliberation. In the present case, the factors support severance under the unique facts pertaining to the Lopez and Campos crimes.

consideration of whether appellant ran from the scene in the Campos homicide and made it easier to dismiss his alibi defense. (3 CT 513-516.) The case against appellant primarily rested on the allegations of Oscar Ross and those who had ties to him. The jurors could have used appellant's disposition in Lopez to infer that appellant would have acted in keeping with the Ross allegations and believed that his testimony accurately portrayed the type of conduct that fit within appellant's predisposition. Under these circumstances, joinder was likely to have created a spillover effect from one case to another. This factor weighed in favor of severance.

2. The strength of the cases

The strength of the cases is appropriate for this Court to consider when weighing the potential effect of joinder. Respondent argues that both the Ross and Lopez shootings were strong cases against appellant.[6/] (RB 53.) When appellant moved for severance, both cases were being tried as first degree murder. As discussed above, in the Lopez shooting, Jose Alvarez's testimony at the preliminary hearing left appellant's intent – and

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[6/] In his opening brief, appellant relied on *People v. Smallwood*, *supra*, 42 Cal.3d 415 and *Williams v. Superior Court* (1984) 36 Cal.4th 881 for guidance on how this Court has analyzed the relative strength or weakness of cases when joinder is at issue. (AOB 62-63.) Respondent argues that these cases failed to take into the account the full importance of judicial economy or otherwise incorrectly weighed prejudice in determining that the trial courts had erroneously granted joinder in those two cases. (RB 56-58.) Appellant did not cite these cases to argue that the burden of showing prejudice falls upon the state (RB 56); that greater scrutiny is required if joinder gives rise to a capital case (RB 57). Rather, appellant has argued that the admission of evidence that is not cross-admissible would have strengthened the weaknesses in both the Lopez and Campos cases by allowing the jurors to conclude that appellant had a criminal disposition. (AOB 63-64.) In this regard, both *Smallwood* and *Williams* remain viable.

whether he committed the homicide through premeditation and deliberation – very much in doubt. Alvarez stated that Lopez was shot to his side (1 CT 38, 40, 61) so that jurors could have readily concluded that appellant did not intend to shoot him or to kill the victim when the gun was fired. The case against appellant involving Campos was also far from certain since it primarily rested upon the credibility of Oscar Ross and those who had close ties to him. The one person who was with Campos that day, Jose Garcia, failed to identify appellant from a photographic lineup conducted by Martin Silva in 1996. Garcia only identified appellant at the preliminary hearing when he saw appellant as the defendant, dressed in an orange jumpsuit. (16 RT 2538-2539, 2540-2542; see also 55 RT 8369, 56 RT 8470.) His identification therefore was in doubt. Both cases had weaknesses that were likely to have been affected by joinder.

Respondent relies primarily upon evidence taken at trial to conclude that the case against appellant was strong. (RB 53.) As discussed above, this Court's review for abuse of discretion should be limited to the evidence that existed at the time of the motion to sever. (*Alcala v. Superior Court*, *supra*, 43 Cal.4th at p. 1220.) Respondent's contention that appellant's defenses were "untenable" is simply a blanket assertion that relies upon select evidence introduced at trial. Even then, it ignores how close the case was from the jurors' perspective. (See 29 RT 4395, 4400;14 CT 3695a [on fifth day of deliberations, jurors could not reach verdict on either count]; 14 CT 3000a [verdict reached after seven days of deliberation]; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-907 [length of deliberations indicates closes case].) Respondent's position therefore is not persuasive. This Court should consider the weaknesses of both cases when determining whether joinder was proper.

3. Appellant offered to testify in regard to Lopez

Appellant has cited his offer to testify in regards to the Lopez shooting as a factor that supported severance. (AOB 57.) Appellant represented to the trial court that he wanted to testify about Lopez, but was concerned that if he testified in the Lopez case, then his silence about Campos, would be prejudicial. (1 RT 133; 3 CT 516.) Respondent faults appellant for not making a more detailed offer of proof regarding the nature of his proposed testimony. (RB 55.) Appellant offered to do so at an in camera hearing where the district attorney would not be present (1 RT 133; 3 CT 516), but the trial court denied the motion to sever without holding such a hearing. (1 RT 141.) In any event, the general nature of appellant's testimony was clear: appellant would have testified regarding the circumstances of the Lopez shooting and his intent at the time. (1 RT 133.)

Respondent states that there was nothing inconsistent about his defense in the two cases that would have prevented his testimony. (RT 55.) Inconsistency is not the issue. Appellant readily acknowledged his role in the Lopez shooting, making his intent and mental state the only real issues in that case. Certainly, appellant's testimony about the events surrounding the Lopez case would have been important to explain why he picked up the shotgun, fought with Alvarez, fired the gun, and ran away. In many respects, his defense was in his own hands since the actual events happened so quickly that testimony of others was far from certain. Appellant, however, was in a "Catch-22" situation, in which he needed to explain his intent in the Lopez case, but his silence about Campos, which was being tried as a capital case with special circumstances, would be particularly harmful. (*People v. Smallwood, supra*, 42 Cal.3d at p. 432 ["willingness to testify as to one charge could not help but leave an unfavorable impression with regard to the

other"], citing *Cross v. United States* (D.C. Cir. 1964) 335 F.2d 987, 989 ["a defendant's silence on one count would be damaging in the face of his express denial of the other"].)

Without appellant's testimony in Lopez, it was far easier for the jury to conclude that appellant committed at least second degree murder. This in turn would have affected both the guilt and penalty phases of the Campos trial. Accordingly, failure to sever the charges was prejudicial.

4. Efficiency does out outweigh the need for severance

Respondent contends that the benefits of efficiency justified joinder, citing the need to litigate discovery matters, select two different venires, and instruct and educate two different jurors on the same legal principles. (RB 55.) As a general matter, these considerations are always true in the sense that impaneling a single jury is more efficient than holding separate trials. The assertion does nothing more than restate the basic policy underlying Penal Code section 954. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 409 ["because consolidation normally promotes efficiency, the law prefers it"].)

The benefits that respondent cites, however, are minimized because discovery in the two cases varied a great deal. The facts underlying each case were substantially different. The issues before the two juries were also different because the Lopez case did not involve special circumstances or penalty considerations. Thus, separate discovery, witnesses, legal issues, and factual questions were required to be resolved on their own in each case.

This case, then, contrasts with *People v. Soper*, *supra*, 45 Cal.4th at pp. 781-782, where there were significant overlapping matters including the cause of death, blood samples, facts unique to the defendant's transient lifestyle, and potential impeachment. Although this Court also emphasized the general benefits of joinder in *Soper*, the final resolution does not depend

on this alone. Here, the trial court was faced with unique counts that were being charged against appellant, where the possibility of prejudice was real.

At bottom, respondent's observation that a single trial is more efficient than separate trials begs the fundamental question presented here: whether the potential prejudice of consolidation in this particular capital case outweighed the potential judicial benefits to be gained from consolidation in this particular capital case. (See *People v. Soper*, *supra*, 45 Cal.4th at p. 774 [assessment requires individualized determination].) Under these circumstances, this Court should find that severance was required.

C. Failure to Sever the Cases Violated Due Process and Reduced the Reliability of the Verdict

Even if the trial court did not abuse its discretion in denying appellant's motion to sever the two charges, this Court must reverse the judgment if joinder actually resulted in gross unfairness amounting to a denial of due process. (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.)

Respondent argues that each case was straightforward and distinct so that joinder would not have affected either case. (RB 59.) Although the facts of the cases were clearly distinct, which is one reason why the cases should have been severed, the charges were not regarded as being as separate and straightforward as respondent claims. As the prosecutor argued during his guilt phase summation, Lopez died because Alvarez fought back against appellant (27 RT 4103.) Campos was "another person who died" because he resisted appellant. (27 RT 4108.) He concluded: "Two people are dead. Two lives were brutally ended because they resisted [appellant]." (27 RT 4142.) Thus, rather than viewing the cases as being separate and distinct, the prosecutor himself brought the cases together and used appellant's disposition to inflame the jury in each. Since the prosecutor

merged the cases together in his mind, the jurors certainly would have done the same. (See *United States v. Sherlock* (9th Cir. 1989) 865 F.2d 1069, 1080 [prosecution's improper use of evidence removed "any reasonable expectation" that the jury would limit their consideration to proper purposes].) Ultimately, the charges were blurred enough so that appellant was sentenced for death for both murders, even though the Lopez second degree murder conviction was not subject to the death penalty. (26 CT 7261.)

Respondent cites to CALJIC No. 17.02, which instructed the jurors to decide each count separately so that their finding is stated in a separate verdict. (RB 60; 14 CT 3808.) As discussed above, the danger with joinder in this case is not that jurors would fail to realize that each crime is a distinct charge, but that disposition evidence relating to one crime would spill over to the other. The combined weight of the evidence brought into the cases as a result of the joinder thus led jurors to conclude that appellant had the malice necessary for second degree murder in the Lopez shooting, weakened appellant's alibi defense in Campos and strengthened the case against him. Accordingly, jurors could have understood that they were to reach separate and distinct verdicts on each charge, but that did mean that joinder did not affect their deliberations on the counts before them.

Both cases were close. Jurors deliberated long over both counts and reported being deadlocked on both counts. Ultimately, the jurors reached a verdict on the Lopez case only after the prosecutor dropped the first degree murder allegation. If appellant had been able to testify in the Lopez case without his silence affecting the capital charges against him, this verdict may well have been different. This Court also can have no confidence in the Campos verdict in light of the evidence concerning his disposition in Lopez.

This Court should find that the actual effect of the joinder violated due process and rendered the judgement against appellant unreliable. (U.S. Const., 8th and 14th Amends.) The judgment against appellant must be reversed. (*People v. Turner* (1984) 37 Cal.3d 302, 313 [reversal required when a joint trial caused gross unfairness and deprived the defendant of due process of law].)

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II.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S MOTION CHALLENGING THE DISCRIMINATORY USE OF THE PROSECUTOR'S PEREMPTORY CHALLENGES

The discriminatory use of peremptory challenges to remove African American and other minority groups from a jury violates both the California and United States Constitutions. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79; Cal. Const., art. I, § 16 [right to jury drawn from representative cross-section of the community]; U.S. Const., 6th & 14th Amends. [Equal Protection Clause].) Appellant has argued that the trial court erred in ruling that the prosecutor had "good reasons" for making his challenges as it denied appellant's motion. (8 RT 1392.) The trial court erroneously accepted the prosecutor's reasons without making the meaningful inquiry required under the federal and state constitutions. The reasons offered by the prosecutor to explain his challenge were not supported by the record and failed to rebut the presumption of discriminatory purpose. (AOB 68-83.)

A. The Trial Court Failed to Conduct a Proper Analysis to Determine if the Prosecutor's Reasons Were Supported by the Record

Appellant raised a *Batson* claim after the prosecutor used a peremptory challenge to strike Vanessa H. as an alternative juror. Appellant noted that the final jury accepted by both sides included an African-American man, Juror No. 8. However, during selection of the alternative jurors, the prosecutor struck two African-American women. (8 RT 1385.) Three out of four African Americans had been excused altogether. (8 RT 1386.) The trial court found that this established a prima facie case of discrimination. (*Ibid.*) After hearing the prosecutor's reasons

for making his challenges against each of the excused jurors, the trial court stated:

> I guess my duty now is to determine whether these reasons are based on reality or race. It does appear to me that he has overcome the prima facie showing that these might have been excused for a racial – or based upon some racial motivation. It does appear that he has a legitimate peremptory challenge for each of these, for good reasons, and reasons that he stated for the record.

(8 RT 1392) Appellant has argued that the trial court simply accepted the prosecutor's reasons without evaluating whether these reasons satisfied the third step of the *Batson* inquiry. (See AOB 73-76.)

Respondent states that this ruling was sufficient because a trial court does not need to expressly state its reasons for denying a *Batson* motion. (RB 77, citing *People v. Mills* (2010) 48 Cal.4th 158, 176.) In *Mills*, the this Court did not require the trial court to make an express finding about the potential juror's demeanor because it had "unquestionably weighed the credibility of the prospective jurors and the prosecutor." (*People v. Mills*, *supra*, 48 Cal.4th at p. 175.) To the extent that *Mills* might be understood to hold that a conclusory finding by the trial court is sufficient for *Batson* purposes, it should be reconsidered.

In *People v. Silva* (2001) 25 Cal.4th 345, this Court found that a trial court generally does not need to make detailed findings, "But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (*Id.* at p. 386.) Indeed, it is well established that at the third stage of a *Batson* analysis, the trial court has two obligations: to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation" (*People v. Hall* (1983) 35 Cal.3d 161, 167-168)

and to clearly express its findings. (*People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 5.) A reasoned effort to evaluate the reasons given by a prosecutor is not established by a global finding that simply adopts the prosecutor's stated reasons.

Our high court has explained, "A *Batson* challenge does not call for a mere exercise in thinking up any rational basis." (*Miller–El v. Dretke* (2005) 545 U.S. 231, 252.) Thus, federal courts have emphasized that trial courts must "evaluate meaningfully the persuasiveness of the prosecutor's [race]-neutral explanations." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969; see also *Williams v. Rhoades* (9th Cir.2004) 354 F.3d 1101, 1108 [trial courts cannot simply accept the proffered reasons at face value].) Indeed, this imposes an "*affirmative duty* under the third step of *Batson* to determine whether purposeful discrimination had occurred." (*Lewis v. Lewis*, *supra*, 321 F.3d at p. 834, original italics.) "At a minimum, this procedure must include a clear record that the trial court made a deliberate decision on the ultimate question of purposeful discrimination." (*United States v. Alanis, supra*, 335 F.3d at p. 968, fn. 2.) This duty is not satisfied by a lower court's conclusory statement that reveals nothing about its rationale. (*United States v. Hill* (6th Cir.1998) 146 F.3d 337, 342; *Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 289 ["some engagement with the evidence considered is necessary as part of step three of the Batson inquiry"].)

In *Green v. LaMarque* (9th Cir. 2008) 532 F.3d 1028, the federal court of appeal found that the California courts had not properly engaged in the kind of review required under *Batson*. The court explained that the third step of the *Batson* analysis entails "not only whether the reasons stated are race-neutral, but whether they are relevant to the case, and whether

those stated reasons were the prosecutor's genuine reasons for exercising a peremptory strike." (*Id.* at p. 1030.) The state courts had not engaged in this level of review because they had "simply reiterated the prosecutor's stated reasons without analyzing the other evidence in the record to determine whether those reasons were in fact the prosecutor's genuine reasons." (*Id.* at p. 1031.) The Ninth Circuit did not give deference to these decisions since the state never fulfilled the affirmative duty to determine if the strikes that been made for discriminatory reasons. (*Ibid.*)

Appellant has demonstrated in his opening brief (AOB 72-82) and below that the record in this case does not support the prosecutor's stated reasons for excusing Vanessa H. Accordingly, this Court should conduct a de novo review of the record without the level of deference commonly given a trial court's ruling. (*People v. Silva* (2001) 25 Cal.4th at p. 386.)

B. The Record Does Not Support the Prosecutor's Stated Reasons for Excusing Vanessa H.

As discussed above, this Court should examine the record de novo to determine if the prosecutor's reasons rebutted the prima facie case of discrimination. However, even assuming that deference is required, this Court must still carefully review the record. "Review is deferential to the factual findings of the trial court, but that review remains a meaningful one. As the high court described it, 'deference does not by definition preclude relief.'" (*People v. Lenix* (2008) 44 Cal.4th 602, 621, quoting *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 240.)

Respondent states that this Court must focus on the "subjective genuineness" of a challenge. (RB 77, quoting *People v. Reynoso* (2003) 31 Cal.4th 903, 924.) Although a prosecutor's reasons may be based upon individual or subjective factors, the genuineness of those reasons is for this

Court to review based upon the record. When a prosecutor gives his reasons for the exercise of a peremptory challenge, "the plausibility of those reasons will be reviewed, but not reweighed, in light of the entire record. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 621.) Where, as here, "the facts of the record are objectively contrary to the prosecutor's statements . . . serious questions about the legitimacy of the prosecutor's reasons for exercising peremptory challenges are raised." (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.) Thus, this Court must evaluate whether the "the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both." (*Id.* at p. 386.)

Respondent generally states that the prosecutor offered race-neutral reasons that were supported on the record for his challenges against African Americans on the venire. (RB 73.) A prosecutor's race-neutral explanation for striking a perspective juror simply indicates that the challenge is facially valid. Indeed, "unless a discriminatory intent is inherent in the prosecutor's explanation, the reason will be deemed race-neutral'" and the analysis proceeds to determine whether the reasons are a pretext for discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768; see also *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830, and authorities cited therein [trial court must undertake third step of the analysis and evaluate whether the "facially race-neutral reasons are a pretext for discrimination"].)

As a preliminary matter, respondent notes that the prosecutor's acceptance of an African-American man should be considered by this Court in determining whether the challenges were discriminatory. (RB 76.) As this Court has stated, the fact that a prosecutor accepted a jury containing members of an cognizable group does not end the inquiry "for to so hold would provide an easy means of justifying a pattern of unlawful

discrimination which stops only slightly short of total exclusion." (*People v. Snow* (1987) 44 Cal.3d 216, 225.) Once a prima facie case has been found, the question becomes whether "the stated reasons for a challenge to a particular juror" are valid. (*People v. Jurado* (2006) 38 Cal.4th 72, 105.) Indeed, in this case, the fact that the prosecutor accepted an African-American man would not necessarily be relevant for comparison purposes to his subsequent challenges of African-American women. (See RT 1385 [appellant brought motion only after prosecutor excluded African-American women].)

Appellant's motion under *Batson* focused on Vanessa H., who had been struck as an alternate juror. The prosecutor stated that he was concerned that the prospective juror had served on a hung jury. (8 RT 1387-1388.) Respondent notes that this is an acceptable race-neutral ground for exercising a challenge. (RB 74-75.) Both cases cited by respondent concerned whether there were obvious race-neutral reasons that this Court has held can defeat a prima face case of discrimination. (See *People v. Taylor* (2010) 48 Cal.4th 574, 644 [serving on a hung jury is a race neutral reason]; *People v. Turner* (1994) 8 Cal.4th 137, 170 ["experience of sitting on a hung jury constitutes a legitimate concern for the prosecution, which seeks a jury that can reach a unanimous verdict"].) At the third stage of the *Batson*, the issue becomes whether such a reason is valid in light of the overall record or is simply a pretext. (*Purkett v. Elem*, *supra*, 514 U.S. at p. 768.)

Here, Vanessa H. stated that she had been frustrated that some jurors in the case seemed to have based their votes upon emotional reasons that prevented the jury from reaching a verdict. She had expected each juror to deliberate, to listen to what everyone had to say, and then to render a verdict

based upon the evidence. She emphasized that a verdict must be based on the evidence presented: "I can't base things on my emotional feelings because I just think when you put feelings in the way, you can't really come up with a decision." (6 RT 1231.) Thus, the prosecutor had no reason to assume that her previous experience would render her unable to reach a verdict. On the record, the mere fact that Vanessa H. had served on a hung jury does not provide a plausible reason for excusing her.

Respondent also characterizes Vanessa H's "rambling responses" in regard to the shooting of her stepson as a reason to support the prosecutor's challenge. (RB 75, citing 6 RT 1228-1230.) Rather than raising doubts about her ability to serve on this case, her responses supported the prosecutor's argument that Campos's murder should not be disregarded because he was involved with drug dealing.

Vanessa H. stated that because her stepson's death was related to drugs, the police treated it like it did not matter. (6 RT 1229.) She believed that the case should have prosecuted based on the evidence and believed that officials could have done more to find out who killed her stepson. (6 RT 1229-1230.) Vanessa H. was forthright. She honestly answered the prosecutor's question in a way that was favorable to him. The record does not show that he could not understand what she was saying about this crime or that she had difficulty understanding his questions.

One of the primary factors relied upon by the prosecutor to justify his challenge was that he doubted whether she could impose the death penalty in light of what she had said during voir dire about her religion and the commandment not to kill. (8 RT 1387.) Respondent argues that these concerns were "fully justified" in light of her questionnaire and voir dire. (RB 74.) During voir dire, Vanessa H. stated that she did not have an

opinion about the death penalty because she had never been in a situation of being a prospective juror in a capital trial. (6 RT 1199.) Nevertheless, she affirmed that she could make the decision to impose the death penalty if it was warranted based on the evidence. (6 RT 1228.)

Vanessa H.'s answers were appropriate and consistent with responses given by seated jurors. The decision of weighing the two most severe punishments that the law provides, of holding the life of another individual in the balance, can never be an easy one. Vanessa H. took this into account, and during voir dire the prosecutor appeared to agree with her reasoning. As the prosecutor acknowledged, "We hope that [the penalty decision] would be difficult for everybody." (6 RT 1127.)

Other sitting jurors who were not African American recognized that the decision would be difficult and the best they could answer would be that they thought they could make it. As discussed in appellant's opening brief (AOB 78-79), Juror Number 5 said that it was hard to answer the prosecutor's question because he had never been on a jury. He acknowledged that he would not want to make the decision for death, but "I think I could." (4 RT 1018.) Juror No. 6 stated that he thought he could impose the death penalty, but he would have to be sure about it, given the difficulty of the decision. (4 RT 734.) Alternate Juror Number 1 stated that it was a hypothetical situation since they did not have the evidence, "And when it actually comes down to it I – I believe I could. But I'm just saying yes now." (5 RT 910; see also 5 RT 1019 [Juror Number 4 agreed with prosecutor that it would be a difficult decision and stated, "I think I could do that"]; 6 RT 1218 [Juror No. 1 recognized difficult decision and stated "I think I could [make it]."].)

Vanessa H.'s reference to her religion – the ten commandments – was hardly as "cryptic" as respondent maintains. (RB 74.) Although her religion told people not to kill, she stated that if the penalty was "based on the evidence and special circumstances, I can look at it both ways. I really don't have any problem with it." (6 RT 1199.) There was nothing cryptic about this. Indeed, it was similar to the way that Juror No. 3 recognized that his religion teaches that all life is sacred, but that he could impose the death penalty if it was appropriate. (5 RT 908.) Thus, accepted jurors expressed similar concerns to Vanessa H.[7/]

[7/] At trial, appellant identified Jurors Nos. 4, 5, and 6 in support of his claim. On appeal, appellant cited responses by these jurors, but asked this Court to consider other jurors as well. (AOB 78-79.) Respondent states that this Court need not consider additional jurors in its review of the record. (RB 79-80, citing *People v. Lenix*, *supra*, 44 Cal.4th at p. 624.) Respondent misinterprets this Court's opinion. In *Lenix*, this Court stated that "evidence of comparative juror analysis must be considered . . . for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons." (*Id.* at p. 622.) This Court cautioned about the limitations of comparative review if raised on appeal for the first time and stated that its review of these claims would be limited to the jurors identified by the defendant. (*Id.* at p. 624.) Since comparative review for the first time on appeal contemplates that the defendant did not raise the issue at trial, it is apparent that such review extends to the jurors identified on appeal. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 903, fn. 12 [comparative analysis must be conducted for the first time on appeal as to those jurors identified by defendant].) Appellant does not ask for more.

Respondent also states that review of Juror No. 8 should be rejected because he was an African-American man. (RB 80.) Appellant referred to this juror to demonstrate that other sitting jurors had similar opinions about the death penalty as Vanessa H. expressed in her questionnaire. (AOB 79, fn. 32.) The prosecutor's stated reason for striking Vanessa H. – uncertainty about whether she could vote for death – was undermined

(continued...)

Moreover, the questionnaire submitted by Vanessa H. made clear that she was not against the death penalty and that she believed it was a good thing to have in this state. (8 CT 2220.) She rated herself as being in the middle of the spectrum, having no firm opinion about the death penalty one way or the other, and emphasized that she could vote for either life or death based upon the evidence. (8 CT 2221.) Appellant noted in the opening brief that several sitting jurors similarly indicated that they were generally in favor of the death penalty but had "no opinion" about it. (AOB 79, fn. 12, identifying 4 CT 985-986 [Juror No. 2]; 4 CT 1042-1043 [Juror No. 5]; 5 CT 1099-1100 [Juror No. 8]; 5 CT 1137-1138 [Juror No. 10]; 5 CT 1156-1157 [Juror No. 11]; 5 CT 1175-1176 [Juror No. 12].)

Respondent attempts to distinguish these jurors from Vanessa H. by arguing that accepted jurors were far more likely to impose the death penalty. (RB 81.) The actual record, however, does not reveal such stark differences. For instance, respondent argues that Juror No. 10 stated that she would probably initiate the death penalty for defendants who murdered more than once in a violent way. (RB 80.) Yet, the juror's actual response was far more restrictive: "Unless the defendant murdered in the most violent way more than once and felt no guilt, then I probably would initiate the death penalty." (5 RT 1137, original underlining.) Accordingly, Juror No. 10 was not more likely to impose the death penalty than Vanessa H.

Respondent similarly states that Juror No. 2 "indicated that a person who commits severe crimes with no remorse should be considered for the

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[7] (...continued)
because her views were not substantially different from other sitting jurors. Thus, a comparison with Juror No. 8 goes to the validity of his reason for challenging Vanessa. H.

death penalty." (RB 80.) Again, the full response of the juror is much more restrictive: "My own feeling about the death penalty is, if this person, commits the crimes have no remorse of the case and no feeling of what he/she done and the defendant did severe cases like rape the victim & kill or mutilation or worse cases. then I consider Death Penalty." (4 CT 985, original spelling and grammar.) He believed that life without parole in prison was a punishment "if the case is planted [sic] to kill." (4 CT 987.) Therefore, Juror No. 2 was certainly open to the possibility of either penalty in a way that went beyond what respondent now contends.

Respondent cites to Juror No. 11's belief that "there are circumstances where the death penalty is warranted – obviously only with diligent study of the facts, etc." (RB 80, 5 CT 1136.) This is not substantially different than Vanessa H.'s opinion that she could vote for death depending on the evidence. (8 CT 2221.) Similarly, Juror No. 12's opinion that she had "mixed" feelings about the death penalty (5 CT 1175) did not distinguish the juror from Vanessa H. As respondent states, Juror No. 12 thought that a purpose of the death penalty was to scare kids straight and reduce crime (RB 80, citing 5 CT 1176), but Vanessa H. also believed the death penalty served a basic purpose to "show that if you take some's life you can receive death in return." (8 CT 2221.)

Respondent cites Vanessa H.'s opinion that "my feelings [about the death penalty] don't count" (8 CT 2220) as a reason that distinguished her from sitting jurors. (RB 81.) In voir dire, Vanessa H. stated that she believed that the opinions of African-Americans did not really count in society as a whole. (6 RT 1228.) To the extent that other sitting white jurors did not share similar opinions simply indicated that she had a different experience than they. Her answer was based on long-standing

divisions in this society based upon race. It should not be a reason to strike her from the jury and further validate such beliefs.[8/]

In short, the jurors identified by appellant expressed substantially the same opinion about the death penalty that Vanessa H. did. Some had confusing answers to the written questions. Some believed that the death penalty served purposes for reasons that were no similar to that identified by Vanessa H. Ultimately, Vanessa H.'s opinions about the death penalty did not distinguish her from sitting jurors. The record does not support the prosecutor's stated reason of striking her because of her views about the death penalty. Accordingly, this fact alone "militates against [the] sufficiency" of any other factor advanced by the prosecutor. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 699; see also *Lewis v. Lewis, supra*, 321 F.3d at p. 830 ["The proffer of various faulty reasons and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a court should sustain a *Batson* challenge"].)

[8/] Respondent also argues that other jurors followed high profile cases, such as O.J. Simpson, but that Vanessa H. did not. (RB 81.) The prosecutor did not cite this as a reason to dismiss Vanessa H. There was good reason for this since other jurors expressed either no or limited interest in high profile cases. Juror No. 7 stated that "she tried not to follow" serious criminal cases. (4 CT 1072.) Juror No. 4 wrote that she really didn't follow any cases. (4 CT 1015.) Juror No. 2 did not follow any. (4 CT 977.) Juror No. 10 tried "not to watch but news" but one case (Jeremy Strohmeyer) "slightly caught" his attention." (5 CT 1129.) Juror No. 12 wrote that she "never <u>really</u> followed any" serious cases but was aware of updates in the Simpson case. (5 CT 1167.) Accordingly, this factor had no bearing on Vanessa H's dismissal and did not distinguish her from other sitting jurors in any meaningful way.

In *People v. Silva*, *supra*, 25 Cal.4th 345, a *Batson* challenge was brought after the prosecutor struck three jurors. The court said only that the prosecutor "did provide an explanation with regard to" the three peremptory challenges and that "I think that there was a good excuse with regard to all of these people." (*Id.* at p. 382.) This Court particularly focused on one of the strikes made by the prosecutor in regard to Jose M. The prosecutor had explained that he believed that the prospective juror would be reluctant to impose a death penalty and thought that the individual was an aggressive person. (*Id.* at p. 377.) This Court reviewed the record of the voir dire proceedings and noted that Jose M. had mixed views on the death penalty but was slightly in favor of it and could return a verdict of death. (*Id* at pp. 376-377.) Under these circumstances, this Court found that "the record of voir dire provides no support for the prosecutor's stated reasons for exercising a peremptory challenge against Jose M., and the trial court has failed to probe the issue." (*Id.* at p. 385.) This Court unanimously reversed the verdict in light of the trial court's failure to meet its obligations to make "a sincere and reasoned attempt to evaluate the prosecutor's explanation." (*Ibid.*)

Here, the record similarly shows that the prosecutor's reasons and the trial court's global finding are unsupported by the record. As in *Silva*, the record shows that Vanessa H. would have evaluated the evidence and imposed the death penalty if she believed it was appropriate. The prosecutor failed to provide reasons that were supported by the record and the trial court failed to make a sincere and reasoned evaluation of those answers. Accordingly, reversal is required. (*People v. Silva*, *supra*, 25 Cal.4th at p. 385.)

III.

THE TRIAL COURT'S IMPROPER ADMISSION OF STATEMENTS MADE BY CAMERINA LOPEZ AFTER SHE WAS SHOT VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND A RELIABLE VERDICT

Appellant has argued that the trial court allowed the prosecutor to use hearsay statements of Camerina Lopez that went beyond simply identifying appellant as the shooter. The statements were based upon Lopez's perceptions of appellant's actions and his motivation. Appellant had no opportunity to confront Lopez on these issues and the reliability of these statements was not established. Accordingly, the trial court should have held that testimony violated appellant's Sixth Amendment rights to confront the evidence against him, his due process right to reliability and fundamental fairness, and his constitutional right to reliable guilt and penalty verdict in a capital trial. (AOB 84-95;U.S. Const., 6th, 8th & 14th Amends.)

A. The Issues Are Properly Before This Court

1. The trial court treated its ruling as being its final decision and appellant preserved the issue with his continuing objection

Although appellant repeatedly objected to the admission of the evidence, respondent contends that appellant's claims are waived on appeal because the trial court made only a tentative ruling and that appellant failed to obtain a final determination. (RB 86-88.) This argument is without merit.

During trial, appellant objected to statements given by Camerina Lopez to Officer Olson on hearsay grounds, as well as the Sixth, Eighth, and Fourteenth Amendments. (12 RT 1912.) The prosecutor argued that

the statements qualified as dying declarations and stated that the trial court should make a "preliminary finding" that left the ultimate weight of the evidence to the jury as the trier of fact. (12 RT 1917.) The trial court adopted this position and stated that "based upon the objection made" and what it had received about the Lopez's declarations that "it would be my preliminary indication that I would probably be allowing those statements." (12 RT 1917.) The trial court stated that it was his belief that the statements were admissible as a dying declaration. (12 RT 1918.) The trial court granted appellant's request that there be a continuing objection to this line of testimony. (*Ibid.*) It then found that Lopez's statements that referred to her children "would not be appropriate" and excluded these statements under Evidence Code section 352. (12 RT 1921.)

During the penalty retrial, appellant again raised the issue. Appellant reminded the trial court that he had objected to any statements that Lopez made that went beyond naming appellant as the shooter on various statutory and constitutional grounds, including the Eighth and Fourteenth Amendments. Counsel stated, "I just want to reiterate all those same objections I made, and I suspect the court's ruling would be the same." (43 RT 6538.) The trial court agreed, "I think it would. The dying declarations will definitely come in. I'll overrule you on that." (*Ibid.*

Under these circumstances, it is clear that the trial court's "preliminary indication"was a reiteration of the prosecutor's argument and effectively constituted its ruling on the issue. That the court granted appellant's motion for a continuing objection to all such testimony introduced at trial indicates that it understood that appellant opposed the introduction of the testimony at trial. That it affirmed its decision in the penalty phase also demonstrates that it understood its "preliminary

indication" to be a ruling. Thus, appellant did not waive the issue by failing to press the court for a more exact terminology.

In light of appellant's continuing objection to the admission of evidence, this Court should reject respondent's argument (RB 87) that "presumably" appellant elected not to object at trial. (See *People v. Venegas* (1998) 18 Cal.4th 47, 94 [after trial court overruled only part of an objection, defendant's cross-examination at trial did not waive a continuing objection].)

Moreover, even assuming that the trial court intended to reserve its ruling, this would not bar consideration on appeal. In *People v. Flores* (1979) 92 Cal.App.3d 461, the defendant objected to testimony about his heroin habit. The trial court stated that it would permit the testimony under Evidence Code section 352, but "reserve[d] ruling until such time as future objections might be made to that issue after the People have proceeded with their testimony to that point." (*Id.* at p. 466.) The defendant did not renew his objections, but the reviewing court found that the issue was not waived. "[T]he court's failure to rule formally, after having reserved the ruling, constituted an implied ruling against the objection and in favor of admissibility." (*Ibid.*) Therefore, the issue was properly before the court on appeal. (*Id.* at p. 467; see also *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1651 [where the trial court reserves its ruling, a failure to renew the point does not bar consideration on appeal].)

The record also makes it clear that any further objection would have been futile. During the penalty retrial, appellant restated his statutory and constitutional objections, but the trial court stated that its rulings would be the same and that the "dying declarations will definitely come in." (43 6358.) Thus, the trial court itself made clear that any further objection

would have been denied. Nothing further is required to preserve the issue on appeal. (*People v. Sandoval* (1992) 87 Cal.App.4th 1425, 1433, fn. 1; *People v. Whitt* (1990) 51 Cal.3d 620, 655.)

Ultimately, the purpose of the procedural rules is to ensure that the trial court was apprised of the issue before it and made a ruling so that any error can be addressed or corrected at trial. (*People v. Lewis* (2008) 43 Cal.4th 415, 481.) It is apparent here that both the trial court and counsel treated its initial finding as its ruling, which it affirmed during the penalty retrial. This served the underlying purpose of the requirement for an objection and ruling. The issue is preserved for review by this Court.

2. Appellant's constitutional objection preserved the specific claim for review

Respondent argues that appellant's claims under the Eighth and Fourteenth Amendment regarding the reliability of the statements that Lopez gave to Officer Olson are waived because they go beyond the arguments presented to the trial court. (RB 88,citing AOB 91-92.) Contrary to this position, appellant's constitutional objections at trial preserved the issue for appeal.

At trial, appellant objected to the statements on hearsay grounds as well as the Sixth, Eighth and Fourteenth Amendments and submitted the matter to the trial court.[9/] (12 RT 1912.) The prosecutor argued only that the statements constituted a dying declaration. (12 RT 1912-1913.) The

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[9/] By submitting the matter, appellant indicated that he had presented the issue to the trial court for ruling in light of the specific statutory and constitutional grounds that he cited. (*In re Richard K* (2001) 25 Cal.App.4th 580, 588 ["after the parties present evidence and argue their respective positions, they will 'submit' the matter, asking the court to rule without further argument"].)

trial court did not address any constitutional provision but "based upon the objection" and the offer of proof, it believed that the statements were admissible as dying declarations. (12 RT 1917-1918, citing Evidence Code section 1242.) The remainder of the trial proceedings that respondent cites were to whether specific portions of the statements could be admitted in the guilt phase pursuant to Evidence Code section 352. (12 RT 1914-1921.)

An issue is preserved on appeal if an apprises the trial court of the grounds that are being raised in regards to the matter that the trial court must decide. (*People v. Morris* (1991) 53 Cal.3d 152, 189; *People v. Scott* (1978) 21 Cal.3d 284, 290.) The objections at trial identified the constitutional basis of appellant's concerns, although the trial court clearly believed that Evidence Code section 1242 settled the issue.

Appellant's argument on appeal is based upon the specific grounds cited at trial. It should be noted, however, that the constitutional basis for appellant's objections underwent a dramatic change after appellant's trial. The United States Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36, resulted in a sea-change in the way that the Confrontation Clause was interpreted. (See AOB 85-86.) Moreover, as discussed below, the Supreme Court has recently clarified that if the Confrontation Clause no longer applies to certain testimony, due process considerations may still bar unreliable evidence. (*Michigan v. Bryant* (2011) ___ U.S. ___ [131 S.Ct. 1143, 1162, fn. 13].) To the extent that these decisions have changed the contours of appellant's claims, it should not bar consideration of the issues on appeal. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 [finding trial counsel's failure to object to object was not forfeited because counsel could not have anticipated later decision.].)

Respondent's reliance on *People v. Holloway* (2004) 33 Cal.4th 96 is misplaced. (RB 88.) In *Holloway*, the defendant failed to object to a limiting instruction. On appeal, it was contended that the limiting instruction should not have been given since it restricted the jury's consideration of evidence that might have been favorable to the defendant under various theories that had not been raised below. Under these circumstances, this Court found that the defendant "could and should have presented those theories to the trial court, which could, if it agreed the evidence was relevant for those purposes, have revised its limiting instructions or given the jury a new instruction permitting wider consideration of the evidence." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 133.)

There is a difference between a new theory advanced on appeal to argue that there should have been a wider admission of evidence and a argument based on a constitutional objection to the evidence that was presented and rejected by the trial court. Appellant develops these grounds in light of recent law, but the basic provisions and the record were before the trial court and should now be reviewed on appeal. Indeed, questions of law based upon the record have long been considered matters that can be addressed on appeal. (*People v. Carr* (1974) 43 Cal.App.3d 441, 444-445.) Accordingly, this Court should find that the issues before it are not waived.

B. The Statements of Camerina Lopez Were Improperly Admitted Under the Confrontation Clause, Due Process, and Constitutional Standards of Reliability in Capital Cases

Appellant has argued that the Lopez statements should be subject to the Confrontation Clause as applied in *Crawford v. Washington*, *supra*, 541 U.S. 36. (AOB 85-88.) Under this decision, testimonial hearsay must be

excluded unless the defendant has been afforded the right of cross-examination. (*Id.* at p. 68.) In *Crawford*, the high court suggested, without deciding that dying declarations may be a historical sui generis exception to the Confrontation Clause. (*Id.* at p. 56, fn. 6.) Appellant has recognized that this Court has found that dying declarations are such an exception. (AOB 87, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 764-765.) Nevertheless, appellant has urged this Court to reconsider this opinion in light of more recent criticism that dying declarations were not a unique historical exception to the right of confrontation and has argued that the basic principles of reliability that the Confrontation Clause is designed to protect can only be satisfied through cross-examination. (AOB 87-88.)

Respondent notes that this Court has emphasized that the "common law pedigree" of the dying declaration poses no conflict with the Sixth Amendment. (RB 89-90, citing *People v. Monterroso*, *supra*, 34 Cal.4th at p. 765.) Similarly, in *Crawford v. Washington*, *supra*, 541 U.S. at pp. 42-43, Justice Scalia focused on the practices in effect in 1791, the year in which the Confrontation Clause was enacted as part of our Constitution. In its footnote discussing dying declarations, the Court cited to a treatise that asserted that a dying declaration was the "only recognized criminal hearsay exception at common law." (*Id.* at p. 56, fn. 6, citing (citing F. Heller, *The Sixth Amendment* (1951) 105.) The pedigree of dying declarations and the conclusion that dying declarations were a sui generis exception to confrontation, however, have been sharply criticized.

Although common law had sometimes permitted hearsay statements made as a person was dying that did not satisfy the procedural requirements of statutory law regarding written statements taken by magistrates and justices of the peace, "[n]o legal historian has been found who would define

dying declarations as the only criminal hearsay exception at common law." (Michael J. Polelle, *The Death of Dying Declarations in A Post-Crawford World* (2006) 71 Mo. L. Rev. 285, 292.) Indeed, it has been recognized that dying declarations did not stand out as a unique hearsay exception under common law. (*California v. Green* (1970) 399 U.S. 149, 178, fn.12 (1970) (conc. opn. of Harlan, J.) ["Wigmore, for one, takes the position that several exceptions to the hearsay rule existed as of the time the Sixth Amendment was adopted"].) Thus, it should not be the claimed uniqueness of the dying declaration exception that is of primary importance, but whether such statements satisfies the core concern of the Confrontation Clause, which is to ensure reliability. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 61; see *Bourjaily v. United States* (1987) 483 U.S. 171, 189 [discussing a common law co-conspirator hearsay exceptions intended to ensure the truthfulness and reliability[.)

To the extent that dying declarations achieved elevated status, it was because they were assumed to be reliable under the circumstances that they were made. This is based on policy rationales that no longer hold sway. *Crawford* clearly rejected the idea that reliability obtained by any method other than cross-examination is constitutionally sufficient.[10/] (*Id.* at pp. 61 [Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"].) This Court should therefore reconsider its opinion in

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[10/] Dying declarations were assumed to be reliable because no one would want to face their maker if they had not told the truth. (*Giles v. California* (2008) 554 U.S. 353, 362.) As appellant argues, *ante*, that assumption no longer holds sway. (See also AOB 89-90.)

Monterroso and find that dying declarations are subject to the demands of the Confrontation Clause as defined in *Crawford.*

Even assuming that dying declarations are not subject to the Confrontation Clause, they must still be reliable under due process and Eighth Amendment standards. (AOB 88-95.) Reliability is a cornerstone of the Eighth Amendment at both guilt and penalty phases. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) The United States Supreme Court has also affirmed that unreliable evidence that does not fall within the limits of the Confrontation Clause is precluded by due process. (*Michigan v. Bryant, supra*, 131 S.Ct. 1143, 1162, fn. 13]["the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence"]; *White v. Illinois* (1992) 502 U.S. 346, 363-364 (Thomas, J., with Scalia, J., concurring) [rather than adding reliability to the Confrontation Clause, it "is more properly a due process concern"]: *United States v. Fields* (5th Cir. 2007) 483 F.3d 313, 337-338 [due process prohibits the admission of unreliable evidence that does not fall within Confrontation Clause].) Indeed, "reliability is the linchpin in determining admissibility" of evidence under the Due Process Clause of the Fourteenth Amendment. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) The admission of unreliable evidence therefore violates a defendant's due process right to a fair trial under the Fourteenth Amendment. (See *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *Foster v. California* (1969) 394 U.S. 440, 442.)

Respondent states that the requirements for dying declarations under Evidence Code section 1242 – that the statement is made upon personal knowledge and under a sense of immediately impending death – is a sufficient indicia of reliability. (RB 90.) Respondent cites the belief that a

sense of impending death is presumed to "'enforce as strict an adherence to the truth as would the obligation of an oath.'" (RB 90, quoting *Mattox v. United States* (1895) 156 U.S. 237, 244.) According to respondent, since dying declarations in this case were properly admitted under Evidence Code section 1242, there can be no violation of due process. (RB 90-91.)

The assumption that personal knowledge and a sense of impending death is sufficient guarantee of reliability does not hold sway. The United States Supreme Court has long warned that dying declarations "must be received with the utmost caution." (*United States v. Mattox* (1892) 146 U.S. 140, 152.) There are many reasons why such caution is particularly warranted with dying declarations. A dying declaration may not be reliable because perception, memory, comprehension, and clarity of expression are likely to be impaired in a dying person. (See Neeson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts* (1985) 98 Harv. L.Rev. 1357, 1374.) The experience of pain could affect the trustworthiness or accuracy of the declaration. (See *Dying Declarations* (1961) 46 Iowa L.Rev. 356, 376.) Moreover, the original "guarantee" of reliability, threat of divine punishment, may simply not apply. (*United States v. Mayhew* (SD Ohio 2005) 380 F.Supp. 961, 966.) Thus, the United States Supreme Court has long recognized that dying declarations do not guarantee truthfulness: "The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts." (*Carver v. United States* (1897) 164 U.S. 694, 697.) It is not enough simply to conclude, as respondent does, that the statements that were admitted in this case satisfied due process and Eighth Amendment requirements because they qualified as dying

declarations under the Evidence Code. (RB 90-94.) Due process and the Eighth Amendment demand more.

This Court should find that the evidence presented in this case was not reliable under Eighth Amendment and due process standards. (AOB 91-93.) Although respondent argues that this Court should review the issue only as an abuse of discretion (RB 91), the questions before this Court go beyond the admissibility of evidence under the relevant statutes. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1113 [admissibility of evidence under Evid. Code, § 1250 given deferential review].) Appellant does not argue that the trial court erred in applying discretionary standards under Evidence Code section 1242, but contends that the admission of the Lopez's declarations violated fundamental constitutional rights even if they otherwise qualify as a state hearsay exception. The constitutional issues implicated by the trial court's ruling are subject to independent review. (See *People v. Cromer* (2001) 24 Cal.4th 889, 901 [practice of this Court to provide independent review of mixed questions of constitutional law and fact].)

Appellant has demonstrated that Lopez's statements to Officer Olson, which went beyond identifying him as the shooter, were not constitutionally reliable. Since respondent does not respond to this claim other than to argue that the statements qualified as a dying declaration, no further briefing on this issue is required. This case, however, amply illustrates why the two standards are not synonymous. The statements here were made when Lopez was under extreme pain (12 RT 1914 [prosecutor's offer of proof]) and clearly under physical and emotional stress. Officer Olson could remember nothing about her demeanor or how she spoke in response to his questions. (12 RT 2001.) Her statement that she stood

directly in front of Jose Alvarez was not corroborated by other witnesses, and indeed, was disputed by Alvarez himself. (See 20 RT 3131; 44 RT 6703.) Thus, on the crucial matters that went beyond identifying appellant as a shooter, her statement stood alone.

Lopez's statements did not amount to reliable evidence as to what appellant actually did or intended to do, and they are not made more reliable because she made them to an officer shortly before she died. Yet, given the impact of her death – and that the officer could not remember the important matters relating to the statements – appellant lacked any real ability to defend himself against them. Accordingly, this Court should find that the statements were erroneously admitted.

C. Reversal is Required

Respondent argues that apart from these statements, the jurors had ample evidence to support appellant's conviction for second degree murder. (RB 94-95.) Under federal constitutional standards, however, respondent must show there is no reasonable possibility that a constitutional error contributed to the jury's actual verdict. (*Chapman v. California* (1967) 386 U.S. 18, 23-24. The question is not whether there would be sufficient evidence for the jury to convict in the absence of the error, but instead focuses on "what the jury actually decided and whether the error might have tainted its decision." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Thus, *Chapman* requires assessing the effect of an error on the actual verdict, not on a hypothetical proceeding before an error-free jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-281.)

Here, there is no question that the statements made to Officer Olson were extremely important to the prosecutor's case. The prosecutor regarded them as such and urged the jurors to give them special consideration

because Lopez was dying at the time. (27 RT 4099.) He read Olson's report to the jurors and emphasized the impact of it: "She is saying, among the last words that she ever spoke on this earth, that he is pointing it at Alvarez, and he is far enough back for her to get in between." (27 RT 4100.) Lopez's words, spoken from beyond the grave, were used to establish that appellant pointed the gun at Lopez and fired it when she stepped in between them.

The case against appellant was close. The jurors deliberated long. The evidence about when and how appellant shot the gun was far from certain. Alvarez testified that Lopez was to the side of him, which suggests that appellant did not deliberately fire at him when Lopez was shot. (20 RT 3131; 44 RT 6703.) Yet, because Lopez's words were spoken as she was dying it is likely that the jurors applied the prosecutor's argument and gave them special weight. Under these circumstances, there is a reasonable possibility that the error affected the jurors and led to the second degree murder verdict. The verdict as to Lopez and the special circumstance of multiple murder must therefore be set aside. (*Chapman v. California*, *supra*, 486 U.S. at p. 24.)

Appellant has also argued that this Court should also reverse the penalty judgment against him. (AOB 94-95.) Respondent cites "overwhelming aggravating evidence" against appellant to contend that the error could not have affected the penalty verdict. (RB 96.) The penalty determination, however, was very close. The first jury could not reach a verdict. The second jury deliberated for three days before imposing death. Thus, the "overwhelming" nature of the aggravating evidence was not reflected in the juror's actual verdict. (See *Parker v. Gladden* (1966) 385 U.S. 363, 365 ["the jurors deliberated for 26 hours, indicating a difference

among them"]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].)

The death of Camerina Lopez undoubtedly was also very important to the penalty deliberations. The jurors were charged not only to determine the verdict with respect to Campos, who was a far less sympathetic victim, but whether appellant should be put to death for her death as well. (See AOB, Argument XXIII.) Her death was particularly tragic. She was a young mother with hope for the future. Thus, Lopez's belief that appellant shot her when she stood directly in front of Alvarez would have been a powerful aggravating circumstance. Indeed, the prosecutor argued that the crime became murder when appellant intended to shoot Alvarez and that the jury should consider the pain that this brought to Lopez and her family. (57 RT 8423-8424) Under these circumstances, the testimony could well have made the difference between life and death. It cannot be shown that the error was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Robertson* (1984) 33 Cal.3d 21, 54 [under state law, any substantial error affecting penalty phase requires reversal].)

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IV.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A MISTRIAL AFTER A PROSECUTION WITNESS DESCRIBED THE CODEFENDANT AS APPELLANT'S "HENCHMAN"

At trial, the prosecutor called Alan Ford to testify that Todd Brightmon was present during the Lopez shooting. During direct examination, Ford stated that Brightmon was appellant's "henchman." The trial court granted appellant's motion to strike this testimony, but erroneously denied appellant's motion for a mistrial in violation of due process and appellant's constitutional right to a reliable verdict. (AOB 96-98.)

Respondent argues that the statement was a fleeting comment and that jurors would have followed the trial court's instruction not to consider evidence that was stricken. (RB 99.) This Court, however, has recognized that in some situations it can be futile to attempt to "unring the bell" once the matter is before the jury. (*People v. Morris* (1991) 53 Cal.3d 152, 188.) This is one of those cases. The "henchman" comment portrayed appellant as a king pin, ordering Brightmon about and having total control of their relationship. (14 RT 2315.) The statement also would have conjured images of people who are abused by villains, but always ready to their masters' bidding, even if it means to take responsibility for the crimes committed by others. (See Wikipedia, "Henchman in Popular Culture," <http://en.wikipedia.org/wiki/Henchman>.) Thus, it was particularly inflammatory.

Even if the jurors followed the trial court's instruction and did not consider it as "evidence," it still would have resonated long after it was spoken and provided a lens through which appellant would be perceived. A

juror who believed that Brightmon was appellant's henchman would assume that appellant so dominated Brightmon that he was ordered to confess to the Campos murder and falsify his testimony about Lopez. This not only would have led jurors to dismiss Brightmon's testimony out of hand, it would have been held against appellant and affected the credibility of his entire defense.

Respondent argues that appellant's alleged role in influencing Brightmon was "inescapable" irrespective of Ford's characterization. (RB 101.) The conclusion may have been inescapable if jurors perceived Brightmon as being appellant's henchman, but even if jurors rejected Brightmon's testimony there was no direct evidence that appellant had coerced him – jurors could have assumed that Brightmon testified because he was appellant's friend or because Brightmon wanted to increase his standing in prison. Having heard that Brightmon was referred to as appellant's henchman, it is likely that jurors took this characterization and assumed that appellant was responsible for any part of Brightmon's testimony that they did not believe.

The juror's decisions as to both Lopez and Campos were close. The jurors deliberated a long time and deadlocked before reaching the verdicts. (29 RT 4395, 4400; 14 CT 3695a.) The jurors' view of the credibility of the witnesses and their perceptions of appellant were therefore very important to their deliberations. The "henchman" comment affected this in critical ways. This Court should accordingly find that the trial court erred in denying appellant's motion for a mistrial. Reversal is required.

V.

THE TRIAL COURT'S ADMISSION OF INFLAMMATORY PHOTOGRAPHS VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND A RELIABLE VERDICT

Appellant has argued that the admission of autopsy photographs and other pictures of Martin Campos and Camerina Lopez, as well as a photograph showing appellant in handcuffs and jail clothing, were irrelevant to any disputed issue and were unduly inflammatory in both the guilt and penalty phases of the trial. The trial court's erred in failing to exclude the photographs as irrelevant or as unduly prejudicial under Evidence Code section 352, violating appellant's state and federal constitutional rights to due process, a fair jury trial and a reliable capital verdict. (AOB 99-110; U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16.)

A. The Photographs of Lopez Were Erroneously Admitted

Over appellant's objection, the trial court admitted several photographs that were taken before or during the autopsy of Camerina Lopez[11/]. Respondent discusses these photographs together with the photographs from the Campos murder as part of a general argument pertaining to the law at issue. Although the law pertaining to the admission of photographs is the same for both the Lopez and Campos counts, the photographs should be analyzed in the context of the specific case and the

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[11/] People's Exhibits No. 48 [Lopez lying on the gurney with an apparatus in her mouth]; No. 51 [gunshot wound showing bruising that may have occurred during surgery]; No. 52 [same wound from a different angle; No. 53 [shape of the wound]; No. 54 [wound along with surrounding gunpowder].

specific purpose for which they were introduced. Accordingly, appellant addresses the photographs separately.

Appellant acknowledges, as respondent argues, that this Court has often upheld the use of photographs that illustrate particular testimony, even if the photographs may be graphic and disturbing. (RB 108-109.) Such photographs may be particularly relevant in the type of cases that respondent cites, where violent sexual assaults were at issue (*People v. Heard* (2003) 31 Cal.4th 946, 976-978) or the photographs were important to document how the murder occurred (*People v. Schied* (1997) 16 Cal.4th 1, 16-17 [photographs used to establish that murder occurred during a robbery]). Here, the cause of death was not in dispute and the photographs were not relevant to the issues before the jurors. Under the circumstances of this case, the photographs were erroneously admitted. (See *People v. Turner* (1984) 37 Cal.3d 302, 321 [photographs of the victim not relevant to the issues presented]; *People v. Marsh* (1985) 175 Cal.App.3d 997, 998 [autopsy photographs irrelevant where coroner's testimony was uncontradicted and cause of death undisputed].)

In particular, respondent states that People's Exhibit No. 48, which was taken before the autopsy and showed Lopez's body lying on a gurney with an apparatus in her mouth (14 RT 2161), was relevant to establish that a murder occurred and to corroborate testimony concerning the circumstance of the shooting. (RB 109.) Respondent relies on *People v. Schied*, *supra*, 16 Cal.4th at p. 15, where this Court found that photographs were relevant for this purpose. In *Schied*, however, there was more than a murder at issue. The prosecutor had to show that the murder was done during the course of a robbery and there were specific features of the photo that substantiated the prosecution's case. (*Id.* at pp. 15-16.)

In contrast to *Schied*, the relevancy of Exhibit No. 48 was not established. The photograph had been used by Jose Alvarez during the preliminary hearing to identify Lopez (14 RT 2166, 20 RT 3134), but Alvarez's identification was not challenged at trial and appellant was willing to stipulate that he had correctly identified the victim. Respondent does not identify how it corroborated any testimony regarding the circumstance of the shooting. The photograph was not relied upon by the coroner or any investigator. Because there was no reason for this photograph to be introduced, this Court should find that it was irrelevant. (Evid. Code, § 210; see *People v. Poggi* (1988) 45 Cal.3d 306, 323 [offer to stipulate to matters depicted in photographs removed them from being in dispute]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1137 [photos that did not reveal the manner of death were improperly admitted].)

Even assuming that the photographs of Lopez had some probative value, the trial court abused its discretion in admitting them since they were cumulative and prejudicial under Evidence Code section 352. (AOB 103-104.) Respondent points to the broad discretion of the trial court in determining whether the photographs were admissible. (RB 111.) The discretion may be broad, but it is not unlimited. This Court has noted that even relevant photographs may be cumulative of other evidence. (*People v. Anderson*, *supra*, 43 Cal.3d at p. 1137.) Reviewing courts have also examined the record to determine if autopsy photographs offered *added* probative value that went beyond the testimony regarding the location and nature of the wounds. (See *People v. Smith* (1973) 33 Cal.App.3d 51, 69.)

The probative value of the Lopez photographs was attenuated since they did establish that appellant committed certain types of acts. The photographs did establish the level of appellant's guilt in the crime, nor

refute his defense. Instead, the pictures simply introduced graphic and inflammatory matters before the jurors of the very nature that has been shown to affect jurors. (See AOB 109, citing Douglas, et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* (1997) 21 Law & Hum. Beh. 485, 491-492.) This Court should find that the trial court erred in admitting the Lopez photographs.

B. The Photographs of Campos were Improperly Admitted

Appellant has argued that certain photographs pertaining to the Campos homicide should have been excluded.[12/] (AOB 104-106) Respondent maintains that these pictures were properly admitted as part of a general discussion pertaining to all the disputed photographs in this case. (RB 108-114.)

Respondent specifically argues that People's Exhibit No. 46 was relevant to show that a murder occurred and to corroborate testimony concerning the circumstances of the shooting and the disposal of Campos's body. (RB 109.) People's Exhibit 46 showed Campos's body when it was found in the weeds, after having been moved by Jose Garcia and dumped there. (12 RT 2180.) Because the body was placed in the car after appellant allegedly left the crime scene and Garcia brought the body there, it had nothing to do the actions of appellant. The coroner did not identify it as being relevant to the cause of death. Moreover, Garcia's testimony about

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[12/] The exhibits are People Exhibits Nos. 13, 14 [bruising of uncertain origin on Campos's face]; No. 15 [upper torso with various probes]; No. 17 [full length picture of body on autopsy table]; No. 18 [abrasions on back]; No. 19 [laceration on wrist]; No. 46 [body as found by road after Garcia left it there].)

leaving the body there was not in dispute. Therefore, the photo showing the body in the weeds was not relevant to any material issue at trial. (Evid. Code, § 210 [defining relevancy as that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence" to the case].)

Even assuming that the Campos autopsy photographs had some probative value, the trial court abused its discretion in admitting them. The cause of death was not in dispute and the photographs were not necessary to explain the coroner's testimony. The testimony needed no further clarification. The photographs instead were likely to have caused a "sharp emotional effect, exciting a mixture of horror, pity and revulsion." (*People v. Smith*, *supra*, 33 Cal.App.3d at p. 69 [three semi-nude photographs were not necessary to clarify testimony about autopsy].) Under these circumstances, the photographs were both cumulative and prejudicial. (*Ibid.*; see also *People v. Anderson*, *supra,* 43 Cal.3d at p. 1137 [photographs cumulative of expert and lay testimony regarding the cause of death, the crime scene, and the position of the bodies].) The trial court erred in admitting the disputed Campos photographs.

C. The Photograph Showing Appellant in Handcuffs Was Erroneously Admitted

Appellant has argued that the trial court erroneously admitted People's Exhibit No. 86, showing a lineup of six people, including appellant, in jail clothing and handcuffs. Appellant had asked the trial court to redact the portion of the photograph that showed the participants handcuffed in orange jumpsuits. (15 RT 2390.) The trial court denied this motion, abusing its discretion under Evidence Code section 352 and violating constitutional guarantees of due process and reliability in a capital case. (AOB 106-108.)

Respondent states that the photograph was important to show why Ronald Moore identification of appellant was "tentative" and was probative of Jose Garcia's failure to identify appellant from the photographic lineup. (RB 110-111.) Respondent emphasizes that appellant originally "confronted Moore with the photographic lineup." (RB 110.) While appellant questioned Moore about his identification, he did not use the photograph during his examination.[13/] The purposes that respondent identifies could have been served without showing jurors the handcuffs, as appellant urged the trial court to do. (15 RT 2591.)

Ronald Moore had been very tentative in identifying appellant from the lineup, stating that two people in the photograph might have been the person who was on the Ross property, but was not sure about either. (15 RT 3492-3493.) Jose Garcia did not recognize appellant in the lineup and picked out the wrong person. (16 RT 2540.[14/]) Even assuming that the similarity of the people in the lineup was important, this could have been shown through the faces alone. Adding the portion of the photograph

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[13/] After the photograph was used in the prosecutor's examination of Ronald Moore (15 RT 2392), appellant questioned Jose Garcia about his failure to identify appellant in the photograph. (15 RT 2474.)

[14/] In the opening brief, appellant cited to both guilt and penalty phase testimony that made clear that Garcia identified someone other than appellant as the shooter when he was shown the photograph. (AOB 107, citing 55 RT 8369.) Respondent notes that the exhibit was not admitted in the penalty phase, which appellant also stated in his opening brief. (RB 111; AOB 107, 110.) This citation was provided only for the convenience of this Court since Garcia had testified that he had picked out the shooter from the lineup. (15 RT 2474.) That the photograph was not used during the penalty phase indicates that it served little purpose in examining either Moore or Garcia.

showing the jail clothing and handcuffs did nothing to bolster the credibility of either witness.

Respondent argues that the handcuffs would not have been prejudicial since jurors would be aware that appellant had been arrested for the murders. (RB 114.) There is a difference between awareness of an arrest and the effect of a photograph depicting appellant in handcuffs. The photograph showed that at the point the picture was taken, officials regarded appellant as someone who needed to be handcuffed. Jurors could well have believed that appellant posed a special danger and that he was disposed to violence. This made it more likely for the jurors to have found that the Lopez shooting constituted murder and the Ross allegations were true in the Campos case. Under these circumstances this Court should find that the full photograph showing the jail clothing and handcuffs was erroneously admitted.

D. Reversal is Requited

The jurors deliberated long at both guilt and penalty issues and struggled to reach verdicts as to both homicides. It is this type of case where graphic photographs are most likely to improperly affect the juror's decisions, swaying them to accept the prosecutor's theories and reject appellant's defenses. The graphic images of Lopez after her death would have stayed in their mind, making it likely that jurors would have given greater credence to her statements that were admitted as dying declarations and ultimately sentence appellant to death for her second degree murder. In turn, the Campos photographs would have inflamed the jurors and caused them to conclude that appellant must have shot and killed the victim as Oscar Ross alleged. The photograph of appellant in handcuffs would have labeled appellant as being a special danger, disposed to commit either

shooting. This Court should find that the photographs were erroneously admitted and prejudicially affected the outcome of this case under either state or federal standards. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result]; *Chapman v. California* (1967) 386 U.S. 18, 24 [error not harmless beyond a reasonable doubt].)

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VI.

STATEMENTS MADE BY THE INVESTIGATING OFFICER ABOUT HIS MOTIVATION TO GET APPELLANT OFF THE STREETS WERE IRRELEVANT AND PREJUDICIAL

Appellant has argued that the trial court erroneously admitted statements made by Riverside police sergeant Arthur Horst during his interview with Todd Brightmon. Over appellant's objections, the jurors heard Horst emphatically state that he had to get appellant off the streets. The statement was improperly admitted under Evidence Code section 352 and violated appellant's Sixth, Eighth, and Fourteenth Amendment rights. (AOB 111-114.)

The statements were made when Horst questioned Brightmon about his friendship with appellant and asked where appellant might be found. (13 CT 3603-3605.) Horst asked Brightmon why he did not leave when things became violent. (13 CT 3606.) Brightmon told Horst that if he had tried, he would have been "a dead man inside the trunk." (13 CT 3607.) The jurors then heard Horst tell Brightmon, "I gotta get him off the streets, man. Gotta get him off the streets. You know who else I'm worried for too, right, is all (inaudible), and everything like that. I gotta get 'em. I gotta get 'em." (13 CT 3607.) Appellant did not object to Brightmon's statements being admitted, but argued that Horst overemphasized his opinion that appellant was a dangerous man who had to be taken off the streets. (23 RT 3666, 3668.)

Respondent states that Horst's comments were part of an interview and was relevant to explain that Brightmon was afraid of appellant.[15/] (RB 121-122.) Appellant did not dispute that Brightmon's statements were relevant, but maintained the Horst's opinion was his own. Moreover, it did not clarify the conversation because Brightmon had to ask, "Who, who else you gotta get?" (13 CT 3607.) Brightmon's statement, then, spoke for itself. Horst's opinion simply conveyed his own sense of urgency and his belief that appellant might commit other crimes, without being responsive to what Brightmon said.

The strength and forcefulness of Horst's statement implied that Horst knew things that were not before the jury that made appellant a danger to "all _____ and everything like that." (13 CT 3607.) Such opinion has been held to be inadmissible. (See *People v. Hernandez* (1977) 70 Cal.App.3d 271, 280 [officer's opinion invited jury to speculate that he had information not before the jury]; cf. *United States v. Young* (1985) 470 U.S. 1, 18 [allowing jury to hear prosecutor's personal opinion on defendant's guilt presents danger that jury will believe other evidence supports charges].) That Horst's statement was part of a taped interview

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[15/] At trial, Brightmon took responsibility for the shooting and stated that after the incident he had been threatened by Ross, who ordered him to help clean up the scene, and was afraid of him. (22 RT 3381, 3391.) During the interview it was unclear whether Brightmon had felt himself in danger from appellant if he backed out of the robbery, or if he was concerned about Ross. (See 23 RT 3668 [trial counsel believes that Brightmon may have been speaking about Ross].) But certainly Horst's statement was made about appellant. Horst identified "Lamar" in the interview (13 CT 3605) and referred to the role of the shooter (13 RT 3606). Immediately after the statement, Horst clarified that he needed to bring in the "loner." (13 CT 3607.)

would not have lessened these concerns. (*United States v. Hernandez-Cuartas* (11th Cir. 1983) 717 F.2d 552, 555 ["Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity."].)

Respondent echoes the trial court in arguing that the opinion was not prejudicial because the jurors would understand that Horst believed that appellant had killed two people, so that he naturally would consider appellant a danger and want him in custody. (RB 123; 23 RT 3668-3669.) In this case, Horst directly emphasized that he was worried for others and felt a particular urgency. His concern about unnamed other people increased the sense of danger that jurors would have perceived. Thus, there is a difference between assuming that Horst would want to try to arrest a particular suspect and the type of direct opinion expressed here.

Moreover, there was a danger that jurors would adopt Horst's agenda and that the emotional reaction – the need to get appellant "off the streets" – would have affected their deliberations. Respondent states that there was no danger of this because appellant was already in custody. (RB 123.) Respondent misinterpret's appellant's argument. The danger was not that the jurors would know that appellant was in custody, but that they would adopt Horst's mission to ensure that appellant did not return to the streets. At guilt, this would have contributed to the verdicts. At penalty, jurors likely believed that the death penalty was the best way to accomplish this goal.

Horst's statement was not simply cumulative of other statements before the jurors. (RB 125.) It was a direct statement that conveyed his opinion, his purpose, his belief that appellant was a danger to others, and

his sense of urgency in responding to that danger. The opinions of officers carry special weight. (*United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172.) This Court should therefore find that the trial court abused its discretion under Evidence Code section 352 and that the statement violated appellants state and federal constitutional rights to due process and a reliable verdict.

This was a close case on both guilt and penalty so that injection of improper emotional factors was likely to have influenced the deliberations and verdicts. Accordingly, for all the reasons stated above and in appellant's opening brief, this Court should also find that the error was prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result under state standards]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error not harmless beyond a reasonable doubt].)

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VII.

THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURORS THAT FLIGHT COULD BE CONSIDERED AS CONSCIOUSNESS OF GUILT

Appellant has argued that CALJIC No. 2.52 (flight instruction) was improper in this case. There is no doubt that appellant left the state after the Lopez homicide, and that he was not present following the Campos murder. Neither instance, however, conveyed appellant's guilt of any particular crime. Under these circumstances, the instruction was unnecessary, argumentative, and permitted the jurors to draw irrational inferences against appellant. Accordingly, the instruction violated appellant's constitutional rights to a properly instructed jury, a reliable verdict in a capital case, and due process. (U.S. Const., 6th, 8th, & 14th Amends.; see AOB 115-124.)

A. The Issue Is Properly Before This Court

Respondent contends that this claim is invited error because trial counsel informed the court that he believed that the use note for the instruction indicated that it had to be given sua sponte for the Lopez shooting. (RB 126, citing 25 RB 3738.)

The doctrine of invited error applies if defense counsel intentionally caused the trial court to err so that a defendant cannot then complain on appeal. (*People v. Marshall* (1990) 50 Cal.3d 907, 931; see also *People v. Wickersham* (1982) 32 Cal.3d 307, 335 [counsel must have "deliberately caused" the error for it to be invited].) Thus, the trial court's duty to instruct the jurors accurately on the law "can only be negated in that 'special situation' in which defense counsel deliberately or expressly, as a matter of trial tactics, caused the error." (*People v. Lara* (2001) 86 Cal.App.4th 139, 164.) "'If defense counsel suggests or accedes to the erroneous instruction

because of neglect or mistake we do not find "invited error;" only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.'" (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 332, quoting *People v. Graham* (1969) 71 Cal.2d 303, 319.)

Counsel's statement that he thought the instruction should be given was based upon the use note. Counsel acceded to the instruction based upon it being classified as part of the trial court's sua sponte duty to instruct the jurors and alerted the trial court to that. There was no deliberate tactical purpose that would make this rise to the level of invited error.

Moreover, as appellant has acknowledged, this Court has repeatedly upheld the use of CALJIC No. 2.52. (AOB 115, citing *People v. Nicolaus* (1991) 54 Cal.3d 551, 579.) Appellant is asking this Court to reconsider its decisions in light of the record in this case and the arguments that have been presented, but at trial appellant's counsel and the trial court would have been bound by this Court's opinions regarding the validity of the instruction. This is not a situation where the doctrine of invited error should be applied.

B. The Consciousness of Guilt Instruction was Improperly Given

Respondent cites this Court's opinion that have upheld CALJIC No. 2.52 over similar claims that it is argumentative or invites irrational influences. (RB 129-130.) As discussed above, appellant acknowledges these decisions but argues that this Court should reconsider its former opinions, particularly as applied in this case.

Appellant has argued that the instruction in this case was unwarranted because there was no dispute whether appellant was the

shooter or fled the area immediately after the crime. The issues before the jurors centered around appellant's mental state – whether he intended to fire the weapon at Alvarez and shot Lopez instead. On this issue, the flight instruction shed no light and permitted the jurors to draw irrational inferences. (AOB 121-122.)

Respondent states that appellant's defense was that the shooting was an accident so the flight was relevant to determine if he held an honest belief that Lopez's death was something "for which he bore no criminal responsibility." (RB 130, quoting *People v. Zombrano* (2007) 41 Cal.4th 1082, 1160.) In *Zombrano*, the defense maintained that the victim pulled a gun which went off accidentally during a struggle. (*Ibid.*) That is a far different situation than this case presents, where appellant acknowledged that he bore moral and legal responsibility, but argued that he had a lesser degree of culpability to that alleged by the prosecutor. (27 RT 4145.)

Appellant's flight was irrelevant to whether he committed manslaughter, second degree murder, or the charged first degree murder. To the extent that appellant ran from the crime scene to avoid prosecution, it would not matter whether he was running to avoid a second manslaughter conviction or because murder was at issue. Under any of these offenses, appellant's consciousness of guilt would be the same. Despite this, appellant's jurors were instructed that appellant's flight could be used in determining whether he was guilty or not guilty of the particular charges against him. (14 CT 3278; CALJIC No. 2.52.) This Court should find that the instruction as given in this case was erroneous.

The error in this case was not harmless under either state or federal standards. As discussed above, the length of the deliberations and the problems that the jurors had in reaching a verdict on the Lopez count in

particular indicates that this was a close case. In the Lopez shooting, the evidence establishing murder was not strong. Since flight was not disputed, it was almost certain that the jury found the instruction applicable. Moreover, the error affected the only contested issue in the case, i.e., the nature and degree of the homicide. It allowed the jurors to assume that appellant was aware of his guilt and must have committed murder rather than manslaughter. The judgment on the Lopez murder conviction and the special circumstance allegation of multiple murder must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result under state standards]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error not harmless beyond a reasonable doubt].)

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VIII.

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

Appellant has argued that the trial court erroneously instructed appellant's jurors on felony murder, even though he was charged with only first degree malice murder. (AOB 125-132.) The instructions on first degree murder were erroneous because the information not only did not charge appellant with first degree murder, it did not allege the facts necessary to establish first degree murder. (U.S. Const., Amends. 6th, 8th & 14th; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Respondent states, as appellant has acknowledged, that this Court has rejected similar arguments in other cases. (RB 133-135, *People v. Hawthorne* (2009) 46 Cal.4th 67, 89, and other cases cited therein). Because respondent does not address appellant's claims other than to note that this Court has rejected similar issues, no further briefing is required at this time. For all the reasons stated in Appellant's Opening Brief, this Court should reconsider the issue.

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IX.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

In his opening brief, appellant argued that the failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and that the error denied him his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to a unanimous jury verdict, and his right to a fair and reliable determination that he committed a capital offense. (AOB 133-141.)

Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 135-137.) Because respondent simply relies on this Court's prior decisions and adds nothing new to the discussion, the issues are fully joined and no reply is necessary. For the reasons stated in Appellant's Opening Brief, this Court should reconsider its previous opinions and hold that the instructions given in this case were erroneous.

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X.

THE TRIAL COURT'S INSTRUCTIONS THAT THE JURORS MUST FIRST ACQUIT ON FIRST DEGREE MURDER BEFORE REACHING A VERDICT ON LESSER OFFENSES SKEWED THEIR DELIBERATIONS IN FAVOR OF THE GREATER OFFENSE

After deliberating for five days, the jurors indicated that they were unable to reach a verdict on either count and asked the trial court to explain CALJIC No. 8.71. (14 CT 3695a.) The trial court explained that the final verdict in this case had to be unanimous. (29 RT 4294.) The following day, before the jurors reached a verdict, the trial court announced that the first degree murder allegation in the Lopez case was being dropped and returned to the language of CALJIC 8.71, which had originally confused the jurors, in regard to the Campos charges:

> Previously, I instructed you under 8.71, and other instructions, that you could not return a verdict on second degree murder or any lesser charge unless you *unanimously* agree that the defendant was not guilty as to first degree murder. This instruction will continue as to Count I, the Martin Campos matter.

(29 RT 4412, 14 CT 3832 [original italics in written instruction].) Appellant has argued that this instruction erroneously skewed the jurors deliberations in favor of first degree murder for the Campos shooting. (AOB 142-151.)

Respondent relies upon this Court's opinions which have upheld the "acquittal first" rule, that jurors must unanimously reject the greater offense before reaching a verdict on the lesser offense. (RB 139-140.) These opinions should be reconsidered for all the reasons stated in the opening brief. Even assuming, however, that such a rule is correctly adopted for the

verdict as a whole, this Court has made clear that the instructions given can affect the deliberations and the individual decision reached by a juror.

In *People v. Moore* (2011) 51 Cal.4th 386, 410, the defendant contended that the 1996 revision to CALJIC No 8.71, which requires the jurors to unanimously agree that they have a reasonable doubt on whether murder is of the first degree before reaching a second degree verdict, was error.[16/] Although this Court found that other instructions conveyed the law, it found that the requirement for unanimity in CALJIC No. 8.71 had "some potential for confusing jurors about the role of their *individual* judgments in deciding between first and second degree murder, and between murder and manslaughter." (*Id.* at p. 411.) Accordingly, this Court held that the better practice was not to give the 1996 revision to the instruction. (*Ibid.*) It found that the error was harmless, however, because the jurors reached a verdict on the special circumstances, indicating that they had unanimously relied upon the felony murder theory and could not have found the defendant guilty of a lesser offense. (*Id.* at p. 412.)

As in *Moore*, appellant has argued that the "unanimous" language in the 1996 revision of CALJIC No. 8.71 was likely to have confused the jurors and skewed the individual decisions of jurors made during the deliberative process. (AOB 149-149.) Thus, even if the "acquittal first" correctly applies to the verdict as a whole, "it is the *process* by which a juror reaches such a verdict that is at issue." (AOB 149.) In this case, the juror's requested that the trial court explain CALJIC No. 8.71 because they

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[16/] Previous versions of the instruction did not use the word "unanimously." (See CALJIC No. 8.71, 5th Ed., 1988 [omitting the word]); *People v. Frye* (1998) 18 Cal.4th 894, 963 [discussing 1979 revision that did not include the word].)

could not reach a unanimous verdict on either the Lopez or the Campos charges. (14 CT 3695a.) Thus, the potential for confusion that this Court recognized in *Moore* was affirmatively identified by the jurors as being a problem that kept them from reaching a verdict on both counts.

The confusion expressed by the jurors should lead this Court to find that the trial court's instruction prejudicially skewed the verdict. The question asked by the jurors indicated that the special circumstances had not been decided and the degree of murder was in doubt. The trial court's explanation of CALJIC No. 8.71 was therefore a key component of the resulting verdict. Having been steered to first degree murder, a juror who had given up his or her individual doubt about the degree of murder under this instruction would also give up doubts about the special circumstances.

The verdict was reached soon after this instruction was given, indicating its importance to the deliberations. Appellant's first degree murder conviction therefore cannot be deemed "surely unattributable to the" erroneous instruction. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, citing *Rose v. Clark* (1986) 478 U.S. 570, 578.) Reversal of appellant's conviction is therefore required.

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XI.

THE TRIAL COURT'S DISMISSAL OF THE FIRST DEGREE MURDER CHARGE ON THE LOPEZ COUNT SKEWED THE VERDICT IN FAVOR OF FIRST DEGREE MURDER IN REGARD TO CAMPOS

After appellant's jurors asked for clarification about the meaning of transferred intent in first or second degree murder (14 CT 3696a), the prosecution proposed to dismiss the first degree charges in the Lopez case. (29 RT 4405.) The trial court treated this as a motion to dismiss the first degree murder allegation under Penal Code section 1385, but it did not state its reasons for granting the motion as required under the statute. (29 RT 4407.) Morever, appellant objected that the dismissal could have a coercive effect on the Campos case, implicitly emphasizing it as being first degree murder. (29 RT 4407.) Appellant has demonstrated that the trial court prejudicially erred in dismissing the count over appellant's objection . (AOB 152-157.)

Respondent argues that despite the trial court's failure to state its reasons for dismissing the first degree allegation, the dismissal should be upheld because it was made at the request of the prosecutor rather than over his objection or upon the court's own motion. In respondent's view, the purpose of the statute is simply to protect the interests of the public and impose a restraint upon judicial power. (RB 144, citing *People v. Schomer* (1970) 13 Cal.App.3d 672, 678.) Respondent argues that when a motion is made upon the request of the prosecutor, this rationale does not apply and a dismissal should be "deemed valid." (RB 144.)

Penal Code section 1385 answers respondent's position. It requires a statement of reasons and is directed to dismissals made either upon the trial court's "own motion or upon the application of the prosecuting attorney."

Thus, even on the motion of the prosecutor, "the reasons for the dismissal must be set forth" in the record. (Pen Code, § 1385, subd. (a).) The statute's requirement for reasons is mandatory and is not simply directory. (*People v. Schomer*, *supra*, 13 Cal.App.3d at p. 678; *People v. Hunt* (1977) 19 Cal.3d 888, 897.)

In *People v. Orin* (1975) 13 Cal.3d 937, 945–946, this Court recognized that the dismissal of a count in the furtherance of justice requires consideration of both the constitutional rights of the defendant and the interests of the state. Thus, the purpose of the statute is not simply to protect against dismissal over the prosecution's objection, but to ensure that the rights of all parties are respected. There should be no difference between the requirements that are in effect when charges are dismissed over the objections of the prosecutor and when charges are dismissed over the objections of the defendant. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 474 [due process requires balance between defense and prosecution]; *Washington v. Texas* (1967) 388 U.S. 14, 22 [distinction between rules pertaining to defense and prosecution are not valid]; *Lindsey v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].) Accordingly, this Court should find that the trial court's dismissal of the first degree murder count under Penal Code section 1385 was invalid.

Respondent maintains that dismissal of the first degree charge did not have any bearing on the Campos case and "'would only operate to the benefit of appellant in thrusting into jurors' minds doubt as to the strength of the remainder of the prosecution's case.'" (RB 145, citing *People v.*

Harris (1977) 71 Cal.App.3d 959, 967.[17]) Although this may be a valid consideration if a charge is being completely dismissed, appellant's concern was a unique situation where the juror's were directed to no longer consider whether the Lopez shooting was first degree murder, leaving lesser crimes on the table. Here, appellant's concerns were directed at the opposite effect.

The trial court's instruction effectively told the jurors that the killing in Lopez did not qualify as first degree murder, but the killing in Campos did. In effect, jurors could assume that the prosecutor did not really mean it when he argued that the Lopez shooting was first degree murder, but he absolutely meant it in regard to Campos. The trial court erroneously signaled the view that the verdict in each count was clear and simple. Indeed, the jurors found it so and soon after returned a verdict after being deadlocked for six days on both counts.

Respondent presumes that the jurors followed the instructions and viewed each count separately. (RB 145.) That indeed is a presumption that is often applied. In this regard, however, it is nothing more than a truism without meaning. Jurors could easily view each charge as a distinct crime, but be influenced by an instruction that signaled the relative strength of each charge.

As discussed above (Argument X), the jurors' question regarding the effect of CALJIC No. 8.71 indicated that they had important doubts about

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[17] Respondent argues this as a quote, but does not identify the source of the quotation other than to point to *People v. Harris*, *supra*, 71 Cal.App.3d at p. 967. *Harris* does not contain this language and deals only with the effect of evidence received on a count that was later dismissed in its entirety. This is a different situation than the issue before this Court. Appellant did not otherwise find the quotation.

the degree of both crimes that were at issue. (14 CT 3695a.) After six days of deliberation, the court's dismissal of first degree charges in Lopez and its instruction was likely seen as a compromise that emphasized the assessment of the trial court as to the relative strength of both charges. It became easier for the jurors themselves to make such a compromise in their deliberations and the instruction acted as a lens to view the strength of the evidence in regard to both counts. Under these circumstances, the error requires reversal under either the beyond-a reasonable-doubt test of *Chapman v. California* (1967) 386 U.S. 18, 24, or the reasonable-probability test of *People v. Watson* (1956) 46 Cal.2d 818, 836.

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XII.

THE TRIAL COURT INCORRECTLY INSTRUCTED THE JURORS ON THE ELEMENTS OF KIDNAPING SO THAT THE SPECIAL CIRCUMSTANCE MUST BE SET ASIDE

Appellant has argued that the trial court erroneously instructed the jurors on the definition of simple kidnaping under Penal Code section 207, using the 1999 revision of CALJIC No. 9.50 that provided a broad definition of the asportation requirement. (14 CT 3796.) This definition was not in effect at the time appellant was alleged to have committed this crime. Therefore, the instruction violated appellant's federal and state due process rights, as well as his Sixth Amendment right to a trial by jury and his Eighth Amendment right to a reliable verdict. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7, 15, 16.)

Respondent agrees that the simple kidnap instruction was erroneous. (RB 146, 151.) Despite this error, respondent argues that it was harmless because this Court can conclude that the jurors relied upon a theory of aggravated kidnaping for which they were correctly instructed. (RB 146.) Respondent states that the robbery special circumstance shows that the jurors based their finding on a kidnap for robbery theory. (RB 151.) According to respondent, no rational juror, having found that the murder was carried out in the commission of an attempted robbery, could have found that there was simple kidnaping but not kidnaping for robbery. (RB 152.)

Contrary to respondent's position, a rational juror could have found that appellant was guilty of robbery, but that the elements of aggravated kidnaping were not met. Aggravated kidnaping requires more than forced movement during the course of a robbery. (Pen. Code, § 209, subd. (a)(2).)

Two elements are needed under the statute: the kidnaping must be more than incidental to the robbery and it must substantially increase the risk of harm to the victim. (*In re Earley* (1975) 14 Cal.3d 122, 127; *People v. James* (2007) 148 Cal.App.4th 446, 454.) A defendant who simply moves the victim around the premises during a robbery will "generally not be deemed to constitute the offense proscribed by section 209." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1140; see also *People v. John* (1983) 149 Cal.App.3d 798, 805-807 [moving the victim 465 feet within the family premises during the course of a robbery is not a kidnaping under section 209].) Accordingly, not every forced movement that occurs in a robbery constitutes "kidnap for robbery." under Penal Code section 209.

The jurors did not necessarily have to determine whether the strict elements of Penal Code section 209 had been yet if they relied upon simple kidnaping. The erroneous simple kidnaping instruction was based a broad determination that focused on the totality of the circumstances to determine if the movement was substantial. The factors included, but were not limited to, the actual distance, the risk of harm, the decreased likelihood of detection, the increased danger inherent in a victim's foreseeable attempt to escape, and the attackers enhanced opportunity to commit additional crimes. (14 CT 3796.) Aggravated kidnaping, however, required a specific finding that the movement substantially increased the risk of harm over and above that which was present in the robbery. (14 CT 3799, 3801.)

Under either instruction, this was a close case where the alleged movement was only for a short distance within the Ross compound and the movement itself did not necessarily expose the victims to a substantially higher risk than the robbery itself entailed. By focusing on the "totality of the circumstances" under the erroneous simple kidnaping instruction, the

jurors could have concluded that the special circumstance was met through simple kidnaping without having to decide whether the additional elements of aggravated kidnaping were satisfied. The verdict of robbery therefore does not show that the jurors "necessarily concluded" that appellant committed aggravated kidnaping so that they rested their finding on a correct legal theory. (Cf. *People v. Hillhouse* (2002) 27 Cal.4th 469, 499 [jurors "necessarily concluded" that murder took place in course of robbery and lying in wait, so this Court could be confident that verdict was supported by at least one correct theory].)

In *People v. Morgan* (2007) 42 Cal.4th 593, the defendant was convicted of simple kidnaping under section 207 and the special circumstance of kidnaping was found to be true. As in the present case, these charges were governed by the standards that made asportation dependent on the distance involved. The *Morgan* prosecutor's closing argument erroneously suggested that asportation could be determined based on the circumstances of the crime – that even a 40-foot distance crossed certain boundaries and increased the harm to the victim. (*Id.* at pp. 608-609.) This Court found that had the crime occurred after 1999, the argument would have been entirely proper. However, under the controlling law it was a legally inadequate theory. (*Id.* at p. 611.) Even though the prosecutor presented another theory of kidnaping, based upon a longer asportation, because this Court could not determine from the record upon which theory the jury relied, it reversed the kidnaping conviction and the related special circumstance. (*Id.* at p. 613.)

Respondent attempts to distinguish this case from *Morgan* by noting that the special circumstance there did not allege aggravated kidnaping as an alternative theory. (RB 151.) This Court reversed the special

circumstance in *Morgan*, however, because it could not determine whether the jurors relied on a correct theory. This Court similarly cannot know whether appellant's jurors based their decision on a correct legal theory. As respondent acknowledges, nothing in the verdict form specified the theory that the jurors were using. (RB 151, citing 14 CT 3867.) Thus, jurors could have rested their special circumstance finding on the erroneous " totality of the circumstances" drawn from Penal Code section 207 rather than the specific elements of Penal Code section 209. Accordingly, this Court must reverse the kidnaping special circumstance. (*People v. Morgan*, *supra*, 42 Cal.3d at p. 613; *People v. Green* (1980) 27 Cal.3d 1, 69.)

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XIII.

THE TRIAL COURT FAILED TO INSTRUCT APPELLANT'S JURORS THAT THEY HAD TO UNANIMOUSLY AGREE ON WHICH ACT CONSTITUTED KIDNAPING IN ORDER TO FIND THAT THE SPECIAL CIRCUMSTANCE WAS TRUE

Appellant's jurors were instructed that they had to reach a decision about whether a kidnaping occurred, but were presented with different theories as to what actions might have constituted the crime. The prosecutor argued that a kidnaping occurred when Brightmon stopped Garcia and brought him 30 or 40 feet back to the area of the U-Haul (27 RT 4133-4135) or when Campos or Garcia were taken into the back of the truck itself (27 RT 4136-4138.) No instruction compelled the jurors to agree that any of these particular acts constituted kidnaping. Appellant has demonstrated that the trial court's failure to require the jurors to unanimously agree on the specific act or acts constituting kidnaping was error, in violation of his state and federal constitutional rights to have a unanimous jury determine every issue before it, and implicated the requirements for due process, and a reliable verdict. (AOB 162-166; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

Respondent argues that a unanimity instruction was not necessary because the acts were part of a "course-of-conduct" exception to the unanimity rule that results if the acts were part of a single transaction or if the statute contemplates a continuous course of conduct. (RB 155, citing *People v. Jennings* (2010) 50 Cal.4th 616, 679.) According to respondent, the course of conduct began with appellant's production of the gun and ended in the shooting death of Campos. Respondent states that "each of

these movements occurring minutes if not seconds apart were effectuated solely for the purpose of stealing the cocaine from Campos." (RB 155.)

As a preliminary matter, as appellant argues below (Argument XV), brief movement that is "effectuated solely for the purpose" of a robbery is incidental to the robbery and does not support a kidnaping finding. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1130-1031 [brief movements of victims "were solely to facilitate" rape and robbery and were incidental to these crimes].) To the extent that any of the alleged acts constituted a kidnaping that was not incidental to the robbery, then this Court should require more than a general finding that some form of kidnaping occurred related to some form of conduct. As a general rule, if "there are multiple acts presented to the jury which could constitute the charged offense, a defendant is entitled to an instruction on unanimity." (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 301.)

Unanimity is essential "to ensure that jurors agree upon a particular act where evidence of more than one possible act constituting a charged criminal offense is introduced." (*People v. Mickle* (1991) 54 Cal.3d 140, 178.) As respondent notes, however, a unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282.) "This branch of the 'continuous conduct' exception [citation] applies if the defendant tenders the same defense or defenses to each act *and* if there is no reasonable basis for the jury to distinguish between them." (*People v. Crandell* (1988) 46 Cal.3d 833, 875, emphasis added.) Here, that exception does not apply.

Respondent generally states that the first prong off this test is met because appellant presented the same defense as to all the movement – that

he was not present or involved in any way. (RB 156.) While appellant relied upon an alibi defense, he also made clear that the jurors had to determine not only who committed the crimes, but what crimes were committed. Accordingly, he argued Brightmon's actions in moving Garcia did not constitute kidnaping. (28 RT 4189.)

Although the incidents alleged occurred as part of a single robbery, there was a reasonable basis for the jurors to distinguish between the separate actions alleged. Respondent states that the "attempted robbery and attempted and completed kidnaps occurred simultaneously," (RB 158, emphasis added), but there were separate alleged victims and separate movements. Even if the acts were close in time, each of the acts raised distinct issues. Some jurors could have concluded that a kidnaping occurred when Brightmon stopped Garcia and brought him back to the area around the truck. Others might have found that Brightmon's action was incidental to the robbery, but believed that if Campos or Garcia were taken to the back of the truck itself, this might have been substantial enough to constitute kidnaping. Some might have believed that kidnaping applied to Garcia, but not Campos. Some might have concluded the opposite, since there was conflicting evidence concerning both. (See 19 RT 2896 [Ross testimony denying that Garcia was hit or that Garcia and Campos were placed in back of truck]; 15 RT 2445-2446 [Garcia testimony that Campos was already in the back of truck when Garcia was ordered to go there].) At bottom, the jurors had to determine which actions in regard to which victim constituted a crime. Given that the movements were separate and involved different victims, the "course of conduct" exception should not apply. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 875.)

Moreover, the constitutional requirements for due process, a reliable penalty verdict, and the right to a jury determination on all factual issues demand more than instructions that simply allow the jurors to determine that one of several factual patterns could support the special circumstance. Respondent notes that this Court has found that *Apprendi v. New Jersey* (2000) 530 U.S. 466, and its progeny are satisfied by requiring the jury to unanimously agree that a special circumstance was committed. (RB 2156, quoting *People v. Davis* (2005) 36 Cal.4th 510, 564 ["We see nothing in *Apprendi* or [*Ring v. Arizona* (2002) 536 U.S. 584] that requires the jury to agree unanimously as to *which* robbery the murder facilitated"].) This Court should reconsider this opinion since the due process and the Sixth Amendment focuses on the *facts* underlying a finding. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490.) A unanimous verdict that a particular set of facts constitute a special circumstance is necessary to ensure the accuracy and reliability of the verdict. (See *Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.)

Respondent argues that the special circumstance finding on robbery establishes that the jurors necessarily agreed that an aggravated kidnaping for robbery occurred, making any error harmless. (RB 158.) As discussed above (Argument XII), a robbery finding does not mean that aggravated kidnaping was established. Accordingly, the finding of a robbery or attempted robbery did not necessarily prove that the jurors relied on a particular legal theory or that the jurors agreed that any particular act rose to that level.

Appellant has argued that lack of a unanimity instruction was structural error because it eliminated a finding by the jury on a material issue in the case. (AOB 165, citing *Sullivan v. Louisiana* (1993) 508 U.S.

275, 280 [lack of proper reasonable doubt instruction could not be harmless because there was no valid jury verdict].) However, even if a harmless error analysis is applied, the special circumstance of kidnaping must still be reversed. (AOB 165-166.) When two different facts are alleged to support a special circumstance finding, and no unanimity instruction has been given, this Court has not hesitated to reverse the finding if the record indicates that a jury could have found the defendant guilty based on one set of facts but not the other. (*People v. Davis*, *supra*, 36 Cal.4th at p. 562.) Here, the jurors certainly could have found that any one of the movements regarding Garcia or Campos did not rise to the level of kidnaping under either statute alleged. (See AOB, Argument XV [insufficient evidence supported the kidnaping special circumstances].) Under these circumstances, failure to require agreement on what facts constituted a kidnaping was prejudicial.

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XIV.

THE DEFINITION OF SIMPLE KIDNAPING WAS UNCONSTITUTIONALLY VAGUE AT THE TIME OF APPELLANT'S OFFENSE

Appellant has argued that Penal Code section 207, as construed by this Court at the time appellant allegedly committed the crimes charged in this case, was impermissibly vague. (AOB 167-179.)

Respondent states that this Court has rejected similar challenges, but need not address the issue because appellant's jury was erroneously instructed on the simple kidnaping statute so that any vagueness in how the statute was construed did not factor into the verdict. (RB 159.) Respondent relies upon *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 674, which rejected a sufficiency of the evidence challenge in a civil case that was based upon a theory that was not before the jury. In that situation, it was not necessary to decide the legal question at issue. Appellant, presents a facial challenge to the statute at issue, which is a far different situation than in *Bullock.*

Appellant agrees, however, that in light of respondent's concession that the trial court erroneously instructed the jurors in regard to Penal Code section 207, this Court need not decide the constitutionality of that statute. For error under either claim to be harmless, this Court would have to decide if the jurors "necessarily concluded" that the kidnaping allegation was found true under Penal Code section 209 rather than simple kidnaping. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 499.) Since the instructional error requires reversal under the same standard at issue in this claim, this Court need not reach the larger constitutional questions.

(*Community Redevelopment Agency v. Force Electronics* (1997) 55 Cal.App.4th 622, 630.)

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XV.

INSUFFICIENT EVIDENCE SUPPORTED THE SPECIAL CIRCUMSTANCE OF MURDER IN THE COURSE OF A KIDNAPING

Appellant has demonstrated that the facts alleged in this case did not rise to the level of either a simple kidnaping (Pen. Code, § 207) or an aggravated kidnaping (Pen. Code, § 209). (AOB 180-189.) Respondent acknowledges that appellant's jurors were instructed on an erroneous theory of simple kidnap and argues only that a finding of aggravated kidnaping is supported by sufficient evidence. (RB 160.)

Penal Code section 209 is violated by "any person who kidnaps or carries away any individual to commit robbery." (Pen. Code, § 209, subd. (b).) The basic law underlying this statute is not in dispute. In order to violate section 209, the movement must be more than incidental to the robbery and it must substantially increase the risk of harm over and above that which is inherent in the underlying crime. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139; *In re Early* (1975) 14 Cal.3d 122, 127-128.) Although no minimum distance is required to satisfy the asportation requirement, a conviction of kidnaping for robbery cannot be "based on movement of the victim that is criminologically insignificant." (*People v. Jones* (1997) 58 Cal.App.4th 693, 717.) The question of "whether the victiim's forced movement was merely incidental to the [target crime] is necessarily connected to whether it substantially increased the risk to the victim." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Thus, the totality of the circumstances must determine if the movement is sufficient to support a kidnaping charge. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.)

In considering this issue, this Court does not limit its review to the evidence favorable to respondent, nor merely considers whether "some" evidence supports the finding, but rather determines if the evidence is substantial based on the entire record. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577; *People v. Dominguez*, *supra*, 39 Cal.4th at p. 1153.)

A. The Movements Were Incidental to the Robbery and Did Not Substantially Increase the Inherent Risk to the Victims

Respondent argues that none of the movements in this case were necessary to complete the crime of robbery.[18] (RB 164.) The movement here, however, was part of the robbery itself. As respondent acknowledges in addressing another claim, the movements were "effectuated solely for the purpose of stealing the cocaine from Campos." (RB 155.) Respondent also recognizes that these movements occurred within the same time frame as the robbery. (RB 158.) Moreover, it is undisputed that the alleged movement occurred within the Ross property and only involved brief distances. Under these circumstances, the movement does not rise to the level of aggravated kidnaping.

This Court has long held that movement of victims that is "solely to facilitate" other crimes are incidental to those crimes. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1130-1031; *In re Earley* (1975) 14 Cal.3d 122, 129 [brief movement to facilitate robbery is incidental].) Moreover, if "a

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[18] Respondent initially refers to this as an attempted burglary. (RB 164.) Appellant assumes that the reference to burglary was an inadvertent mistake since the underlying crime was robbery. For purposes of this argument it does not matter if a robbery was committed because Ross had possession of Garcia's car, or if the crime was an "attempt" because Ross never succeeded in finding the cocaine that was in the car. For simplicity, appellant simply refers to this as a "robbery."

defendant does no more than move his victim around inside the premises in which he finds him . . . his conduct generally will not be deemed to constitute the offense proscribed by section 209." (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140.) The brief movement of Campos and Garcia were part of the course and conduct of the robbery itself and incidental to it. The special circumstance of kidnaping must be set aside.

1. The initial movement of Garcia

The first movement that was alleged to be a kidnaping was when Garcia attempted to run from the scene and Brightmon tackled him and brought him back. Garcia thought that he was only taken 19 feet (15 RT 2442), while Ross estimated the distance at 40 feet. (19 RT 2895.) Respondent mischaracterizes this as a "totally unnecessary forced movement" that was not incidental to the robbery. (RB 164.) To the contrary, the movement was integral to the robbery and cannot be separated from it.

Oscar Ross planned to take the cocaine and scare Campos into leaving the area. (19 RT 2869-2874.) Ross testified that he was about to tell Campos "what was getting ready to go down" when Garcia saw something he did not like and ran towards the gate. (19 RT 2891.) Garcia stated that he ran when he saw a person holding a gun that was pointed at Campos. (15 RT 2441.) Garcia did not make it past the gate before Brightmon caught him and brought him to the back of the U-Haul truck where Campos remained. (15 RT 2441-2442, 19 RT 2893.)

At the point Garcia ran, Ross had set the stage for the robbery, but it certainly had not been completed. Indeed, Garcia had the keys to his car and the cocaine was still locked in the trunk. (15 RT 2453, 2462.) If Garcia had run away, the planned robbery would have been much more

difficult to accomplish. Garcia could have obtained outside assistance. Moreover, the keys – and indeed Garcia's presence – were important for Ross to obtain if he was going to succeed in taking the cocaine and completing the robbery.[19/] Thus, Brightmon did not move Garcia to a new location as much as he prevented Garcia from leaving until the robbery could be carried out.

In determining whether this movement was incidental to robbery, it is helpful to consider the rationale underlying *People v. Daniels, supra,* 71 Cal.2d 1119. In *Daniels,* this Court reviewed three counts of kidnaping for robbery as it related to a homicide. (*Id.* at p. 1125.) Each count in *Daniels* arose from a home invasion in which the defendants entered the victim's home and moved her through it in order to find money and commit sexual assaults. (*Id.* at pp. 1124–1125.) This Court emphasized that the defendants "had no interest in forcing their victims to move just for the sake of moving; their intent was to commit robberies and rapes, and the brief movements which they compelled their victims to perform were solely to facilitate such crimes." (*Id.* at pp. 1130–1131.)

This Court noted that it was a "common occurrence" in robbery for the victim to be confined briefly at gunpoint, bound, or moved into another place. (*Id.* at p. 1135.) This Court was concerned that the Legislature had not intended such incidental movements to constitute asportation sufficient to establish kidnaping and noted that prosecutors could subject a defendant to death simply because the victim happened to be moved as an incident to the underlying offense. (*Id.* at p. 1131, 1138.) Therefore, this Court

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[19/] Ross was unable to find the cocaine after the homicide. (19 RT 2902.) As a practical matter, Garcia's assistance was critical to the success of Ross's plan.

concluded that Penal Code section 209 not only excluded "standstill" robberies, "but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself." (*Id.* at p. 1139.)

The movement here was meant to effectuate a standstill robbery by keeping Garcia at the intended location. It is certainly far less significant than that in *People v. John* (1983) 149 Cal.App.3d 798, in which the evidence did not support an aggravated kidnaping. The victim in *Jones* had been moved 465 feet among a cluster of buildings on a family compound. He was taken from the pool house where he lived, through a driveway or open causeway, up stairs, and through sliding doors to the master bedroom of the main house, where he was bound, blindfolded, and robbed.[20/] (*Id.* at pp. 802-804.) The reviewing court emphasized that the victim was not moved out of the premises. (*Id.* at p. 805.) It set aside the conviction under Penal Code section 209, finding that the victim's movement was an integral part of the underlying burglary and robbery. (*Id.* at p. 806.) Here, the movement was similarly limited to the premises where the robbery took place.

In *In re Crumpton* (1973) 9 Cal.3d 463, the defendant and an accomplice drove to a service station. The victim was moved at gunpoint and forced to lie down behind a truck parked at the station, 20 to 30 feet

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[20/] Respondent states the victim in *John* was never forced to to move "outside the interconnected living quarters" shared by the family. (RB 169, quoting *People v. John*, *supra*, 149 Cal.App.3d at p. 805.) The opinion makes clear that the buildings were interconnected only in the sense that they were part of the same compound.

away. While the defendant emptied a cash box, the accomplice searched the victim in order to obtain a set of keys. The accomplice shot and wounded the victim. (*Id.* at p. 466.) This Court noted that the movement was on the same premises as the robbery. (*Ibid.*) Moreover, even though the movement reduced chances of being seen, this Court found that it did not substantially increase the risk of harm to him over and above that normally present in the crimes of robbery and assault. (*Id.* at p. 467.)

The risk of harm inherent in robbery arises from the perpetrator's use of force or fear and not from brief movements incidental to the robbery. (*People v. Daniels, supra,* 71 Cal.2d at p. 1134.) In this case, Brightmon's action was directed to keeping Garcia from running away until the robbery could be completed. This preserved the status quo rather than presenting a new and independent danger. Garcia was already on the Ross premises. Keeping him on the premises did not rise to the level of an aggravated kidnaping. (See *People v. Hoard* (2002) 103 Cal.App.4th 599, 607 [confining robbery victims gave defendant access to jewelry in a store and served only to facilitate the crime itself].)

At bottom, moving Garcia a very short distance was part of the robbery itself, necessary to keeping him in the location where Campos, Garcia's car, and the cocaine remained. It did not substantially increase the risk inherent in the robbery. Accordingly, this Court should find that the initial movement of Garcia did not support a finding of aggravated kidnaping. (See also *People v. Washington* (2005) 127 Cal.App.4th 290, 299-300 [25 to 45 foot movement of bank employees to vault was part of the robbery itself]; *People v. Morrison* (1971) 4 Cal.3d 442, 443 [movement of robbery victims up and down stairs and into various rooms in the same

premises did not substantially increase the risk of harm beyond that inherent in the robbery itself].)

2. The movement of Garcia and Campos into the truck

Respondent argues that the movements of Garcia and Campos into the rear of the truck were not necessary to accomplish the robbery. (RB 164.) Respondent has also acknowledged that the movements were "effectuated solely for the purpose of stealing the cocaine from Campos." (RB 155.) Thus, at a minimum, any movement of the victims into the truck was directed to achieving the goals of the robbery rather than for any separate purpose.

In reviewing the totality of the circumstances, it is important for this Court to consider the context of the robbery itself. All of the events occurred on the Ross compound, which was a gated and fenced property that was isolated from public view. The property was generally filled with old mobile homes, running and inoperable trucks and cars, animal pens, and large amounts of trash. (15 RT 2331-2339, 2347-2348 [testimony of Deputy Sheriff Michael Angeli]; People's Exhibit Nos. 3 [crime scene], 24 [property from the street], 29 [Ross Cadillac and U-Haul]; 37 [evidence scene]; 65 [view of second gate].) The crime scene itself was set back, well out of public view. (See People's Exhibit No. 49 [diagram of Ross property].)

Campos and Garcia had either driven up near to the white Cadillac that was parked by the U-Haul truck (19 RT 2889 [Ross]) or just to the left of it (15 RT 2436 [Garcia]; People's Exhibit No. 2 [photograph of car and truck]). Ross ended up talking with Campos behind back of the U-Haul (19

RT 2889, 2892) or near the back tires on the driver's side (15 RT 2438-2439 [Garcia testimony].)

As discussed above, Garcia first tried to run away after he saw a gun, just as Ross was about to inform Campos that he was going take the cocaine. Garcia was brought to the back of the old U-Haul truck that Ross had parked nearby. (15 RT 2441 [Garcia], 19 RT 2893 [Ross].) At the time, Campos was stooped near the truck, but apparently not in it. (15 RT 2443; 19 RT 2896.) Garcia testified that he could not understand what was being said, but believed that they wanted to get him to get into the truck against his wishes. (15 RT 2445.) He stated that when he was ordered to move, Campos was already inside the back of the truck. When Garcia did not move, Brightmon grabbed him and hit him in the face. Garcia fell into the back of the U-Haul truck. At the same time, Campos jumped from the truck and ran. (15 RT 2446.) When Campos was shot, Garcia jumped into the trash trailer and was able to escape over the fence from there.[21/] (15 RT 2448; 19 RT 2899.)

There is no evidence to establish how Campos ended up in the back of the truck. There is also no evidence to indicate that the basic plan had changed in any way: Ross wanted to take the cocaine and convince Campos to move out of the area. The movement of Campos and Garcia was

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[21/] Respondent correctly notes that Escalera's testimony, that she saw Garcia in the back of trailer used for trash, refers to this escape and not the U-Haul. (RB 168, fn. 73, citing 18 RT 2750.) Respondent also states that Ross's testimony, that Campos and Garcia were not told to get into the back of the truck, is not inconsistent with Garcia's account. (RB 168, fn. 74.) Ross denied that Garcia was hit and stated that neither had been told to get into the truck. (19 RT 2896.) The kidnaping allegation therefore rested upon Garcia's testimony.

designed to effectuate the robbery and accomplish Ross's plan. Contrary to respondent's position, Ross had not obtained the keys to Garcia's car.[22/] (15 RT 2453.) Ross also needed to find the cocaine (which he eventually was unable to do). Given that Garcia had just tried to escape, the robbery was facilitated by keeping the victims within the Ross property. Under these circumstances, moving Garcia or Campos a few feet to within the U-Haul was part of the robbery itself. (See *People v. Daniels*, *supra*, 71 Cal.2d at p. 1131 ["defendants had no interest in forcing their victims to move just for the sake of moving"].)

Respondent attempts to distinguish this case from *People v. Daniels*, *supra*, 71 Cal.2d at p. 1140 [movement of victim within residence, business, or other enclosure will generally be insufficient under Penal Code section 209] and *In re Crumpton*, *supra*, 9 Cal.3d at p. 466 [movement within a service station's grounds were within *Daniels*], by arguing that Garcia and Campos were not moved simply within a building or enclosure, but were moved within an exterior location and taken into an enclosed truck. (RB 165.) This distinction is without merit. *Daniels* was concerned with a robbery in which a defendant "does no more than move his victim around inside the premises in which he finds him" and offered examples of movement within a residence, business, or other enclosure. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140.) Indeed, this Court specifically noted

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[22/] Respondent mistakenly states that Garcia had actually handed the keys over to the Ross group. (RB 164.) Garcia testified that he wanted to give Ross the keys to his car, but had them in his possession throughout the course of events. (15 RT 2445, 2453; see also 19 RT 2910 [after the shooting, Ross had to break the steering column to move car].) There is no evidence that Ross or anyone else ordered Garcia to give him the keys before the Campos homicide occurred.

that robberies commonly bind, detain, or move the victim into another place. (*Id.* at p. 1135.) Here the events occurred within the Ross property, well off the street, behind fences and two gates. (See People's Exhibit No. 49.) The movement was simply another place on the Ross property and well within the basic enclosure.

Moving Campos or Garcia to the back of the truck did not change the basic situation. Although the U-Haul was covered, the back of the truck remained open. It was within the Ross compound. The truck was not driven anywhere, nor where there any attempts to move it. Accordingly, this Court should find that the movement was within the same premises under the *Daniels* formulation. (See *People v. Smith* (1971) 4 Cal.3d 426 [forcing clerk to move about the office and up to a second-floor room was incidental to robbery]; *People v. Hoard*, *supra*, 103 Cal.App.4th at p.607 [moving victims to back office and confining them facilitated robbery]; *People v. John*, *supra*, 149 Cal.App.3d at pp. 802-806 [moving victim through open causeways to other buildings].)

Respondent relies on *People v. Salazar* (1995) 33 Cal.App.4th 341 to argue that the movement here was not necessary to the robbery or incidental to it. (RB 164.) In *Salazar*, the reviewing court upheld a conviction for aggravated kidnaping for rape because the victim had been moved from a public walkway outside a motel room, where she could have been raped, to a room inside the motel. The court found that the movement may have made the crime easier, but it was not necessary to have committed rape. (*People v. Salazar*, *supra*, 33 Cal.App.4th at p. 347.) This rationale has been criticized, particularly to the extent that *Salazar* equated "incidental" with "necessary." (*People v. Hoard*, *supra*, 103 Cal.App.4th at pp. 605-606.) Indeed, it stands in contrast to cases where the Court focused on

whether brief movement was solely to facilitate the crime. (See *In re Early*, *supra*, 14 Cal.3d at p. 129.)

Moreover, in *Salazar*, the reviewing court distinguished the rape case before it from several cases decided by this Court that involved kidnaping for robbery. "Whereas the commission of a robbery may frequently require that a victim be moved to the property which is the object of the robbery, a rape involves solely an attack on the person and does not necessarily require movement to complete the crime." (*People v. Salazar*, *supra*, 33 Cal.App.4th at p. 348, fn. 8; see also *People v. Aguilar* (2004) 120 Cal.App.4th 1044, 1050-1052 [difference between movement in the course of a robbery and movement that allows a defendant to target a rape victim].) Here, the movement of the victims was to ensure that they were kept on the property until the robbery could be completed. Under the rationale of the opinion itself, *Salazar* is not applicable to the present case.

Respondent agues that the movement resulted in a greater risk of danger because Campos and Garcia were out of the line of sight when they were within the back of the U-Haul. (RB 168.) However, the entire property was set back from a rural road, behind fences and two gates. Even the view of the side of the U-Haul that was most open to the road, where Garcia stated that Campos and Ross talked, was partially obscured. (People's Exhibits Nos. 2, 24.) In addition, the amount of trash, mobile homes, and abandoned vehicles on the property further hid the entire area. (People's Exhibits Nos. 3, 49.) Although the U-Haul was enclosed, the door was open and they were not shut inside it. (People's Exhibit No. 3.) Since that section of the Ross property was hidden from casual view in any event, the covered truck did not significantly alter the situation. The few feet that either Campos or Garcia was moved did not contribute to a

substantially increased risk over and above the robbery. (*In re Crumpton*, *supra*, 9 Cal.3d at p. 467 [movement of victim at a service station to more hidden location behind parked truck did not substantially increase the risk beyond that inherent in the robbery].)

This Court should find that the movement was incidental to the crime and did not substantially increase the risk of harm to the victims. Accordingly, there was insufficient evidence to support the kidnaping special circumstance. (*People v. Daniels*, *supra*, 71 Cal.2d at p. 1140.)

B. There was Insufficient Evidence to Support the Special Circumstance on the Theory of an Attempted Kidnaping

Respondent argues that the evidence was sufficient to support an attempted kidnaping allegation. (RB 170-171.) Appellant's opening brief focused on establishing that the evidence was not sufficient to support kidnaping under either Penal Code section 207 or 209. Since the actual movement did not amount to a kidnaping, and there was no evidence that any further movement was intended, it follows that the evidence is also insufficient to support attempted kidnaping.

At trial, the prosecutor did not rely on a theory of attempted kidnaping. In arguing against appellant's motion to dismiss the kidnaping special circumstances under Penal Code section 1118.1, the prosecutor cited the asportation of Garcia and Campos to argue that the elements of kidnaping had been met. The trial court in turn denied the motion to dismiss by citing elements for aggravated kidnaping listed in CALJIC No. 9.54, rather than attempted kidnaping. (21 RT 3267.) The prosecutor also did not rely on an attempt theory in his closing argument to the jurors. (27 RT 4133-4138, 4141; 28 RT 4253.) The reason for this is clear: there was

no evidence that appellant had the specific intent to kidnap but that the crime was otherwise uncompleted.

It is not enough for respondent to say that the only specific intent required was to "move the victim against his or her will regardless of any actual movement." (RB 171.) Attempted kidnaping requires that the perpetrator have the specific intent to kidnap. (*People v. Kipp* (1998) 18 Cal.4th 349, 376; *People v. Cole* (1985) 165 Cal.App.3d 41, 48.) The perpetrator's intent must be supported by sufficient evidence. "If it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed; but when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is under way . . . ." (*People v. Dillon* (1983) 34 Cal.3d 441, 455.)

Attempted kidnaping is generally found when a kidnaping has been interrupted or otherwise thwarted. In *People v. Cole*, *supra*, 165 Cal.App.3d at p. 49, the defendant entered a home and found the victim's mother in a dark bedroom. Instead of running out of the house, he went into another room and forced the adult's daughter downstairs at knife point. The defendant released the victim when he heard the mother upstairs. (*Id.* at p. 47.) The reviewing court found that jurors could have believed that the defendant would have completed the kidnaping if he had not been interrupted when he heard the mother's footsteps on the stairs. (*Id.* at 49-50; see also *People v. Martinez* (1999) 20 Cal.4th 225, 241[attempted kidnaping appropriate because movement was thwarted by police]; *People v. Fields* (1976) 56 Cal.App.3d 954, 956 [evidence of attempted kidnap when defendant ordered a young girl to get into a car but drove off when the victim threatened to scream]; *People v. Mullins* (1992) 6 Cal.App.4th

1216, 1219-1221 [attempted kidnaping when victim jumped from moving vehicle before asportation could be completed].)

Respondent relies on *People v. Medina* (2007) 41 Cal.4th 685. (RB 171.) In *Medina*, the defendant was running from the police when he jumped into the driver's seat of van with children inside and tried to drive away. The children's mother struggled with the defendant and told him that her children were in the van, but the defendant still tried to start the ignition, put the van into gear, and move the steering wheel. (*People v. Medina*, *supra*, 41 Cal.3d at p. 691.) There was a clear intent to take the van and move the victims to a different location. Accordingly, this Court found that the evidence supported an attempted kidnaping during commission of a carjacking. (*Id.* at p. 699.) Here, there was no evidence that Brightmon or Ross intended to move the victims to a different location. They did not try to start the U-Haul truck, and the truck remained on the Ross property. Thus, respondent's reliance on *Medina* is misplaced.

According to Ross, the planned crime involved taking the drugs and convincing Campos to leave the area on his own. The prosecutor never alleged otherwise. Thus, the issue in this case was not whether there was an attempt to kidnap that was beyond the movement at issue, but whether the movement that actually occurred was sufficient to support kidnaping under Penal Code section 207 or 209. Appellant has demonstrated that the movement did not rise to the level of simple or aggravated kidnaping. Since the prosecutor did not rely on an attempt theory nor present any evidence to show that further movement was intended, the special circumstance finding cannot be sustained on the basis of an attempted kidnaping. Under these circumstances, the trial court erred in denying

appellant's motion to dismiss under Penal Code section 1118.1 and the kidnaping special circumstance cannot be sustained.

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XVI.

THE TRIAL COURT IMPROPERLY PERMITTED THE JURORS TO CONSIDER ALLEGED THREATS TO TINA JOHNSON AND JARAH SMITH AS EVIDENCE IN AGGRAVATION DURING THE PENALTY RETRIAL

Appellant has demonstrated that the trial court erroneously allowed evidence of alleged telephone threats to Tina Johnson and Jarah Smith to be considered in aggravation. The prosecutor alleged that these acts violated Penal Code sections 653m (telephone calls with intent to annoy), 422 (criminal threat), or 148.1 (false bomb report). The trial court admitted the evidence under Penal Code section 653m (30 RT 4469) and instructed the jurors that they could consider evidence of telephone threats made to Tina and Jarah in aggravation (57 RT 8500; 26 CT 7226). Because the statements did not rise to the level of a criminal threat or a bomb report under these statutes, they were not admissible as incidents in aggravation under Penal Code section 190.3, factor (b), and violated appellant's rights to due process and a reliable sentencing verdict.[23/] (AOB 190-201; U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.)

A. Appellant's Words to His Wife Did Not Violate Any Criminal Statute and Were Not Admissible under Factor (b)

The basic facts underlying the alleged threats that appellant made to his wife, Tina Johnson, are not in dispute. In November, 1999, while in jail

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[23/] Respondent discusses the statements made to Tina and Jarah together, under each statute in question. Appellant believes it is better to discuss these statements separately since they occurred at different times and involve distinct issues. Although the prosecutor alleged that appellant violated the same statutes pertaining to criminal threats, the application of those statutes differ according to what was said..

awaiting trial on the present charge, appellant learned that Tina and Jarah Smith were having an affair. (47 RT 7115.) Tina testified that appellant was angry, heartbroken, and upset. (47 RT 7115, 7119.) Appellant told her that he "could" blow up the school where she worked if she did not stop seeing Smith. (47 RT 7116.) He did not say there was a bomb on campus and Tina was certain that it was not possible for him to do such an act from jail. (47 RT 7118, 7120, 7123.) She knew that his words were directed to her and that they did not have any meaning other than that he was heartbroken and upset. (47 RT 7119.) Even after appellant spoke to her, she continued to see Smith on an intimate basis. (47 RT 4120.)

Respondent goes beyond these facts and emphasizes that three months after appellant spoke with his wife, a real bomb was found at the school. (RB 173-175.) According to respondent, this showed that appellant's alleged threats were genuine. (RB 183.) Respondent acknowledges that the prosecutor indicated early in appellant's trial that he did not intend to admit evidence of the actual bomb. (RB 173-174, citing 30 RT 4465-4469.) This incident was therefore not before the trial court when it overruled appellant's objections to admitting his statements as evidence of criminal threats. (30 RT 4469.) The prosecutor later sought permission to cross-examine Tina concerning this bomb, which had been found at the school, but away from where Tina worked. (47 RT 7127-7128.) Appellant's counsel stated that the conversation had taken place in November, 1999, but the bomb was not found until February 14, 2000, after Tina had broken up with Smith. The trial court noted the prejudicial effect of this evidence. (47 RT 7129.) The prosecutor subsequently withdrew his request (47 RT 7130) and did not otherwise seek to question Tina Johnson about the bomb.

Testimony about an actual bomb was never introduced, nor was there any evidence to show that this bomb was linked to appellant in any way. Moreover, since it was found after Tina ended her relationship with Smith, there was no reason for appellant to have arranged for a bomb to be placed. This Court therefore should not consider it in determining appellant's claims. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1168 [reviewing "the totality of the evidence presented" to determine whether a trial court properly allowed incident under Penal Code section 190.3, factor (b)].)

1. Appellant did not violate Penal Code section 653m

The trial court admitted appellant's statements under Penal Code section 653m, subdivision (a), which prohibitstelephone calls that are made with the intent to annoy and convey a threat to inflict injury. (30 RT 4469.) Appellant has noted that in other contexts, the term "annoy" has been used to to refer to conduct specifically designed to disturb or irritate, particularly by continued or repeated acts. (AOB 193, citing *People v. Thompson* (1988) 206 Cal.App.3d 459, 464 [using definition from Webster's New Inter. Dict., 2d ed.].) Respondent adopts a similar standard and defines the word as meaning "to irritate with a nettling or exasperating effect." (RB 184; citing *People v. Ewing* (1999) 76 Cal.App.4th 199, 207 [relying upon Webster's New Inter. Dict., 3d ed.].)

Appellant has argued that there is no evidence that appellant's call to his wife was made with the intent to annoy. (AOB 193-194.) Respondent maintains that the intent to annoy "is fairly subsumed within [appellant's] telephonic threats." (RB 184, citing *People v. Lewis* (2006) 39 Cal.4th 970.) In *Lewis*, this Court simply found that under the facts of that case, found that the defendant intended to annoy the victim by making death threats. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1053.) This Court did not

find that the two are always synonymous and respondent does not explain how this is so under the facts at issue here.

The statute requires proof of both an intent to annoy *and* to have made actual threats. (Pen Code, § 653m, subd. (a); *People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1381.) Accordingly, even if appellant's statement to Tina rose to the level of an actual threat, the call must have been made with the intent to annoy her. Here, appellant called his wife to talk about matters sensitive to their marital relationship – his wife was having an affair. He did not call to harass or annoy her, but to try to work out a marital relationship and express his heartbreak. (47 RT 7115.) Appellant's intent, then, did not rise to the level required by statute. (See *People v. Cooper* (1975) 32 Ill.App.3d 516, 519 [336 N.E.2d 247] [emotional outburst during phone cal made for other purposes did not amount to a call made with an intent to annoy].)

Respondent seeks to distinguish this case from *People v. Cooper*, *supra*, 32 Ill.App.3d 516, because the Illinois statute at issue makes no reference to threats in defining annoying calls. (RB 184.) Appellant, however, did not cite this case to argue whether appellant's words would be a threat under Penal Code section 653m, but because it is instructive as to how telephone call made with an "intent to annoy" should be evaluated. In *Cooper*, the intent to annoy was directly at issue, as it is under the statute in this case. The reviewing court found that an emotional outburst during a telephone call that was placed for other reasons did not meet the intent requirements. (*People v. Cooper*, *supra*, 32 Ill.App.3d at pp. 516-517.) This Court should similarly find that appellant's call was not made with an intent to annoy.

Moreover, this Court should find that appellant's words did not amount to a "true threat" that went beyond an intemperate outburst or exaggerated rhetoric. (*Watts v. United States* (1969) 394 U.S. 705, 708 (per curiam).) Respondent states that calls that threaten lethal harm to the recipient are within the meaning of Penal Code section 653m. (RB 184, citing *People v. Lewis* (2006) 39 Cal.4th 970, 1053 [death threats made over the phone fall within statute].) Here, of course, appellant did not threaten to kill his wife. Appellant stated that he "could blow up" the school where she worked if she did not stop seeing Smith. (47 RT 7116.) Tina, however, understood that this was simply an outburst directed at the situation rather than being an actual threat that he was capable of carrying out. (47 RT 7116, 7123.)

Tina was right. Appellant was in jail. He had never used a bomb in any other context. There was no evidence that he could have arranged a bomb to be planted at the school. He was hurt that Tina was having an affair. This was not a "serious expression of intention to inflict bodily harm" such that there was a "reasonable tendency to produce in the victim a fear that the threat will be carried out." (*In re M.S.* (1995) 10 Cal.4th 698, 714 [explaining when statements rise to the level of a threat]; see also *Virginia v. Black* (2003) 538 U.S. 343, 359 [threat is made if the "speaker means to communicate a serious express of an intent to commit an act of unlawful violence"].)

Respondent characterizes this issue as being an "outlandish contention" that a bomb threat is constitutionally protected speech. (RB 186.) The outlandish situation here is that an emotional outburst in a phone call to his wife over an affair, occurring when appellant was in jail and could not place a bomb himself, is equated with a true threat. Appellant

was upset by his wife's affair and mentioned the school because that was where Tina worked. (47 RT 7124-7125.) Under these circumstances, this court should not find that his words constituted a threat made with the intent to annoy Tina. Accordingly, the trial court erred in finding that the statements were admissible under Penal Code section 653m.

2. Appellant's statements to his wife did not violate Penal Code section 422

Penal Code section 422 prohibits threats that cause the victim to have a reasonable and sustained fear for his or her safety, conveying a gravity of purpose and the immediate prospect of execution of the threat. (*People v. Toledo* (2001) 26 Cal.4th 221, 227.) This section demands that the purported threat be analyzed in the context of how it was made. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.) As discussed above, the trial court admitted the statement under Penal Code section 653m rather than this section. (30 RT 4469.) Assuming arguendo that the trial court's ruling and its instruction to the jury that they could consider "telephone threats" in aggravation (57 RT 8500) include this statute as well, the evidence fails to support its application. (AOB 196-198.)

Penal Code section 422 requires:

> (1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat – which may be "made verbally, in writing, or by means of an electronic communication device" – was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in

> sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances."

(*People v. Toledo*, *supra*, 26 Cal.4th at p. 227.)

Respondent states that the alleged threat was "unequivocal, unconditional, immediate, and specific" as to meet this standard. (RB 177.) Appellant's statement that he "could" blow up the school, however, was none of these things. It was not so specific, or unequivocal that it conveyed a gravity of purpose and the immediate prospect of execution. As appellant's wife understood it, the statement was simply an expression of his heartbreak rather than a serious intent to blow up the school. She did not testify that she was in sustained fear as a result of the threat, and continued to see Jarah after the statement was made. Under these circumstances, it did not rise to the level of a violation of Penal Code section 422.

There is a distinct difference between appellant's statements and the type of threats cited by respondent. (RB 178-179.) For example, in *People v. Bolin* (1998) 18 Cal.4th 297, 336, fn. 11, the defendant stated, "I'm only going to say this one time so you better make sure you understand. If you ever [] touch my daughter again, I'll have you permanently removed from the face of this Earth." The defendant directly told the victim that he "found out what happen[e]d to most of the money from the van, and I also found out you got 1500 for the truck not 1300 like you said. I'm still going to find out how much you got for the Buick and if it's 1¢ over 1000 you can kiss your ass good by[e]." (*Ibid.*) He went on to warn, "I told you a long time ago don't play fucking games with me. You're playing with the wrong person asshole. I've made a couple of phone calls to San Pedro to some

friends of mine and the[y're] not to[o] happy with your fucking game playing with other people's money and especially you hitting Paula." (*Ibid.*) Accordingly, the defendant not only stated that he would do certain things, he made clear that he had the means to carry out his threat and the purpose to do so. The total context, including the language and the tone the defendant used, conveyed the immediacy of the threat. (*Id.* at p. 340.) Appellant's statements to his wife lacked the immediacy and the direct violent implication that was unmistakably made in *Bolin*.

Similarly, in *People v. Dias* (1997) 52 Cal.App.4th 46, the defendant stated, "I kept telling you and telling you, but you wouldn't listen to me, and so now I'm gonna have to kill both of you." (*Id.* at p. 49.) He pointed a gun at the victims and forced one of them to accompany him. He then stated, "If you are lying to me, I'm going to kill you." (*Ibid.*) The defendant in *Dias* was armed, his statements were made in the context of a confrontation that eventually led to a high speed flight when he was chased by the police. (*Ibid.*) As the reviewing court found, the context of the statements in *Dias* conveyed the gravity of purpose and the immediate prospect of execution. (*Id.* at p. 54.) It has nothing to do with the kind of statements made in the present case.

In *People v. Franz* (2001) 88 Cal.App.4th 1426, the defendant had assaulted, hit, and threatened Erika Schmidt, a 20-year old woman. (*Id.* at pp. 1433-1434.) Matthew Zook, a 17-year old boyfriend of Schmidt's sister was also threatened and battered. (*Id.* at p. 1436.) When an officer arrived, the defendant looked at Zook and made a slashing gesture, moving his hand across his throat. (*Ibid.*) Given the nature of the defendant's history with the victim, including his previous assaults, it is little wonder that Zook took the threat seriously. (*Ibid.*) Thus, the reviewing court found that the throat

slashing gesture was an immediate threat because the defendant was in a rage. Indeed, the court noted that the defendant "had already hit Schmidt, punched Zook, and said he was going to kill Zook." (*Id.* at p. 1449.)

Respondent states that appellant was similarly in a rage after learning that his wife was having an affair with another man. (RB 179.) Even assuming that this may be true, *Franz* teaches that it is the context of the statements – the "surrounding circumstances" – that is important. (*People v. Franz*, *supra*, 88 Cal.App.4th at p. 1449.) A statement made in a rage may be a true threat or it may be an emotional outburst that does not meet the standards set forth in Penal Code section 422. In this situation, appellant had neither the immediacy of purpose nor the type of history that compelled Tina to recognize the seriousness of his intent. There is also no evidence that appellant repeated the statement or took further action against Tina, even though she continued to have a relationship with Jarah. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014 [later action taken by a defendant can be considered in evaluating whether the crime of making a terrorist threat has been committed].) Under these circumstances, appellant's statements do not rise to the level of a terrorist threat.

Moreover, there simply is no evidence that appellant placed his wife in sustained fear. Respondent states that the jurors could reasonably infer from the circumstances that Tina was placed in sustained fear, yet cites no evidence other than to argue that Tina's testimony was biased. (RB 180.) Contrary to respondent's position, none of Tina's actions demonstrates that the alleged threat placed her in fear. She did not report the incident as a

serious bomb threat. She did not immediately stop seeing Jarah[24/]. Respondent's position, then, is nothing more than speculation, which is not enough to warrant an instruction that jurors should consider the alleged threat in aggravation. (See *People v. Moore* (2011) 51 Cal.4th 386, 406, 409 [jurors should not be invited to build narratives nor should instructions be based on speculation].)

Respondent's attempt to distinguish this case from *In re Ricky T.*, *supra*, 87 Cal.App.4th 1132, is unavailing. (RB 181-183.) In *Ricky T.*, a door struck a minor, who cursed at a teacher and told him that he was "going to get you." (*Id.* at p. 1135.) He admitted to an officer that he told the teacher, "I'm going to kick your ass." (*Id.* at p. 1136.) The reviewing court emphasized that Penal Code section 422 "was not enacted to punish an angry adolescent's utterances, unless they otherwise qualify as terrorist threats under that statute. [The] statement was an emotional response to an accident rather than a death threat that induced sustained fear." (*Id.* at p. 1114.)

[24/] Respondent misstates the facts by alleging that the "bomb threat . . . led Tina to end the relationship the following month." (RB 181.) To be sure, her relationship with Smith ended some time after appellant's alleged threat – either the end of 2000 or the beginning of the next year. (47 RT 7120, 7136.) There is no evidence that Tina's decision to end the relationship had anything to do with appellant's statement that he could blow up the school. Tina did not take immediate action to end the relationship and relationships end for many reasons. Tina's realization that this particular relationship was causing appellant a great deal of pain may have contributed to her decision. (47 RT 7115,7118.) All that can be known for certain, though, is that the relationship continued for some period of time before she ended it.

Respondent points out that the defendant in *Ricky T.* apologized for the incident.[25] (RB 182, 183, citing *In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1135.) Significantly, the reviewing court did not rely on the apology in its ruling. Rather, it found that the surrounding circumstances did not indicate that the statements were anything other than an angry, emotional outburst. (*Id.* at p. 1139.) Moreover, there was no evidence that the victim was in sustained fear. (*Id.* at p. 1140.) The reviewing court noted that the teacher did not do anything beyond the ordinary in response to this situation and that officers were not called until the next day. (*Ibid.*) Thus, the Court refused to speculate about what fear the teacher might have felt, and focused on what the record revealed.

As in *Ricky T.*, the record here demonstrates that appellant's words were exactly as his wife described, an outburst that had no meaning beyond their relationship. As discussed above, there was no evidence that Tina acted in accordance with someone who had experienced sustained fear. Thus, the surrounding circumstances, like those in *Ricky T.* indicate that Penal Code section 422 did not justify either the evidence being admitted or instructions given in this case.

3. Penal Code section 148.1 did not support the allegations being admitted

Respondent argues that appellant's words violated section 148.1, which provides that a person who "maliciously informs any other person that a bomb or other explosive device has been or will be place or secreted

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[25] As discussed above, respondent's citation to the bomb that was later found at the school, which was never introduced against appellant and never tied to him in any way, should be disregarded. (RB 183.)

in any public or private place, knowing that the information is false" is guilty of a crime. (RB 186, citing Penal Code section 148.1, subd. (c).)

Although the prosecutor cited this section in arguing that the evidence should be admitted (30 RT 4468-4469), the trial court did not rely on this section in allowing the statements to be introduced. (30 RT 4469.) Ultimately, the court instructed the jurors that they could consider appellant's "telephone threats" to Tina Johnson and Jarah Smith as criminal activity in aggravation under factor (b) rather than describe them as a false report of a bomb. (57 RT 8500, 26 CT 7226.) Accordingly, the issue of whether Penal Code section 148.1 could have supported this incident as an aggravating factor was never before the jurors.

The trial court had good reason for not instructing the jurors that appellant had falsely reported a bomb. Penal Code section 148.1 is a separate and distinct crime from "telephone threats." (See *Levin v. United Airlines* (2008) 158 Cal.App.4th 1002, 1022-1023 [distinguishing section 148.1 from crimes involving threats].) Appellant was not reporting or informing Tina that a bomb had been or would be placed – he simply stated that he could place it. (47 RT 7116.) This statement was not the kind of conduct that the statue was designed to punish. (*Levin v. United Airlines*, *supra*, 158 Cal.App.4th at p. 1021 [statute requires that the person intend to communicate that a bomb has been placed or secreted knowing that it has not been].) Therefore, this Court should find that section 148.1 did not provide a basis for instructing the jurors to consider evidence of telephone threats.

Moreover, since threats are not an element of Penal Code section 148.1, and subdivision (c) applies only if the information about a bomb is *false*, appellant is at a loss as to how this section would support an

aggravating factor that requires "the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, factor (b).) Respondent does not explain how section 148.1 might be applied to factor (b), particularly given that the jurors were never instructed on it. This Court should therefore find that this section is not at issue.

4. Respondents theory of attempted threats did not provide a basis for admitting the evidence or instructing the jurors to consider telephone threats

Respondent argues that appellant's statement was also admissible as an attempted violation of the sections discussed above[26/], (RB 186-188.) This Court has explained that an attempted threat under Penal Code section 422 generally involves "circumstances in which the defendant in fact has engaged in *all* of the conduct that would support a conviction for criminal threat, but where the crime of criminal threat has not been completed only because of some fortuity outside the defendant's control or anticipation." (*People v. Toledo*, *supra*, 26 Cal.4th at p. 234, emphasis in original.) Thus, if a victim "for some reason does not actually suffer the sustained fear that

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[26/] Respondent cites Penal Code sections 653m, 422, and 148.1, but the argument focuses only on whether appellant could be found guilty of an attempted threat under section 422. (RB 186-187; see *People v. Toledo*, *supra*, 26 Cal.4th at p. 230 [discussing attempted threat under Penal Code section 422].) Respondent does not explain the circumstances in this case which would constitute an attempt to annoy by telephone under section 653m or an attempted false bomb report under section 148.1, nor does respondent cite any authority in regard to these sections. Accordingly, the claims related to these sections are not properly presented. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 126 [appellate court can deem an argument waived if it is not supported by analysis or argument in the appellate briefs].)

he or she reasonably could have sustained under the circumstances" the incident could be an attempted threat. (*Ibid.*) An attempted threat therefore encompasses factual and legal questions – in particular, whether a victim reasonably could have suffered sustained fear under the circumstances – that must be resolved by a trial court and the jurors.

Respondent's theory was not advanced by the prosecutor below, who argued that appellant directly violated the statutes listed above rather than characterizing the acts as attempted threats. (30 RT 4468-4469.) The trial court in turn did not instruct the jurors that they could consider appellant's words as attempted threats, but rather as actual "telephone threats." (57 RT 8500, 26 CT 7226.) Respondent therefore presents a new factual and legal basis for the evidence to be admitted, and one which the jurors were never instructed to consider. This Court should not consider this theory for the first time on appeal. (*People v. Moses* (1990) 217 Cal.App.3d 1245, 1252-1253; *People v. Smith* (1977) 67 Cal.App.3d 638, 655.)

Assuming that this Court does consider this issue for the first time on appeal, this case is far different than *People v. Toledo*, *supra*, 26 Cal.4th 221, relied upon by respondent. (RB 187.) In *Toledo*, the defendant threw a telephone into a closet door, tossed a chair across a room, punched a hole through a bedroom door, and told the victim that "death is going to become you tonight." (*People v Toledo*, *supra*, 26 Cal.4th at p. 225.) The defendant then approached the victim with scissors and plunged them towards her neck, stopping inches from her skin. The victim went to a nearby apartment, crying, shaking, and appearing to be frightened. (*Ibid.*) In this context, this Court found that the threat reasonably could have been expected to cause sustained fear, as the defendant had intended. (*Id.* at p,. 235.)

In contrast, as discussed above, appellant's words were not sufficient to constitute an attempt under Penal Code section 422. Appellant's statement that he "could" blow up the school was not so specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 227.) Moreover, there is no evidence that appellant intended his words to be taken as an actual threat, rather than an expression of his emotional pain, as Tina understood them to be. Thus, this is not a case where appellant engaged in "*all* of the conduct that would support a conviction for criminal threat." (*Id.* at p. 234, original italics.)

In addition, appellant's conduct could not have reasonably caused Tina to suffer sustained fear. Unlike *Toledo*, where the victim was directly threatened, assaulted with a deadly weapon, and appeared to be visibly frightened directly after the incident, Tina did not express any fear. Certainly, Tina knew her husband. She would have been well aware that he had never tried to bomb anything or committed an act that could hurt so many. She was aware that appellant was in jail. She was in a position to judge appellant's tone, his demeanor, and place his words in the context of their marital situation. Considering all the circumstances, her reaction was altogether reasonable. Accordingly, this Court should find that appellant's statement was not admissible in aggravation as an attempted threat.

B. Appellant's Words to Jarah Smith Were Not a Criminal Threat

Appellant spoke to Jarah two to three times on the telephone from the county jail.[27] (47 RT 7138.) Jarah testified that the first conversation was polite, but that appellant grew more insistent in a later conversation, and was agitated when they last spoke. (47 RT 7138, 7143, 7149-7150.) Appellant said that he knew where Jarah lived, but did not make a direct threat against him. (47 RT 7141, 7150.) Jarah believed that appellant was simply trying to "punk him out" and he did not take appellant seriously or feel threatened by the phone calls. (47 RT 7142-7144.) Jarah told investigator Silva that appellant did not make a straight threat and that a person can say whatever he wants. (26 CT 7206-7207.)

Chaka Coleman listened in on the conversation between Jarah and appellant. She heard appellant say that he could "have something done." (47 RT 7158.) Jarah was listening to every word and sounded scared. (47 RT 7161.) She believed that appellant was serious, like he meant business, but he did not use offensive language or make a direct threat. (47 RT 7174.) Coleman told investigator Silva that Jarah was terrified and that appellant said something "harsh," but she did not know whether it involved a death threat or fighting. (27 CT 7203-7205.) She knew appellant said something harsh because Jarah promised not to see Tina again. (47 RT 7162.) However, she also noted that it did not matter what appellant had said because Jarah continued to have a relationship with Tina. (47 RT 7172; 2 CT 7204.)

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[27] Appellant tried to call several other times when he was not able to speak with Jarah. (47 RT 7137.)

1. Appellant did not violate Penal Code section 653m

As discussed above, the trial court found that appellant's words to Jarah could be admitted under Penal Code section 653m as a threat made with an intent to annoy. (30 RT 4469.) Respondent states that the nature of the threats against Jarah demonstrates sufficient intent under this statute.[28/] (RB 184.) Respondent therefore believes that the calls showed "a deliberate and calculated plan with gravity of purpose in effectuating change in Tina's and Jarah's behavior rather than some instantaneous, impulsive outburst." (RB 185.) Appellant's calls to Jarah were undoubtedly made in regard to the affair that Jarah was having with his wife. It is clear that appellant was attempting to deal with a difficult situation while he was in jail. The first call to Jarah was polite. Appellant was much more agitated in the second or third call and told Jarah that he knew where Jarah lived. Chaka Coleman told investigator Silva that appellant said something "harsh" to Jarah. This is not evidence of a deliberate and calculated plan to annoy Jarah, but of increasing frustration as Tina and Jarah continued their affair.

Moreover, the phone call to Jarah happened in November, 1999. The relationship between Jarah and Tina began in February, 1999, and continued until the end of that year or early 2000. (47 RT 7120, 7136.) During this period, appellant called Jarah's home numerous times but only spoke to him on two or three occasions. (47 RT 7138.) Appellant did not lose his phone privileges until March 14, 2000. (8 RT 1415.) There is no evidence that appellant made any more phone calls to Jarah after the one at

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[28/] Respondent refers to appellant's bomb threat and threats against "Lewis." (RB 184.) Appellant believes that respondent is referring to Jarah Smith.

issue, even during the period of time during which the affair continued. Thus, rather than being part of a "deliberate and calculated" plan or a continuing course of harassment, the call was a relatively isolated incident. It did not indicate a plan to harass or annoy Jarah. (See *People v. Solis*, *supra*, 90 Cal.App.4th at p. 1014 [later action taken by a defendant can be considered in evaluating whether threats were made].) Accordingly, the call did not constitute a violation of Penal Code section 653m.

2. Appellant did not violate Penal Code section 422

As discussed above, Penal Code section 422 requires an unconditional, immediate, and specific threat that causes the victim to be in a reasonable and sustained fear. (*People v. Toledo, supra*, 26 Cal.4th at p. 227.) As used in this statute, "'sustained' has been defined to mean 'a period of time that extends beyond what is momentary, fleeting, or transitory. . . .'" (*People v. Wilson* (2010) 186 Cal.App.4th 789, 808.)

Respondent states that jurors could reasonably conclude that Jarah suffered sustained fear despite his attempts to portray otherwise. (RB 180.) Although Chaka Coleman told Silva that she believed that Jarah was scared during the phone call, Jarah did not otherwise change his conduct in response to appellant's call. Respondent attempts to link the breakup of Tina and Jarah's relationship to appellant's statements (RB 180), but there is no evidence to support this. To the contrary, appellant's phone call did not deter Jarah from continuing to see Tina until she broke up the relationship. (47 RT 7120, 7136.)

Appellant was in jail and there is no evidence that he did – or could do – anything but make phone calls.[29] Under these circumstances, this Court should find that appellant's statements did not convey an immediate threat that caused Jarah to be in sustained fear. Accordingly, the trial court erred in admitting the evidence and in instructing the jurors that they could consider the statements to be criminal threats.

3. Appellant's statements do not amount to an attempted threat

Respondent states that even if the statements did not rise to the level of a terrorist threat under Penal Code section 422, they should be considered an attempted threat.[30] As discussed above, this issue involves factual and legal considerations that were not presented below. The trial court instructed the jurors that appellant's words were actual threats, rather than attempted threats. Therefore the claim is not properly before this Court. (See *People v. Moses*, *supra*, 217 Cal.App.3d at pp. 1252-1253 [prosecution may not change its theory on appeal].)

Even assuming that this Court should consider the claim, appellant's words did not convey an immediate and specific threat necessary to

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[29] Respondent states that these calls show appellant's "savvy in executing his plans from custody." (RB 181) Arranging for a phone call is entirely different than showing that appellant had the capability of carrying out a threat.

[30] As discussed above, respondent cites both Penal Code section 422 and section 653m in making this claim. (RB 186.) However, respondent provides no authority in regard to Penal Code section 653m and does not explain how appellant's statements would constitute an "attempt" under this statute. The issue is not properly presented on appeal. (*In re Jordan R.*, *supra*, 205 Cal.App.4th at p. 126 [appellate court can deem an argument waived if it is not supported by analysis or argument in the appellate briefs].)

constitute an attempted threat under Penal Code section 422. (*People v. Toledo*, *supra*, 26 Cal.4th at p. 227.) The words were part of an emotional call, with appellant becoming increasingly agitated. Appellant had not made such a statement before, and he did not do so again – even though Tina and Jarah continued their relationship. He was in jail and there is no evidence that he had the capability of carrying through with any threat. Under the totality of the surrounding circumstances, this Court should find that the incident did not rise to the level of an attempted threat.

C. The Evidence Was Prejudicial

Respondent states that any error would be harmless in light of the underlying crime and other aggravating evidence. (RB 188-189.) Respondent ignores how close the penalty decision was even in light of the aggravation presented in this case. The first penalty jury could not reach a verdict. The jurors deliberated for three days in the penalty retrial before reaching a decision. (*Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case].) Thus, any substantial error in the penalty phase was likely to have affected the juror's decision, requiring reversal. (*People v. Robertson* (1984) 33 Cal.3d 21, 54.)

The prosecutor used the evidence of alleged threats to argue that appellant could terrorize others even from within prison. (57 RT 8417, 8451.) The prosecutor told the jurors that the death penalty was the only way that society could be free from fear and menace that appellant caused. (57 RT 8417.) Such an argument is particularly powerful. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 773 [prejudicial effect of speculating on future violence or crimes].) Under either federal or state standards, the judgment of death must be reversed. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [state law requires penalty reversal if there has been substantial

error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [error is not shown to be harmless beyond a reasonable doubt].)

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XVII.

THE TRIAL COURT FAILED TO INFORM APPELLANT'S JURORS OF THE SPECIFIC CRIMINAL ACT AT ISSUE INVOLVING THE SHOOTING OF ERIC DAWSON

The trial court instructed the jurors that under Penal Code section 190.3, factor (b), they could consider a criminal act involving "the incident occurring at the American Motel on January 9, 1992, involving the shooting of Eric Dawson and the striking of Anita Smith." (57 RT 8500; 26 CT 7226.) Appellant did not dispute that the jurors could consider the"striking of Anita Smith," but objected that the "shooting of Eric Dawson" went far beyond this. (30 RT 4464.) Appellant has argued that the trial court erred in allowing the Dawson shooting to be used without finding that appellant violated a specific crime and accordingly instructing the jurors. (AOB 202-206.)

Respondent argues that it is not necessary to identify the specific crime used under Penal Code section 190.3, factor (b). (RB 190.) Appellant acknowledges that this Court has found that it is not necessary to "describe or otherwise identify" any of the acts that might be applied under factor (b). (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 591.) In *People v. Taylor* (2010) 48 Cal.4th 574, 655-656, this Court approved an instruction that simply identified the evidence – defendant's incident involving sheriff's deputies" – without specifying the actual crime or describing the acts in a particular way. Since the trial court had found that these acts

constituted a crime involving force or violence, this Court reasoned that the instruction did not skew the juror's normative decision.[31] (*Id.* at p. 656.)

To the extent that *Taylor* holds that the criminal act need not be identified, it should be reconsidered. This Court has long held that evidence admitted under Penal Code section 190.3, factor (b) must establish that a defendant is guilty of an actual crime that involves force or violence under that section. (*People v. Phillips* (1985) 41 Cal.3d 29, 72.) This Court has emphasized that "to avoid potential confusion over which 'other crimes'" – if any – the prosecution is relying on as aggravating circumstances in a given case," the prosecution itself should request an instruction enumerating the crimes that are at issue. (*People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19.)

This case illustrates the type of confusion that was acknowledged *Robertson*. The trial court admitted evidence relating to Dawson after finding that appellant "was somehow involved [in the shooting] as an aider and abettor, as an accessory, or intimidating, or whatever number of other things you think." (30 RT 4464.) Certainly, there is a vast difference between a principal who is directly involved in the shooting and an accessory who aids the perpetrator only after the crime has been convicted. The principal in a shooting undoubtedly committed a violent crime involving force or violence, but an accessory who acts after the crime has a "totally different and distinct state of mind." (*People v. Prado* (1977) 67 Cal.App.3d 267, 273.) A principal clearly has committed a crime under Penal Code section 190.3, factor (b), but an aider and abetter has far less

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[31] As argued below (Argument XVIII), appellant believes that the determination of whether an act violates a criminal statue under Penal Code section 190.3, factor (b), must be left for the jurors.

liability and has not necessarily committed a crime involving force and violence. Accordingly, the difference between the two crimes is critical to the juror's normative penalty determination and the extent of appellant's moral liability for any acts that he committed. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 263 [jurors assess moral culpability] *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [defendant's moral culpability at issue during penalty proceedings].)

The instruction in this case therefore went beyond that given in the cases cited by respondent. Even assuming that it is not necessary to instruct on the element of the crimes, the trial court should ensure that it meets the standards set forth in factor (b) and accurately identify the incident at issue so that the jurors will not be confused over what can or cannot be considered in aggravation. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72.) Eighth Amendment requirements for reliability and due process standards of fundamental fairness demand more than finding that apellant was "somehow involved" in the shooting. (*Saffle v. Parks* (1990) 494 U.S. 484, 493 [capital sentencing must be "reliable, accurate, and nonarbitrary"].) Under the circumstances of this case, the instruction was erroneous.

In a close case, where the jurors deadlocked on penalty in the first trial and took three days to decide the verdict in the retrial, the errors regarding the Dawson shooting took on particular significance. The judgment of death must be reversed. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54 [state law requires reversal for any significant penalty phase error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal required because respondent has not shown the error to be harmless beyond a reasonable doubt].)

XVIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURORS THAT THE ACTS ALLEGED UNDER FACTOR (B) WERE CRIMINAL

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any "criminal activity" that involved "the use or attempted use of force or violence or the express or implied threat to use force or violence." The trial court instructed the jurors that evidence had been introduced to show that appellant had committed "the following criminal acts and activity" as listed by the court and stated that the acts were "criminal." (57 RT 8499; 26 CT 7226-7227.) Jurors were required to find that appellant committed the acts, but jurors were not instructed to determine if the acts were criminal or had the requisite force or violence. Accordingly, once the jurors found that appellant committed the acts, there was a presumption that he had violated the law. Appellant has argued that the instruction violated appellant's federal and state constitutional rights to a trial by jury, due process, and the requirements for a reliable penalty verdict. (AOB 207-219, citing U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16.)

Respondent notes, as appellant acknowledges, that this Court has rejected similar claims in the past. (RB 191; AOB 210, citing *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [characterization of factor (b) allegation as involving force or violence was matter for trial court to decide].) This position should be reconsidered. This Court has recognized that when evidence of uncharged crimes is introduced as aggravation, the defendant is being tried for the prior crimes. (*People v. Robertson, supra*, 33 Cal.3d at pp. 53-54.) This Court has also affirmed that a defendant may

offer innocent explanations for other criminal acts alleged in aggravation. (*People v. Tuilaepa* (1992) 4 Cal.4th. 569, 589.) Accordingly, a defendant may argue that an act alleged under factor (b) does not rise to the level of a criminal offense. (*People v. Phillips* (1985) 41 Cal.3d 29, 84.) Indeed, this Court has noted that even if an action may be criminal, there may still be doubt as to whether it meets the requirements for force or violence under factor (b). (See *People v. Roberts* (1992) 2 Cal.4th 271, 332 [possession of unsharpened metal piece].) Such explanations raise a evidentiary conflict for the trier of fact to decide. (*People v. Mason* (1991) 52 Cal.3d 909, 957.) These evidentiary questions cannot be resolved under an instruction that defines all alleged acts as being "criminal" and leaves a defendant's commission of an act as the only question for the jurors to determine before considering it as aggravation under factor (b),

Appellant has demonstrated that specific acts alleged under factor (b) may not have been criminal or involved force or violence[32/]. (AOB 213-218.) As the instruction dictated, the prosecutor argued that the only place for the reasonable doubt standard is the decision about whether the activities occurred. (57 RT 8435.) Because the instruction given in this case defined these acts as being "criminal," the jurors were precluded from considering any other explanation or defense relating to these acts. Given the extent that this error affected the juror's consideration of the alleged aggravation, and the close nature of the verdict itself, this Court should reverse the penalty verdict. (*People v. Robertson, supra*, 33 Cal.3d at pp. 53-54; *Chapman v. California* (1967) 386 U.S. 18, 24.)

[32/] Because respondent does not address this aspect of appellant's claim, no further briefing on the issue is required.

XIX.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT A WITNESS HAD HEARD THAT APPELLANT WAS "VERY LETHAL"

The trial court allowed the prosecution to question Chaka Coleman about a statement that she made to Detective Silva, "I know [appellant's] past, and I've heard he's very lethal around here. . . . I did hear that and that's one person you don't want to mess with." (47 RT 7170.) Appellant has argued that the statement was irrelevant; more prejudicial than probative under Evidence Code section 352; and, that it violated appellant's constitutional rights to due process and a reliable penalty verdict. (AOB 220-228; U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16).

Respondent argues that the statement was not hearsay since it was not offered for the truth of the matter, but to show that Coleman was afraid of appellant so that it affected her testimony and to impeach Coleman's testimony that appellant's words to Jarah Smith were not harsh. (RB 196.) According to respondent, Coleman's testimony that she was not afraid of appellant was "precisely the reason why the prior statement was admissible." (RB 197.)

The testimony did not properly impeach Colman's statement that she was not afraid of appellant. A witness's personal fear may be relevant to the extent that it explains particular testimony. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869-870.) Here, Coleman did not say that she was afraid of appellant, either in her testimony or in her interview with Detective Silva. She stated that she understood appellant's statements to Jarah Smith to be a threat because she knew about appellant's past and heard that he was lethal. (14 CT 3903.) There was no indication that

Coleman took the information that she had heard and considered that she herself was in danger so that it affected her testimony.

Moreover, the statement did not impeach Coleman's testimony that she could not remember telling Silva that appellant used harsh words. (47 R 7163.) The tape of the interview with Silva substantiated what she did or did not say to him regarding the nature of his words. Her statement that she heard that appellant was lethal went beyond this because it purported to explain how Coleman knew that appellant had threatened Smith. In effect, Coleman stated to Silva that she could not remember what appellant told Smith, but interpreted the conversation in light of what she had heard about appellant and his reputation. (14 CT 3903-3904.)

Her opinion about appellant's "lethal" conduct was not based on her personal knowledge. (Evid. Code, § 702.) If offered to prove that appellant threatened Smith, it would be inadmissible hearsay. (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 77-78 [reputation evidence is hearsay].) Since her knowledge of appellant's reputation had no bearing on Coleman's state of mind concerning her testimony and was hearsay if offered to prove that appellant threatened Smith, it served no relevant purpose.

Even assuming that the statement might have some relevance, the trial court abused its discretion under Evidence Code 352 when it found that the probative value outweighed the potential for prejudice. (47 RT 7169.) Evidence is unduly prejudicial under this section if it "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Samuels* (2005) 36 Cal.4th 96, 124.) More recently, this Court has stated that evidence is prejudical it it causes jurors "not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors'

emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145.)

As discussed above, the statement had minimal probative value because it did not go to specific matters that might have impeached Coleman's testimony. In contrast, the potential for prejudice is clear. The jury could believe that the statement showed that appellant had such a reputation for being lethal that Smith knew that appellant could harm him. The prosecutor himself argued that it showed that Coleman believed that it would be "well within [appellant's] power to have somebody go over and whip Jarah's ass." (47 RT 7169.) He also argued that the same inference applied to Smith. (*Ibid.*) The jurors were therefore invited to speculate that appellant could have carried out any threat and that appellant may have been "lethal" in any number of situations that went beyond the testimony introduced at trial.

It has long been recognized that it is difficult to separate evidence of a witness's fear from the truth of the assertions. (See *People v. Hamilton* (1961) 55 Cal.2d 881, 896 ["declarant had this mental state of fear only because of the truthfulness of the statements contained in the assertion. . . . Logically it is impossible to limit the prejudicial and inflammatory effect of this type of hearsay evidence."].) In this case, it would have been impossible for the jury not to believe that what Coleman heard was true – appellant must have threatened Smith because he was "lethal." Admission of this kind of emotional and speculative hearsay is the kind of evidence that section 352 was designed to prevent. The trial court erred in allowing it to be admitted.

Respondent argues that even if the statement was erroneous it paled in comparison to other evidence of appellant's violence.[33/] (RB 199.) The statement went beyond the other specific instances of aggravation, however, to allow the jury to infer that appellant had a general reputation for being lethal. It allowed the prosecutor to argue, "The people who know the defendant know enough about him to fear him, and so should you." (57 RT 8418.) Evidence about appellant's reputation for being "lethal" therefore raised the level of aggravation. In a case that the jurors found to be close, deliberating long about the penalty verdict, this Court should find the erroneous admission of this statement had a substantial effect upon the verdict. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24 [error cannot be shown to be harmless beyond a reasonable doubt]; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error affecting penalty decision requires reversal].)

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[33/] Respondent cites "custodial violence" and other evidence to show that appellant was lethal. (RB 199.) To the extent that this testimony allowed jurors to believe that any evidence of violence rose to the level of being lethal, than it is further evidence of the prejudice inherent in it.

XX.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT APPELLANT BRAGGED ABOUT RUNNING A GANG OUT OF THE AREA

Duane Beckman, a Riverside police officer, spoke to appellant in 1999. Appellant bragged that he single-handedly ran the Gardena Payback Crips out of the Casa Blanca area, which was offered into evidence to link appellant to the shooting of Nigel Hider. (51 RT 7721.) Appellant objected that the statement was more prejudicial than probative under Evidence Code section 352. (49 RT 7409.) The trial court erred in admitting this statement in violation of appellant's rights under this statute as well as his constitutional rights to due process and a reliable verdict. (AOB 229-232; U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

Under Evidence Code section 352, evidence is more prejudicial than probative if it causes jurors "not to evaluate logically the point upon which it is relevant, but to reward or punish the defense because of the jurors' emotional reaction." (*People v. Valdez* (2012) 55 Cal.4th 82, 145,) Due process similarly is implicated when the probative value of evidence is outweighed substantially by its prejudicial effects. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 52.) Such evidence also renders the judgment unreliable in violation of the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

Respondent states that the testimony carried great probative value because Hider was a member of the Crips and the shooting occurred in the Casa Blanca area. Respondent argues that it resolved questions about the identity and motive of the Hider shooter. (RB 203.)

The prosecution linked appellant to the shooting through statements that Hider had given a police officer (47 RT 7101) and that of another witness, Angela McCurdy, who told Detective Silva that a bald black man, who was a passenger in a car, had shot Hider. (46 RT 7025.) Although appellant's brag suffested that he did not like Crips in the area, he did not state how he ran them out or imply that he was involved in the Hider shooting. Beckman was not speaking to appellant about the Hider incident. The shooter had not acted single-handedly. Appellant did not say that he shot at Crips to run them out of the area. Thus, the statement itself might have raised a suspicion that appellant was involved in the shooting, but its probative value was minimal.

In contrast, the potential for prejudice was enormous because it allowed the jurors to speculate about the crime. While many people in the area might have wanted the Crips to leave, the shooting went beyond this. To the extent that the statement provided a motive (RB 203), then it would follow that the jurors would speculate about what appellant's motive actually entailed – whether he was in a rival gang or shot Hider because of the drug trade and did not want the Crips competing with him. (49 RT 7411.) Moreover, the statement went beyond this, to allow the prosecutor to argue that appellant presented a future danger:

> I'd submit that that's not what it looks like. The defendant is bragging to police about . . . how he single-handedly ran a Crip street gang out of town. He is not dominated by the gnag. He is not dominated by gangs. He is the dominator. When he's at Corcoran, he's promoting his reputation and cultivating fear.

(57 RT 5831.) Accordingly, the statement was not simply limited to showing that appellant was motivated to rid the neighborhood of a certain

gang (RB 203), but that appellant was even more dangerous than the Crips. The statement did more than provide a motive for the Hider shooting, but invited jurors to speculate that appellant would be a future threat of danger and dominate others for as long as he lived. The prejudice of this outweighed the limited probative value that the statement provided.

This was a close penalty case. The jurors could not reach a verdict on penalty in the first trial, where this testimony was not presented. The second penalty jury deliberated long before reaching a verdict. Under these circumstances, this Court should find that the error was substantial under and requires reversal under either state law (*People v. Ashmus* (1991) 54 Cal.3d 932, 965 [reversal for substantial error in penalty phase]) or that it cannot be proved harmless beyond a reasonable doubt under federal constitutional law (*Chapman v. California* (1967) 386 U.S. 18, 24).

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XXI.

THE TRIAL COURT FAILED TO INSTRUCT THE JURY SUA SPONTE ON THE APPROPRIATE USE OF THE VICTIM IMPACT EVIDENCE IN THIS CASE

In his opening brief, appellant argued that the trial court erred by failing to instruct the jury sua sponte on the appropriate use of the highly inflammatory and emotionally charged victim impact evidence in this case. (AOB 233-237.) Appellant proposed that the trial court should have given an instruction like the one quoted below:

> Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Finally, a victim impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard.

(AOB 235, citing *Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159; (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 177.)

Respondent contends that the trial court was under no duty to give such a limiting instruction sua sponte in appellant's case. (RB 204-206.) Respondent cites to this Court's decision in *People v. Zamudio* (2008) 43 Cal.4th 327, 369-370. In *Zamudio*, this Court considered and rejected an instruction identical to the one proposed by appellant here, holding that the first two sentences of the proposed limiting instruction are adequately covered by CALJIC No. 8.85, and that the "remainder of the proposed

instruction . . . is not the type to give rise to a sua sponte duty to instruct." (Id. at pp. 369-370, fn. omitted.)

CALJIC No. 8.85 does not provide express guidance on victim impact evidence nor inform the jurors that it is part of the circumstances of the crime. As a general instruction, it does not accomplish the same purpose as the instruction proposed by appellant. The specific nature of victim impact evidence and the potential for misuse is what has led other states to require instructions tailored to this unique type of evidence. (AOB 234-235.)

For the reasons set forth in his opening brief, appellant urges this Court to reconsider its decisions that have rejected the need for a sua sponte instruction on victim evidence. A cautionary instruction, such as the one proposed here, was absolutely necessary in appellant's case given that victim impact evidence was introduced not just in relation to the Campos crime, for which appellant was being sentenced, but in regard to the Lopez case as well.

The penalty decision in a capital case must be a reasoned moral decision. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) In *People v. Haskett* (1982) 30 Cal.3d 841, 864, this Court held that, in every capital case, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." The limiting instruction proposed by appellant here would have conveyed that critical message to appellant's jury; none of the instructions given at appellant's trial did that. As a result, there was nothing to stop raw emotion and other improper considerations from tainting the jury's ultimate penalty decision. In view of this, and the manifest closeness of the case for the death penalty, the trial court's failure to instruct the jury sua sponte on the

appropriate use of the victim impact evidence in this case cannot be considered harmless, and therefore reversal of the death judgment is required.

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XXII.

THE PROSECUTOR'S IMPROPER ARGUMENT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND A RELIABLE PENALTY VERDICT

The prosecutor in this case told the jurors that they should fear appellant, used lack of remorse to aggravate the crime, and attacked appellant for an allegedly "unspoken theme" of his defense. Appellant has argued that these errors deprived him of his right to a fair trail and a reliable penalty verdict. (AOB 238-254, citing U.S. Const., 8th &14th Amends.; Cal. Const., art 1, §§ 7, 15, 17.)

A. The Prosecutor Improperly Argued that the Jurors Should Fear Appellant

The prosecutor argued to the jurors that, "The people who know the defendant know enough about him to fear him, and so should you." Appellant objected that this was prejudicial and improper. (57 RT 8418.) Indeed, the argument served "only to arouse the generalized fears of the jurors and divert the focus of their attention." (*Tucker v. Zant* (11th Cir. 1964) 724 F.2d 882, 889.) Accordingly the trial court erred in overruling appellant's objections.

Respondent contends that the argument is waived despite appellant's objections because he did not request a curative admonition. (RB 207, citing *People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) The reason for requesting a curative admonition is that a trial court should be given an opportunity to correct an error and prevent any harmful effect through suitable instructions. (*People v. Green* (1980) 27 Cal.3d 1, 27.) If a court overrules an objection, however, and finds that there is no error, then a subsequent request for an admonition is futile. Therefore, this Court has

recognized, the absence of a request for a curative admonition does not forfeit the issue for appeal if the court immediately overrules an objection and as a consequence "the defendant has no opportunity to make such a request." (*People v. Hill* (1998) 17 Cal.4th 800, 820; see also *People v. Noguera* (1992) 4 Cal.4th 599, 638 [request for curative admonition required "if practicable"].) Here, the trial court immediately overruled appellant's objection, making any further request for an admonition pointless.

Moreover, a request for an admonition is not required if the admonition could not have cured the harm. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019.) As this Court has recognized, in some situations it is not possible to "unring the bell" once the matter is before the jury. (*People v. Morris* (1991)53 Cal.3d 152, 188.) Here, the prosecutor used the weight of his authority to urge the jurors to fear appellant. Fear is particularly likely to influence a penalty verdict. (See Garvey, *The Emotional Economy of Capital Sentencing,* (2000) 75 N.Y.U. L. Rev. 26, 31 ["fear appears to play a distinct role in the decision of those who cast their final ballot for death"].) It would have been impossible for jurors to set aside the personal fear that the prosecutor engendered and make a rational, normative decision about whether to impose the death penalty.

Respondent states that the argument was proper comment on the evidence. (RB 208-210.) In *People v. Riggs* (2008) 44 Cal.4th 248, 323, the prosecutor argued that the victim could have been anyone, so that it was "scary what happens out there on our highways" and "even more scary" because a predator was in the courtroom." This Court found that the misconduct claim on appeal was waived for failure to object, but noted that the randomness of the crime was a relevant observation that the

prosecutor's argument was not "unduly inflammatory." (*Ibid.*) Similarly, this Court has held that allusions to fear caused by urban violence was not unduly inflammatory. (*People v. Sanders* (1995) 11 Cal.4th 475, 551 ["considerable leeway is given for emotional appeal so long as it relates to relevant considerations"].) There is a distinction between a generalized fear relating to concerns that are addressed in society as a whole and the personalized fear that the prosecutor created here.

The prosecutor's statement in this case was based on the assumption that "the people who know the defendant know enough about him to fear him." (57 RT 8418.) As a preliminary matter, the record demonstrates that appellant was not feared by witnesses for both the prosecution and the defense. (AOB 241-242.) Anita Smith testified for the prosecution, but credited appellant for saving her life. (46 RT 6978.) Jarah Smith did not fear appellant enough to make him quit seeing appellant's wife. (47 RT 7151-7153.) Prisoners testified that they had no lingering problem with appellant even after incidents took place that were used as aggravating factors. (See, e.g., 46 RT 6844-6846 [testimony of Frank Smith].) Numerous witnesses for appellant testified about their love and respect for him, whether it be his family or prisoners who requested appellant as a cellmate. (55 RT 8111.) The record did not indicate that appellant presented such a general threat that the jurors themselves should fear him.

The prosecutor's argument was personal. It was directed to an alleged fear that jurors themselves should feel. Fear by jurors had already played a role in this trial and one juror had to be dismissed because she was afraid after an incident with a courtroom visitor. (47 RT 7089.) The argument played into such fears. It was inflammatory and prejudicial. (*People v. Lewis* (1990) 50 Cal.3d 262, 284 ["irrelevant information or

inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response, should be curtailed"].)

B. The Prosecutor Improperly Argued That Appellant Did Not Show Remorse

The prosecutor vividly argued that appellant lacked remorse. The prosecutor told the jurors that appellant had shown no remorse after killing Norberto Estrada; he did not feel bad after allegedly shooting Nigel Hider; rather than deciding never to be put in that situation again, he stormed off a porch with a shotgun and ended up shooting Lopez. The prosecutor reminded the jury that appellant allegedly told Oscar Ross, "It's easy to kill" and then killed Campos. The prosecutor compared the life that appellant lived after the Lopez shooting with the impact of the crime upon the victim's family. He stated that violence comes easy to appellant so that remorse is not mitigating. (57 RT 8426-8427.)

Respondent states, as appellant has acknowledged, that this Court has often ruled that prosecutors may argue that remorse is not a mitigating factor. (RB 213.) For the reasons stated in appellant's opening brief, however, this Court should review the issue under the facts of this case. The prosecutor effectively used lack of remorse to rebut to rebut an argument that had not been made and evidence that was not presented. The alleged lack of remorse became a basis for arguing future dangerousness. The comparison between appellant's family life after the Lopez shooting with the victim impact evidence presented in regards to this crime turned what might have been mitigating evidence into aggravation. The prosecutor therefore used appellant's alleged lack of remorse to create aggravation. (Compare Shakespeare, *Julius Caesar*, Act III, scene II [Antony proclaiming that Cesar's killer was honorable while inciting the

crowd against Brutus].) This Court should find that the argument was error. (See *People v. Ainsworth* (1988) 45 Cal.3d 984, 1034, fn. 27 [erroneously creating a series of hypotheticals that turned mitigating factors into aggravation, such as asking if the defendant were crazy, was he under pressure, was he trying to feed his family, was he young].)

C. The Prosecutor Improperly Argued that Appellant Had an Unspoken Theme Denigrating the Victims

The prosecutor attacked appellant for an "unspoken theme" of his defense – allegedly portraying Campos, Alvarez, Lopez, and Estrada as not being worthy enough victims for appellant to deserve the death penalty. (57 RT 8443-8444.) Appellant has demonstrated that the prosecutor diverted the jurors from their proper consideration of the evidence pertaining to these events and instead inflamed them against appellant by making it appear that appellant was simply trying to attack the victims. This argument effectively violated appellant's due process right of fundamental fairness and a reliable capital trial. (AOB 246-252; U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15. 17.)

Respondent states that appellant waived this issue because he did not request a curative admonition. (RB 214.) As discussed above, appellant objected to this argument, but the trial court overruled the objection and allowed the prosecutor to proceed. (57 RT 8443.) At that point it would have been futile, and risked alienating the trial court and the jurors, by continuing to object and to request further admonitions. Under these circumstances, a separate request for an admonition was not required. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Noguera*, *supra*, 4 Cal.4th at p. 638.)

Moreover, the error was extremely important and could not have been cured by an admonition. The prosecutor's charge that appellant engaged in an "unspoken theme" would have inflamed the jurors against him and invited the jurors to look at the penalty phase through a particularly restrictive and emotional lens. It could not have been easily ignored or disregarded. Accordingly, a request for an admonition should not be required. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019.)

Respondent attempts to defend the prosecutor's argument as being nothing more than "eminently reasonable inferences" based on the evidence. (RB 215.) An inference is a deduction of fact based upon other underlying facts. (See Evid. Code, § 600, subd. (b) [defining "inference"]; *People v. McCall* (2004) 32 Cal.4th 175, 182-183.) Here, the prosecutor was not simply arguing that the jurors could deduce facts relevant to the circumstances of the crime or other aggravating factors under Penal Code section 190.3. Instead, he was directly attacking a theme that had not been raised and falsely ascribing it to appellant's defense, plainly accusing the defense as doing something that was not right.

Respondent does not explain why it was an eminently reasonable inference for the prosecutor to attack appellant for raising important evidence in regards to Camerina Lopez. (57 RT 8444.) Appellant did not dispute that Lopez was loved and respected throughout the community. Her death and the effect that it had upon her children was tragic. There was no unspoken theme to the contrary. As part of the circumstances of the crime, there was evidence that Lopez had amphetamines and alcohol in her system. (48 RT 7240.) This evidence was relevant because Lopez made a statement in the hospital that was used against appellant. The prosecutor recognized

its relevance when he withdrew his objection to it during the guilt phase. (14 RT 2255.) Yet, the prosecutor tore into appellant's defense and argued:

> And what did the defense ask Dr. Choi, the coroner? They specifically asked him about Camerina Lopez having amphetamines in her system at the autopsy. Why? What was the point of that? What was the point of all that evidence?

(57 RT 8444.) The prosecutor knew the answer to his questions but chose to denigrate appellant's defense. This was not a "reasonable inference from the evidence" but a calculated maneuver to divert the jurors from the proper use of the evidence and inflame them against appellant.

Similarly, respondent does not explain why impeachment evidence pertaining to Jose Alvarez allowed the prosecutor to infer that an unspoken theme of appellant's defense was to attack the victims. The prosecutor specifically chided appellant for introducing evidence that Alvarez had been convicted of a shooting incident. (57 RT 8444.) The evidence was introduced without objection from the prosecutor, indicating that he understood its relevance and importance to determining Alvarez's credibility. Yet, it, too, was attacked as part of appellant's unspoken theme.

Respondent does not state how the prosecutor could deduce that evidence about Norberto Estrada was submitted "to make you like them less, to get you looking away from the defendant and the acts that he committed" and concluded that it was "not right." (57 RT 8344.) Because appellant had been convicted of manslaughter, rather than murder, the circumstance of the shooting was an important part of the full picture of the offense. It was necessary for the jurors to understand why the manslaughter verdict had been reached so that they could weigh that in terms of appellant's moral responsibility as part of their penalty determination. The prosecutor did not object to this evidence when it was admitted, yet he

disregarded this during his closing argument and ascribed a highly prejudicial ulterior motive to attack appellant's defense.

Respondent also does not explain why the prosecutor's questions about appellant's defense relating to Campos were legitimate inferences based upon the evidence. The prosecutor asked why appellant questioned Ross about his drug dealings with Campos and Ross's belief that Campos had set up the robbery that led to the present crime. (57 RT 8443.) The questions were all relevant to the credibility of Ross and the circumstances of the crime. Indeed, on *direct examination* the prosecutor established that Ross knew Campos through "illegal dealings" and had bought kilos of cocaine from him at least 25 to 30 times. (50 RT 7629-7630.) Ross also testified on direct examination that he suspected Campos of setting up the robbery. (50 RT 7631.) Yet, during closing argument, appellant's questions about these matters became part of the "unspoken theme" that was criticized by the prosecutor.

Respondent attempts to defend the prosecutor's argument by stating that "the prosecutor was legitimately attempting to counter the temptations any juror might naturally entertain to feel less sympathetic towards drug dealers, drug users, and convicted criminals as victims." (RB 215.) If the prosecutor had simply done this, it would have been proper. He was entitled to argue that each's person's life has value and jurors should not measure the gravity of a crime by determining whether the victim is worthy of consideration. Appellant did not contend otherwise. But the prosecutor went beyond this to accuse appellant of having an "unspoken theme" that blamed the victims in a way that was "not right."

Ultimately, respondent does not identify why it was proper to create sympathy for the victims by attacking appellant for asking relevant

questions of various witnesses. Indeed, the prosecutor's argument did not counter temptations to feel less than sympathetic towards victims as much as it blamed appellant for introducing relevant evidence in his defense. (57 RT 8344.) Respondent states that a court should not lightly infer that an ambiguous remark by a prosecutor should take on it's most damaging meaning. (RB 216.) Yet, the prosecutor's message here was not ambiguous. In substance and effect, the prosecutor set up an "unspoken theme" and castigated appellant for asking certain questions and pursuing a a defense. His conclusion was clear and direct: "I would submit that it was to make you like them less . . . and that's not right." (57 RT 8444.)

The *only* way to interpret this argument was that appellant's counsel had done something wrong. Jurors likely accepted this characterization and became inflamed against appellant's defense. (*People v. Sandoval* (1992) 4 Cal.4th 155, 184 [improper to portray defense counsel as being a villain] *rooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1411 [improper for prosecution penalty phase argument to disparage defendant based on exercise of rights to trial, counsel, and kindred rights].) This Court should find that the argument was improper and erroneous.

D. The Argument Was Prejudicial

Respondent states that any error would have been harmless because jurors understood that the prosecutor's argument was not evidence. (RB 217-218, citing CALJIC No. 1.02 [argument of counsel is not evidence].) The prosecutor did not merely review evidence or assert facts that the jurors could measure against the evidence produced at trial. Rather, he played upon the emotions of the jurors to affect how they would view the evidence. He brought the juror's personal fears into play, set up a false standard of remorse, and then used appellant's defense to further inflame the jury. The

jurors certainly would have understood that he was not presenting evidence when he repeatedly asked "why" appellant raised a defense and his opined that it was "not right." But his argument became a lens through which the jurors viewed the evidence. As such, the instruction cited by respondent did not apply.

The prosecutor's argument undoubtedly carried great weight with the jurors. (*People v. Talle* (1952) 111 Cal.App.2d 659, 677; *Berger v. United States* (1935) 295 U.S. 78, 88.) Here, it is likely that the prosecutor's words distracted the jurors from proper considerations and turned the jurors against appellant's defense. This was a close case on penalty, with the first jury unable to reach a verdict and the second jury deliberating long. Whether viewed as individual errors or when analyzing the cumulative effect of the argument, the prosecutor's words undoubtedly played an important role in how the jurors considered the evidence. This Court should find that the errors cannot be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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XXII.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED APPELLANT'S JURY THAT THEIR SENTENCING DECISION ENCOMPASSED BOTH THE FIRST DEGREE AND SECOND DEGREE MURDERS SO THAT APPELLANT WAS SENTENCED TO DEATH FOR BOTH CRIMES

Appellant was found guilty of only a single capital crime, the Campos murder, and the sole task for the jurors at the penalty retrial was to determine if life or death was the appropriate punishment for this crime. The jurors did not reach this decision. The trial court instructed the jurors that appellant had been found guilty of murder as charged in the prosecutor's second amended information and that the penalty determination encompassed both murders. (57 RT 8512; 26 CT 7236.) The jurors specifically imposed death for *both* the Campos and Lopez murders. (57 RT 8530; 26 CT 7258.) After the verdict, the trial court sentenced appellant to death for both crimes. (58 RT 8616; 26 CT 7316 [abstract of judgment stating that appellant was "sentenced to death on Counts 1 [Campos Homicide] and 2 [Lopez Homicide]"].) Respondent acknowledges that this was error but disputes that the error requires that the penalty verdict be set aside. (RB 218.)

To the best of appellant's knowledge, this Court has not had this situation before it in any other case. This Court has acknowledged that returning a single death verdict "could be troublesome in a case in which the conviction on one of several murder counts is reversed" if judgment is not pronounced on each count separately. (*People v. Coddington* (2000) 23 Cal.4th 529, 566, fn. 7; *People v. Rogers* (2009) 46 Cal.4th 1136, a single verdict form was used without specifying any of the counts. The form did

not indicate whether it was for the two first degree murders or a second degree murder, but based upon the instructions and arguments, this Court found that the jury would have understood that the penalty decision only pertained to the first degree murders. (*Id.* at pp. 1173-1174.) Respondent correctly states that this case is different from both *Coddington* and *Rogers* in that the jurors here specifically imposed death for both the first degree and the second degree homicides. (RB 221.) Yet, this simply means that the troublesome aspects that this Court identified in *Coddington* have come to pass.

Moreover, respondent misreads the language of the instruction and the verdict form and misjudges the effect upon the actual verdict:

> In essence, Johnson's jury returned two verdicts on one form. Thus the danger of not knowing which count the penalty applied does not arise in Johnson's case – the jury found *each* count deserved the death penalty.

(RB 221, italics added.) It is not that the jurors found that "each" count deserved the death penalty – that is something that this Court has no way to determine. Rather, it was a unitary verdict. The issue is that the jurors found that both counts, considered together, deserved the death penalty and imposed the death sentence for both crimes as a single matter.

The distinction between respondent's interpretation and the specific language of the instruction and verdict form is critical to this Court's decision. If the verdict form had required jurors to find that death was the appropriate punishment for each of the murders considered separately, then the Court could conclude that the verdict would have been the same even without the error. (See *People v. Coddington*, *supra*, 23 Cal.4th at p, 566, fn. 7 [verdict form for each count allows court to determine if verdict was affected by error].) Here, the jurors did not reach a separate verdict for the

two charges. This Court cannot know if the verdict rested on the Campos murder alone or would have been the same had not both crimes specifically been included in the equation. Accordingly, this Court cannot be satisfied that the verdict was based only on the Campos crime. (See *Jones v. State* (Okla. Crim. App. 2006) 134 P.3d 150, 157[single verdict form did not allow court to determine to which count an aggravating circumstance applied; court cannot speculate on verdict in death penalty case].)

Respondent notes that the jurors were also instructed that appellant had been found guilty of one count of first degree murder and one count of murder in the second degree; and that it was the law that a first degree murder should be subject to death or life in prison without parole. (RB 219, citing 57 RT 8493, 26 CT 7221.) Respondent does not argue that these instructions alone were sufficient to negate the instructions and verdict form that required jurors to determine the penalty for both the Lopez and Campos murders. Indeed, a verdict form that states principles "contrary to the instructions given" might cause the jury to disregard or discount those principles. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.)

The trial court's instruction ultimately told the jurors that appellant had been found guilty of both counts, as charged against him, and that the jurors were to consider whether to fix the "penalty for the murder of Martin Campos *and* Candy Camerina Lopez" as death or life in prison. (27 CT 7236, italics added.) The verdict form included both crimes as part of a single penalty determination. (26 CT 7258.) This Court cannot know how the jurors resolved any conflict in the instructions. The only certainty is that the final instruction and the verdict itself were erroneous. (*People v. Green* (1980) 27 Cal.3d 1, 69 [reversible error where reviewing court cannot determine if jurors relied on legally correct theory]; see also *Atkins v.*

Commonwealth (1999) 257 Va. 160, 179 [reversal where the jury was placed in confusing situation where the instructions and the verdict form were in conflict]; *State v. Breton* (1995) 235 Conn. 206, 240-244 [erroneous instructions and verdict form required reversal even if some instructions were otherwise correct]; *State v. Carter* (Tenn. 1999) 988 S.W.2d 145, 152 [jury's use of and signing of the improper verdict forms rebutted the presumption that the jury followed other instructions].)

Respondent argues that the erroneous verdict only implicates state law. (RB 222, fn. 94.) This Court can have no doubt that federal constitutional principles are at issue. The fundamental nature of the penalty verdict brings the error within the core principles of due process and the Eighth Amendment. Appellant had a due process right to fundamental fairness for a verdict based upon the single count for which he was being tried. (See *Morgan v. Illinois* (1992) 504 U.S. 719, 726 [capital sentencing implicates due process].) California's statutory requirements for capital cases (Pen Code, § 190) also implicated federal due process rights that mandate a proper jury verdict. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [state procedure and practice protected by federal due process].) Moreover, the trial court's failure to properly guide the jury in its sentencing decision created a risk of arbitrary and capricious infliction of the death penalty in violation of Eighth and Fourteenth Amendments. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 188-189 [8th and 14th Amendments require safeguards in capital sentencing]; *Mills v. Maryland* (1988) 486 U.S. 367, 383-384 [erroneous instructions and verdict forms implicated Eighth Amendment demands for reliability in capital cases].)

This is not an issue of simple evidentiary or instructional error. A single sentence of death for both the Lopez and the Campos crimes is

unauthorized and the verdict itself is erroneous. (See *State v. Carter*, *supra*, 988 S.W.2d at p. 153 [verdict forms sentencing defendant to death based on improper standard rendered the judgment "void and of no effect"].) Since there is no valid verdict of death, this court should find that the error requires reversal per se.[34/] (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [harmless error analysis cannot operate when there is no valid verdict upon which to rest].)

Even if the error is not structural, the judgment must be reversed unless the prosecution can show beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under harmless error review, the question "is not whether the legally admitted evidence was sufficient to support the death sentence . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258-259. quoting *Chapman v. California, supra*, 386 U.S., at 24.) "[T]he focus is what the jury actually decided and whether the error might have tainted its decision." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) To put it another way, "'The inquiry . . . is

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[34/] Except to dispute the federal constitutional basis, respondent does not otherwise address appellant's claim that the erroneous verdict was structural error under *Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310. The United States Supreme Court has explained that certain errors, "whose precise effects are unmeasurable but without which a criminal trial cannot reliably serve its function" are reversible per se." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281.) State law provides for similar analysis when a defendant is deprived of orderly legal procedure or the errors are not susceptible to ordinary harmless error analysis. (*People v. Cahill* (1993) 5 Cal.4th 478, 493; *People v. Lightsey* (2012) 54 Cal.4th 668, 699.) Appellant has demonstrated that the erroneous verdict falls into this category and requires reversal. (AOB 260.)

not whether, in a trial that occurred without the error, a [verdict for death] would surely have been rendered, but whether the [death verdict] actually rendered in this trial was surely unattributable to the error.'" (*State v. Kleypas* (2001) 272 Kan. 894, 1088 [quoting *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279, as quoted by the Kansas court in respect to penalty error].)

Respondent observes that the jurors would have been able to consider the Lopez murder as an aggravating factor if they had been correctly instructed. (RB 222.) Under any situation, properly instructed jurors would not have been asked to impose punishment for her death as part of the sentence. (See *People v. Harris* (1984) 36 Cal.3d 36, 65 [a special circumstance itself does not "impose punishment"].) The fundamental error in this case affected the way in which jurors viewed the evidence.

There is a major distinction between determining whether the Campos crime warranted death – in light of all the aggravating factors – and whether appellant should be sentenced to death *for both* the Campos and the Lopez murders. The Lopez murder was not brought before the jurors as a mere aggravating factor, but as a specific part of the capital verdict that added to the cumulative weight of the prosecutor's case. It undoubtedly contributed to the death judgment. This Court, therefore, should find that the verdict was not "surely unattributable" to an error of this importance. Under federal standards, the error is not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

Respondent contends that under state law appellant must show that there is a realistic possibility of a "different outcome" had the jury's verdict been limited to the Campos count. (RB 222) In the penalty phase of a

capital trial, the defendant has been convicted of first degree murder with at least one special circumstance, with a history that often includes substantial criminal or antisocial behavior. (See *People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13.) This Court, therefore, can assume that in capital cases there is sufficient evidence to support a death verdict. It is the effect of the error on the verdict that must be considered and not simply whether a jury could have found that death was the appropriate punishment.

Reversal is required if a substantial error occurs in the penalty phase. (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) This is true because such error creates a "reasonably possibility" that it "affected a verdict." (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) Although *Brown* also phrased the test as determining the possibility of a "different verdict" (*id* at p. 448), this Court has generally analyzed the effect of an error upon a verdict itself.[35/] (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 527; *People v. Abel* (2012) 53 Cal.4th 891, 939.) It is clear, however, that the erroneous instruction and verdict form was substantial error under either formulation used by this Court.

The sole purpose of the penalty phase is to determine if the defendant should be put to death for a specific capital crime. Bringing the

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[35/] This Court has explained that the state standard for evaluating penalty phase error – whether "there is a reasonable possibility the error affected verdict" — is effectively the same as the federal analysis for constitutional error. (*People v. Wilson* (2008) 43 Cal.4th 1, 28.) As with the federal standard discussed above, this Court can assume that there would be sufficient evidence to support a death judgment, but still must determine whether the error affected the verdict. (See *Satterwhite v. Texas*, *supra*, 486 U.S.at pp. 258-259; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 279 [harmless error inquiry is not whether different outcome would be rendered but whether error affected actual verdict].)

Lopez murder directly into the sentencing equation significantly changed the issues before the jurors. It placed her death and the victim impact evidence relating to it at the center of the penalty decision. This error affected the fundamental manner in which the verdict was reached and the basis for it.

Respondent asserts that the error would have benefitted appellant since the prosecutor had a higher burden to prove that both crimes warranted the death penalty. (RB 221-222.) Not so. Respondent again mistakes the cumulative effect of determining whether the Lopez murder and the Campos murder together warranted death with the hurdle that might have been imposed if the jurors had to determine if each of the crimes, considered separately, deserved the death penalty.

Contrary to respondent's position, the inclusion of the Lopez murder in the instructions and on the verdict form made it easier to obtain a death verdict. Campos was undoubtedly important to his family, as the victim impact evidence pertaining to him established, but he made his living dealing drugs and guns. As respondent acknowledges elsewhere, the prosecutor had to "counter the temptations any juror might naturally entertain to feel less sympathetic toward drug dealers." (RB 215.) Indeed, Ross suspected Campos of having set up an earlier robbery and regarded him as being a dangerous man. Campos was killed after he brought a substantial amount of cocaine to the Ross property. The path that Campos chose to follow was one that was full of danger. Violence, or the threat of violence, was a significant part of his life. (See, e.g., *People v. Bland* (1995) 10 Cal.4th 991, 1005 [drug dealers are known to keep guns]; *People v. Glaser* (1995) 11 Cal.4th 354, 367 [firearms are "tools of the trade" in narcotics business].)

In contrast, Lopez had done nothing wrong. She was killed while trying to stop a fight. She was universally liked and respected – generous to strangers; a mother who was devoted to her children; and a student with hopes for the future. (See, e.g., 43 RT 6563-6593 [testimony of Lopez's mother, Socorro Roman].) Since her death was particularly tragic, it gave the prosecutor added sympathy. It is little wonder that the prosecutor began the penalty retrial with witnesses about the Lopez shooting and presented more victim impact evidence about Lopez than he did about Campos. Rather than increase the burden on the prosecutor, the erroneous instructions and the verdict form made it easier to obtain a death judgment.

This was a very close case. There were significant aggravating factors introduced in both the original trial and the penalty retrial, yet the first jury could not reach a penalty verdict; the second penalty jury returned a death judgment only after lengthy deliberations. Inclusion of the Lopez murder as a direct part of the punishment directly brought enormous sympathetic factors into the sentencing equation. Accordingly, there was a reasonable possibility that the trial court's erroneous instructions and verdict form affected the penalty verdict. Reversal is required even if the error is considered only under state law. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447-448.)

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XXIV.

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

Appellant has argued that the California death penalty statute is unconstitutional in several respects, both on its face and as applied in this case. Appellant acknowledged this Court's decisions rejecting these claims but asked that they be reconsidered. (AOB 263-277.) Respondent cites decisions of this Court that have rejected these claims. (RB 222-226.) The issue is joined and no further briefing is necessary unless this Court requests further briefing to reconsider these claims. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304 [standard claims challenging death penalty considered fairly presented to the Court].)

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XXIV.

CUMULATIVE ERRORS REQUIRE THAT THE JUDGMENT IN THIS CASE BE REVERSED

Appellant has argued that the cumulative effect of the error in this case requires reversal of both the guilt and penalty judgments. (AOB 278-280.) Respondent generally claims that the error in this case is inconsequential and that it would not have had any cumulative impact. (RB 226-227.)

The error in this case affected the very fabric of this trial. The decision of the trial court to join the Lopez and Campos murder together led directly to the penalty verdict that combined the two cases into a single death judgment. The portrayal of appellant as someone who must be taken off the streets – as someone so powerful that Todd Brightmon acted as his "henchman" or where he could threaten to bomb a school from jail – combined with the prosecutor's penalty phase argument that instilled personal fear into the jurors. The kidnaping allegations increased the weight of the aggravation by making it appear that appellant was guilty of additional crimes, just as the aggravating evidence presented each of the acts alleged under Penal Code section 190.3, factor (b), as being criminal. The prosecutor's penalty argument that appellant's defense attacked the victims through an improper, unjustified, and unspoken theme, made it easier for the jurors to dismiss his defense and find that appellant deserved death for the second-degree murder of Lopez.

Even under these circumstances, appellant's trial was particularly close in both the guilt and penalty phases. The guilt verdict was reached after seven days of deliberations, with the jurors first reporting that they could not reach a verdict on either count. The original jury could not reach

a penalty verdict and the jurors took three days to deliberate in the retrial. This Court, then, should have no doubt that the cumulative effect of the errors played an important role in both the guilt and penalty phases of appellant's trial. The errors cannot be said to be harmless beyond a reasonable doubt. The entire judgment must be set aside. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].)

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CONCLUSION

For all the reasons discussed above, and those given in appellant's opening brief, the judgment against appellant must be reversed.

DATED: Oct 1, 2012

Respectfully submitted,

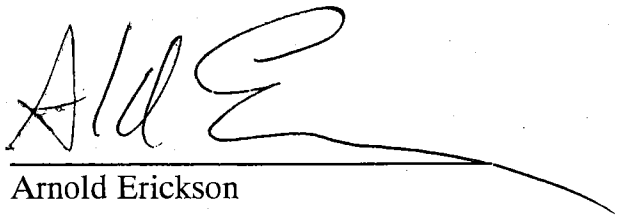
MICHAEL J. HERSEK
State Public Defender

ARNOLD ERICKSON
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE8.630(b)(2)

I, Arnold Erickson, am the Senior Deputy State Public Defender assigned to represent appellant, *Lumord Johnson*, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 42,789 words in length excluding the tables and certificates.

Dated: October 1, 2012



Arnold Erickson

DECLARATION OF SERVICE

Re: *PEOPLE v. LUMORD JOHNSON*

Riverside County Superior
Court No. CR-66248
Supreme Ct. No. S-105857

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111Broadway, 10th Floor, Oakland, California 94607; that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Ronald Jakob
Deputy Attorney General
Office of the Attorney General
110 W. A St., Suite 1100
San Diego, CA 92101

Superior Court of California
County of Riverside
4100 Main Street
Riverside, CA 92501

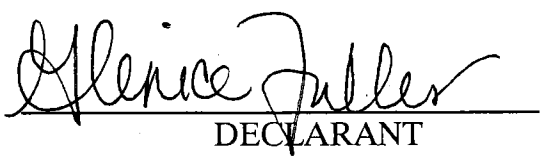
Lumord Johnson
CSP-SQ
T-50231/5EB-592
San Quentin, CA 94974

Habeas Corpus Resource Center
Attn: Michael Laurence
303 2nd, Suite 400 South
San Francisco, CA 94107

Each said envelope was then, on October 1, 2012, sealed and deposited in the United States mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on October 1, 2012, at Oakland, California.



DECLARANT