IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. RUBEN BECERRADA, Defendant and Appellant.	No. S170957 (Los Angeles County Superior Court No. LA033909)

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Los Angeles

HONORABLE WILLIAM R. POUNDERS, JUDGE

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INTRODUCTION

The fatal altercation that resulted in Maria Arevalo's death on March 4, 2000, was tragic. Appellant admitted committing the crime, but contended that it was the result of sudden anger rather than murder by lying in wait. Maria had accused appellant of rape in August, 1999, and she met with the prosecutor the day before her death to discuss the case. Although appellant expected Maria to recant her statement at that time, she instead decided to go forward with the allegation. Early the next morning, appellant and Maria spoke on the phone as they did every day. They met soon after, and appellant erupted in anger, beating her until he forced Maria into her car and drove away. Maria's body was found later that morning in the trunk of her car.

Appellant's opening brief demonstrated that lying in wait was based on speculation that appellant knew that Maria had not recanted her statement and lured her to her death. Respondent adds to the speculation by embellishing the story still further, imagining what might have happened when appellant met Maria on the morning of her murder. Despite the evidentiary gaps in the prosecutor's case, jurors found that the lying-in-wait special circumstance was true. Appellant has argued that there were errors in the trial that fundamentally affected how jurors viewed appellant and the case before them, leading to the guilt verdict and ultimately the death judgment.

In order to strengthen her case, the prosecutor brought appellant's gang affiliation into a crime that was rooted in the volatile personal relationship between appellant and Maria. Although no gang enhancement was alleged, the prosecutor's opening statement identified appellant as being a member of a dangerous criminal gang. Over objection, the prosecution introduced photographs of large gang tattoos and other images on appellant's front and back torso. Also over objection, the trial court allowed testimony that appellant flashed a gang hand signal during a pretrial hearing. Again over objection, a "gang expert" identified appellant as being a member of a criminal street gang that was engaged in drugs, guns, and other unlawful acts. The detective described appellant's gang tattoos as being the largest he had ever seen and identified gang monikers that were written in Maria's address book that had been found in appellant's room The trial court also admitted, over objection, testimony that before any of the events at issue occurred, appellant bragged to one of Maria's coworkers that he was a hit man for the Mexican Mafia and had committed other uncharged murders.

The gang evidence was minimally relevant at best, if not wholly irrelevant, but had profound consequences in the way that it tainted appellant from the start of his trial. Jurors likely believed that appellant's gang involvement showed a criminal disposition to commit almost any crime imaginable, including raping Maria and killing her while lying in wait. The repeated references to gangs made it easy for jurors to find that appellant was not only guilty of the charged crimes but that he deserved death. This Court can have no confidence in a trial permeated by prejudicial gang evidence and rank speculation about the crime itself. The judgment must be reversed.[1/]

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[1/] In this brief, appellant does not reply to respondent's arguments that are adequately addressed in the opening brief. That appellant may not respond to any particular argument or allegation made by respondent or 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 joined.

I.

THE TRIAL COURT ERRED IN ADMITTING PHOTOGRAPHS DISPLAYING APPELLANT'S TATTOOS

Appellant has argued that the trial court erred in admitting photographs showing his tattoos depicting his gang, women, and other images.[2/] From the start of the trial, beginning with the prosecutor's use of the photographs during his opening statement, the photographs of the tattoos transformed this case by bringing gang issues to a crime that was otherwise very personal. The erroneous admission of the evidence violated appellant's statutory rights under Evidence Code section 352 and appellant's constitutional rights to due process and a reliable verdict. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.) The error affected both the guilt and penalty phases of the trial and compels reversal. (AOB 44-56.[3/])

A. The Photographs Were Far More Prejudicial than Probative

This Court has emphasized, "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, original italics.) Here, the probative value of the photographs was minimal at best. No gang enhancement was alleged. No witness relied upon the disputed photographs to support or illustrate their testimony. No witness testified about the

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[2/] The pictures at issue were admitted as People's Exhibit 37, photographs A, C, and D, as well as People's Exhibit 38, photograph B.

[3/] Throughout this brief, "RB" refers to Respondent's Brief; "AOB" refers to Appellant's Opening Brief.

impact of the tattoos on Maria. The photographs showing the tattoos were not necessary for the prosecutor's case.

Despite this, the trial court erroneously admitted the photographs after finding that there was "no prejudice at all" in their use. (10 RT 1416.) Respondent acknowledges that the photographs showed gang tattoos and other images that were "out of the ordinary" and "particularly intimidating." (RB 79.) The trial court described the tattoos as "somewhat overpowering" and "perhaps frightening." (10 RT 1416.) The potential for prejudice is evident. The graphic images on appellant's body would have affected the jurors' perceptions of him and cemented within their minds a powerful association with gangs. Without a doubt, the tattoos would have been particularly shocking and frightening to jurors who saw such images for the first time. (See *People v. Perez* (1981) 114 Cal.App.3d 470, 479 [gang evidence "connotes opprobrious implications"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 228 [gang evidence extraordinarily prejudicial in a case where it had little relevance].) This Court should accordingly find that the prejudice inherent in gang evidence outweighed the scant probative value of the photographs.

1. The photographs were not necessary to show scratches on appellant's body at the time of his arrest

Appellant objected that the full photographs were not necessary to show that he had scratches on his body at the time of his arrest. (10 RT 1414-1415.) Respondent argues that they were relevant to show the location of scratches on appellant's body. (RB 79.)

At trial, the photographs were introduced to show scratches on appellant's shoulder and neck. (13 RT 1983-1984; 15 RT 2189-2190; 15 RT 2277.) Yet the disputed pictures were not necessary to establish the

type or the location of the scratches. The scratches were far more apparent in the close-up photographs, which were not at issue, than in the full-body photographs. Indeed, the coroner relied on the close-ups rather than the full-torso panoramas to testify that the injuries that appellant received were consistent with his observations of Maria. (15 RT 2188-2190.) Similarly, Officer Crees, who transported appellant to jail, identified one of appellant's scratches using People's Exhibit 37, photograph B, which was also a photograph that was not in dispute. (15 RT 2277.) Given that the larger pictures showing appellant's tattoos were not used to illustrate trial testimony, and that other photographs served the prosecutor's purpose in introducing the evidence, the photographs at issue offered no probative value. (AOB 48-49.)

2. The photographs were not relevant to Maria's state of mind

Respondent argues that the photographs were relevant to show Maria's state of mind after she alleged that appellant had raped her. (RB 79.) The trial court admitted the photographs, in part, because it believed that the tattoos would have intimidated Maria and showed why she was reluctant to report the rape. (10 RT 1416; 16 RT 2519.) Maria, however, had been in a long-term relationship with appellant, including after the alleged rape. She was very familiar with the tattoos, and there was no evidence to show that she was intimidated by them.

Respondent's rank speculation that Maria was intimidated by the tattoos was lacking simply because she could not testify is without merit. (RB 80.) Maria stated that she was afraid of appellant because of what he might do to her or her family (see, e .g., 11 RT 1688-1689), yet she did not say that she was intimidated because appellant had large tattoos that

included images relating to his gang. Speculation that she might have been intimidated by tattoos is not substantial evidence that justified admission of the photographs. (*People v. Perez* (1992) 2 Cal.4th 1117, 1133 ["substantial evidence requires evidence and not mere speculation"].)

Contrary to respondent's argument (RB 80), there is no inconsistency in appellant's position that even though Maria would not have been intimidated by the tattoos, they were overpowering and prejudicial to the jurors. Maria knew about the tattoos throughout her relationship with appellant and there is no evidence that she found them intimidating. The jurors, however, were shown photographs of the tattoos at the beginning of appellant's trial, even as the prosecutor identified appellant as being a member of a "dangerous gang." (10 RT 1428.) Additional irrelevant and prejudicial information was erroneously introduced over the course of the trial regarding the tattoos, appellant's gang affiliation, and the violence that gangs may perpetrate. Even the trial court, when viewing the photographs for the first time, recognized that they were "somewhat overpowering" and "perhaps frightening images." (10 RT 1416.)

Ultimately, the trial court's decision that Maria must have been intimidated by the tattoos was based on how it perceived the photographs, rather then evidence about how Maria related to them. To the extent that the trial court found the photographs to be intimidating, it is more of a reflection on how the tattoos would have prejudiced appellant when viewed by the jurors rather than how they specifically affected Maria. The trial court's ruling that the tattoos were intimidating to Maria was unsupported by any evidence, let alone substantial evidence. The photographs lacked probative value and it was error to admit them. (AOB 49.)

3. Sandra Baca's testimony about intimate partner violence did not support admission of the photographs

Respondent states, without further argument or support, that the photographs were probative to Sandra Baca's testimony about intimate partner violence. (RB 79, citing 16 RT 2491-2493.) This position tracks the trial court's belief that "to some extent the caricatures" on appellant's body were significant in regard to his attitude toward women. In particular, the trial court found that the tattoo of a woman in a sexual posture (People's Exh. 37, photograph C) was consistent with Baca's testimony. (16 RT 2519.) Respondent expands this to link appellant's tattoos to "what they represented about appellant's gang lifestyle" and "violent attitude towards women." (RB 79.)

Respondent concedes that the tattoos were not admissible to show appellant's disposition to commit sexual crimes (RB 80), yet the tattoo evidence was admitted precisely for that reason. The trial court believed that the tattoo of a woman in a sexual posture was probative of appellant's attitude towards women. (16 RT 2519.) Respondent argues that they were probative not only of his "violent attitude toward women" but also his "gang lifestyle." (RB 79.) Both rationales would admit the evidence for the exact purpose that it is inadmissible, that is, to prove bad character. It is the type of bad character evidence that can "prove too much" about a defendant's disposition to be admissible. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 915 [propensity evidence "deemed objectionable, not because it has no appreciable probative value, but because it has too much"]; *People v. Carter* (2003) 30 Cal.4th 1166, 1194 [evidence of defendant's gang membership creates a risk the jury will improperly infer defendant has a criminal disposition].)

Sandra Baca's testimony about intimate partner violence did not otherwise justify admission of the tattoos. Baca testified that 85% of women in the United States are battered or abused before the age of 18. (16 RT 2511.) Her testimony focused on explaining why such victims may be reluctant to report or prosecute assaults. In particular, Baca stated that abusive behavior, threats, and intimidation impact victims – an abuser could use his criminal history, past incarceration, or membership in a violent gang to tell the victim that he was capable of carrying out his threats. (16 RT 2492.) She believed that threats, coercion, and intimidation terrorizes victims and allows perpetrators to control them. (16 RT 2493.)

Baca did not use the photographs or discuss the tattoos as part of her testimony. Her opinion was directed to statements made to the victim in the context of specific threats and abuse – the ways in which a perpetrator could point to his criminal history to make threats more credible. Nothing in her testimony suggested that a woman may be a victim of intimate partner violence because of the partner's tattoos. Baca's testimony did not open the door to all evidence of appellant's "gang lifestyle." Without a specific nexus between the tattoos and Maria's state of mind or intimate partner violence, the tattoos had minimal or no probative value. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193 [importance of "evidentiary link" between the evidence and the purpose for which it is being introduced].)

4. The Trial Court Erred in Admitting the Photographs

Although respondent argues that the prosecutor was not obligated to sanitize her case (RB 78), that does not lessen the need to show that evidence has substantial probative value that is not outweighed by its potential for undue prejudice. There is no right to present overly prejudicial

evidence. (*People v. Williams* (2009) 170 Cal.App.4th 587, 610 [rejecting argument the prosecutor was entitled to over-prove a case through cumulative and prejudicial prior crimes evidence].)

Even if the photographs showing the tattoos had some probative value, the deep, emotional impact of the images weighed heavy against their admission. Gang evidence has been recognized as having a particularly inflammatory effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193 [gang evidence may have "highly inflammatory impact" on jurors]; *People v. Albarran*, *supra*, 149 Cal.App.4th 214, 228 [prejudicial affect of gang evidence].) The sexual image included in the photographs of appellant's tattoos added further emotional content to the gang markings. Despite this – and despite the trial court itself acknowledging that the impact of the tattoos could be overpowering or frightening – the trial court found "no prejudice involved at all" in permitting the prosecution to display the photographs at trial. (10 RT 1416.) The trial court clearly failed to consider the significant prejudice inherent in the photographs.

Respondent similarly fails to address the prejudicial effect that such evidence engenders. Respondent, for instance, describes the tattoo of a woman as being "semi-pornographic" and argues that appellant's tattoos were "socially unacceptable and intimidating." (RB 82-83.) This is appellant's exact point. There is no reason to believe that jurors would have felt any differently and would not have had an emotional reaction to the photograph that tainted their view of appellant.

Evidence Code section 352 guards against evidence that may "evoke an emotional bias against" appellant while having very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588.) This is

precisely the kind of evidence at issue here. The trial court erred in ruling that the photographs were admissible.

B. The Error was Prejudicial

The trial court abused is discretion under Evidence Code section 352 when it allowed the photographs showing appellant's tattoos to be used against him. Appellant has argued that in the guilt phase, the error was prejudicial under state law. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal required if there is a reasonable probability that the error affected the judgment].) This error also was federal constitutional error, violating appellant's Fourteenth Amendment due process right to fundamental fairness and his Eighth Amendment right to a reliable verdict. (AOB 52-56; see *Estelle v. McGuire* (1991) 502 U.S. 62, 75 [state law error rises to constitutional level if it "infused the trial with unfairness as to deny due process of law"]; *Anderson v. Goeke* (8th Cir. 1995) 44 F.3d 675, 679 [error violates federal due process if it is reasonably probable that it affected the verdict]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589 [Eighth Amendment requirements of a reliable verdict can be undermined by improper evidence].) Accordingly, reversal is required since it cannot be shown that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent argues that appellant's claim of constitutional error is waived because he did not raise federal grounds at trial. (RB 80-81.) However, the legal consequence of an error in admitting evidence may implicate federal constitutional rights. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Appellant has argued that the error in admitting the large photographs showing the tattoos had such a legal effect. His claim is properly before this Court.

Respondent also contends that any error was harmless because appellant did not contest that he killed Maria, only that he had not acted with premeditation or deliberation. (RB 82.) There was more to the case than that. The rape charge was based upon Maria's statements immediately after the August, 1999, incident in which she alleged that appellant had beaten and sexually assaulted her. (See 10 RT 1517-1518.) At trial, appellant argued that this was insufficient evidence to prove rape. (17 RT 2632-2634.) The lying-in-wait special circumstance was built upon the prosecutor's speculation about whether appellant intended to murder Maria when they spoke on the telephone early on March 4, 2000, the same day that the homicide occurred. Appellant conceded the homicide and based his defense on it being an act of spontaneous anger that was not a planned crime. (17 RT 2626-2629; see AOB, Argument VII [lying in wait unsupported by substantial evidence].) The photographs of appellant's tattoos, about which a "gang expert" later testified were the largest he had ever seen (15 RT 2264), sent a clear message to the jurors that appellant was a dangerous gang member and committed the crime as charged.

Gang evidence is often "catastrophically prejudicial." (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 76.) Tattoos in particular affect the perception of a viewer. (See *In re Victor L.* (2010) 182 Cal.App.4th 902, 930 [heavily tattooed appearance engenders prejudices and suspicions].) Alleged gang tattoos are particularly inflammatory. (See *State v. Huff* (Ohio Ct.App. 2001) 145 Ohio App.3d 555, 566 [irrelevant allegations of gang tattoos prejudicial to assault charges]; *Brooks v. State* (Miss. 2005) 903 So.2d 691, 700 [improper admission of gang tattoos and other evidence required reversal]; *People v. Mason* (Ill. App. Ct. 1995) 274 Ill.App.3d 715, 723 [inflammatory effect of tattoos used to show pride in gang membership].)

The sexual tattoo added further weight against appellant. (See *Wilde v. State* (Wyo. 2003) 74 P.3d 699, 710 [sexual tattoos prejudicial to sexual assault charges].) The tattoos were among the first images to be associated with appellant and thus became the lens through which appellant was viewed. The link to a gang activity, a criminal disposition, and the frightening nature of the tattoos themselves made it likely that the jurors accepted the prosecutor's narratives without further question. (See Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L. Rev. Discourse 2, 11-14 [gang evidence increases likelihood of guilt verdict].)

Although respondent argues that the tattoos were ambiguous to jurors unfamiliar with criminal culture (RB 82), the prosecutor's opening statement identified appellant as being a member of Venice 13 and described it as a dangerous gang. (10 RT 1428.) The photographs in turn branded appellant in one of the most powerful ways possible. Jurors could not have had any doubt about what the tattoos meant, particularly after a gang expert testified that they were the largest gang tattoos he had seen. (15 RT 2264.)

Respondent inexplicably maintains that the tattoo photos could not have prejudiced appellant because a person who obtains socially unacceptable tattoos would have been more likely to make poor rash judgments, and presumably not planned the murder. (RB 82.) Respondent's argument is not only fully contrary to the state's theory of its case, but ignores that the prosecutor linked the tattoos to appellant's membership in a dangerous gang, not that he was someone who on a whim got a tattoo. Thus, the number and size of the tattoos at issue did not simply show rash judgments. Instead, the jurors likely considered them as

evidence of how much appellant was attached to a criminal gang and capable of criminal thought and planning. To the jurors, the photographs would have shown appellant's character and disposition and been taken as evidence that he was guilty of the charged crimes.

The gang images had a powerful effect upon the jurors that extended throughout both the guilt and penalty phases of the trial. Appellant not only had to defend himself against the charges at issue, but also the underlying perception that the prosecution presented by introducing the issue of gangs at the start of his trial. Whether considered singularly, or in combination with other gang allegations (Arguments II-IV), this Court can have no confidence in a verdict where the perception of appellant was fundamentally altered by improper evidence. Under either state law or federal constitutional standards, the error was prejudicial in both the guilt and penalty phases. (See *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 229-232 [error in admitting gang evidence was prejudicial under both state and federal standards].)

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II.

THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT A HAND SIGN THAT APPELLANT FLASHED DURING A PRETRIAL HEARING WAS A GANG SYMBOL

Detective Oppelt testified that during a 2004 pretrial hearing, he saw appellant flash a V-shaped hand sign to Rosa Marquez, a lifelong friend of appellant's who had let him stay in a room in her house at the time of the homicide.[4/] (15 RT 2258.) Over appellant's objections, Oppelt explained the gang implications of the sign by establishing his alleged expertise in gang matters, his knowledge of the Venice 13 gang, and his understanding of the use of the sign by gang members. (15 RT 2260-2264).

Appellant has argued that the trial court abused its discretion in both identifying the sign used by appellant as one common to the gang and in admitting foundational testimony about the Venice 13 gang and the kind of criminal activities that it committed in order to explain the sign's significance. The evidence had virtually no probative value and was extraordinarily prejudicial. As a result, the testimony violated appellant's statutory rights under Evidence Code section 352 and appellant's

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[4/] Marquez testified as a prosecution witness during the 2002 preliminary hearing. She had known appellant for 30 years and testified about matters pertaining to his residence in her house. (5 CT 1161-1179.)

Oppelt testified that the hand sign occurred during a pretrial conference on August 12, 2004. (15 RT 2257.) No conference was held on that day, but on August 26, 2004, Marquez spoke to the trial court during a pretrial conference about scheduling later appearances. (2 RT 192-195.) Nothing unusual was noted in the record. The prosecutor did not call Marquez as a witness at trial.

constitutional rights to due process and a reliable verdict. (AOB 60-67; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. The Trial Court Erred in Allowing Oppelt to Identify the Hand Sign as Being Gang Related

Respondent states that the hand sign showed appellant's active gang association and was relevant to explain a letter to his brother Gabriel and his intimidation of Maria. Respondent further contends that the testimony was relevant to show that appellant and Rosa maintained a relationship with each other and the Venice 13 gang. According to respondent, the testimony explained why Rosa and her daughter Elizabeth did not testify at trial. Rosa's other daughter, Vanessa, testified at trial and respondent argues that the hand sign corroborates her statement that Rosa had "tried to convince her not to testify." (RB 87.)

Respondent does not explain why testimony about the hand sign was relevant to explain an unsent envelope addressed to his brother that included a photograph of Maria with a note, "This is the bitch, Ruben, JKS." (People's Exhibit No. 61; 15 RT 2256.) The hand sign incident was not connected with the note. The reference to the Jokers ("JKS") did not transform this case into a gang matter allowing any gang evidence to be admitted. Once again the prosecution took evidence irrelevant to the case in an attempt to bootstrap this case into one of gang violence. Even if the note demonstrated appellant's state of mind as to Maria, the gang identification was tangential to any other issue and did not open the door to further evidence of gang involvement. (*People v. Cox* (1991) 53 Cal.3d 618, 660 [disapproving of "the introduction of evidence of gang membership if only tangentially relevant"].)

The hand sign also did not relate to any proper issue before the jurors in regards to Maria. Even if it showed that appellant maintained some kind of association with the Venice 13 gang, the incident in court occurred long after Maria's death. Thus, contrary to respondent's position, it was not directly relevant to any action that might have affected Maria's state of mind. It did not show that she was intimidated. The fact that appellant flashed a sign in court had no probative value. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193 [finding reversible error to admit expert testimony about the gang-related graffiti where there was no evidentiary link between the graffiti and the alleged crime].)

Respondent also contends that the gang sign was directly relevant to bolster Vanessa's testimony that Rosa had tried to convince her not to testify. (RB 87.) Vanessa stated that before the 2002 preliminary hearing, her mother told her "not to talk" to the police or at trial because it could get her uncles in trouble since they were members of the Venice 13 gang and in state prison. Her father, however, encouraged her to speak to the police. (16 RT 2363-2364.) Respondent does not explain how the hand sign given to Rosa was relevant to *Vanessa's* testimony. Nothing in the record suggests that appellant sought to influence either Rosa or Vanessa or that the hand sign was related to Rosa's concerns about the uncles.

Respondent similarly speculates that the gang sign explained why Rosa and her other daughter Elizabeth did not testify at trial. (RB 87.) No such explanation was needed. It was the prosecutor's prerogative to call them as witnesses and she chose not do so. Respondent's argument simply demonstrates the kind of speculation and prejudice that testimony about the hand sign and gangs introduced during the trial. Indeed, there is no evidence that either Rosa or Elizabeth refused to testify. Rosa testified as a

prosecution witness at the preliminary hearing (5 CT 1161-1179) and stated at the pretrial hearing that she and her daughters would be available if called at trial (2 RT 194-195). Elizabeth was never called as a witness in any proceeding. At bottom, there was no evidence that appellant used the sign in order to intimidate or influence Rosa or that Rosa and Elizabeth did not testify as a result of appellant's gang involvement. It did not explain anything that was relevant at trial but served to further taint appellant as a member of a violent and dangerous street gang.

Had the prosecutor chosen to call Rosa as a witness at trial, she may have been able to question Rosa about whether the sign or appellant's gang affiliation might have influenced her testimony. The prosecutor did not do so, and never alleged that either Rosa or Elizabeth were reluctant to testify as a result of the hand sign or for any other reason. The kind of speculation inherent in respondent's argument made it imperative to exclude the testimony under Evidence Code section 352. (*People v. Lewis* (2001) 26 Cal.4th 334, 373 [speculative testimony properly excluded].)

Significantly, respondent does not defend the trial court's explanation that it was important to identify the nature of the sign once testimony about the sign had been received. (15 RT 2266.) As appellant has argued, regardless of whether any testimony about the sign should have been admitted in the first place, it did not open the door to prejudicial testimony linking the sign to one used by gang members. (AOB 61.)

Although the testimony about flashing a hand sign in court during a pretrial proceeding had no relevance to any issue at trial, that it was a gang sign made it extraordinary prejudicial. Testimony about flashing a gang sign during the solemnity of a court proceeding effectively inflamed the jurors against appellant in ways that went beyond mere gang membership.

Indeed, the trial court found it highly relevant that appellant "flashes a gang sign to somebody else in the courtroom at a time when you would expect him to be on his best behavior." (15 RT 2269.) The link to the same courtroom as the trial created an immediate connection between the jurors and the evidence. It was as if appellant had breached the sanctity of the court and should expect no further consideration from the jurors. This, undoubtedly had a profound effect upon the way that jurors viewed appellant.

The prejudicial nature of the testimony is also shown by respondent's argument that characterizes the sign as an attempt "to pressure Vanessa and presumably Elizabeth not to testify" and equates it to witness intimidation that could "legitimately be considered" under Penal Code section 190.3, factor (b). (RB 90.) As discussed above, nothing about the gang sign rose to this level or established that it was used to intimidate Rosa, Vanessa, or Elizabeth. Yet the kind of speculation that allowed respondent to view the hand sign as a threat of force, made in the very courtroom itself, shows the kind of prejudice that such evidence engenders.

This Court has repeatedly warned about the danger of introducing gang evidence unless it is highly probative (see, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905), yet the trial court found that there was no prejudice at all in introducing gang evidence. (15 RT 2270.) That alone suggests that the trial court failed to weigh the potential prejudice of gang evidence in any meaningful way. The trial court abused its discretion in allowing testimony that appellant flashed a gang sign during the pretrial hearing.

B. The Trial Court Erred in Allowing Foundational Testimony Establishing That Venice 13 Was a Criminal Gang

Appellant objected to any explanation of the hand sign as being more prejudicial than probative, the trial court sustained the objection as to foundation. (15 RT 2258.) The trial court treated the objection as going to Detective Oppelt's expertise to identify the sign as one made by the Venice 13 gang (15 RT 2258), sustained appellant's objection as if the objection was based on foundation grounds, and allowed the prosecution to continue down its journey of introducing minimally relevant, highly prejudicial evidence. Appellant explained that his objection was to the relevancy and probative value of the testimony, not to foundation (15 RT 2259, 2260), but the trial court stated:

> You asked for the foundation, you're getting the foundation. If you don't like it, don't ask for it . . . . Don't ask for it if you don't want it. You wanted to know the basis for his conclusion about the V sign. That is what you are getting.

(15 RT 2260-2261.) The trial court erroneously redefined the nature of appellant's objection and allowed Oppelt to testify that Venice 13 was a criminal street gang, going back at least two generations, that engaged in drug and gun dealing. (15 RT 2260-2261, 2331.) Oppelt not only identified the hand sign as one used by the gang, but further testified that appellant's gang tattoos were the largest he had seen. (15 RT 2263-2264.)

Respondent argues that Oppelt's testimony about the Venice 13 gang was a necessary foundation for both the hand sign and to explain the gang-related tattoos discussed above (Argument I). (RB 88.) That tangential evidence was admitted did not open the door to expand the testimony into a prejudicial line of questioning. As appellant clearly stated in his objection at trial, any probative value that it may have had was far outweighed by its

prejudicial effect. The testimony only served to further taint appellant and emphasize that appellant committed the crimes charged here, just as he may have committed any number of crimes as a result of his gang membership.

In discussing the potential for prejudice, respondent generally discounts the impact of the gang testimony at issue and describes it as "brief" or "minimal." (RB 87-88.) Even brief testimony about highly inflammatory matters may have a profound effect upon jurors. It is not the length but the effect of testimony that is determinative and there can be powerful testimony that does not require elaboration. Here, the prosecutor had no need to ask Oppelt to elaborate on his testimony about the Venice 13 gang for it to be prejudicial. Gang evidence was introduced repeatedly from the start of appellant's trial – appellant's tattoos, the hand sign, and the gang monikers in Maria's address book were magnified through Oppelt's testimony. Oppelt tied the package together that was already presented.

Such testimony had a significant impact since just the word "gang" has long encompassed a deep emotional and sinister connotation. (*People v. Perez* (1981) 114 Cal.App.3d 470, 479.) It has been recognized that the kind of testimony elicited through Oppelt can persuade jurors that a defendant has "committed other crimes, would commit other crimes in the future, and posed a danger to the police and society in general." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1140; see also (*State v. DeLeon* (Wash., May 5, 2016, No. 91185-1) ___ P.3d ___ [2016 WL 2586679, at p. *6] [officer's testimony about crimes committed by gangs prejudicially suggested that defendants were "part of a pervasive gang problem and were criminal-types with a propensity to commit the crimes charged"].)

Respondent states that the testimony about the hand sign did not associate appellant with any particular gang activity. (RB 87.) To the

contrary, Oppelt identified the sign as that used by Venice 13 and explained that appellant was a member of a criminal street gang that engaged in any number of unlawful activities. He added fuel to the prejudice by stating that the size of appellant's tattoos were larger than any he had ever seen. Oppelt effectively labeled appellant as being among the "worst of the worst." His testimony as a "gang expert" told the jurors that they could assume that appellant was a major player in the gang and committed both charged and uncharged offenses.

It has long been recognized that irrelevant evidence of gang membership creates tremendous prejudice because the "only inference" that jurors can draw from it is that a defendant has a bad character and criminal disposition. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1382-1383; see also *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905 [irrelevant gang evidence creates a "real danger" that the jurors will infer criminal disposition].) Given the potential for prejudice that gang evidence presents, it was error to have allowed Oppelt to testify about his knowledge of Venice 13 and the kinds of crimes that the gang commits.

C. The Errors were Prejudicial

Respondent argues that appellant's claim of constitutional error is waived because he did not raise this ground at trial. (RB 88.) However, the legal consequence of an error in admitting evidence may implicate federal due process rights. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Here, the admission of improper gang evidence had profound consequences that affected appellant's constitutional rights.

Although respondent maintains that there is nothing about appellant's gang association that made it more likely that he lay in wait to kill Maria rather than impulsively did so in anger (RB 90), the erroneously

admitted gang evidence made it more likely that the jurors would adopt the prosecutor's narrative and fill in the evidentiary gaps. (See Argument VIII [insufficiency of lying in wait].) Admission of Oppelt's testimony left the jurors free to speculate that appellant had tried to tamper with the witnesses; that the very nature of appellant's gang association engendered fear and intimidation; that appellant had engaged in the type of criminal activities – including gun and drug dealing – identified by Oppelt; and, that appellant had the disposition to not only commit the crimes alleged in this case, but to have done any number of other crimes as well. The erroneously admitted evidence suggested that appellant would set out to plan Maria's murder because it was the type of thing that a person involved with gangs would do. Fear and loathing helped convince jurors that appellant was guilty of the charged offenses and deserved the ultimate punishment. (See Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L. Rev. Discourse 2, 11-14 [gang evidence increases likelihood of guilt verdict].)

The prosecutor had no need to introduce to introduce evidence about the hand sign and the gang's criminal acts, but she seized yet another opportunity to present alleged gang evidence in order to taint appellant. Whether viewed as a single issue, or in conjunction with other improper gang evidence (Arguments I, III, & IV), this Court should find that the gang information and hand sign prejudicially affected the both the guilt and penalty phases, under either state law or federal constitutional law. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 [applying federal constitutional law under *Chapman v. California* (1967) 386 U.S. 18, 24 to reverse due to the introduction of largely irrelevant gang evidence].)

III.

THE TRIAL COURT IMPROPERLY ADMITTED GANG EVIDENCE FOUND IN THE VICTIM'S ADDRESS BOOK

The trial court erroneously admitted various entries found in Maria's address book that related to gangs and gang nicknames. The entries simply linked appellant to gang activity and served no proper purpose. The writing was improper hearsay and introduced further inflammatory that related to gangs and gang involvement. The testimony violated appellant's statutory rights under Evidence code sections 352 and 1200 and his federal and state constitutional rights to due process and a reliable verdict. (AOB 68-73; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. The Writing Was Not Authenticated to Establish an Exception to the Hearsay Rule

Appellant objected that the writing introduced against him from Maria's address book was hearsay. (16 RT 2332.) Although the trial court did specify the basis for its decision overruling appellant's objection, the only possible grounds for admitting the writing was as an admission. (Evid. Code, § 1220.) Before a writing can be used against a party as an admission, there must be proof of the writing's authorship. (*Lewis v. Western Truck Line* (1941) 44 Cal.App.2d 455, 465.) Appellant has argued that the writing in the address book was not identified as being his. The only thing established at trial was that the book was found in appellant's bedroom and that some of the writing was not Maria's. This did not establish that appellant wrote the entries. Accordingly, it did not fall under any exception to the hearsay rule. The trial court erred in admitting the entries in the address book. (AOB 69-70.)

Respondent faults appellant for noting that the prosecutor had not established that the writing met any exception to the hearsay rule or was not being admitted for the truth of the statements. (See AOB 69, fn. 11.) Respondent argues that the prosecutor was not required to explain why the testimony was not hearsay. (RB 92.) This is not the law. When the opponent of the evidence lodges a hearsay objection, as appellant did, then "[t]he proponent of hearsay has to alert the court to the exception relied upon and has the burden of laying the proper foundation." (*People v. Livaditis* (1992) 2 Cal.4th 831, 778; see also *People v. Woodell* (1998) 17 Cal.4th 448, 464.) Here, the prosecutor simply stated that she was "just pointing out various things, given some of the evidence in this case." (16 RT 2334.) That does not establish the admissibility of the evidence.

Respondent states that the evidence was not admitted for its truth. (RB 92.) The prosecutor, however, sought to use the writings to point out "various things, given some of the evidence in this case." (16 RT 2334.) The truth of the writing in the address book, that the various monikers referred to gang members, was integral to its use in order to connect appellant to the Venice 13 Jokers and cannot be separated from its use. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 289 [explaining when truth of the matter is implied in a hearsay statement].) The writing should have been identified as being that of appellant before being admitted as an admission.

B. The Evidence was Irrelevant

Even assuming the writing was sufficiently authenticated, it is not enough that a nonhearsay purpose or exception to the hearsay rule is identified. A trial court must also find that the exception is relevant to an issue in dispute. (*People v. Armendariz* (1984) 37 Cal.3d 573, 585; *People*

v. Bunyard (1988) 45 Cal.3d 1189, 1204.) Here, the trial court was understandably concerned about the relevancy of the testimony and raised it on its own initiative. (16 RT 2334.) In response to the trial court's question about relevancy, the prosecutor simply stated that she was "pointing out various things given some of the evidence in this case." (*Ibid.*) Respondent does not argue that this was proper, but contends that the information was relevant to show that appellant was recording Maria's personal information with an eye to intimidation and to show that appellant still was associated with the gang. (RB 92.)

Nothing suggests that appellant was using the address book to record Maria's personal information in order to intimidate her. The writing itself referred to gang monikers of various individuals rather than her personal information. It is not known if Maria was aware of the writings, when appellant obtained the address book, or the purposes that the book might have served. The prosecutor failed to establish any foundation that would allow the evidence to be used for the purpose respondent identifies. Accordingly, respondent's rationale provides no basis for this Court to uphold the admission of the address book and its entries.

Similarly, appellant's continued association with the gang was not at issue. Since it is not known when the writings were made, the degree that appellant "was still associated with Venice 13 and the Jokers" (RB 92) cannot be determined. The writings may have been made long before any of alleged crimes took place or long after Maria accused appellant of rape. There mere fact that Maria's address book contained some writings relating to gangs served no proper purpose and should have been excluded.

C. The Evidence was More Prejudicial than Probative

Appellant has argued that the writing in the address book had little or no probative value and was inadmissible under Evidence Code section 352 when weighed against the potential for prejudice that gang evidence presents. (AOB 70-71.) Respondent does not address the reason for the evidence given by the prosecutor – to point out various things relating to gangs – but repeats that the evidence was relevant to show that appellant was recording Maria's information with an eye toward intimidation and that it showed that appellant was associated with Venice 13. According to respondent, "this intimidation evidence was material to whether appellant raped Maria and then killed her to avoid prosecution." (RB 93.)

As discussed above, there is no evidence that appellant was using the address book to record Maria's personal information in order to intimidate her. Indeed, respondent does not explain why the gang monikers within the book had anything to do with recording information. There is no evidence about when the writing was done or how it affected Maria. Without proof that Maria was aware of the writing or that it intimidated her, the evidence had little or no probative value.

By "pointing out various things" in the address book (16 RT 2334), the prosecutor effectively suggested that appellant had violated something personal to Maria with gang references. The prejudicial nature of gang evidence, as discussed above in Arguments I and II, weighs far heavier than the tangential nature of the writings. (*People v. Cox* (1991) 53 Cal.3d 618, 660 [Court has "condemned the introduction of evidence of gang membership if only tangentially relevant"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [evidence of gang membership "should not be admitted

if its probative value is minimal"].) The trial court abused its discretion in allowing the evidence to be admitted.

D. Reversal is Required

Respondent argues that appellant's claim of constitutional error is waived because he did not raise this ground at trial. (RB 93.) However, the legal consequence of an error in admitting evidence may implicate federal due process rights. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Here the error in admitting evidence implicated both state law and the federal constitutional standards for a reliable verdict and due process. (US. Const., 8th & 14th Amends.)

As the prosecutor implicitly acknowledged, the only purpose the address book showed was to point out appellant's gang association. The prosecutor, however, was not simply pointing out some things that were otherwise relevant to the case, but again brought inflammatory gang evidence to the front and center of her case. Appellant's gang membership became the lens through which all the evidence was considered. Jurors concluded that because appellant was a member of a criminal gang, he had committed crimes in the past, had the disposition to rape Maria, and was far more likely to have developed a plan to conceal a murderous purpose rather than having acted in rage. (See Eisen, Dotson, & Dohi, *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?* (2014) 62 UCLA L. Rev. Discourse 2, 11-14 [gang evidence increases likelihood of guilt verdict].)

The prosecutor's repeated introduction of gang evidence created "a near certainty that the jury viewed appellant as more likely to have committed the violent offenses charged against him because of his membership in the [] gang." (*People v. Cardenas* (1982) 31 Cal.3d 897,

906 [reversing in part due to introduction of gang membership].) Whether viewed as a single issue, or in conjunction with other improper gang evidence (Arguments I, II, & IV), it infected the both the guilt and penalty trial with irrelevant and prejudicial material, requiring reversal under both state law and federal constitutional standards. (AOB 65-77; see *People v. Albarran* (2007) 149 Cal.App.4th 214, 229 [applying federal constitutional law under *Chapman v. California* (1967) 386 U.S. 18, 24, to reverse due to the introduction of largely irrelevant gang evidence].)

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IV.

THE TRIAL COURT IMPROPERLY ADMITTED STATEMENTS BY APPELLANT CLAIMING TO BE A HIT MAN FOR THE MEXICAN MAFIA

Over appellant's objections, the trial court admitted testimony that during a course of a casual conversation, before Maria alleged that appellant raped her, appellant told one of Maria's coworkers in her presence that he had been a hit man for the Mexican Mafia and had gotten away with killing people in the past. (11 RT 1612-1613.) The testimony violated appellant's statutory rights under Evidence Code section 352 and appellant's constitutional rights to due process and a reliable verdict. (AOB 74-80; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

A. The Testimony Was More Prejudicial than Probative

The trial court believed that the incident was relevant to whether a rape occurred – if Maria was terrified of appellant being a Mexican Mafia hit man, she would "keep her mouth shut." The court also found that even if the statement was nothing more than a brag it would still have the effect of terrifying Maria. (10 RT 1469.) Respondent recasts this rationale by claiming, without legal or factual authority, that the statement "necessarily intimidated Maria." (RB 97.)

Respondent acknowledges that there was "no direct evidence that Maria felt threatened by appellant, his tattoos, his active gang membership, or his braggadocio," but claims that this was all "all the more reason" why these matters were necessary to explain "that any woman in Maria's place would have acted as she did . (RB 97.) Respondent cites no authority that permits the state to introduce evidence of a defendant's gang membership or criminal propensity under these circumstances, without establishing that

the victim's state of mind was affected. To the contrary, it is axiomatic that for state of mind evidence to be admissible, there must be evidence of a declarant's state of mind. (Evid. Code, § 1250; see *People v. Griffin* (2004) 33 Cal.4th 536, 578 [state of mind evidence "reflects the declarant's mental state"].) Respondent, then, proceeds from the wrong premise. It is not whether "any woman" would have been intimidated by appellant's bragging, but if there is evidence that the statement affected Maria and influenced her course of conduct in a way that was directly relevant at trial. Without this nexus, the statement had no probative value. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193 [necessary to establish "evidentiary link" between the evidence and the purpose for which it is being introduced].)

There was no evidence that appellant was a hit man for the Mexican Mafia. Nothing in the record establishes that Maria believed the claim related to the Mexican Mafia or that a mere brag terrified her or affected her in any way. Indeed, Chris Eck testified that the statement was made without any attempt to intimidate or scare him. (11 RT 1630-1632.) There is no basis to believe that appellant's claim, made in the course of a casual conversation, influenced Maria's state of mind.

Respondent also relies upon the testimony of Sandra Baca, an expert witness regarding intimate partner violence. (RB 97, citing 16 RT 2491-2493.) Baca stated that abusive behavior, threats, and intimidation impact victims and opined that a perpetrator's history of having been to state prison or being a member of a violent criminal gang would affect a victim by making threats more credible. (16 RT 2492.) Baca's testimony was directed to statements made to the victim in the context of threats and abuse – a perpetrator who states that his threats should be taking seriously because "you know what I'm capable of doing" (*ibid.*) rather than to something said

in the course of a casual conversation with another person. Baca did not cite appellant's brag anywhere in her testimony and her testimony did not open the door to any and all evidence about appellant's criminal propensity. Without evidence that this statement affected Maria and without any use as part of Baca's testimony, it lacked any probative value.

Other than to characterize the testimony as "relatively insignificant evidence of braggadocio" (RB 98), respondent does not address appellant's claim that the prejudice inherent in the statement rendered it inadmissible. As discussed above (Arguments I, II, III), gang evidence can have a "highly inflammatory impact" upon jurors. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) This is especially true with claims involving the Mexican Mafia, a particularly notorious prison gang. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn. 1 ["more than one California court has recognized references to the Mexican Mafia are extremely prejudicial"]; *People v. Ayala* (2000) 23 Cal.4th 225, 276-277 [noting with approval efforts of trial court to exclude references to the Mexican Mafia from testimony to explain why a witness might be fearful]; *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1128-1129 [notoriety of Mexican Mafia]; *United States v. Krout* (5th Cir. 1995) 66 F.3d 1420, 1427-1428 [Mexican Mafia's constitution defines organization as criminals dealing in drugs, contract killings, and prostitution].)

The claim of being a Mexican Mafia hit man was particularly prejudicial because its relevance depended on jurors believing that either the statement was true or that Maria believed it was true so that it affected her state of mind. The prosecutor's opening statement told the jurors that appellant gloated "about the fact" that he had been a Mexican Mafia hit

man who had gotten away with murder. (10 RT 1468.) Since the prosecutor suggested that such a claim was a factual statement, it is likely that the jurors also considered it for its truth. Very few things would be as powerful as the belief that a defendant was a hit man for a dangerous prison gang and had murdered in the past without suffering consequences. Once considered for its truth, it would be impossible for a juror not to be affected by it.

Even if the jurors did not believe appellant's claims about being a hit man, that appellant was willing to make such a brag during a casual conversation would have been shocking to jurors in and of itself. Jurors likely assumed that it was further evidence that appellant was predisposed to commit almost any crime. Under these circumstances, the potential for prejudicial emotional bias outweighed any probative value. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 [explaining the nature of prejudice under section 352].) The trial court abused its discretion in allowing the testimony.

B. The Error was Prejudicial

Respondent argues that appellant's claims of constitutional error under the Eighth and Fourteenth Amendments are waived because he did not raise these grounds at trial. (RB 88.) However, the legal consequence of an error in admitting evidence may implicate federal constitutional rights. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) The error in admitting evidence that appellant claimed to be a Mexican Mafia hit man rose to federal constitutional standards by rendering the trial fundamentally unfair and making the judgment unreliable. Appellant's claims are properly before this Court. (*Estelle v. McGuire* (1991) 502 U.S. 62, 75 [state law error rises to constitutional level if it "infused the trial with unfairness as to

deny due process of law"]; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589 [Eighth Amendment requirements of a reliable verdict can be undermined by improper evidence].)

Respondent states that any error was harmless because there was overwhelming evidence that appellant planned to murder Maria (RB 99), yet the record cited does not support such an assertion. For instance, respondent alleges that appellant asked Maria to come to his house for the purpose of killing her, yet the record respondent cites (12 RT 1763, 1769-1770) only establishes that appellant spoke with Maria and that she bought some items from a store. There is no evidence about who suggested a meeting, what the motives might have been, or where they agreed to meet. Respondent argues that Maria managed to run from the back of appellant's house to the front, where she was assaulted in front of witnesses. (RB 99.) Yet, appellant was staying at 9651 Dorrington (See 16 RT 2319, People's Exh. No. 64), while the assault took place at 9633 Dorrington (12 RT 1793), about three houses away (People's Exh. No. 16). More importantly, respondent maintains that appellant had brought a ligature and knife with him as part of a plan to murder Maria (RB 99), but the record respondent cites establishes only that Maria generally did not bring utensils to work (11 RT 1639, 1652; 12RT 1736). There is no evidence that appellant brought weapons to the crime scene as part of a plan to kill Maria – indeed, the witnesses to the assault did not see such weapons. (See 12 RT 1826 [Margabeth Gonzalez testimony that she did not see ligature or knife]; 14 RT 2046 [Lizabeth Gonzalez that she did not see a knife]; 14 RT 2098-2099 [Luz Garcia testimony that she did not see victim being choked or assailant with a knife].) Ultimately, there was insufficient evidence that appellant lay

in wait to kill Maria. (See Argument VIII [lying in wait was based on speculation].)

The testimony about the Mexican Mafia encouraged the jurors to accept the kind of narrative that respondent alleges and to conclude that someone who presented himself as a gang hit man must have a criminal disposition. This had profound consequences upon both the guilt and penalty phases. A hit man for the Mexican Mafia would be far more likely to plan a murder. Even someone who claimed to be a hit man for the Mexican Mafia would have the disposition lure the victim to her death. Whether viewed singly or in conjunction with other gang evidence (Arguments I-III), this Court should find that the testimony served to inflame the jurors and taint appellant with the most extreme gang violence.

Regardless of whether the issue is considered as a matter of state law under *People v. Watson* (1956) 46 Cal.2d 818, 836, or as federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24, this Court must find that it was prejudicial.

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V.

THE TRIAL COURT ERRONEOUSLY ALLOWED TESTIMONY THAT APPELLANT WAS ABLE TO MANIPULATE THE LEGAL SYSTEM AS SUBSTANTIVE EVIDENCE AGAINST HIM

After the alleged rape, Maria was afraid to report the incident to the police. Maria was persuaded to go the police two days after the events at issue. Even at the police station, however, Maria was afraid to make the report. She stated that appellant had told her that he knew how the system worked and that he could "make believe that he was crazy and that way get away with it." (12 RT 1708.)

The trial court erroneously refused to limit this evidence to Maria's state of mind, and allowed its use for any purpose as a spontaneous statement. (12 RT 1709.) Appellant has argued that the trial court erred in allowing the statement to be admitted on this basis and used without limitation. The error violated appellant's statutory rights as well as his constitutional rights to due process and a reliable verdict. (Evid. Code, § 1240; Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 8th & 14th Amends.)

A. The Claim is Not Waived

Respondent states that appellant forfeited his claims by failing to object to the prosecutor's assertion that the statement was a spontaneous declaration. (RB 103.) Appellant moved that the statement be limited to Maria's state of mind and contended that it was double hearsay and unreliable if used for any other purpose. (12 RT 1708-1709.) The prosecutor stated that it was admissible under Evidence Code section 1240 as a spontaneous declaration. The trial court agreed and overruled appellant's objection. (12 RT 1709.)

Respondent's reliance on *People* v. *Hajek* (2014) 58 Cal.4th 1144, 1208, is misplaced. In *Hajek*, the defendant objected to certain evidence, withdrew the objections, and later made new objections apparently unrelated to the grounds advanced on appeal. (*Id.* at pp. 1207-1208.) This is not analogous to the present case. Respondent cites no case holding that a defendant's request to limit the evidence and a subsequent hearsay objection is insufficient to preserve the issue of whether the statement should be admitted for all purposes as a spontaneous declaration. Indeed, this Court has reviewed a trial court's ruling that a statement was a spontaneous declaration after the defendant's hearsay objection. (See *People v. Brown* (2003) 31 Cal.4th 518, 540 [issue reviewed after defendant's hearsay objection had been overruled as a spontaneous statement].) The issue is properly before this Court.

B. The Testimony was Inadmissible as a Spontaneous Declaration

Appellant has argued that the statement that appellant knew how to act crazy and get away with crimes was not admissible for all purposes as a spontaneous declaration under Evidence Code section 1240. (AOB 82-83.) Respondent states that Maria was distraught, agitated, and emotional as a result of the assault so that both her description of the assault and appellant's threats were properly admitted. (RB 103-104.)

To be admitted as a spontaneous declaration, there must be (1) a startling act sufficient to render the statement spontaneous and unreflecting; (2) the statement must be made before there is time to reflect, while the emotional state that resulted from the startling act prevails; and (3) the statement must relate to the circumstance of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

Here, the alleged rape and assault occurred two days before Maria went to the police station to make a report. (See AOB 8; RB 5 [citing record and agreeing that Maria went to the police two days after the rape].) Although Maria was afraid at the time she made the statement, her fear was based upon reporting the matter to the police rather than the stress of the assault itself. During the interval, Maria had been at home and with her husband, so that she had ample opportunity for deliberation and reflection. (See *People v. Pirwani* (2004) 119 Cal.App.4th 770, 789 [two day interval provided sufficient time to reflect].)

Even assuming that the stress of the incident lingered so that Maria's statement was still spontaneous, it must "narrate, describe, or explain an act, condition, or event perceived by the declarant" that caused the stress. (Evid. Code, § 1240.) In other words, the statement must "relate to the circumstance" of the preceding occurrence. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 810.)

Respondent does not explain how Maria's statements about appellant's ability to get away with crimes met this definition. The testimony does not describe the assault and was relevant only to show that Maria was afraid to report the incident because appellant had threatened her. Although the statement may have been relevant to Maria's fear, it did not mean that it was generally admissible for all purposes as a spontaneous declaration relating to the rape itself.

C. The Statement Should Have Been Limited to Maria's State of Mind

Appellant argued that the statement was admissible only to show Maria's state of mind. (12 RT 1708-1709.) Although respondent agrees that the statement was admissible for this purpose, respondent contends that

the relevance of the evidence was so obvious that a limiting instruction was not needed – in other words, that jurors would only use it as evidence of Maria's state of mind. (RB 104-105.)

As discussed below (subdivision (D) of this claim), the jurors could have used this statement to go beyond Maria's state of mind. Moreover, respondent cites no authority to establish that jurors should not be instructed to limit the use of state of mind evidence if its purpose is "obvious." Since what is relevant under the law may not necessarily be obvious to a juror, the law provides that upon request jurors should be instructed that testimony is being admitted only for a specific purpose. (Evid. Code, § 355 [when evidence is admitted only for a limited purpose, and inadmissible for other purposes, a trial court "upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"].)

To the extent that respondent relies on *People v. Chisum* (2014) 58 Cal.4th 1266, 1307, fn. 13, the argument is misplaced. (RB 105.) In *Chisum*, the trial court admitted evidence of a robbery for the purposes of establishing knowledge, identity, common plan, and intent. (*People v. Chisum, supra*, 58 Cal.4th at p. 1305.) This Court found that the evidence was admissible under Evidence Code section 1101, subdivision (b), to show identity and intent. (*Id.* at pp. 1306-1307.) Having found that the evidence was admissible for these purposes, the trial court's additional ruling that the evidence could be admitted to show knowledge was of no consequence. (*Id.* at p. 1307, fn. 13.)

More importantly, in *Chisum* this Court explained that "[u]nless evidence is admitted for a limited purpose, or against a specific party, evidence admitted at trial may generally be considered for any purpose." (*People v. Chism, supra*, 58 Cal.4th at p. 1305.) The trial court's ruling

permitted Maria's statement to be used without limitation. Since appellant requested that the evidence be limited to Maria's state of mind, and respondent does not identify any proper other use for which the testimony could have been admitted, this Court should find that allowing the statement to be admitted for all purposes was error. (Evid. Code, § 355; see *People v. Miranda* (1987) 44 Cal.3d 57, 83 [failure to give requested limiting instruction was error].)

D. The Error was Prejudicial

Respondent's contention that the relevance of the evidence was "obvious" does not affect whether the trial court should have limited its use at trial, but this Court has used this factor to determine whether an error was prejudicial. (See *People v. Lam Thanh Nguyen* (2015) 61 Cal.4th 1015, 1042 [error in not limiting evidence harmless because the purpose was clear from the prosecutor's question].)

Here, the prosecutor's question did not identify the purpose for introducing the statement. The prosecutor asked if Maria stated that appellant "knew how the system worked, and that he could make believe that he was crazy and that way get away with it." (12 RT 17908.) That the prosecutor successfully argued that the statement could be used without limitation indicates that she intended for the jurors to broadly use the statement beyond Maria's state of mind.

The "obvious" nature of the evidence was not as clear as respondent contends. Jurors could believe it was true simply because Maria – who knew appellant well – believed it. If used for its truth, the statement that appellant knew how to get away with his threat to murder Maria by pretending that he was crazy went to the heart of appellant's defense. The statement suggests that appellant's knowledge came from past experience

with other crimes that he had committed. Jurors could infer that appellant planned the crime to make it appear that he was crazed. Once the jurors considered the statement for its truth, they would believe that appellant was willing to do anything he could to manipulate the legal system.

Respondent misinterprets the guilt phase evidence to argue that the statement could not have affected the verdict because there was overwhelming proof that appellant planned to kill Maria on the morning of the homicide. Respondent speculates that appellant called Maria to his house intending to kill her. (RB 106.) The record does not establish who suggested the meeting or appellant's intent at the time of the call. (See Argument IV, subd. (B) [addressing similar claims regarding the trial record that respondent cites in support of the argument]; Argument VIII [insufficient evidence of lying in wait].) Ultimately, the statement made it easier for the jurors to accept the prosecutor's narrative as being consistent with a plan to murder Maria by acting crazy.

In the penalty phase, jurors likely used the statement to discount evidence concerning appellant's mental state. Respondent disputes the effect of this testimony on the jurors' consideration of Dr. Light's findings. (RB 107.) As respondent notes, Dr. Light testified that appellant had neuropsychological deficits that affected his ability to inhibit his behavior, make good judgments and to control his anger. (24 RT 3563-3564.) This testimony explained why appellant erupted in anger upon learning that the charges had not been dropped and been unable to stop once the assault began. Yet, if the jurors believed that appellant acted crazy to avoid punishment, it made them more likely to accept Dr. Brook's rebuttal testimony that appellant had no major problems and a patient could still fake or exaggerate something while passing tests for malingering. (28 RT

4064.) At bottom, the statement at issue could have been used as a powerful, emotional plea not to let appellant "get away" with a life sentence based his upon psychological condition and used to discount all the neurospychological testimony in this case. (AOB 84.)

This statement was also introduced in the context of the gang evidence that was improperly admitted. (Arguments I-IV; see AOB 171 [cumulative effect of errors].) It is likely that the statements as a whole convinced jurors that appellant had committed numerous other crimes and had gotten away with them through various means. In particular, it reinforced the prejudice of the statements that appellant committed other murders for the Mexican Mafia and testimony that he belonged to a gang that engaged in any number of crimes. The prejudice of this statement, then, went beyond the evidence that respondent cites and affected the fundamental way that jurors viewed appellant and the evidence in both the guilt and penalty phases.

Respondent argues that appellant forfeited his constitutional claims that allowing this evidence to be used for any purpose violated his rights to a reliable verdict under the Eighth Amendment and due process under the Fourteenth Amendment. (RB 105.) Although appellant did not object under federal grounds, the legal consequence of an error in admitting evidence may implicate federal constitutional rights. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Here, the evidence rendered the verdict unreliable under the Eighth Amendment and violated due process requirements for fundamental fairness by bringing in a powerful statement alleging that appellant might carry out his threats against Maria by acting crazy. Regardless of whether the issue is considered only as a matter of state law under *People v. Watson* (1956) 46 Cal.2d 818, 836, or as federal

constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24, this Court must find that it was prejudicial.

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VI.

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 appellant was only charged with second degree murder in violation of Penal Code section 187. The information did not charge appellant with first degree murder or allege the facts necessary to establish first degree murder; thus the trial court lacked jurisdiction to try him for first degree murder. (AOB 86-93.) Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 107-108.) 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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VII.

THE INSTRUCTIONS IN THIS CASE IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant has argued that several instructions undermined the requirement of proof beyond a reasonable doubt. (AOB 95-105, challenging CALJIC Nos. 2.01 [circumstantial evidence], 2.21.1 [discrepancy in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.27 [sufficiency of one witness], 2.51 [motive], 8.20 [deliberate and premeditated murder], and 8.83 [circumstantial evidence to prove special circumstances].) Respondent argues, as appellant acknowledges, that this Court has rejected similar claims. (RB 108-109.) 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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VIII.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATION OF LYING IN WAIT

Appellant has argued that the lying-in-wait special circumstance is not supported by substantial evidence. (AOB 106-116.) The prosecutor based her theory of lying in wait on speculation that appellant knew that Maria had not recanted her allegations of rape, so that he planned to murder her and lured her to meet with him when they spoke on the phone the morning of the crime. (17 RT 2590-2592 [prosecutor's closing argument].) Speculation, however, is not substantial evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) There was no evidence that appellant knew at the time they talked that Maria had not recanted her allegations. It is not known if appellant asked to meet with Maria or whether she suggested meeting with him. All that is known is that appellant erupted with anger and violence after they met. This is not substantial evidence to establish lying in wait. The special circumstance must be set aside under the due process provisions of the state and federal constitutions. (Cal. Const., art. I, §§ 7 & 15; U. S. Const., 14th Amend.)

A. The Lying-In-Wait Special Circumstance is Based on Speculation

Respondent argues that appellant planned the murder and lured Maria to her death. (RB 112-113.) To determine whether this is supported by substantial evidence, it is important to first focus on what the evidence actually establishes:

- Appellant was angry that Maria had reported the matter to the police. He had threatened to kill her if she did not recant her statements. (16 RT 2327-2318, 2319.)

- Appellant stated that he would turn himself in to be arrested if Maria withdrew her statement about the rape. (10 RT 1543-1544.) He believed that Maria would recant her accusation when she met with the prosecutor on the day before her murder. (6 RT 2319.) At the meeting, Maria's demeanor changed after she received a text or a message from someone. (10 RT 1494.) Maria did not withdraw her allegation and agreed to testify against appellant. (10 RT 1497.)
- Appellant called Maria very early in the morning before she left for work, as he normally did. (12 RT 1761, 1733.) There did not appear to be anything usual about the call. Maria's demeanor did not change. (12 RT 1763.) After the call, she finished making her lunch and left her house. (12 RT 1749.)
- Around 4:45 a.m., Maria stopped at a drug store and purchased appellant's favorite brand of cigarettes, a cigarette lighter, and water. (12 RT 1770, 1774, 1787.) The people at the store, whom she knew as friends, testified that Maria was in a hurry but did not state that there was anything unusual about her demeanor. (12 RT 1770, 1779.)
- Shortly after that, a family in the neighborhood near where appellant lived was wakened to the screams of a woman pleading for help. (12 RT 1796; 14 RT 2075.) The assailant was extremely angry and did not appear to notice the family or pay them any heed. (12 RT 1817, 1848; 14 RT 2059.) The woman was beaten badly and forced into the back of a car. (14 RT 2043.) The witnesses did not see the victim being stabbed or strangled. (12 RT 1826, 1844; 14 RT 2046, 2098.)

The police arrived about 5:03 a.m., just as the assailant drove off. (12 RT 1827; 13 RT 1874.)

- The car was later found in an apartment complex, with Maria's body in the trunk. (13 RT 1892-1893.) A garbage collector saw the car when he came to pick up the trash, somewhere between 6:00 a.m. and 8:00 a.m. (13 RT 1921.)
- Appellant returned to his house that morning, knocking on a window so that others sleeping there could let him in. He had been scratched and was bleeding around the ankles. (16 RT 2353-2358.) A pack of cigarettes was later found in his room. There was blood on the package that was later identified as being that of Maria. (13 RT 2010; 16 RT 2342, 2347.)

These facts form the parameters upon which the lying-in-wait special circumstance must be determined. Both the prosecutor and respondent speculate about other matters, but the evidentiary gaps are too broad to permit reasonable inferences to establish lying in wait.

Respondent's argument demonstrates the weakness of the lying-in-wait theory. The prosecutor had to fill in the gaps in the evidence cited above by speculating that appellant knew that Maria had not recanted her testimony and that he asked Maria to meet him in order to lure her to her death. As discussed below, the narrative respondent advances is even more embellished and adds details about where Maria met appellant and what happened at that point. Respondent effectively invites this Court to replace evidence with speculation about events before the homicide. This Court should decline to do so. (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8 ["conjecture and surmise" does not provide substantive evidence]; *People v.*

Redmond (1969) 71 Cal.2d 745, 755 [suspicion is "not a sufficient basis for an inference of fact"].)

Respondent first attempts to lay the groundwork for the special circumstance by arguing that appellant was angry about the charges pending against him and told Noemi Hernandez that he would kill Maria. (RB 112, citing 16 RT 2315-2318.) There is no question that appellant grew increasingly angry because he did not understand how Maria could be pursuing rape charges and did not want to return to prison. (16 RT 2313, 2317.) The issue, however, is whether appellant planned to murder Maria when they spoke on the morning of the crime – that is, did he lure Maria to her death? Hernandez testified that appellant believed that Maria met with the prosecutor in order to recant her statements alleging rape. (16 RT 2319.) No evidence establishes that appellant knew that Maria had not done this. Although Hernandez's testimony makes it likely that appellant erupted in a rage once he learned that the rape charges had not been dropped, it does not show that appellant knew about Maria's decision or that he called Maria on the morning of the crime in order to kill her once they met.

Respondent also points to Hernandez's testimony that a few days before the murder, appellant gave Hernandez a duffel bag of clothing to hold for him. According to respondent, appellant did this so he could pick the bag up quickly if the police were searching for him. (RB 112, citing 16 RT 2320.) Appellant told Hernandez, however, that he wanted her to keep the clothes because the police were going to arrest him on the rape charge. (16 RT 2320.) This is consistent with testimony that appellant had told Maria that he would turn himself in or allow himself to be arrested if she told the police that she had lied about the rape. (10 RT 1543-1544.) Given

that appellant expected Maria to meet with the prosecutor to recant the allegations against him (16 RT 2319), it is unlikely that he dropped off the bag as part of a plan to murder her. Indeed, appellant did not use the bag after Maria's murder and made no attempt to leave the area. Whatever appellant intended to do with the bag does not provide evidentiary support to establish lying in wait.

There is no question, as respondent notes, that Maria spoke to appellant on the phone the morning of the crime – as she did virtually every day – and stopped at a Sav-On store to pick up cigarettes for him. (RB 112.) Without evidentiary support, however, respondent asserts that Maria did not initiate the meeting and that appellant asked her to buy him cigarettes as a ruse to get her to go to his house. (RB 113.) Appellant had no need for a ruse if he believed that Maria had recanted her statement as planned. Moreover, Maria undoubtedly would have been very apprehensive or nervous on the phone, or immediately after, if she had informed appellant of her decision.[5/] Yet, she did not appear to be anxious when she spoke with appellant the morning of her death or when she left for work. (12 RT 1749, 1763.) The only thing that can be known for certain is that Maria spoke on the phone with appellant as usual, left for work, and stopped to get water for herself and cigarettes for appellant on the way to meet him. Respondent's speculation about the nature of the call does not make it true.

[5/] In numerous other instances, Maria was visibly anxious or afraid when she discussed pressing charges against appellant. (See, e,g. 10 RT 1494 [demeanor changed after receiving message during conversation with prosecutor]; 10 RT 1520 [discussion with husband; 11 RT 1617 [expressing fear to Chris Eck]; 12 RT 1705 [meeting sister at police station].)

Respondent further asserts that appellant obtained a knife and ligature ahead of their meeting. (RB 113.) The record that respondent cites only establishes that Maria did not bring utensils with her to work when she packed her lunch. (11 RT 1639 [Eck testimony]; 1652 [Guzman testimony]; 12 RT 1736 [Mejia testimony].) None of the witnesses to the initial attack on Maria saw a knife or an instrument that could have been used as a ligature. (See 12 RT 1826 [Margabeth Gonzalez testimony that she did not see ligature or knife]; 14 RT 2046 [Lizabeth Gonzalez that she did not see a knife]; 14 RT 2098-2099 [Luz Garcia testimony that she did not see victim being choked or assailant with a knife].) The final crime scene was never determined and all prosecutor could argue was that appellant had to get the cord "from wherever" it was that he took it from. (17 RT 2586.) It therefore is not known when or where appellant obtained the knife and ligature that caused Maria's death. (See 14 RT 2149 [coroner's testimony regarding cause of death].) The use of these items did not mean that appellant obtained them before the crime as part of a plan to commit murder, nor does it mean that the crime was not committed as a result of spontaneous anger. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1345 [ligature strangulation does not "preclude a finding that defendant acted upon impulse"].)

Respondent paints a vivid scenario about what happened after appellant met with Maria. According to respondent, Maria went to appellant's room. Appellant allegedly waited until she gave him the cigarettes and then "pounced" on her. Respondent states that Maria screamed and managed to escape through the back door until appellant subdued her in public. Again, respondent does not, and cannot, cite to the record in support of the essential details of this story. (RB 113.)

That a package of cigarettes was found in appellant's room does not allow this Court to find that appellant lured Maria to his room and pounced on her, or that she screamed and managed to escape. No one who lived in the house where appellant stayed testified that they were awakened with screams. Vanessa Finn stated that later in the morning, appellant knocked on the window to the room where she slept with her sister until Vanessa opened the back door. (16 RT 2353-2355.) Surely, they would have been awakened if appellant and Maria fought inside the house and Maria screamed. In short, the theory that respondent advances is dramatic, but it is simply a drama. A narrative in a capital case must be more supported by substantial evidence rather than speculation. (*People v. Moore* (2011) 51 Cal.4th 386, 406.)

Apart from speculation, the record only establishes that appellant met with Maria just before the crime, he attacked her in front of the neighborhood houses, forced her into her car, and drove her to where she was killed. This is not enough to establish lying in wait. Indeed, the facts in this case contrast with each of the cases that respondent cites in support of the lying-in-wait finding. (RB 111-112.)

In *People v. Combs* (2004) 34 Cal.4th 821, the defendant argued that there was insufficient evidence of physical concealment while lying in wait and that the period for lying in wait had been disrupted during the course of the crime. This Court found that the defendant devised a ruse about and tricked the victim into giving him a ride. He sat in the back seat behind the victim with cords that he had obtained earlier and waited for an opportune time to strangle her. Eventually, he removed the cords from his pocket, and after the victim parked her car, he placed the cords over her head and strangled her. (*Id.* at p. 853.) This Court had no need to speculate about the

circumstances at issue. The defendant had described the plan to lure the victim to her death in detail. He carried out the plan until it reached its eventual conclusion. (*Id.* at p. 850.) Under these circumstances, it was clear that there was a murder by lying in wait. (*Id.* at p. 853.)

In *People v. Streeter* (2012) 54 Cal.4th 205, 243, the defendant had written a suicide note to his parents before the crime, indicating that he intended to kill both himself and the victim. There was also evidence that the defendant planned the method that he would use to carry out the murder. (*Id.* at pp. 243-244.) Significantly, the defendant testified that the victim had refused to meet with him until he told her that he would hurt himself. (*Id.* at p. 247.) The defendant then waited until he launched a surprise attack upon the victim, beating her in order to douse her with gasoline and burn her to death. Although each of these steps involved discrete stages, it took only a matter of seconds or minutes between them. (*Id.* at pp. 248-249.) This Court found that there was sufficient evidence to support each element of the lying-in-wait special circumstance. (*Id.* at p. 249.)

In *People v. Morales* (1989) 48 Cal.3d 527, the defendant told his girlfriend that he was going to hurt the victim by strangling her with his belt. When the victim got into the car, the defendant sat in the backseat, directly behind the victim. The driver proceeded to a remote location, where the victim was strangled and then hit over the head with a hammer. (*Id* at p. 554.) The defendant's plan was clear, and he carried out this plan in order to attack the victim while she was unaware. This was sufficient evidence to find that there was murder while lying in wait. (*Id.* at pp. 557-558.)

In each of these cases, there was direct evidence that the defendant planned to kill the victim and had developed a ruse to carry out the plan.

The ultimate attack was a surprise only to the victim. Actual evidence supported the special circumstance in contrast to the speculation that is evident in respondent's argument. Under the circumstances here, this Court should find that speculation is not enough to support the lying-in-wait special circumstance.

B. There is No Evidence to Show Concealment of Purpose

Concealment of purpose is the hallmark of lying in wait. (*People v. Hardy* (1992) 2 Cal.4th 86, 164.) Appellant has argued that the evidence did not establish that appellant concealed a purpose to kill Maria before they met. (AOB 108-110.)

Respondent contends that appellant must have concealed his purpose and used the cigarettes as a ruse to get Maria to come to his home so that he could kill her. Respondent states that appellant "was well aware that Maria had not dropped the [rape allegation] and, as a result, was growing angrier by the week." (RB 113, citing 16 RT 2315-2318 [testimony of Noemi Hernandez].) According to respondent, Maria would not have met appellant alone and in private if he did not say something to conceal his intentions. (RB 113.)

Respondent's contention that appellant was "well aware" of Maria's decision lacks evidentiary support. The testimony respondent cites refers to the weeks before Maria had her meeting with the prosecutor. As discussed above, Hernandez also testified that appellant believed that Maria would drop the charges when she met with the prosecutor. (16 RT 2319.) Even after she filed a police report, Maria continued to visit appellant at the house where he was living (16 RT 2375) and if she had recanted her allegation, he had no reason to plan her murder and convince her to meet

with him so that he could kill her. No evidence establishes when Maria informed him differently, but the amount of anger and rage – the very nature of the attack against Maria – suggests that it was spontaneous eruption of violence rather than a planned murder.

Respondent wonders why Maria "foolishly" agreed to meet with appellant in order to tell him that she was not dropping the rape charges. (RB 114.) It is equally possible to wonder why Maria would meet with appellant after telling him that she had decided to pursue the rape charges, since there was evidence that she was frightened by what appellant had threatened to do. (See, e.g., 10 RT 1537-1543 [Maria was afraid for herself and her family].) Either choice by Maria might appear to be foolish or tragic in retrospect, but her decision to meet appellant does not provide evidence that appellant concealed a purpose to kill Maria.

Ultimately, respondent states that Maria's decision to meet appellant at his house and the nature of the attack, where she suddenly began to scream, led to the "inexorable conclusion" that appellant took her by surprise. (RB 114.) Although it is not certain where Maria and appellant first met, appellant agrees that Maria would not have expected to be attacked. She was on her way to work and had brought water for herself at the store, along with the cigarettes for appellant. The sudden nature of the attack, however, does not establish that appellant concealed his purpose. It simply indicates that Maria had not expected to be faced with an onslaught of anger and violence. The crime had all the earmarks of impulsive anger that quickly escalated to a brutal assault after something changed – after appellant learned that Maria was going forward with the allegations against him. The crime was tragic, but there is no substantial evidence that appellant concealed a purpose to commit murder while lying in wait.

C. Maria Was Not Killed During a Period of Lying in Wait

At the time of the crime, the special circumstance of lying in wait required that the murder be committed without any "cognizable interruption" from the period of lying in wait. (*Domino* v. *Superior Court* (1982) 129 Cal.App.3d 1000, 1001; see also *People v. Hajek* (2014) 58 Cal.4th 1144, 1185 [evidence that the murder was inevitable did not establish lying in wait].) Appellant has argued that the homicide was separate from whatever else happened that morning so that the murder was not committed while lying in wait. (AOB 111-113.)

Respondent maintains that the events at issue occurred as part of a sequence that commenced at appellant's home and ended with her being taken to another place to "finish the job because there were witnesses at the first location." (RB 115.) There is no reason to assume that the witnesses to the attack on Maria affected him. (12 RT 1817, 1848; 14 RT 2059 [appellant was extremely angry and did not appear to notice family watching the attack].) It is not known where Maria was killed, how long a period there was between the kidnaping and the homicide, or what might have occurred during that time. Maria may have been killed within the hour of the attack. She may have been killed a few hours later. Indeed, the prosecutor suggested that the initial assault and the subsequent homicide were separate and distinct when arguing that after the initial assault appellant had to get the murder weapons and make a conscious decision to kill. (17 RT 2586.) The initial attack and kidnaping may have made her murder inevitable, but it does not mean that the murder was committed while lying in wait. (*People v. Hajek, supra*, 58 Cal.4th at p. 1185

[concealment must be contemporaneous with a substantial period of watching and waiting for an opportune time to act].)

D. The Special Circumstance Must Be Set Aside

Respondent states that appellant is asking this Court to reweigh the evidence. (RB 115.) Not so. Appellant is not asking this Court to adopt one interpretation of the evidence over another, but to view the evidence free from speculation.

An inference is not reasonable if it is based on speculation or mere possibilities. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *People v. Berti* (1960)178 Cal.App. 2d 872, 876.) As this Court has long held, substantial evidence must rely on more than conjecture:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."

People v. Morris (1988) 46 Cal.3d 1, 21 [citations omitted]; see also *People v. Davis* (2013) 57 Cal.4th 353, 360.)

In this case, it is possible to speculate about any number of scenarios that may have occurred before the crime. The prosecutor based her theory on speculation about what appellant said during the phone call with Maria. Respondent adds further speculation to the mix and embellishes the case with a narrative about what happened when Maria came to appellant's room. As appellant has demonstrated, the evidence simply does not support the tale that respondent proposes.

There are evidentiary gaps that had to be filled to draw the necessary inferences for lying in wait. Without knowing when Maria told appellant

that she was not recanting her statement or if appellant instigated their meeting following that news, the inferences necessary for a murder by lying in wait cannot be made. Accordingly, this Court should set aside the lying-in-wait special circumstance. (See *Estate of Lindstrom* (1987) 191 Cal.App.3d 375, 381 ["like a house of cards or a house built on a foundation of sand rather than rock, neither the entire structure nor the individual components can support the weight of the unsturdy premises"].)

E. This Court Should Reverse the Penalty Verdict

Appellant has argued that the speculation underlying lying in wait was crucial to the juror's view of the crime and their penalty decision. Although an invalid special circumstance does not require a penalty reversal if jurors can give aggravating weight to the same facts and circumstances (*People v. Hajek, supra*, 58 Cal.4th at p. 1186; *Brown v. Sanders* (2006) 546 U.S. 212, 220), the allegations here required the jurors to assume matters that were not in evidence that fundamentally changed their understanding of the facts at issue.

The prosecutor argued that the "facts" showing lying in wait, including appellant's telephone call with Maria and luring her to her death, was important aggravation. (See 30 RT 4272, 4336; 31 RT 4408.) It is this speculation that made the murder especially aggravating. Appellant's telephone call with Maria would not have been aggravating except for the way that the prosecutor used it to add additional "facts" and create a story about what was said and done. The speculation that appellant planned to murder Maria on the morning of the crime and lured her to a very violent death is a far different scenario than appellant learning about her change of mind during their meeting and exploding into anger. The prosecutor's rank speculation added new matters that were not properly in evidence. The

lying-in-wait allegation fundamentally changed the nature of the evidence offered at trial and added to appellant's moral culpability during the penalty phase. (AOB 115.)

Respondent states that even if the lying-in-wait special circumstance had been set aside, jurors would still have been able to consider Maria's brutal murder, two special circumstances, and other aggravation. (RB 116.) The issue is not whether there is sufficient evidence to support a verdict without the error, but the effect that the error had upon the verdict. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279, [inquiry is whether the verdict actually rendered "was surely unattributable to the error"].) In other words, the reviewing court must consider more than the quantity of the evidence, but the nature of the error itself and its "qualitative impact" on the jurors' assessment and weight of the evidence as a whole. (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892.)

The unsupported allegations used against appellant transformed the crime into a "particularly heinous and repugnant" offense. (*People v. Stanley* (1995) 10 Cal.4th 764, 795 [explaining that murder by lying in wait is different than other types of murders]; *People v. Sandoval* (2015) 62 Cal.4th 394, 416 [same].) Indeed, there is an important difference between murder by lying in wait, showing a particularly cold-hearted planning, and a crime that occurred after a spontaneous eruption of intense anger. The allegation that appellant called Maria in order to lure her to her death certainly impacted the jurors' penalty decision.

Appellant presented mitigation to place the aggravating evidence in the context of his life. He was raised in an environment where violence, drugs, crime, and prison were commonplace occurrences. (See 22 RT 3368-3369, 3484-3485, 3389 [appellant verbally abused and beaten by

mother]; 27 RT 3980-3982 [uncle using drugs and involving appellant in crimes]; 27 RT 3937-3938 [stepfather introducing appellant to prison culture].) That he eventually turned to gangs to find care and acceptance (22 RT 3398) was both sad and understandable. Dr. Light diagnosed appellant with neuropsychological deficits that affected his ability to inhibit his behavior, make good judgments and to control his anger. (See. e.g., 24 RT 3563-3564.) Death was not the only possible verdict. The factual speculation inherent in the lying-in-wait special circumstance fundamentally altered the jurors' understanding of the case and made the verdict inevitable.

Under state standards, the speculation underlying the lying-in-wait special circumstance had a substantial effect upon the penalty verdict. Accordingly, there is a reasonable possibility that the jurors would not have sentenced appellant to death if the factual allegations of lying in wait had not been made. (*People v. Brown* (1988) 46 Cal.3d 432, 448; *People v. Robertson* (1982) 33 Cal.3d 21, 54-55.) Under federal standards, respondent cannot show beyond a reasonable doubt that the alleged "facts," beyond what the evidence showed, did not affect the juror's decision to sentence appellant to death. ((*Chapman v. California* (1967) 386 U.S. 18, 24.) The penalty verdict must be set aside.

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IX.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE WHICH IT IS NOT

Appellant has argued that the lying-in-wait special circumstances has been applied so broadly that it fails to narrow the application of the death penalty or provide a meaningful basis to distinguish cases in which the death penalty is imposed from those where it is not. (AOB 117-127.) Respondent observes that this Court has rejected arguments that the special circumstance is unconstitutional and argues that there is no cogent reason why this Court should reconsider these decisions. (RB 117.)

Given the importance of the death penalty, reconsideration should never be foreclosed. The United States Supreme Court has overturned unconstitutional provisions even after it had rejected numerous challenges on the identical issue. (See *Hurst v. Florida* (2016) ___ U.S.___ [136 S.Ct. 616] [finding Florida's statutory scheme violated Sixth Amendment]; *Hurst v. Florida,* Brief in Opposition to Petition for Writ of Certiorari at p. 16, fn. 3 [2015 WL 6866206] [noting that Supreme Court had denied certiorari in 17 other cases].) This Court should do no less.

In *Glossip v. Gross* (2015) ___ U.S. ___ [135 S.Ct. 2726], Justice Breyer, joined by Justice Ginsburg, concluded that it is time to revisit the constitutionality of the death penalty as it is applied today. (*Id.* at p. 2755 [dis. opn. of Breyer, J.].) Justice Breyer's analysis focused on several factors, including the arbitrary and capricious manner in which the death

penalty has been imposed. He explained that when capital punishment was reinstated in 1976, the High Court "believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence." (*Id.* at p. 2762, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 195 (joint opn. of Stewart, Powell, and Stevens, JJ.).) *Gregg*, in turn, had looked to the American Law Institute's Model Penal Code section on the death penalty (§ 210.6) as proof that it was possible to formulate constitutionally sufficient "standards to guide a capital jury's sentencing deliberations." (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 193.) However, as Justice Breyer noted in *Glossip*, the ALI has since withdrawn this section of the Model Penal Code. (*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2775, citing ALI, Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty (April 15, 2009).) A key factor in the ALI's decision was the difficulty of limiting the number and scope of aggravating factors so that they do not cover a large percentage of murderers. (ALI Report at p. 5.)

It is time, then, to reconsider whether California's lying-in-wait special circumstance provides "the 'reasonable consistency' legally necessary to reconcile with the Constitution's commands." (*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2760 [dis. opn., of Breyer, J.], quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) As appellant has shown in the opening brief, the manner in which the special circumstance has been applied has broadened beyond constitutional limits. Lying in wait does not "genuinely narrow the class of persons eligible for the death penalty" or "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244 [internal quotation marks omitted].)

Respondent argues that invalidating the lying-in-wait special circumstance would not require setting aside appellant's death sentence. (RB 117-118.) Appellant did not contend otherwise. There is a difference between striking the lying-in-wait special circumstance as applied in this case and determining that it added "facts" that affected the penalty decision (Argument VIII), and setting aside the lying-in-wait special circumstance as matter of law. Appellant's instant claim focuses on the latter. In making this claim, appellant asked only that this Court reconsider its previous opinions and set aside the lying-in-wait special circumstance. (AOB 127.)

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X.

THE TRIAL COURT ERRONEOUSLY ALLOWED INADMISSIBLE OPINION AND HEARSAY TESTIMONY DURING THE PENALTY PHASE

Several deputies testified about incidents in the county jail that were introduced during the penalty phase under Penal Code section 190.3, factor (b). The trial court, however, allowed testimony that went beyond the officers' role as percipient witnesses. It allowed the deputies to opine about appellant's rank among prisoners in the county jail who were regarded as manipulators; to present hearsay that appellant commonly asked officers to take his chains off so they could fight; to state their belief that appellant posed a special danger in the jail; and to speculate about appellant's motivation or fear while in the jail. Appellant has argued that the trial court's errors in allowing this testimony violated his state and federal constitutional rights. (AOB 128-135.)

A. Deputy Florence's Testimony that Appellant was a Leading Manipulator was an Improper Opinion

The prosecutor asked Deputy Florence to rank where apepllant stood among inmates in the jail in terms of difficulty or violence. Florence testified that he believed that appellant was among the top five inmates in the jail who were able to "manipulate any given situation however he wants the outcome to come for him." (19 RT 2982-2983.) Opinion evidence is proper only if it rationally based on the perception of the witness and is helpful to a clear understanding of the given testimony. (Evid. Code, § 800.) It is permitted only when the matters upon which the opinion is based cannot be otherwise conveyed. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 130.) Cal.4th 107, 153-154.) Florence's belief about appellant's ranking

and his ability to manipulate situations was an improper opinion or conclusion. (AOB 129-130.)

Respondent argues that the testimony was based on Florence's own perceptions and experiences in jail and that it helped the jurors to understand the problems that the deputies had when dealing with appellant's actions. (RB 121, citing *People v. Farnum* (2002) 28 Cal.4th 107.)

In *Farnum*, a correctional officer testified about a specific incident that was introduced at the guilt phase. He stated that the defendant was being "very defiant" about a court order and physically stood with his hands at his side and left foot forward, in "a posture like he was going to start fighting." (*People v. Farnum, supra*, 28 Cal.4th at p. 153.) This Court found that description clarified the officer's testimony and was within common experience. (*Ibid.*)

Here, in contrast, Florence's opinion was not directed to a specific incident and therefore did not serve to clarify his testimony about an event that he witnessed. Since Florence was testifying as a percipient witness, it follows that any opinion was proper only to the extent it related to the actions at issue, and not to Florence's conclusions about appellant. Whether appellant was a difficult prisoner or could manipulate a situation was not at issue. (See *People v. Sergill* (1982) 138 Cal.App.3d 34, 40 [officers' opinions or conclusions improper because they could otherwise provide concrete details without opinions].)

Respondent states any objection to the relevancy of the testimony is forfeited because appellant did not object on that basis. (RB 121-122.) Appellant did not claim that the testimony is irrelevant, but that it was improper opinion and did not serve to clarify the substantive testimony

about the acts that Florence witnessed that were being admitted under factor (b). The trial court erred in overruling appellant's objection and admitting the testimony. (AOB 129; see also *People v. Hinton* (2006) 37 Cal.4th 839, 889 [lay opinion allowed only "where the concrete observations on which the opinion is based cannot otherwise be conveyed"].)

B. The Trial Court Improperly Admitted Hearsay Alleging that Appellant Commonly Committed Misconduct

Appellant objected on hearsay grounds to testimony by Deputy Florence he was aware that appellant commonly told deputies to take his waist chain off so they could "go one on one." (19 RT 2984.) Statements attributed to another must be based on the personal knowledge of the witness, rather than on what he or she has been told by others. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1779.) Appellant has argued that Florence's testimony did not relate to any particular incident or constitute a specific admission of appellant's. There was no foundation to establish that it was something that he had heard appellant say. The trial court erred in admitting the testimony. (AOB 130-131.)

Respondent contends that the testimony was directed to what Florence personally observed. (RB 122.) The record does not allow this kind of assumption. Florence first testified that he was aware of an incident between appellant and another deputy, but did not personally witness it.[6/] (19 RT 2983-2984.) The prosecutor then asked, "If the defendant said to a deputy, 'take this waist chain off and let's go one on one,' was that a

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[6/] The prosecutor referred to an incident involving Deputy Sheriff Brandon Love. Love later testified that appellant had asked him to take off his chains so that they could fight. (21 RT 3227.)

common occurrence with the defendant in this case?" After appellant objected on hearsay grounds, the prosecutor also asked, "That you are aware of?" The trial court overruled the objection both before and after the latter question. Florence said, "Yes." (19 RT 2984.)

Florence's awareness that appellant commonly told deputies to take off his chains so they could fight does not establish that he personally heard appellant make such a statement. As a senior interviewer in the jail, Florence would be aware of a number of things that he had not personally observed or heard. (19 RT 1983.) Indeed, Florence testified that he was aware of the previous incident that he had not witnessed. He did not provide any additional details to establish that he had personally heard appellant make this statement in other situations. The prosecutor failed to provide the necessary foundation to establish Florence's personal knowledge. (See *People v. Livaditis* (1992) 2 Cal.4th 831, 778 [burden on proponent to lay the proper foundation].)

Moreover, by presenting testimony that such statements were common, without linking them to any specific occurrence, the prosecutor was able to do an end run around a key part of the rationale for allowing admissions as a hearsay exception: that the party who made the statement can respond because he or she was the one who said it. (See *People v. Alvarez* (1968) 268 Cal.App.2d 297, 305.) Appellant could not have responded to the kind of generality that was admitted here. The trial court erred in allowing the testimony to be introduced.

C. The Trial Court Erroneously Allowed Florence to Opine that Appellant Presented a Special Danger in the Jail

Deputy Florence testified that he believed that appellant presented a danger to other officers, inmates, and staff in the county jail. (19 RT 2986.) Appellant has argued that Florence's opinion did not relate to any specific incident under factor (b) and was not helpful to the jurors' understanding of his testimony. (AOB 131-132.)

Respondent states that the testimony was relevant to the difficulties that the deputies experienced when dealing with appellant's acts. (RB 122.) Florence's belief about appellant, however, did not help the jurors understand testimony about the actions at question. The acts could speak for themselves. (See *People v. Sergill*, *supra*, 138 Cal.App.3d at p. 40 [officers' opinions or conclusions improper because they were able to provide concrete details without opinions].)

As discussed above, respondent's reliance on *People v. Farnum*, *supra*, 28 Cal.4th at pp. 153-154, is misplaced. (RB 122-123.) There is a substantial difference between the opinion provided in *Farnum*, which helped the officer's testimony relating to the posture the defendant had adopted during a specific incident, and the kind of general opinion expressed here. The opinion here related more to appellant's general disposition than the acts at issue and was not necessary to explain any testimony establishing that appellant committed a factor (b) crime of force or violence. Accordingly, the opinion was not helpful to a clear understanding of the underlying testimony. (Evid. Code, § 800.) The trial court erred in admitting it.

D. Florence Improperly Speculated that Appellant Committed Misconduct in Order to Gain Respect from Other Inmates

Deputy Florence testified that appellant was housed in a unit with dangerous prisoners, but that he did not believe that appellant was fearful of the other inmates so much as he wanted to gain their respect. (19 RT 2987.) Appellant has argued that Florence improperly speculated about appellant's state of mind and that this was not relevant to any specific testimony offered under factor (b). (AOB 132-133.)

Respondent states that Florence's testimony was proper lay opinion because it was based on his own perceptions of appellant's conduct and helped the jury to understand appellant's demeanor when he committed violent acts. (RB 123, citing *People v. Farnum*, *supra*, 28 Cal.4th at p. 153-154.) The testimony, however, did not describe appellant's demeanor during any particular incident, but his motivations in general. Florence stated that the appellant's actions were meant "to show the other inmates that he wasn't afraid." He believed that inmates sought to gain respect by "disregarding rules, disobeying instructions, orders, provoking fights with other inmates, fights with deputies, assaulting deputies, slashing deputies. Whatever it takes to get the attention that they're to be accepted." (19 RT 2987.) Florence's opinion and conclusion about appellant's subjective belief and motivations did not clarify his testimony under factor (b) and was an improper opinion based on his observations about inmates other than appellant. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659 [interpreting *People v. Muniz* (1993) 16 Cal.App.4th 1083, 1087, to distinguish between opinions based on facts observed and inferences made on the basis of incidents that did not involve the defendant].)

Respondent states that Florence's testified as an expert when he gave his opinion about how inmates gain respect. (RB 123-1124, citing Evid. Code, § 801.) The prosecutor did not offer Florence as an expert witness and his testimony was only relevant under factor (b) as a percipient witness, since neither appellant's mental state the way nor the way that inmates gain respect in the county jail was not otherwise at issue. (See *People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 658 [expert testimony about general beliefs or expectations of gang members was an improper opinion when offered to establish defendant's state of mind].)

Because respondent's theory of Florence testifying as an expert witness is advanced for the first time on appeal, appellant never had the opportunity to question the deputy on his expertise or seek jury instructions relating to the dual use of his testimony. (See *United States v. Vera* (9th Cir. 2014) 770 F.3d 1232, 1234 [when officer testifies as both a percipient witness and an expert, jurors must be instructed on how to evaluate each form of testimony].) Accordingly, this Court should not now consider respondent's argument. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [explaining circumstances under which a new legal theory will not be considered on appeal and noting that defendant's lack of "notice of the new theory and thus no opportunity to present evidence in opposition" merits rejection].)

Regardless of whether the testimony was presented as a lay witness or that of an expert, Florence's opinion about appellant's state of mind was improper speculation. Accordingly, the trial court erred in admitting the statement.

E. Deputy Davis Improperly Opined That He Did Not Believe That Appellant Feared for His Own Safety

Deputy Sheriff Mike Davis testified about specific incidents, including one where appellant was found with razors after being attacked with a razor by another inmate. (20 RT 3135, 3142.) Davis opined that appellant in general did not seem to be afraid for his own safety. (20 RT 3143-3144.) Appellant has argued that this was improper opinion testimony. (AOB 133.)

Respondent states that the testimony was proper as lay opinion because it was based on Davis's own perceptions of appellant's conduct and helped the jurors understand appellant's demeanor. (RB 124, citing *People v. Farnum, supra*, 28 Cal.4th at pp. 153-154.) As discussed above, respondent's reliance on *Farnum* is misplaced. Davis's opinion did not describe appellant's demeanor at the time of any particular incident, but appellant's subjective motivations and his state of mind. The opinion was not necessary to describe the incident with the razors. (See *People v. DeHoyos, supra*, 57 Cal.4th at p. 130 [lay witness cannot opine about another person's state of mind, but only describe behavior as being consistent with a state of mind].)

Respondent alternatively argues that the testimony was admissible as expert opinion. (RB 124.) The prosecutor never presented Davis as an expert or established a proper foundation for his testimony as an expert who could determine whether appellant acted out of fear or out of a willingness to participate in fights. (20 RT 3143-3144.) As discussed above, appellant never had the opportunity to question Davis on his qualifications as an expert or seek jury instructions relating to the dual use of his testimony. (See *United States v. Vera, supra*, 770 F.3d at p. 1234 [officer's testimony

as both a percipient witness and an expert requires juror instructions on how to evaluate each form of testimony].) Accordingly, this Court should not now consider respondent's argument. (See *Green v. Superior Court*, *supra*, 40 Cal.3d 126, 138 [new theory will not be considered on appeal].)

Moreover, contrary to respondent's position, Davis did *not* testify that inmates who feared for their safety "ordinarily let a deputy know so that he could receive extra protection." (RB 124.) Davis only testified that some inmates have told him that they were afraid of being attacked in order to get protection, but that appellant did not do so. (20 RT 3144.) This does not establish that inmates would ordinarily go to an officer for protection, nor would it mean that appellant had no fear for his safety if he did not confide in an officer. It did not provide a basis for an expert opinion about appellant's mental state. (Evid. Code, § 801.)

Regardless of whether Davis's opinion was that of a lay witness or an expert, the opinion was improper speculation upon appellant's mental state. The trial court erred in allowing the testimony.

F. The Errors were Prejudicial

Appellant has argued that the opinion and hearsay admitted here invited the jurors to believe that appellant's disposition made him more likely to commit the aggravating acts relating to the county jail. Jurors would believe that appellant posed a continuing danger in prison. Even though appellant was attacked in the jail by other inmates, the opinions presented appellant as a willing participant rather than a victim. Given the extent of the hearsay and opinions, this Court should find that the errors prejudicially affected the penalty phase under either state or federal standards. (AOB 133-135.)

Respondent argues that any error is harmless in light of appellant's criminal history, the circumstances of the crime, and the number of aggravating incidents that occurred in the county jail. (RB 125.) The issue on appeal, though, is not whether there is a sufficient basis for a finding of death, but the effect that the error may have had on the verdict. *(People v. Brown* (1988) 46 Cal.3d 432, 447 [state law requires reversal if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [substantial error in penalty phase requires reversal]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitution requires respondent to show an error is harmless beyond a reasonable doubt].)

This Court has explained, during the penalty phase the defendant has been convicted of committing a first degree murder with special circumstances, so that the choice of an appropriate punishment does not involve a balance between good and bad, but between life and death. (*People v. Brown* (1985) 40 Cal.3d 512, 541, fn. 13.) Even assuming that aggravating evidence here might have convinced jurors that appellant was "bad," the decision to sentence appellant to death involved more than the this determination. In spite of the aggravation, the jurors had reason to sentence appellant to life without possibility of parole.

Appellant offered mitigating evidence in the penalty phase about his upbringing, which was tied to drugs, prison, and violence on the part of those who raised him. (See 22 RT 3368-3369, 3484-3485, 3389 [appellant verbally abused and beaten by mother]; 27 RT 3980-3982 [uncle using drugs and involving appellant in crimes]; 27 RT 3937-3938 [stepfather introducing appellant to prison culture when family visited him in state prison].) His mother testified that appellant was pushed towards gangs to

find care and acceptance. (22 RT 3398.) Indeed, some of the history that respondent cites in referring to gang murders involved a homicide that occurred while appellant was still a juvenile and in which he was not the actual killer. (See 20 RT 3045-3051 [gang related shooting].) Given this history, it is little wonder that appellant struggled with drugs (21 RT 3188 [civil commitment to rehabilitation center]) and was diagnosed with neuropsychological deficits that affected his ability to inhibit his behavior, make good judgments and to control his anger. (See. e.g., 24 RT 3563-3564 [testimony of Dr. Light].) Despite these problems, appellant introduced testimony of other deputy sheriffs in the county jail to show that he had been a model prisoner since 2004 and had not engaged in violence or other unlawful activities in jail during that time. (23 RT 3422-3425; 3438-3441.) The jurors, then, were not presented with someone who would inevitably be subject to death – appellant's life that had its own tragic moments that intersected with the crime and the events at issue.

The incidents in the county jail formed an important part of the prosecutor's penalty case, and the opinions and hearsay discussed here increased the weight of the aggravation. Jurors likely believed the deputy's statement that the incidents in the jail were common occurrences and considered additional aggravation beyond that alleged by the prosecutor. Jurors would also believe that appellant's mitigation was another attempt to manipulate matters, even as he was one of the top manipulators in jail. The respect and esteem afforded the opinions of the officers certainly strengthened the prosecutor's case against life without parole – that despite appellant's evidence about his more recent conduct in jail, he would be pose a danger if sentenced to life in prison. Jurors thus considered the officers'

opinions and believed that appellant posed a special and continuing danger that undermined the mitigating evidence offered in this case.

Under state law this Court should find that the errors were significant, creating a reasonable possibility that the jurors would have rendered a different verdict absent the errors. (*People v. Brown*, *supra*, 46 Cal.3d at 447.) Under federal constitutional standards, respondent cannot show that the errors are harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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XI.

THE TRIAL COURT ERRED BY PROVIDING THE JURORS WITH AN INSTRUCTION THAT BOTH IMPROPERLY DIRECTED THEM TO FIND THAT CERTAIN ACTS WERE COMMITTED WITH FORCE AND VIOLENCE AND PERMITTED THEM TO CONSIDER ACTS THAT WERE NOT COMMITTED WITH FORCE AND VIOLENCE AS AGGRAVATING CIRCUMSTANCES UNDER FACTOR (B)

At the end of the penalty phase, the trial court instructed the jurors about other crimes introduced under Penal Code section 190.3, factor (b), using extremely broad categories to define the acts at issue. The instruction stated that evidence had been introduced to show that appellant had committed criminal acts, including obstructing peace officers, and that such acts involved force or violence. (31 RT 4442; 9 CT 2433.) The instruction allowed the jurors to consider nonstatutory aggravation and removed fundamental issues from the jurors' consideration in violation of statutory requirements and appellant's state and federal constitutional rights. (AOB 136-147.)

A. The Instructional Issue that Appellant Raised is not Waived

Penal Code section 190.3, factor (b), is directed toward specific criminal acts involving force or violence, or the threat of force of violence. (*People v. Lancaster* (2007) 41 Cal.4th 50, 93.) Appellant has argued that the broad reach of the trial court's instruction allowed the jurors to consider misconduct that did not rise to this level. To support this argument, appellant listed numerous instances of misconduct that were alleged during the penalty phase that jurors could have considered as nonstatutory aggravation. Appellant did not challenge whether the incidents were

properly admitted, but focused on the instruction that allowed jurors to consider the allegations as aggravation under factor (b). (AOB 138-141.) Respondent states that appellant has forfeited his claims involving these matters because he did not object to all of the underlying acts at trial. (RB 127.)

Regardless of whether testimony about the acts were admitted without objection, it is the instruction that is at issue. This Court has cautioned 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 should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty." (*People v. Robertson* (1982) 33 Cal.3d 21, 55, fn. 19.) Implicit in this guidance is the recognition that misconduct that does not fall within factor (b) may be introduced during the penalty phase so that it is important to distinguish between general acts and the aggravating factors that are being alleged. Appellant has argued that the instruction given did not provide sufficient guidance and allowed nonstatutory aggravation to be considered by the jurors. This claim is properly before this Court.[7] (Pen. Code, § 1259 [instructions that affect substantial rights may be reviewed by this Court without objection].)

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[7] Appellant has also argued that the instruction itself violated state and federal law by removing certain matters from the jurors' consideration and creating an impermissible presumption that the incidents at issue were criminal acts involving force or violence. (AOB 142-147.) To the extent that respondent argues that this issue is waived (RB 126), this Court should reject it. Appellant has challenged the instruction given and the matter is properly before this Court. (Pen. Code, § 1259.)

B. The Instruction Allowed Jurors to Consider Misconduct That Fell Outside the Statutory Framework

The instruction at issue allowed the jurors to consider numerous acts of misconduct that either were not criminal conduct or did not rise to the level of criminal activity involving force or violence that is required under factor (b). These acts added considerable weight to the aggravation used against appellant. (AOB 139-141.)

1. General misconduct

The first eleven instances that appellant identified related to testimony concerning general misconduct in the county jail. These ranged from appellant yelling "Man down" on the tier to appellant faking seizures and acting crazy. (AOB 139-140.) Respondent acknowledges that these acts fell outside of factor (b), but claims that they were properly admitted because the evidence put appellant's criminal behavior into context. (RB 128.) It is not the admissibility of the evidence that is at issue, however, but the instruction that allowed jurors to consider these incidents as aggravation.

Respondent relies upon that portion of the instruction that required jurors to find beyond a reasonable doubt that appellant committed acts under factor (b) and argues that nothing suggested to the jurors that they could decide the penalty on evidence other than violent criminal activity. (RB 128-129.) This does not mean that jurors understood that the incidents appellant identified were not to be used to aggravate the crime. Jurors were instructed that factor (b) included evidence of obstructing peace officers. (31 RT 4442.) This instruction permitted jurors to consider a wide range of conduct that might divert an officer from performing duties or that delays or

obstructs officers. (Pen. Code, § 148, subd. (e).) As appellant has argued, since the instruction expressly defines such acts to be crimes that involve the implied use of force or violence, jurors likely assumed that any act that obstructed an officer fell into this category. (AOB 139.)

Respondent argues that two of the incidents in the jail that were listed by appellant were properly considered within factor (b). (RB 128.) Respondent does not identify the specific incidents, but appellant assumes that the argument refers to allegations that appellant commonly told officers to take off his chains so that they could fight one on one or told an officer to take off his chains during an incident when appellant wanted his shoe laces returned to him. (AOB 139-140.) Respondent does not explain how these allegations could have been considered in aggravation had the jurors been properly instructed.

That appellant commonly told officers to take off his chains in order to fight does not establish a threat of force or violence. (19 RT 2984.) In once instance, appellant lay on floor, refusing to move until he was brought his shoelaces, and then told an officer to take off his chains so they could go "one on one." (21 RT 3227-3228.) This does not rise to the level that factor (b) requires. Indeed, appellant was on the ground and not moving when he wanted his shoelaces and in chains when he suggested that officers remove them. (*Ibid.*) Although appellant's actions might have been construed as obstructing an officer, his words did not convey a gravity of purpose or a likelihood of execution necessary to constitute a true threat of violence. (See *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 [discussing what constitutes a criminal threat]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136, 1141 [statement of intent to "kick your ass" was emotional response rather than threat].) Respondent's argument, then, serves only to

emphasize how broadly the instruction could be construed to incorporate nonstatutory aggravation.

2. Alleged threat to Lieutenant Rosson

Respondent argues that an allegation that appellant threatened to kill a lieutenant during a disciplinary hearing (19 RT 2905) could legitimately be considered a criminal threat under the instruction, in light of his history of actual attacks on deputies and inmates. (RB 128-129.) The prosecutor did not list any threats made by appellant to the hearing officer in her notice of aggravation. (7 CT 1651.) The discipline hearing report of the underlying incident attached to the notice did not make any reference to a threat against Lieutenant Rosson. (7 CT 1752.) By not providing notice that the statement would be used against appellant, it was clear that the prosecutor was not relying on it as an aggravating factor but for the way that the instruction encompassed a range of general misconduct. (See *People v. Hart* (1999) 20 Cal.4th 546, 639 [discussing notice requirement under section 190.3].)

Moreover, the statement was not a true criminal threat of force or violence under factor (b) since it was insufficient to establish either a gravity of purpose or a likelihood of execution. (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 337-340.) This Court does not know the circumstances under which the statement was made. This Court cannot make any inferences about the tone, the manner, or other factors that would allow it to determine that appellant made a genuine threat. At the very least, the criminal nature of any threat should have been a matter for jurors to decide. Despite this, under the instruction given, the statement could have been considered by the jurors as an attempt to obstruct an officer and used against appellant as aggravating evidence.

3. Unspecified misconduct

Lieutenant Rosson alleged that appellant routinely threatened to gas deputies if he did not receive a special diet or other considerations. (19 RT 2906) Respondent states that this was proper aggravation. (RB 128-129.) Rosson's testimony that appellant routinely made statements was not evidence of a specific criminal act under factor (b). It was simply hearsay about statements that were not necessarily made in Rosson's presence or directed to any identifiable incident. Respondent's belief that such general testimony could have been considered by the jurors in aggravation simply establishes that the instruction failed to narrow the factors that were at issue and erroneously encompassed both factor (b) evidence and nonstatutory misconduct.

Appellant cited seven other allegations that appellant committed unspecified acts of general misconduct, including that he "commonly," "routinely" or "continually" threatened officers or acted in an aggressive manner. (AOB 141.) Respondent states that jurors could have considered these statements as evidence of obstructing officers or that they provided a context for appellant's specific acts against others. (RB129.) The general statements that prosecutor introduced did not establish specific instances of criminal conduct under factor (b). But the issue before this Court is not whether the statements were admissible. By not specifying specific conduct that had been introduced under factor (b), the instruction allowed the jurors to consider any general allegation made in the course of the penalty phase, without any context or limitation. Respondent's argument simply confirms the broad reach of the instruction.

4. The instruction was not limited by requiring jurors to find that appellant committed criminal acts

Respondent argues the jurors were properly instructed to consider testimony as aggravating only if satisfied beyond a reasonable doubt that appellant committed the criminal acts. (RB 129.) This did nothing did nothing to resolve what acts were at issue. Factor (b) does not allow jurors to consider any and all acts of misconduct, nor to consider appellant's general character or disposition in aggravation. The instruction given in this case allowed the jurors to do just that.

Appellant's general acts of misconduct were the type of "incidental incidents of misconduct and ill temper" that falls outside of factor (b). (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) The broad language of the instruction failed to resolve the potential for confusion of jurors when considering such allegations. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 55, fn. 19.) Indeed, it encouraged jurors to apply factor (b) to almost any misconduct alleged to have happened in the county jail, or any statement that appellant was alleged to have made. Under these circumstances, this Court should find that the instruction given failed to provide meaningful guidance and improperly allowed arbitrary and nonstatutory factors to enter into the sentencing process. This violated appellant's rights under state law as well as his federal constitutional rights to due process and a reliable penalty verdict. (See *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [sentencer must be provided clear and specific guidance]; *Espinosa v. Florida* (1992) 505 U.S. 1079, 1081 (per curiam) [specific guidance required]; *Bollenbach v. United States* (1946) 326 U.S. 607, 614 [instructions must not be misleading].)

C. The Instruction Improperly Directed the Jurors to Find that Misconduct Amounted to Criminal Acts Involving Force or Violence

1. The instruction erroneously replaces juror findings with judicial determinations of fact

The instruction on the incidents alleged under factor (b) defined the acts listed within it as being crimes that "involved the express or implied use of force or violence or the threat of force or violence." (31 RT 4442; 9 CT 2443.) Appellant has argued that the right to a trial by jury under the Sixth Amendment and due process under the Fourteenth Amendment require that jurors determine whether a crime has been committed and if that act has the requisite force or violence. By defining the listed acts as "criminal" and stating that they involve force and violence, the instruction impermissibly took these issues from the jurors and replaced juror findings with judicial determinations. (AOB 142-147.)

Respondent does not directly address appellant's argument but this Court has rejected similar claims by holding that the facts may be decided by the trial court. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 720 [distinguishing between the acts at issue and the characterization of those acts].) This Court should reconsider the issue in light of recent decisions by the United States Supreme Court.

In *Ring v. Arizona* (2002) 536 U.S. 584, 603, the United States Suprme Court found that "if a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." In *Hurst v. Florida* (2016) ___ U.S.___ [136 S.Ct. 616], the United States Supreme Court confirmed that the kind of decision at issue under factor (b) is within the ambit of *Ring* – jurors are constitutionally required to

make every factual finding as part of the process of weighing aggravating and mitigating circumstances. Under Florida law, a defendant was eligible for death upon conviction of a capital crime at the guilt phase. (Fla. Stat., §§ 782.04, subd. (1)(a), 775.082 and 921.141, subd. (1).) After the penalty phase, the trial judge was responsible for determining that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which are prerequisites for imposing a death sentence. (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622, citing former Fla. Stat., § 921.141, subd. (3).) The United States Supreme Court found that these determinations – the existence and weight of aggravating factors – were part of the "necessary factual finding that *Ring* requires." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622.)

California law is similar to Florida in that a death sentence may be imposed only if aggravation outweighs mitigation. (Pen. Code, § 190.3.) *Hurst* makes clear, then, that this portion of the sentencing process is an essential part of the fact finding under *Ring*. Indeed, the penalty phase determinations under California law are explicitly recognized as "factual matters" (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236) and are assigned to the "trier of fact." (Pen. Code, § 190.3; *see* Black's Law Dictionary (10th ed. 2014) [defining "fact-finder" as "[o]ne or more persons who hear testimony and review evidence to rule on a factual issue"].) Accordingly, there is no reason to distinguish between the findings at issue in *Hurst*, which determined the existence and weight of aggravating facts, and the identical type of finding that is made under California law in determining whether aggravation applies under factor (b). All matters used in aggravation must be subject to the jurors' determination of the facts.

Moreover, the characterization of the acts – the finding that a crime was committed that involved force or violence – is the type of factual decision that jurors routinely make. Under state law, for instance, it is clear that an "implied threat of force" is an factual inference from the circumstances surrounding the act in question. (See, e.g., *People v. Mendoza* (1997) 5 Cal.App.4th 1333, 1339-1345 [defendant's ambiguous statement supported convictions for making terrorist threats and for attempting to dissuade witness by implied threat of force or violence based on all the surrounding circumstances,]; *People v. Veale* (2008) 160 Cal.App.4th 40, 47 [circumstances allowed jurors to make reasonable inference that defendant implied a threat]; *People v. Uecker* (2009) 172 Cal.App.4th 583, 594-595 [defendant's pattern of conduct sufficient to support jury finding of implied threat for stalking conviction].) Indeed, jurors are instructed to find the existence of force or violence in other types of cases. (See, e.g., CALJIC No. 16.141 ["Force and Violence" - Defined]; CALCRIM No. 1000 [Rape by Force, Fear or Threats], CALCRIM No. 1015 [Oral Copulation by Force, Fear or Threats]; CALCRIM No. 1030 [Sodomy by Force, Fear or Threats]; CALCRIM No. 1240 [Felony False Imprisonment by Violence or Menace]; CALCRIM No. 1350 [Interference with Civil Rights by Force]; CALCRIM No. 1351 [Interference with Civil Rights by Threat]; CALCRIM No. 1830 [Extortion by Threat or Force]; CALCRIM No. 2620 [Using Force or Threatening a Witness]; CALCRIM No. 2671 [Escape by Force or Violence]; and parallel Penal Code provisions.)

There is no logical way to distinguish the factual findings that must be made under factor (b) from other issues that jurors must determine. Whether a defendant expressly used force or violence or threatened force or

violence are observable acts that must necessarily be decided by the jurors. The issue of whether a crime has been committed is not simply a characterization, but the central fact finding that must be made before factor (b) can be applied. Accordingly, this Court should hold that all of the factual determinations under factor (b) are subject to the constitutional requirements for jury findings. (Cal. Const., art. I, § 16; U.S. Const., 6th Amend.)

2. The instruction is infirm in other ways

Appellant has argued that the requirement that acts alleged under factor (b) be proved beyond a reasonable doubt is meaningless without submitting all of the issues implicated by this factor to the jurors. (AOB 144.) Indeed, even assuming that the judicial findings are permissible, the preliminary screening conducted by the trial court bears no resemblance to the ultimate fact finding that must be done. The trial court's determinations do not amount to a finding beyond a reasonable doubt that a crime occurred or that it involves force or violence. (See *People v. Phillips* (1985) 41 Cal.3d 29, 73, fn. 25 [court should conduct preliminary inquiry to determine whether there is sufficient substantive evidence to prove the elements a crime].)

Respondent attempts to evade this requirement by arguing that since the instruction told the jury that some of the penalty phase evidence was introduced to show that appellant committed one or more specific criminal acts that involved force or violence, jurors would be precluded from considering acts that did rise to this level. (RB 130.) Respondent fails to recognize that the instruction given in this case provides no means to separate nonstatutory misconduct from crimes that could properly be considered. The instruction defines obstructing a police officer to be a crime involving the express or implied use of force or violence. The only issue for

the jurors to decide was whether appellant committed the act. As discussed above, rather than preclude consideration of misconduct that was not within factor (b), the instruction erroneously directed the jurors to find that misconduct fit within factor (b).

Respondent also argues that the prosecutor's closing argument explained the law to the jurors. (RB 130.) Argument of counsel cannot substitute for proper instructions by the court. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489.) Even assuming, however, that argument may sometimes clarify the scope of the aggravating evidence, the prosecutor here simply stated that factor (b) encompasses "evidence that indicates that the defendant is either a threat, poses some sort of danger, commits crime, things of that nature." (31 RT 4398.) This general description did nothing to identify the acts at issue or to assure that the jurors understood that they must find that the acts were criminal and involved force or violence. Indeed, the specific wording of the instruction led the jurors to believe, under the prosecutor's argument, that general misconduct in the county jail posed "some sort of danger" or was otherwise something "of that nature" that aggravated the crime. (See 31 RT 4442; 9 CT 2443 [language of instruction].)

Ultimately, respondent relies on the premise that jurors will follow the court's instructions and not consider non-aggravating evidence as an aggravating circumstance. (RB 131.) When the instruction itself takes the factual questions out of the equation and directs jurors to find that a broad category of acts are crimes involving force or violence, the problem is not that jurors will fail to follow the trial court's instruction, but follow it to the letter.

Respondent does not address appellant's contention that there were incidents that could not have been considered in aggravation except for the broad reach of the instruction and the presumption that it created. (AOB 145.) By instructing the jurors that all such acts were crimes involving force or violence, the trial court effectively removed these issues from the jurors and precluded any defense. Accordingly, this Court should find that the presumption created by the instruction at issue impermissibly directed the jurors to consider non-aggravating incidents as crimes of force or violence under factor (b). As such, it violated appellant's state and federal rights to a trial by jury, due process, and a reliable verdict. (Cal. Const., art. I, §§ 7, 15, 16, 17; U.S. Const., 6th, 8th & 14th Amends.)

D. The Error Violated Appellant's Federal Constitutional Rights

Respondent states that appellant has raised no cognizable claim under the federal constitution, arguing that a trial court's noncompliance with state law does not constitute a violation of federal law. (RB 131.) As appellant has argued, however, the instruction at issue directly implicated appellant's constitutional rights a reliable penalty verdict and due process. (U.S. Const., 8th & 14th Amends.; see AOB 138, 141-142, and cases cited therein.) It also violated appellant's Sixth Amendment right to a trial by jury. (AOB 143-145, and cases cited therein.) These federal rights are cognizable before this Court.

Respondent relies on *Wilson v. Corcoran* (2010) 562 U.S. 1, 5-6, to argue that a violation of state law does not provide grounds for relief in federal court. This case does not stand for the proposition that respondent asserts. In *Wilson*, the lower federal courts reversed a judgment of death on the grounds that it had violated Indiana law. The United States Supreme

Court emphasized that the decision "contained no hint that it thought the violation of Indiana law it had unearthed also entailed the infringement of any federal right." (*Id.* at p. 5.) The Court found that it was improper for a federal court to issue a writ of habeas corpus "without first concluding that a violation of federal law had been established." (*Id.* at p. 7.) Nothing in this decision precludes the constitutional claims raised here, but simply confirms that a federal writ of habeas corpus must be based on federal claims.

Similarly, respondent's reliance on *Zant v. Stephens* (1983) 462 U.S. 862, 878-879, is misplaced. In *Zant*, the United States Supreme Court stated that the federal constitution requires an individualized determination so a state is free to adopt sentencing rules that meet this standard. In addition to adopting circumstances that narrow the class of people eligible for the death penalty, a state can provide that jurors consider "other possible aggravating factors." (*Id.* at p. 878.) A state can also adopt rules that "limit the evidence of aggravating factors that the prosecution may offer at the sentencing hearing." (*Id.* at p. 879, fn. 17.) *Zant*, then, does not mean that consideration of nonstatutory aggravation in a particular case does not raise federal constitutional issues, but instead determined whether a particular statute passed constitutional muster.

Without question, an error under state law may give rise to constitutional claims. (*Hernandez v. Ylst* (9th Cir.1991) 930 F.2d 714, 719.) Indeed, it is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) Accordingly, a trial court's misapplication of a capital sentencing statute implicates the Eighth Amendments protection against cruel and unusual

punishment and the due process interest protected by the Fourteenth Amendment. (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300-1301.) In the present case, the consideration of nonstatutory aggravation violated due process and rendered the judgment unreliable. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, 589 [Eighth Amendment requires reliable capital verdict]; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [due process liberty interest in jurors exercising discretion as mandated by statute].)

Moreover, the presumptions created by the instruction lightened the prosecutor's burden of proving each allegation beyond a reasonable doubt in violation of appellant's due process rights under the Fourteenth Amendment. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520-521.) It also deprived appellant of his Sixth Amendment right to have the jury decide all aggravating facts used to impose a sentence. (*Ring v. Arizona, supra*, 536 U.S. at p. 603; see also *United States v. Voss* (8th Cir. 1986) 787 F.2d 393, 398 [when jury "is not given an opportunity to decide a relevant factual question," the defendant is deprived of the right to a jury trial].) Accordingly, this Court should find that the error implicated both state law and federal constitutional claims.

E. The Error was Prejudicial

Respondent argues that the amount of aggravating evidence properly considered makes any error harmless. (RB 131-132.) As discussed above (Argument X), the issue is not whether there was a sufficient basis for the jurors to have imposed death, but if there is a reasonable possibility that the error affected the verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447 [state standard]) or if the error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal standard].)

Respondent minimizes appellant's penalty case by stating that he failed to present any truly mitigating evidence. (RB 131.) As appellant established above (Argument VIII, subd. (E); Argument X, subd. (F)), there was mitigating evidence in the penalty phase about his upbringing. His mother testified that appellant found care and acceptance in gangs. (22 RT 3398.) Some of the history that respondent cites in referring to appellant's "long and uninterrupted history of violent crimes" (RB 131) involved a homicide that occurred while appellant was still a juvenile and in which he was not the actual killer. (See 20 RT 3045-3051 [gang related shooting].) Given appellant's background, it is little wonder that he struggled with drugs and was diagnosed with neuropsychological deficits that affected his ability to inhibit his behavior, make good judgments and to control his anger. (See. e.g., 24 RT 3563-3564 [testimony of Dr. Light].) Despite such problems, deputy sheriffs in the county jail testified that appellant had been a model prisoner since 2004 and had not engaged in violence or other unlawful activities in jail during that time. (23 RT 3422-3425; 3438-3441.) The mitigating evidence showed that appellant should not be defined solely by the crimes that were alleged, but there were other things that influenced his life and placed the aggravation in a broader context.

The error in the instruction allowed the jurors to consider any of the matters identified by appellant as further aggravating evidence and added considerable weight to the prosecutor's case. In particular, the nonstatutory aggravation and the allegations that appellant commonly or routinely committed misconduct helped convince jurors that appellant presented a future danger in prison and have been an important factor in reaching a penalty judgment. (See Claussen-Schulz et al., *Dangerousness, Risk Assessment, and Capital Sentencing* (2004) 10 Psychol. Pub. Policy & L.

471, 481-482 [jurors "especially primed to give inappropriate weight to evidence concerning the defendant's dangerousness"].) Indeed, the prosecutor urged the jurors to consider appellant's conduct in jail. (30 RT 4299-4302.) It is likely that the jurors did just that, and used the evidence encompassed by the instruction against him.

Under state law this Court should find that the significant instructional error affected the verdict and raised a reasonable possibility that the jurors would have rendered a different verdict absent the errors. (*People v. Brown*, *supra*, 46 Cal.3d at 447.) Under federal constitutional standards, respondent does not show that the errors are harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*. 386 U.S. at p. 24.) Reversal of the penalty judgment is required.

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XII.

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 specific portions of California's capital sentencing scheme violate the United States Constitution. (AOB 148-169.) Respondent generally argues, as appellant has acknowledged, that this Court has upheld the statute against similar challenges. (RB 132-144.) Rather than discuss each issue, appellant focuses on the effect of a recent case relating to appellant's claim that jurors must make each penalty phase finding using the beyond-a-reasonable-doubt standard. (AOB 151-152.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 600, and *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. This Court has rejected the application of these cases because the death penalty decision is normative rather than factual, so that any finding of aggravating factors does not increase the penalty for the crime beyond the maximum penalty set by statue. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Recently, the United States Supreme Court, invalidated Florida's death penalty statute under *Apprendi* and *Ring* because the sentencing judge, not the jury, made factual findings that were required before the death penalty could be imposed. (*Hurst v. Florida* (2016) ___ U.S.___ [136 S.Ct. 616, 624].) Under Florida law, a defendant is eligible for death upon conviction of a capital crime at the guilt phase. (Fla. Stat. §§ 782.04, subd.

(1)(a), 775.082 and 921.141, subd. (1).) After the penalty phase, the trial judge was responsible for determining that "sufficient aggravating circumstances exist" and "that there are insufficient mitigating circumstances to outweigh aggravating circumstances," which are prerequisites for imposing a death sentence. (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622, citing former § 921.141, subd. (3).) The Court found that these determinations were part of the "necessary factual finding that *Ring* requires." (*Hurst v. Florida*, *supra*, 136 S.Ct. at p. 622.)

California law is similar to Florida's in that a death sentence may be imposed only if the sentencer finds "the aggravating circumstances outweigh the mitigating circumstances." (Pen. Code, § 190.3.) Although *Hurst* did not address the standard of proof to be applied in Florida, the Court made clear that the weighing decision is within the ambit of *Ring*. (See *Hurst v. Florida*, *supra*, 136 S.Ct. at p. 621.)

Moreover, the constitutional imperative for juror determination of factual issues is not affected by whether the decision is "narrative" instead of "factual." The terms are simply a label attached to the process by which the jury comes to a conclusion. Any number of issues a jury decides (for instance, various degrees of culpability in mental states) could be labeled as "moral" or "normative." But California cannot evade constitutional error simply by ascribing a label to a question that must be part of the jury's determination. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602.) This Court, should therefore reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Hurst*.

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XIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINE THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Throughout appellant's briefs, he has argued that the cumulative effect of errors regarding gang evidence led inevitably to the rape verdict, the lying-in-wait special circumstance, and the death judgment. Looking at the case as a whole, it is all the more apparent. At the very beginning of the prosecutor's case, the jurors were shown graphic photographs of appellant's tattoos that focused on gang membership, sexual images, and other depictions that made him appear to be particularly frightening. Irrelevant and overly prejudicial evidence suggested that appellant was bold enough to use a gang sign in court. The trial court admitted irrelevant evidence in the victim's address book that allegedly linked appellant to the Venice 13 Jokers. The gang evidence did not stop with the Jokers, however, and the trial court allowed testimony that appellant claimed to be Mexican Mafia hit man who had murdered in the past. Appellant was also alleged to be able to manipulate others by claiming to be crazy and get away with crimes. The errors led jurors to accept a scenario that appellant raped Maria, and then lured her to her death while lying in wait.

These errors went beyond the guilt determination by adding to the weight of the aggravating evidence during the penalty phase. At penalty, opinion and hearsay set appellant apart as one of the most dangerous inmates in the jail. Moreover, the penalty instructions allowed the jurors to consider nonstatutory evidence and directed the jurors to find that simple misconduct amounted to a crime of force and violence. Even assuming that these errors

in themselves would not have been prejudicial, the combined effect requires reversal of the penalty verdict. (AOB 170-172.)

Respondent maintains that any error was discrete, unrelated, and had no accumulating effect. (RB 144.) Yet, the errors described above were building blocks that created the lens through which jurors viewed the entire case. The prosecutor took an act rooted in appellant's personal relationship with Maria and informed jurors that appellant was a hardened member of a criminal gang who was capable of doing almost any crime. Jurors likely believed that a member of a dangerous gang would find it easy to rape and kill for his own ends; to lie in wait in order to accomplish a killing; to commit other uncharged crimes; and, that to present a continuing danger as long as he lived. The errors, then, created a structure where the death verdict was the inevitable outcome.

This Court has long recognized that even in cases where evidence of guilt has been firmly established, errors may alter the balance between a life verdict or death. This is particularly true when the errors, as here, go directly to the character and disposition of a defendant. Under these circumstances, "the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].) Ultimately, under federal standards, reversal of the death judgment is mandated here because it cannot be shown that the cumulative impact of the errors had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

CONCLUSION

For all the reasons stated above, and in appellant's opening brief, the judgment in this case must be reversed.

DATED: May 12, 2016

Respectfully submitted,

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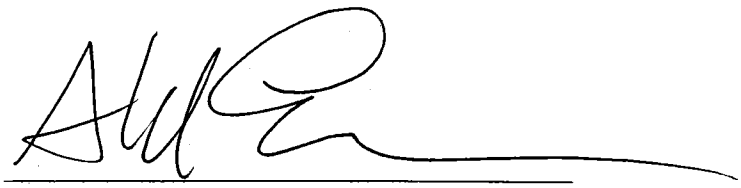
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, Rule 8.630(b)(2))

I, Arnold Erickson, am the Senior Deputy State Public Defender assigned to represent appellant Ruben Becerrada 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 the brief is 25,893 words in length.

Dated: May 12, 2016



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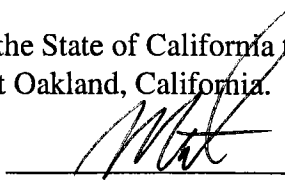

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