IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LUIS LEON, Defendant and Appellant.	No. S143531 Riverside County Superior Court No. RIF109916

APPELLANT'S REPLY BRIEF

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

HONORABLE CHRISTIAN F. THIERBACH, JUDGE

MICHAEL J. HERSEK
State Public Defender

ANDREA G. ASARO
Senior Deputy State Public Defender
State Bar No. 107039
Asaro@ospd.ca.gov

Office of the State Public Defender
1111 Broadway, Suite 1000
Oakland, California 94607
Telephone: (510) 267-3300
Fax: (510) 452-8712

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

CONSTITUTION

STATE STATUTES

COURT RULES

JURY INSTRUCTIONS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LUIS LEON, Defendant and Appellant.	No. S143531 Riverside County Superior Court No. RIF109916

APPELLANT'S REPLY BRIEF

INTRODUCTION

As explained in appellant's opening brief, appellant's statements to the police should have been suppressed because the record – including the video tape of the May 2, 2003, interrogation and the unrebutted expert testimony of Dr. Francisco Gomez – demonstrates that appellant did not knowingly and intelligently waive his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Because the evidence that appellant was guilty of one count of first degree murder and another of first or second degree murder was otherwise weak, the erroneous admission of appellant's statements cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The trial court also erred prejudicially at the guilt phase by instructing the jury pursuant to CALJIC No. 2.71.1, over defense counsel's

objection, that appellant's statement to Veronica Haft that no matter what happened, he would always love her, constituted a pre-offense statement of intent, plan, motive or design. The court erred at the penalty phase by refusing defense counsel's request to give exclusively CALCRIM instructions, or to give any of three specially-drafted instructions encompassed by CALCRIM No. 763.

The erroneous admission of appellant's statements to the police and the instruction with CALJIC No. 2.71.7, individually or cumulatively, warrants reversal of appellant's conviction. The refusal to give exclusively CALCRIM instructions at the penalty phase, or any of the three specially-prepared instructions requested by the defense, individually, cumulatively or in combination with defects in California's statutory capital sentencing scheme overall, warrants reversal of appellant's death sentence.

Finally, as respondent concedes, the trial court erred in imposing a $10,000 restitution, off the record, without affording appellant or his counsel the opportunity to explain that he would be unable to pay a fine greater than the $200 statutory minimum. Respondent agrees that, in the event appellant's conviction and sentence are affirmed, this Court should reduce the restitution fine to $200.[1]

---

[1] In this brief appellant addresses specific contentions made by respondent where necessary in order to present the issues to the court fully and accurately. Appellant does not reply to those of respondent's contentions that are fully addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, should not be construed to constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court*

(continued...)

ARGUMENT

I.

APPELLANT'S STATEMENTS TO THE POLICE SHOULD HAVE BEEN EXCLUDED AT TRIAL BECAUSE HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS

The totality of the circumstances regarding both the May 2, 2003, interrogation and appellant's "background, experience and conduct" show that appellant did not knowingly and intelligently waive his *Miranda* rights. (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Because this initial interrogation was videotaped, the facts surrounding the *Miranda* exchange are undisputed, and review is de novo. (*People v. Duff* (2014) 58 Cal.4th 427, 551, citing *People v. McWhorter* (2009) 47 Cal.4th 318, 346.) The video shows appellant was distraught and inattentive when Officer Rasso began reciting the *Miranda* advisements and merely nodded as Rasso continued reading. (People's Ex. 93, 3:02-3:27.) Dr. Gomez's expert testimony regarding appellant's limited intellectual functioning, mental disorder, dependent personality traits, poor acculturation and inexperience with any criminal justice system was unrebutted and confirms that appellant did not understand or knowingly and intelligently waive his *Miranda* rights. The undisputed violation of appellant's right to consular notification, under the Vienna Convention on Consular Relations and Penal Code section 834c, further undermines the validity of appellant's purported *Miranda* waiver.

---

[1] (...continued)
(2001) 25 Cal.4th 1046, 1064-1065), but rather reflects appellant's view that the issue has adequately been presented and is fully joined.

A. The Record Shows That Appellant Did Not Knowingly and Intelligently Waive His *Miranda* Rights

As noted in appellant's opening brief (AOB at pp. 41-42)[2], the video of the May 2, 2003 interrogation shows appellant was crying and distracted when Officer Rasso began reciting the *Miranda* advisements; that after turning to reach for a tissue appellant nodded periodically, still upset and unfocused, slumped in his chair, as Officer Rasso kept reading; and that Officer Rasso read the advisements straight through, without stopping at each one to ask appellant whether he understood. (People's Ex. 93, 3:02-3:46.) When Officer Rasso then asked appellant whether he had understood the rights he had read and pressed for a yes or no answer, appellant said yes, and in the same breath asked either, "[a]nd does my girlfriend already know?" or "[a]nd how is she, do you know?" (Seventh Supp. CT 31; 9 CT 2402.)[3] Officer Rasso ignored the question and elicited appellant's agreement to talk to him. (*Ibid.*) The video also shows that appellant signed the *Miranda* form Officer Rasso handed him without reading it, as Officer Rasso acknowledged. (People's Ex. 93, 4:14-4:22; B RT 572.) The unrebutted testimony of Dr. Francisco Gomez, the forensic psychologist who reviewed the tapes and transcripts of all of appellant's statements and conducted a comprehensive psycho-social assessment, would confirm that appellant lacked the cognitive, intellectual, cultural and verbal ability to

---

[2] In this brief, the following abbreviations are used: "AOB" refers to appellant's opening brief; "RB" to respondent's brief; "CT" to the Clerk's Transcript; "Supp. CT" to the Supplemental Clerk's Transcript; and "RT" to the Reporter's Transcript.

[3] As explained at p. 24, fn. 7, of appellant's opening brief, the translations differed.

understand and knowingly waive his *Miranda* rights.

Respondent argues, first, that appellant "was properly advised of his rights under *Miranda*." (RB at p. 34.) For this respondent relies principally on the testimony of Officer Rasso, who said that he read a *Miranda* form aloud slowly and clearly, in a dialect of Spanish appellant understood; that appellant appeared to understand him; that he "went through each warning and made sure Leon understood his rights;" and that appellant "said he understood the rights" and signed the *Miranda* form. (RB at p. 34, citing B RT 559, 561-562.) Officer Rasso's testimony proves little. As noted, both the video and the transcript show Officer Rasso read the *Miranda* advisements straight through without stopping to confirm that appellant had understood each one individually. (People's Ex. 93, 3:06-3:42.) As explained in appellant's opening brief (AOB at pp. 34-35), this is among the factors that should be considered in assessing whether appellant's waiver was knowing and intelligent. (*United States v. Garibay* (9th Cir. 1997) 143 F.3d 534, 538-539, citations omitted.) Dr. Gomez confirmed that appellant would have had difficulty following a litany. (B RT 592.) Respondent fails even to address this point. Moreover, the issue here is not whether Officer Rasso accurately recited the *Miranda* advisements, in Spanish, or whether appellant eventually said "yes," but whether appellant in fact understood what was happening – i.e., whether his purported waiver of his *Miranda* rights was knowing and intelligent. The video shows it was not, and Dr. Gomez's testimony explains why.

Respondent also argues that the trial court's decision should be upheld because, in addition to hearing testimony at the suppression hearing, the court "was afforded the ability of observe the interview wherein Leon was advised of and waived his *Miranda* rights," and to review the

transcript. (RB at p. 32.) Preliminarily, respondent ignores that the record suggests the court only watched a portion of the May 2, 2003 video. (See AOB at p. 32, fn. 9.) More importantly, respondent cites the transcript of the interrogation, *not* the video, for the proposition that by nodding and saying "Uhm hm" appellant had "affirmed his understanding" of the *Miranda* advisements. (RB at p. 33.) This ignores appellant's demeanor – that he was crying, visibly distraught and inattentive – and begs the very question at hand – whether the fact that appellant nodded meant he understood. Dr. Gomez explained why nodding did not mean comprehension: because appellant "nodded yes to everything, just nodded" at many junctures; that he was simply going along naively with what he understood was expected of him by law enforcement officials; and that he was not intellectually capable of understanding the meaning or import of what Officer Rasso had said. (B RT 592-594.)

Respondent nonetheless urges that "[appellant's] demeanor throughout the interview" supported the trial court's finding that he validly waived his *Miranda* rights. (RB at p. 35.) Without citing the video, respondent simply asserts that there is no "visual or auditory evidence" indicating appellant "was not cognizant of his situation and 'fully' aware of his surroundings and what was being communicated to him;" that appellant's "emotional response" to the news of the homicides "did not appear to impact his ability to listen and comprehend" what Officer Rasso was saying; and that appellant "maintained mental acuity" during the advisements and "respond directly to the statements." (RB at p. 35.) Again without citing the video itself, respondent concludes that an "objective observation" of the evidence shows appellant understood the *Miranda* advisements, adding that Officer Rasso believed he did. (*Ibid.*)

As noted, the beginning of the video, which Officer Rasso did not review (B RT 564), shows appellant crying, distraught and inattentive, reaching for a tissue as Officer Rasso starts reciting the *Miranda* advisements. (People's Ex. 93, 3:02-3:27, 4:21-4:26.) This is "visual and auditory evidence" that appellant was not "cognizant" of the situation. Moreover, respondent again simply declares as given what in fact is at issue: whether appellant actually had the requisite "mental acuity" or ability to comprehend the *Miranda* advisements Officer Rasso read to him. Dr. Gomez testified, based on hours of clinical interviews with appellant, extensive psychological testing, and third party interviews, that appellant in fact lacked the intellectual ability to understand *Miranda* advisements, particularly as they were conveyed to him by Officer Rasso. (B RT 577-587, 591-594.) That testimony was unrebutted.

Respondent urges that the trial court appropriately "gave little weight" to Dr. Gomez's testimony because appellant knew enough to "concoct a story" to explain why he had gone to the Ragland residence. (RB at p. 35.) The trial court in fact appears to have given Dr. Gomez's testimony virtually *no* weight, given its assertion that there was "not even a scintilla" of evidence to suggest appellant did not knowingly and intelligently waive his *Miranda* rights. (B RT 616.) Moreover, as noted in appellant's opening brief (AOB at p. 46), the issue is whether appellant validly waived his *Miranda* rights; not whether he initially denied Officer Rasso's accusations, and Dr. Gomez explained that someone who is intellectually limited, like appellant, may still lie, even in the face of contradicting information. (B RT 602-603, 608-609, 593-594.)

Respondent argues that Dr. Gomez's testimony is "of limited value" because "he did not claim appellant was mentally retarded, had a mental

disorder, or was even a special education pupil," but instead opined, based on the tests he administered, that appellant was intellectually low functioning and had difficulty with reading comprehension and memory. (RB at pp. 36, 35.) Respondent mischaracterizes Dr. Gomez's testimony and minimizes its significance. As Dr. Gomez explained, an "adjustment disorder with depressed mood anxiety" is an Axis 1 *mental disorder* within the meaning of the then-current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR), just as his borderline intellectual functioning was recognized as an Axis 2 psychological disorder, and his dependent traits were recognized under Axis 3. (B RT 591.) Further testing would have been needed to rule out mental retardation. (*Ibid.*) Moreover, whether or not appellant was ever "even" a "special education pupil," it was established that he failed sixth grade at the school he attended in an insular Mexican village, where he lived with protective parents until moving to the United States with his mother. (B RT 583, 585, 586.) In any event, the question is not whether appellant is mentally retarded, has a particular mental disorder or attended special education classes, but whether, based on the circumstances that do pertain to his character and background, it can be said that he knowingly and intelligently waived his *Miranda* rights.

Respondent's assertion that Dr. Gomez based his opinion that appellant was intellectually low functioning "solely on self-reporting" (RB at p. 36) is contradicted by the record. Dr. Gomez interviewed appellant's parents, because "he's always been in the care of his parents," and had come to the United States with his mother. (B RT 587.) Moreover, Dr. Gomez's forensic assessment included a test for malingering. (B RT 580.) Appellant scored in the normal range and was not being deceptive. (B RT

577, 578-580.)

The assertion that Dr. Gomez "did not consider many aspects of [appellant's] life showing his ability to participate and navigate society" (RB at p. 36) is also contradicted by the record. Dr. Gomez clearly did take into consideration appellant's ability to function in society, acknowledging, for example, that "how [appellant] secured jobs in the U.S." was "information you want to find out about" because it discloses "initiative" and the "the willingness to get out into society." (B RT 587.) Dr. Gomez took into account that appellant had gotten his jobs through friends or had had his girlfriend go with him to help him get jobs, which consisted mainly of unskilled farm labor. (B RT 588.)

Respondent's reliance on other "examples raised by the prosecutor" that Dr. Gomez purportedly failed to consider – that during the crime scene re-enactment appellant acknowledged writing "Austin is a bad student" (on a mirror), that he took English as a second language (ESL) and that he was able to rent apartments – is baseless. Dr. Gomez acknowledged, on cross-examination, that "Austin is a bad student" is indeed grammatically correct; he was not asked whether this was significant and volunteered no opinion on the subject. (B RT 604.) As for appellant taking ESL classes, Dr. Gomez testified it was appellant's girlfriend who had taken him, and that he had gone only once. (B RT 604.) The prosecutor presented no evidence to the contrary and asked no further questions on the subject. Dr. Gomez had already noted that appellant had not even mastered "survival English," even though he had been incarcerated for two years. (B RT 583.) When asked by the prosecutor whether he was aware that appellant was able to find himself two different apartments to rent, Dr. Gomez replied that he was not (B RT 604); no evidence was presented that appellant in fact had done so.

Respondent asserts, with no citation to the record, that "[appellant's] responses and explanations revealed that he engaged in a sophisticated thought process and had the cognitive ability to lie in a manner that matched the evidence." (RB at p. 36.) The assertion is speculative, conclusory and unfounded. The only evidence before the trial court regarding appellant's "thought processes" and "cognitive ability" – the videotaped interrogations and Dr. Gomez's clinical assessment – discloses nothing "sophisticated" about appellant whatsoever. As noted, he tested at the borderline mental retardation level of intellectual functioning, grew up in a Mexican village, had no experience with the criminal justice system and asked, at the conclusion of the first interview, whether he was going to be executed "today or tomorrow." (9 CT 2510.) As noted in appellant's opening brief (AOB at p. 46) and above, the fact that *after* appellant agreed to talk to Officer Rasso he initially denied any involvement in the homicides is not probative of whether he understood at the outset that he had the right not to speak to the police at all. And, again, Dr. Gomez explained why the fact that appellant lied did not undermine his finding, based on his clinical assessment, psychological testing and third party interviews, that appellant in fact lacked the intellectual and cognitive capacity to understand and waive his *Miranda* rights. (B RT 602-603, 608-609, 593-594.) In other words, appellant may have known enough to know he was in trouble, and so denied entering the Ragland residence, yet not have had the intellectual ability to understand *Miranda* advisements. Respondent fails even to address, much less refute, these arguments. Finally, respondent's assertion that appellant "lied in a manner that matched the evidence" is nonsensical on its face. (From respondent's perspective, if appellant "lied" in denying he committed the homicides, that would not "match" whatever evidence

there was that he had.)

Respondent's reliance on *People v. Whitson* (1998) 17 Cal.4th 229 is misplaced. As this Court noted in *Whitson*, the question whether a *Miranda* waiver is valid turns on "the particular facts and circumstances surrounding *that case*, including the background, experience and conduct of the accused." (*Id.* at p. 246, citations omitted, italics added.) The particular facts and circumstances before the court in *Whitson* – where the defendant was charged with murder when he ran a red light and crashed into another car – distinguish the case from appellant's. First, in *Whitson* the videos of the second and third interviews of the defendant confirmed the police officers' uncontradicted testimony that the defendant had given "clear and responsive" answers to their questions. (*Id.* at p. 249.) Here the videotape of appellant's May 2, 2003 interrogation plainly shows appellant was distraught and inattentive when Officer Rasso read the *Miranda* advisements. (People's Ex. 93, 3:02-3:27, 4:21-4:26.)

Moreover, it appears that in *Whitson* the defendant was advised of his *Miranda* rights one at a time, and he "affirmatively responded that he understood *each* of his rights *as they were read to him* . . . ." (*People v. Whitson*, *supra*, 17 Cal.4th at p. 237, italics added.) Here, as noted, Officer Rasso read the *Miranda* advisements straight through. (People's Ex. 93, 3:02-3:46.) Further, while in *Whitson* the defense had presented a psychologist who "characterized defendant 'as having anywhere between a mentally retarded to borderline intelligence'" (*sic*) (*id.* at p. 240), here Dr. Gomez testified not only that appellant was borderline mentally retarded, but that *as a result* of this impairment – coupled with his poor acculturation, sheltered childhood in Mexico and the lack of experience with any criminal justice system – appellant was not capable of understanding the *Miranda*

advisements or knowingly and intelligently waiving them. Finally, the defendant in *Whitson* had previously been *Mirandized* incident to an earlier encounter with the police (*Id.* at pp. 249-250), whereas appellant had no such prior experience, but rather, as Dr. Gomez explained, was ignorant and naive (B RT 585-586).

Respondent errs in asserting that appellant relies on his "below-average intelligence" as "conclusive proof" that he was incapable of intelligently waiving his *Miranda* rights. (RB at p. 36.) First, it is undisputed that appellant is not merely of "below average" intelligence, but that he scored in the mildly mentally retarded or borderline intellectual functioning range on every psychological test Dr. Gomez administered. (B RT 581, 582.) Second, appellant has consistently argued, here and in the trial court, that it is the totality of the circumstances regarding appellant's character and background, and the interrogation, not merely appellant's intellectual deficits, that invalidate his *Miranda* waiver. (See, e.g., AOB at pp. 22-23, 29-30, 33-35.) Third, appellant is not relying on his intellectual impairment as "conclusive proof" that his *Miranda* waiver was invalid. The issue is whether the prosecution met *its* burden to establish that appellant knowingly and intelligently waived his *Miranda* rights.

Thus, respondent's assertion that a confession "is not inadmissible as a matter of law *merely* because the accused was of subnormal intelligence" (RB at p. 36, italics added) is beside the point, and the three court of appeal cases respondent cites for this proposition are distinguishable in any event. In *People v. Jenkins* (2004) 122 Cal.App.4th 1160, first, the defendant had a "low IQ," but tested "reasonably well" on portions of a psychological test designed to measure the subject's understanding of *Miranda* rights and did "quite well" explaining the right to remain silent. (*Id.* at p. 1172.)

Moreover, in *Jenkins* the defendant had been read his *Miranda* rights *seven* times before and had invoked his right to remain silent on four of those occasions. (*Ibid.*) He was "street smart." (*Ibid.*) Apart from the low IQ, none of this is true for appellant.

In re Norman H. (1976) 64 Cal.App.3d 997, is similarly distinguishable. Although the defendant in that case had a very low IQ, he affirmatively testified that he understood his rights, knew something about the criminal justice from talking with his brother-in-law, and, because he was not the actual killer, thought it would be to his advantage to implicate a co-defendant. (*Id.* at pp. 1001-1002.)

People v. Watson (1977) 75 Cal.App.3d 384, finally, is even further from the mark. At the pretrial hearing on the admissibility of the defendant's confession "no evidence was introduced bearing upon [the defendant's] asserted subnormal level of intelligence or psychiatric infirmity." (*Id.* at p. 396.) Such evidence was presented for the first time as part of the defendant's case-in-chief at trial. (*Id.* at pp. 396-397.) Moreover, in *Watson* the evidence regarding the defendant's mental impairment was in conflict: in rebuttal the prosecution called a psychiatrist who had diagnosed the defendant as "having sexual deviant interests and suffering from drug abuse with schizoid features, but had found "no mental disease or defect that would have prevented an understanding of the nature and consequences of his actions." (*Id.* at p. 397.) Here Dr. Gomez's comprehensive pretrial testimony regarding appellant's intellectual limitations and cognitive impairment was unrebutted.

B. The Denial Of Appellant's Right To Consular Notification Is Another In the Totality Of Circumstances Undermining the Validity Of Appellant's *Miranda* Waiver

The trial court concluded appellant was not prejudiced by not having "somebody from Mexico" tell him to "keep his mouth shut," because he was properly advised of his *Miranda* rights. (B RT 629.) However, as explained in appellant's opening brief (AOB at pp. 46-49), appellant does not claim on appeal that the violation of his right to consular notification in itself renders his statements to the police inadmissible, but rather that the denial is another factor in the totality of circumstances undermining the validity of appellant's *Miranda* waiver. As this Court has recognized, a defendant can assert the violation of his right to consular notification as part of challenge to the voluntariness of his confession. (*People v. Enraca* (2012) 53 Cal.4th 686, 757, quoting *Sanchez-Llmas v. Oregon* (2006) 548 U.S. 331 at p. 350.) Respondent nonetheless argues that to demonstrate the violation "had [any] bearing" on the validity of appellant's *Miranda* waiver appellant must "show prejudice" (RB at p. 37), and that he has failed to do so because he has not shown that if the Mexican consulate had been notified, help would have come in time and appellant would have heeded the consular representatives' advise (RB at pp. 38-39). The point, again, is that the fact that appellant did not have the benefit of consular assistance, as such, is one of the factors that undermine confidence in the validity of his *Miranda* waiver, as is the fact that he had no prior experience with the criminal justice system, in Mexico or the United States. Requiring appellant to show what would have happened had his right to consular notification been respected is like requiring him to show what he would have done in this case if he had had prior experience with the criminal

justice system and had previously been advised of his *Miranda* rights.

Moreover, unlike in *People v. Enraca*, *supra*, 53 Cal.4th 686, where the defendant confessed while he was being booked, here appellant did not confess until his second interrogation, on May 3, 2003, fully a day after he was arrested and first interrogated. (*Id.* at p. 758.) If appellant had promptly been advised of his right to consular notification, and the consulate had been notified of his arrest, there likely would have been ample time for a local consular representative to meet with appellant,[4] and there is certainly no reason to doubt that appellant would have heeded his or her advice – i.e., that he "keep his mouth shut," in the words of the trial court.

C. The Erroneous Admission Into Evidence Of Appellant's Post-Arrest Statements To the Police Was Prejudicial

As explained in appellant's opening brief (AOB at pp. 49-51), the erroneous admission of appellant's video-taped statements was highly prejudicial, because of the inherently "probative and damaging" nature of a confession (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296; because the prosecutor focused on appellant's confession in closing argument (9 RT 1718-1729); because the jurors asked to watch the taped confession again during deliberations (10 CT 2735-2736); and because, absent appellant's statements, the evidence was not sufficient to establish appellant was guilty beyond a reasonable doubt of at least one count of first degree murder and a second count of first or second degree murder, which the prosecutor had the burden to prove in order to establish the multiple murder special

---

[4] Appellant announced early in the May 2, 2003 interrogation that he was a Mexican national. (9 CT 2419.)

circumstance (Pen. Code, § 190.2, subd. (a)(3)).

Respondent suggests initially that "while defendant's interview was incriminating, he nevertheless maintained he acted in self-defense." (RB at p. 39.) The notion that appellant's confession to killing Hope and Austin *supported* the defense case at trial borders on the absurd. Had the statements properly been excluded, the defense would have had no reason to concede appellant was guilty of manslaughter as to Hope, much less that he was guilty of the murder of Austin.

Respondent argues next that even without appellant's statements there was "overwhelming evidence" that appellant "murdered Hope and Perez with the requisite intent and mental state for first degree murder, and the attempted murder of Marion." (RB at pp. 39-40.) Not so. Respondent maintains, first, that the evidence of appellant's guilt includes "the manner in which [appellant] approached the Ragland home, i.e., on foot, having parked his vehicle outside of the gated community, *and entering the home undetected with gloves and ski mask.*" (RB at p. 40, citing 4 RT 1291; 5 RT 1321-1322; 6 RT 1489-1490;[5] italics added.) Yet, there is no evidence appellant entered the Ragland residence "with," much less wearing, a ski mask or gloves, or that he was "undetected" that evening. As respondent in fact notes, appellant, far from "undetected," "was seen" waiting by the gate and "was seen" the evening of the homicides, including at the Ragland

---

[5] As in respondent's Statement of Facts, the record cites here are to Osvaldo Magdaleno's testimony that he saw appellant waiting at the gate (4 RT 1291); to Jenyffer Soto's testimony that she recognized appellant when she saw him by the gate as she drove out (5 RT 1321-1322); and to forensic technician Daniel Verdugo's testimony that a ski mask and partially used box of rubber gloves were found in appellant's car (6 RT 1489-1490). (RB at p. 40.)

residence, with nothing in his hands. (RB at p. 40, citing 4 RT 1266-1269, 1271, 1278-1281, 1291; 5 RT 1321-1322; RB at p. 12, citing 7 RT 1568-1569.) Nor was there any evidence of anything unusual, much less surreptitious, about the way appellant was walking when he first passed by the video store window, headed toward the housing complex. (4 RT 1271.)

Respondent also asserts that the absence of fingerprints at the scene "indicates the assailant used gloves," and urges that the fact gloves were found in appellant's car shows he engaged in "planning activity." (RB at p. 40, italics added.) But the record does not establish that the assailant wore gloves. Rather, evidence technician Verdugo, asked whether, "hypothetically," wearing gloves would prevent the deposit of fingerprints on a knife, said "Yes, *it can*." (6 RT 1487, italics added.) Moreover, respondent minimizes the significance of the testimony by Arnulfo Avalos, appellant's co-worker at the dairy, that they sometimes wore latex gloves when they worked with the cows. (4 RT 1309.)

Respondent's reliance on *People v. Perez* (1992) 2 Cal.4th 1117, 1126, on the issue of "planning activity," is misplaced. In *Perez*, a non-capital case, the issue was whether the Court of Appeal had applied the correct standard of review in concluding the evidence was insufficient to establish premeditation and deliberation. (*Id.* at pp. 1124-1126.) That the defendant was the perpetrator was not in question. (*Id.* at pp. 1120-1121.) This Court found the lower court had "failed to focus on the evidence presented and the possible inferences drawn there from, but instead [had] reviewed the theories articulated in the prosecutor's argument." (*Id.* at pp. 1125-1126.) The evidence presented in *Perez* included the defendant's fingerprint on a wall near the victim's body, and test results showing that blood found at the scene was consistent with only one percent of the

population, which included the defendant. (*Id.* at p. 1122.) Here no such evidence implicating appellant was introduced.

Respondent also argues that "the exact manner of the killings" shows appellant acted with premeditation and deliberation. (RB at p. 41.) However, respondent misconstrues the record. Respondent asserts, for example: "Armed with a kitchen knife, Leon stabbed Hope while seated in a lounge chair."[6] (RB at p. 41, citing 6 RT 1468-1469.) The record citation is to the evidence technician's testimony about crime scene photos showing Hope's clothing and eyeglasses. (6 RT 1468-1469; People's Ex. 7.)

Respondent cites three cases in support of the proposition that "the nature and manner of the deaths leave no doubt that [Hope and Austin] were murdered." (RB at p. 41.) None of these cases are on point. In *People v. Anderson* (1968) 70 Cal.2d 15, first, the defendant was charged with killing his girlfriend's 10-year-old daughter. This Court found the evidence – including the defendant's apparent attempt to clean up the bloodstained kitchen, his fabrication of conflicting explanations of how the blood had gotten there, the recovery of his blood-spotted shorts from the living room and blood-encrusted socks from the bedroom, the extraordinary number of wounds (60) and the manner in which the victim's clothes had been torn, among other things – was *insufficient* to support a finding of first degree murder, and reduced the conviction to second degree murder. (*Id.* at pp. 24-25.) The issue here is whether, *absent* appellant's statements to the police, including his "conflicting explanations" of what happened, the evidence of premeditation and deliberation was sufficient. Under *Anderson*

---

[6] Presumably respondent means that Hope, not appellant, was seated in the lounge chair.

it was not. Moreover, *Anderson* undermines respondent's reliance on the number of stab wounds inflicted (RB at p. 41) as evidencing premeditation and deliberation: "It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation." (*Id.* at p. 24.)

In *People v. Sanchez* (2001) 26 Cal.4th 834, the defendant, a gang member, exchanged fire with a rival gang member, resulting in the death of an innocent bystander. This Court found the Court of Appeal had erred in its analysis of causation, and concluded that the fact that it could not be determined who fired the single fatal bullet did not preclude a finding of deliberate and premeditated murder, where the evidence was sufficient to show the defendant and his rival had armed themselves and had premeditated and deliberated the attempted murder of one another. (*Id.* at pp. 839-840, 849.)

In *People v. Wright* (1985) 39 Cal.3d 576, this Court rejected the defendant's challenge to the trial court's erroneous modification of the standard instructions on deliberation and premeditation, finding the instructions as a whole, coupled with the argument of counsel, rendered the instructional error harmless. Neither *Sanchez* nor *Wright* bears on the issue at hand – whether the evidence apart from appellant's statements to the police was sufficient to establish deliberation and premeditation.

Finally, respondent argues that "[m]otive also adds to the overwhelming evidence of premeditation and deliberation," noting that appellant believed Veronica's family "was in the way of their relationship and had motive to kill them." (RB at p. 41.) Respondent also cites the fact that appellant told Veronica he would always love her, no matter what happened, as evidence of motive. (RB at p. 41.) As explained Argument II,

below, Veronica never testified that appellant said Hope was "in the way." Veronica said appellant routinely blamed Hope for Veronica's change of heart about their relationship, but that she had repeatedly assured him it was her own decision to give their relationship "a breather." (5 RT 1362-1364.) Moreover, on its face, "no matter what happens, I'll always love you" does not "prophes[ise] something terrible happening" (RB at p. 41) but merely expresses appellant's unconditional commitment to Veronica.

In sum, absent appellant's statements, the evidence would not have been sufficient for the state to prove appellant guilty of one count of first degree murder and a second count of first or second degree murder. No forensic evidence clearly tied appellant to the crime. The record shows that appellant went to the Ragland residence May 1, 2003, in the evening (4 RT 1270-1271, 1280-1283; 5 RT 1321-1322); that Hope and appellant had not been getting along as well as they had at first and had skirmished once in a church parking lot, and another time when Hope had bent down as though to pick up a brick (5 RT 1343-1348); that appellant thought Hope was to blame for the alienation of Veronica's affection (5 RT 1354, 1362, 1363-1365); and that a knit ski mask and partially used box of latex gloves were found in appellant's car (6 RT 1489-1490; People's Exs. 98, 34). This does not amount to evidence of deliberation and premeditation.

Moreover, it was also established that appellant had agreed to make monthly car payments to Hope and went to the Ragland on the first of the month to make those payments (4 RT 1270-1271, 1280-1283; 5 RT 1321-1322, 1359; 10 RT 1858); that Hope carried a small knife in her purse (5 RT 1348-1350); that appellant worked the night shift at a dairy, when it sometimes got cold (such that he might wear a knit ski mask) (4 RT 1309); that they sometimes wore latex gloves when they worked with the cows (4

RT 1309); and that while appellant's key ring tested "presumptively" positive for blood (6 RT 1489), the test was not definitive and no evidence was presented as to whether the blood was human or animal (see 6 RT 1455, 1496 [a presumptive test shows blood "might be present" but is "not specific;" if present the blood "could be either human or animal blood."]).

Thus, given the paucity of other evidence that appellant was guilty of even one count of deliberate and premeditated murder, and a second count of first or second degree murder, respondent cannot show that the erroneous admission of appellant's statements to the police was harmless beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. at p. 24), and so the entire judgment must be reversed.

II.

THE TRIAL COURT ERRED PREJUDICIALLY BY INSTRUCTING THE JURY THAT EVIDENCE HAD BEEN PRESENTED THAT APPELLANT HAD MADE A PRE-OFFENSE STATEMENT OF INTENT, PLAN, MOTIVE OR DESIGN

A. Introduction

Veronica Haft's affection for appellant had cooled by the time she left for England, and Hope and appellant were not getting on as well. (5 RT 1354, 1360-1362, 1398.) But Veronica and appellant stayed in touch (5 RT 1360-1361; 8 RT 1614-1622), and Hope still cooked meals for him, even as their friendship waned (5 RT 4019). Veronica was "out there" on her own in England, but appellant still loved her, and called her often (5 RT 1361-1362.) When he reached her Thursday evening, May 1st, she was out with friends and brushed him off (5 RT 1366-1367). He told her that no matter what happened, he would always love her. (5 RT 1367.)

Over defense counsel's objection, the court instructed the jury in the language of CALJIC No. 2.71.7, effectively telling the jurors that the statement Veronica attributed to appellant evidenced his "intent, plan, motive or design" to kill. The court erred prejudicially by giving this instruction. "No matter what happens, I'll always love you" on its face is not a statement of "intent, plan, motive or design," and even in context is benign. The instruction impermissibly usurped the jury's role as fact finder and lightened the prosecutor's burden of proof on the element of malice.

B. The Trial Court Had No Sua Sponte Duty, Over Defense Counsel's Objection, To Give CALJIC No. 2.71.7

Respondent argues at length that a trial court has a sua sponte duty to give CALJIC No. 2.71.7 when supported by the evidence or reasonable inferences that may be drawn from it, and that it is a standard cautionary instruction intended for a defendant's benefit. (RB at pp. 43-44.) But here the instruction was not supported by the evidence, and instead transformed an innocuous expression of appellant's love for Veronica into a statement of criminal intent. The instruction was given at the prosecutor's request, over defense counsel's objection. (8 RT 1603-1604.)[7]

The record makes clear that the statement prompting the instruction was, "No matter what happens, I'll always love you." That was the focus of the instruction colloquy (8 RT 1603), and that is the statement the prosecutor urged the jury to consider as "most ominous," during closing argument (8 RT 1666-1667).[8] Respondent argues the statement "might reasonably have been interpreted" as a statement of his intent to kill (RB at p. 42) or, "in context with other evidence," could have allowed the jury to infer the statement evidenced such intent (RB at p. 45). Respondent thus

---

[7] A trial court is not *required* to give CALJIC No. 2.71.7 over defense counsel's objection. (See *People v. Echevarria* (1992) 11 Cal.App.4th 444, 453 ["There is no error in the trial court's acquiescence to the defense strategy of not instructing the jury pursuant to CALJIC No. 2.71.7."].)

[8] Although respondent asserts the prosecutor also relied on appellant complaining to Veronica about Hope "being in the way," Veronica never attributed that statement to appellant; there was no such testimony. (RB at p. 43, citing 8 RT 1603 [prosecutor makes reference at instruction conference to "the other one about his (*sic*) mom being in the way," without citing the record].)

implicitly concedes the statement itself – "No matter what happens, I'll always love you" – is on its face not one of intent, plan, motive or design.

The only other evidence respondent cites for "context" is Veronica's testimony that in an earlier phone call appellant had said, "I know it's [Hope] that's making you think like this," and that *Veronica* had interpreted this to mean that appellant thought Hope was responsible for the break-up of their relationship. (RB at p. 45, quoting 5 RT 1364:11.) Veronica's testimony in fact confirms appellant had said nothing to warrant giving CALJIC No. 2.71.7:

> Q. Did he mention your mom at that point during the conversation [of April 29th]?
>
> A. He did that, you know – in the beginning, he was like, I know it's your mom that's making you think like this and what not. And I kept saying no, no. *I mean it was like a normal conversation with us.* Toward the end he just didn't understand. And he would blame my mom. *And I would always tell him, no, it's not my mom. This is my decision.*

(5 RT 1364, italics added.) Thus, as respondent elsewhere acknowledges (RB at p. 42), this was a "normal conversation:" appellant routinely blamed Hope for Veronica's change of heart – his comment was nothing new or troubling – while Veronica repeatedly told him it was she who had decided to break off their relationship – all the while agreeing to see him again when she returned from England (5 RT 1363-1364). Veronica's testimony thus did not convey a pre-offense statement by appellant of "intent, plan, motive or design" to commit murder.

Moreover, that appellant had no intention of killing Hope is evidenced by Veronica's testimony that he suggested they move in together

when she returned, without telling her "parents:"[9]

> Q. So now back to the conversation. What happened on April 29th, 2003?
>
> A. It started out like any other conversation with him. He wanted to work things out. . . . Come back. He goes, You can come back. *We don't have to tell your parents.* You can stay here with me. Just little things like that.
>
> Q. "You can stay with me?"
>
> A. Yeah. You can stay here with me. Come back. You don't have to let them know. . . .

(5 RT 1363, italics added.) While appellant may have been deluding himself to think Veronica would move in with him, much less do so without telling Hope and Marion, he was obviously not contemplating their demise. Rather, given Veronica was "out there" in England, ready to end their relationship, "*No matter what happens*, I'll always love you" referred to something appellant feared Veronica might do – decline his offer to move in with him and instead break up with him for good – rather than to something appellant might have been contemplating.

Respondent counters that "while this is one possible inference, it is not the only reasonable one and so it necessitated a cautionary instruction by the court." (RB at p. 45.) Yet, respondent fails to suggest what appellant's statement could have anticipated *other* than that Veronica might finally end their relationship for good; much less how such other eventuality would support the inference that appellant had the "intent, plan, or design to commit the murders." (RB at p. 45.) Respondent simply begs the question:

---

[9] Veronica regarded her grandparents, Hope and Marion, as her parents. (5 RT 1326-1327.)

"The fact Leon called [Veronica] the morning of the murders and made this statement that [Veronica] perceived as 'odd' *that foreshadowed some further event*, supported the inference this was a statement of intent, plan, or design to commit the murders." (RB at p. 45, italics added.) The question is whether appellant's statement in fact *did* "foreshadow" something that supported giving CALJIC No. 2.71.7. The record shows it did not.

Moreover, respondent takes Veronica's statement out of context. Asked by the prosecutor whether she found appellant's statement "odd," Veronica replied, "I did, but at the same time I was just, like – I was irritated that he still called me. So . . . ." (5 RT 1367, ellipses in original.) Asked next whether appellant had said anything else, Veronica responded, "No because I cut him off. I was like, 'Okay. Whatever.'" (5 RT 1367.) Thus, as appellant has explained (AOB at p. 64), Veronica herself did not find appellant's statement remarkable, much less threatening, or think to mention it to Hope, with whom she was close, when she spoke to her later the same evening. Respondent fails to address the fact that Veronica – the only person to have heard appellant's words – was neither concerned nor, in the prosecutor's words, "alarmed" by anything appellant said. (4 RT 1252.)

Respondent cites several cases for the proposition that "CALJIC No. 2.71.7 must be given when supported by the evidence." (RB at p. 43.) As explained, the point is that here the instruction was not supported by the evidence, but prejudicially characterized appellant's innocent statement to Veronica as incriminating. In any event, the cases respondent cites are inapposite. In *People v. Lang* (1989) 49 Cal.3d 991, 1021, and *People v. Clark* (2011) 52 Cal.4th 856, 957, the defendants challenged the trial court's *failure* to give CALJIC No. 2.71.7, not, as here, the giving of the instruction. In *Lang* and *Clark* this Court found the erroneous omission

harmless, as CALJIC No. 2.71 was given, "which advised the jury to view with caution *any* out-of-court statement by defendant offered to establish his guilt of the charged offenses." (*People v. Lang*, *supra*, 49 Cal.3d at p.1021, italics in original; see also *People v. Clark*, *supra*, 52 Cal.4th at p. 957 [same].)

Respondent's reliance on *People v. Williams* (1988) 45 Cal.3d 1268, 1315, another case in which the defendant challenged the court's *failure* to give a cautionary instruction, is entirely misplaced. (RB at p. 44.) In *Williams* the prosecutor's motive theory – that the defendant and his codefendants robbed and killed the victim in order to get his car, so they could go on to another location to burglarize someone else – was supported by the codefendant's testimony about planning the burglary, including admissions by the defendant. (*Ibid.*) This Court held the failure to instruct the jury, per *People v. Beagle* (1972) 6 Cal.3d 441, 455, to view evidence of an oral admission with caution was harmless error, in light of the instructions properly given regarding accomplice testimony. (*Ibid.*)

In *People v. Zambrano* (2007) 41 Cal.4th 1082, which respondent also cites (RB at p. 43), the defendant objected that giving CALJIC No. 2.71.7 "pinpointed" certain evidence of motive and was cumulative of the general instructions given on motive and admissions. (*Id.* at p. 1157.) This Court observed that CALJIC Nos. 2.71.7 and 2.71 are "standard cautionary instructions, intended for the defendant's benefit, which must be given *where applicable*." (*Ibid.*, italics added.) Unlike here, however, the defendant in *Zambrano* "d[id] not argue that CALJIC No. 2.71.7, as given in [his] case, was unsupported by the evidence" (*ibid.*); i.e., the defendant acknowledged that the statements attributed to him – that he had said he suspected the assault victims were behind the anonymous phone calls

exposing his extra-marital affair, and had said more than once that he would "handle it his way" rather than go to the police – *were* statements of intent, plan, motive or design. Moreover, this Court found any error harmless, because CALJIC No. 2.71, broadly encompassing all out-of-court statements by a defendant, was properly given, *and* because the evidence of motive was "overwhelming." (*Id.* at p. 1158.)

Respondent's reliance on *People v. Rodrigues* (1994) 8 Cal.4th 1060, in which this Court held CALJIC No. 2.71.7 was properly given over the defendant's objection, is also misplaced. (RB at p. 44.) As noted in appellant's opening brief (AOB at p. 65), in *Rodrigues* the instruction was given because an accomplice "recounted the conversations she had had with [a co-assailant] and defendant before the murder." (*Id.* at p. 1136.) This Court rejected the defendant's argument that the witness had not attributed any particular statement to him, noting that the witness "repeatedly affirmed that her conversation was with both [the co-assailant] *and defendant*, and that all three of them discussed the plan to get drugs from the [murder victim and his brother]." (*Id.* at p. 1136, italics added.) From this, the jury could infer that the defendant "[had] made a pre-offense oral statement by actively participating in planning the robbery, or at least by assenting to the plan." (*Id.* at p. 1137.) The issue, in other words, was whether the defendant himself could be said to have made pre-offense statements of the sort contemplated by CALJIC No. 2.71.1; not, as here, whether the statement directly attributed to appellant – "No matter what happens, I'll always love you" – warranted giving the instruction.

People v. Farmer (1989) 47 Cal.3d 888, finally, is also distinguishable. As noted in appellant's opening brief (AOB at p. 64), in *Farmer* this Court held that the fact that the defendant had said he was

going to the apartment of someone who owed him money, coupled with his request that the witness get him bullets for the revolver he had stolen from the murder victim's apartment, warranted given CALJIC No. 2.71.7. (*Id.* at p. 900.) Nothing appellant purportedly said to Veronica is comparable.

C. By Erroneously Giving CALJIC No. 2.71.7 the Trial Court Usurped the Jury's Role As Fact Finder and Lightened the Prosecutor's Burden to Prove the Element Of Malice

Under CALJIC No. 2.71.7, the jurors are told it is their role to determine whether the defendant *made* a statement of "intent, plan, motive or design" attributed to him; not whether that statement in fact *was* one of intent, plan, motive or design. The language of the instruction, as given in this case, makes this clear:

> Evidence has been received from which you may find *that an oral statement of intent, plan, motive or design was made* by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide *whether the statement was made* by the defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

(CALJIC No. 2.71.7; 10 CT 2761; Fourth Supp. CT 27; 8 RT 1645; italics added; see *People v. Beagle, supra*, 6 Cal.3d at p. 456 ["The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made."]; cf. *People v. Ervine* (2009) 47 Cal.4th 745, 781 ["The purpose of CALJIC No. 2.71 is to help the jury determine whether the admissions . . . were ever made."].)[10] Thus, by giving CALJIC No. 2.71.7

---

[10] As noted in appellant's opening brief (AOB at p. 64, fn. 15), under CALCRIM No. 358 juries are now given a single, cautionary instruction covering all statements made by a defendant, leaving it to the jurors to "consider the statement[s], along with all the other evidence, in

(continued...)

the trial court effectively instructed the jurors in this case that the statement Veronica had attributed to appellant – "No matter what happens, I'll always love you" – was, as the prosecutor had urged, an "ominous" declaration of "intent, plan, motive or design" (8 RT 1666-1667), and left it to the jurors to determine whether appellant had made the statement – i.e., whether Veronica had testified accurately and truthfully.[11]

Notwithstanding the plain language of the instruction, as construed in *Beagle*, respondent says this is "not so." (RB at p. 46.) Respondent's position is confusing at best. First, respondent asserts that CALJIC No. 2.71.7 "merely instructed the jury that it may *draw a particular inference* if it found the proffered statements were made, but *due to the incriminating nature of the statements* they should be viewed with caution." (RB at p. 46, italics added.) Respondent then quotes this Court's observation in *Beagle* that "[t]he purpose of the cautionary instruction is to help the jury determine *whether the statement was in fact made*." (RB at p. 46, italics added.)

---

[10] (...continued)
reaching your verdict." The bench notes provide that the following additional admonition should be given "where there is evidence of an incriminating out-of-court statement by the defendant: "Consider with caution any statement made by (the/a) defendant *tending to show (his/her) guilt* unless the statement was written or otherwise recorded." (Italics added.) (At the penalty phase of a capital trial this admonitions is to be given only at the defendant's request.) Thus while the court makes the threshold determination whether the cautionary instruction is warranted, the jury ultimately decides whether any statement in fact does "tend" to show guilt. The phrase "an oral statement of intent, plan, motive or design" has been eliminated altogether.

[11] In the same way, CALJIC No. 2.71.7 bolstered the prosecutor's argument that Veronica's testimony that appellant "blamed Hope" for alienating Veronica's affections (5 RT 1364) further evidenced appellant's guilt (8 RT 1666).

Respondent then shifts gears yet again, contending, contrary to the language of CALJIC No. 2.71.7, that "the instruction informed the jury that it 'may' find [appellant's] statements evidenced intent, plan, motive or design. But did not direct or mandate the jury come to this conclusion." (*Sic.*) (RB at p. 47.) Respondent's position is unclear at best.

In fact, what CALJIC No. 2.71.7 tells the jury it "may" find, is that the defendant made a pre-offense statement of intent, plan, motive or design (or not). (CALJIC No. 2.71.7.) The plain language of the instruction makes clear the jury is *not* free, as respondent maintains, to "determine if" the statement the defendant made "evidenced intent, plan, motive or design." (RB at p. 46.) Nor does anything in CALJIC No. 2.71.7 inform the jury that it may draw any "particular inference" from the statement. (RB at p. 46.) Precisely because CALJIC No. 2.71.7 does not give the jury this discretion, it should only be given when the pre-offense statement is on its face a statement of intent, plan, motive or design, which was not the case here, for any statement attributed to appellant.

Respondent next asserts, without citation to appellant's opening brief, that appellant claims CALJIC No. 2.71.7 "direct[ed] the jury that his pre-offense statements were *proof of his guilt.*" (RB at p. 46, italics added.) This overstates appellant's argument. Appellant has argued that the error in giving CALJIC No. 2.71.7 lies in the erroneous characterization of appellant's statement to Veronica as one evidencing intent, plan, motive or design. (AOB at p. 64.) Respondent's very next statement, that "the jury was instructed it must determine whether Leon made statements *evidencing his guilt*" (RB at p. 46, italics added), begs the question at hand – whether "No matter what happens, I'll always love you" *is* a statement evidencing appellant's guilt. Because it is not, the instruction was not supported by the

evidence and should not have been given.

D. Giving CALJIC No. 2.71.7 Was Not Harmless Error

As appellant has argued (AOB at pp. 63-65), giving CALJIC No. 2.71.7 was not harmless error under either the state or federal standard because the instruction effectively told the jurors that, assuming they found Veronica credible, appellant had made a pre-offense statement evidencing his intent, plan, motive or design to kill, and because it is possible that message contributed to at least one count of first degree murder, given the admissible evidence of appellant's guilt was weak. Respondent argues that any error is harmless under state law, but fails even to acknowledge, much less address, appellant's claim that he was denied his federal constitutional right to due process, under the Fifth and Fourteenth Amendment, and his Sixth Amendment right to a jury determination of every element of each offense charged. (RB at pp. 47-48.)

In arguing that any error is harmless under state law, respondent argues that CALJIC No. 2.71.7 was given "for appellant's benefit," because it told the jurors "how to consider his prior statements" to Veronica "and to view such evidence with caution." (RB at p. 47.) The problem, however, is that the instruction effectively told the jurors that appellant's statements to Veronica evidenced his intent, plan, motive or design to commit murder – and *as such* to view Veronica testimony with caution. This was not to appellant's benefit.

Respondent next argues that any error in giving CALJIC No. 2.71.7 was harmless because "Leon's pre-offense statements to Veronica were uncontradicted. Leon adduced no evidence that the statements were not made, fabricated, or inaccurately remembered or reported (*sic*). There was

no conflicting testimony concerning the precise words used, their context or their meaning." (RB at pp. 47-48, citations omitted.) Again, that is the problem – because the jurors had no reason to doubt Veronica's veracity as to what appellant had said, they were left with the characterization of those statements afforded by CALJIC No. 2.71.7. Put differently, at trial the defense never denied that appellant made the statements Veronica attributed to him; only that they evidenced criminal intent, plan, motive or design. (8 RT 1603.)

Next, having just stressed that Veronica's testimony was "uncontradicted" (RB at p. 47), respondent suggests that giving CALJIC No. 2.71.7 was harmless because the instruction "informed the jury to decide (*sic*) whether such inculpatory statements were made." (RB at p. 48.) As explained, the issue here is not whether the appellant made the statements Veronica attributed to him, but whether they warranted giving CALJIC No. 2.71.7.

Finally, respondent argues any error was harmless in light of the "overwhelming evidence" of appellant's guilt. (RB at p. 48.) Again, however, respondent's argument is confusing. On the one hand, respondent reprises the harmless error argument offered with respect to appellant's *Miranda* claim (Argument I): "As demonstrated in the Statement of Fact and previous argument, *with or without Leon's confessions*, the evidence undoubtedly showed Leon murdered Hope and Perez, and attempted to kill Marion." (RB at p. 48, italics added.) In the very next sentence, however, respondent *takes appellant's confession into account* in urging that giving CALJIC No. 2.71.7 was harmless error: "His conviction was based on *his statements to police*, witnesses placing near the scene, and the manner of the killings – not his statements to Haft over the phone." (RB at p. 48,

italics added.) As appellant explained in his opening brief (AOB at pp. 52-54) and in Argument I, above, *setting aside* appellant's statements to the police, which include his confession, the admissible evidence of appellant's guilt of at least one count of first degree murder and second count of first or second degree murder is far from overwhelming. Accordingly, the judgment of conviction must be reversed.

III.

THE TRIAL COURT ERRED PREJUDICIALLY AT THE PENALTY PHASE BY DECLINING TO GIVE EXCLUSIVELY CALCRIM INSTRUCTIONS ANY BY REFUSING TO GIVE ANY OF THREE SPECIALLY-DRAFTED INSTRUCTIONS THAT WERE LEGALLY MANDATED

A. The Trial Court Erred In Declining To Give Exclusively CALCRIM Instructions

Appellant maintains the court erred in denying his counsel's request at the penalty phase to give exclusively CALCRIM instructions, which would more clearly and accurately have explained the jury's sentencing task. While the legal issues are now essentially joined, appellant wishes to clarify and emphasize certain points.

First, the question is whether the court erred in refusing to give CALCRIM instructions *instead* of CALJIC instructions; not whether or how CALJIC Nos. 8.85 and 8.88 are deficient in themselves. (That issue is addressed in Argument IV, below.) As defense counsel explained at trial (10 RT 1762-1766), and as appellant has argued (AOB at pp. 69-72), the CALCRIM instructions were better worded and legally more accurate. CALCRIM No. 766 in particular is more clear than CALJIC Nos. 8.85 and 8.88 and would have explained to the jurors that their ultimate sentencing task was to weigh the aggravating and mitigating circumstances and determine which penalty was appropriate.

Respondent's reliance on *People v. McKinzie* (2012) 54 Cal.4th 1302, 1361 (RB at pp. 50-51) for the proposition that appellant's "criticism of CALJIC No. 8.88 has been repeatedly rejected" is therefore misplaced. The trial in *McKinzie* took place long before the CALCRIM instructions were adopted. (See *People v. McKinzie*, *supra*, 54 Cal.4th at pp. 1323-

1324, 1338 [trial underway in 1999].) The Court in *McKinzie* was thus not asked to compare CALCRIM and CALJIC instructions, much less CALCRIM No. 763 and CALJIC No 8.88 in particular; nor to decide whether a trial court could give CALCRIM instructions at the penalty phase if it had given CALJIC instructions at the guilt phase.

Second, the trial court in this case construed CALCRIM No. 763 as "basically contain[ing] everything that is contained in [CALJIC Nos.] 8.85 through 8.88," and "d[id]n't see any prejudice in using *either one of them*" (10 RT 1767, 1768, italics added). Thus, the court did not find any CALCRIM instructions legally wanting or inaccurate, but instead worried about "mixing and matching" CALJIC and CALCRIM instructions – even though, as defense counsel reiterated, the jury would be given *exclusively* CALCRIM instructions at the penalty phase and would be instructed to disregard the CALJIC instructions that were given at the guilt phase. (10 RT 1762, 1768; see 11 CT 2947; 4 Supp. CT 92 [CALJIC 8.84.1].) The court itself acknowledged it decided to "stick with CALJIC" instructions "for consistency's sake." (10 RT 1768.) To the extent the trial court was also motivated by the fact that counsel had been given the choice initially and had opted for CALJIC instructions, its decision is more arbitrary than reasoned. (10 RT 1760 ["I gave you gentlemen your choice at the beginning of the proceedings . . . ."].) Respondent simply accepts the court's rationale at face value. (RB at p. 49.)

Third, this was a close question. The prosecutor agreed with defense counsel that "[s]ome parts [of CALCRIM] are more accurately or better worded than the old CALJICS." (10 RT 1760.) He expressed "concern" about switching from CALJIC to CALCRIM at the penalty phase, but did not object to doing so. (10 RT 1765-1766.) He prophesied correctly that

"[e]ither way this is going to end up being litigated on appeal." (10 RT 1760, 1767.) The trial court agreed that its decision to opt for consistency "may well be issue number one" on appeal. (10 RT 1768.)

B. The Trial Court Erred Prejudicially In Refusing To Give Any Of the Three Specially-Drafted Instructions Requested By the Defense

As appellant has argued (AOB at pp. 72-74), the trial court erred in declining to give any of three specially-drafted instructions defense counsel requested, all of which are encompassed in CALCRIM No. 763. Respondent counters, as to two of these, that the CALJIC instructions given were adequate, and, as to the third, that any error was harmless. Although certain issues are joined, respondent's analysis is flawed in several respects.

1. Sympathy Or Compassion For the Defendant

Defense counsel requested the jury be instructed, "You may consider sympathy or compassion for the defendant[,]" consistent with CALCRIM No. 763, which expanded the language of sentencing factor (k) to explicitly include: "In reaching your decision, *you may consider sympathy or compassion for the defendant* . . . ." (11 CT 2963, italics added.) Citing *People v. Burney* (2009) 47 Cal.4th 203, 261, and *People v. Brassure* (2008) 42 Cal.4th 1037, 1070, respondent counters that CALJIC 8.85 adequately informed the jurors they could consider sympathy. (RB at pp. 52-53.) In fact, none of the CALJIC instructions, including CALJIC No. 8.85, explicitly informs the jury they can consider "sympathy for the defendant." CALJIC No. 8.85 states that, in addition to any circumstances that extenuate the gravity of the crime, the jury may consider any "sympathetic or other *aspect of the defendant's character or record* . . . " (CALJIC No. 8.85, italics added.) This is not the same as "sympathy *for the*

defendant" himself. Appellant acknowledges that in *People v. Burney*, *supra*, 47 Cal.4th at p. 261, fn. 16, this Court characterized the relevant language in CALJIC No. 8.85 and CALCRIM No. 763 as "similar," but urges that similarity is not sufficient, and that appellant was entitled to have his jurors instructed, in the language of CALCRIM No. 763, that the jurors could consider "sympathy for the defendant" – i.e., sympathy *for him*.

Respondent suggests the prosecutor "clarified" the issue in his closing argument by saying, "You can consider sympathy for the defendant, some sympathetic aspect of him but not sympathy for the family." (RB at p. 53, quoting 12 RT 2281.) This was no substitute for an unambiguous instruction from the court. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489.)

2. Non-statutory Aggravating Circumstances

The trial court also denied defense counsel's request that the jury be instructed that they could not consider non-statutory aggravating factors. (11 CT 2964; 11 RT 1993.) As noted in appellant's opening brief (AOB at pp. 74-75), none of the CALJIC instructions so informed the jury; yet appellant was entitled to this instruction, which is included in CALCRIM No. 763.

On this issue respondent conflates error with prejudice. First, respondent argues that "the trial court was not required to give the proposed instruction." (RB at p. 54.) Next, respondent acknowledges that in *People v. Hillhouse* (2002) 27 Cal.4th 469, 509, and *People v. Gordon* (1990) 50 Cal.3d 1223, this Court held that the jury may only consider statutory aggravating factors, but found the erroneous omission of an instruction to this effect was not prejudicial because the prosecutor had presented no non-

statutory aggravating evidence. (RB at p. 54.) Respondent asserts that in this case the prosecutor presented no non-statutory evidence, and did not argue that the fact appellant had acted "normally" and seemed "fine"after the homicides should be considered as a factor in aggravating (RB at pp. 54-55). This suggests respondent concedes the error but maintains it was harmless.

The prosecutor's argument – no substitute in any event for a correct instruction from the court – was in fact ambiguous at best. In the course of reviewing what he characterized as potential but inapplicable mitigating circumstances he acknowledged that an inapplicable mitigating factor cannot be counted as an aggravating factor, but also stated: "Remember how he spoke about the murders afterwards, how normal, how fine he was describing where and how he killed Austin. There's no evidence at all under factor (d)." (12 RT 2274.) The jury had also heard evidence that appellant went to work at the dairy as usual the night of the homicides and did not seem "agitated" or "different" in any way. (4 RT 1304-1305, 1308.) The bottom line is that the court erred in refusing to explicitly instruct the jury, as required by law, not to consider non-statutory aggravating circumstances. Such an instruction would have clarified that acting "normal" or seeming "fine" after the homicides could not be considered in aggravation.

3. Double Counting

Respondent acknowledges that appellant was entitled to have the jurors instructed not to "double count" the multiple murder special circumstance and the circumstances of the crime, but argues the error here was harmless. (RB at pp. 55-56.) Citing *People v. Ayala* (2000) 24 Cal.4th 243, 289 and *People v. Medina* (1995) 11 Cal.4th 694, 779, respondent

argues that because the prosecutor made no "misleading comments," the jury was unlikely to have "give[n] undue weight under factor (a) to evidence which proved the circumstances of the offense and also proved the special circumstance." (RB at p. 56.) *Ayala* and *Medina* are distinguishable, in that neither case presented the situation before the jury here, where the only special circumstance was multiple murder, and the only aggravating circumstance was the circumstances of the crime. Moreover, in *Ayala*, the prosecutor affirmatively cautioned the jury against double counting the defendant's robbery and burglary convictions. (*People v. Ayala*, *supra*, 24 Cal.4th at p. 289.) The prosecutor did not do that here.

The risk that the jury would double count a double homicide as both the special circumstance and the principal circumstance of the crime was inherently substantial. Moreover, while the prosecutor did not invite the jury to double count, in questioning witnesses he repeatedly reminded the jury that appellant had killed two people (12 RT 2243, 2245), and in his argument he urged that appellant had deliberately gone to the Ragland residence to kill "two precious people" and referred the "the two people he's just butchered" (12 RT 2270-2272).

In sum, all three of the specially-drafted instructions defense counsel requested were legally mandated, were part of CALCRIM No. 763 and were not covered by any of the CALJIC instructions given. They would have supported the defense goal of eliciting sympathy for appellant and would clearly and correctly have guided the jurors' consideration of aggravating circumstances. The trial court's refusal to give these instructions mandates reversal of appellant's death sentence.

IV.

RESPONDENT CONCEDES THE TRIAL COURT ERRED BY IMPOSING A $10,000 RESTITUTION FINE WITHOUT AFFORDING APPELLANT A HEARING AND THAT THE FINE SHOULD BE REDUCED TO THE APPLICABLE $200 STATUTORY MINIMUM

As explained in appellant's opening brief (AOB at pp. 100-104), the judgment, as set forth in the March 12, 2006, Minute Order, includes a $10,000 restitution fine (3 Supp. CT 4); yet at the time of sentencing in open court the court said nothing about restitution and thus failed to afford appellant the opportunity to explain why he would be unable to pay a fine greater than the $200 statutory minimum. Respondent concedes the court erred in this regard. (RB at 72-73.)

Appellant has urged the Court to either modify the restitution fine to $200, on the basis of appellant's inability to pay, or to remand the matter, in the event appellant's conviction and death sentence are affirmed. (AOB at p. 104.) Respondent cites judicial economy and public safety in support of its alternative proposal that, in lieu of remand, the abstract of judgment be amended to reflect the imposition of a $200 restitution fine if the conviction and death sentence are affirmed. (RB at p. 74.)

The parties are thus in agreement that, if appellant's conviction and sentence are affirmed, he should be ordered to pay a restitution fine of only $200.

CONCLUSION

For all of the reasons stated above, and for the reasons set forth in appellant's opening brief, appellant's the conviction, the special circumstance findings and the sentence of death must be reversed.

DATED: May 21, 2015

Respectfully Submitted,

MICHAEL J. HERSEK
State Public Defender

ANDREA G. ASARO
Senior Deputy State Public Defender

Attorneys for Appellant

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

I, ANDREA G. ASARO, am the Senior Deputy State Public Defender assigned to represent appellant JOSE LUIS LEON 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 11,296 words in length.

DATED: May 21, 2015

ANDREA G. ASARO

DECLARATION OF SERVICE

Re: *People v. Jose Luis Leon*

Supreme Court No. S143531
Superior Court No. RIF109916

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, California 94607. On this day, I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing it in envelopes and

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;

/X/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **May 22, 2015**, as follows:

Clerk of the Court for Honorable
Christian F. Thierbach
Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

Kristen K. Chenelia,
Deputy Attorney General
Attorney General's Office
P.O. Box 85266
San Diego, CA 92186

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, the above-described document will be hand delivered to appellant, Jose Luis Leon, at San Quentin State Prison, within 30 days.

I declare under penalty of perjury that the foregoing is true and correct. Signed on **March 22, 2015**, at Oakland, California.

DECLARANT