No. S045423

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. EDGARDO SANCHEZ-FUENTES Defendant and Appellant.	(Los Angeles County Sup. Ct. No. LA011426)

APPELLANT'S OPENING BRIEF

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

HONORABLE JACQUELINE A. CONNOR, JUDGE

MICHAEL J. HERSEK
State Public Defender

SARA THEISS
State Bar No. 159587
Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600

Attorneys for Appellant

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PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	No. S045423
Respondent,	)	
	)	(Los Angeles County
v.	)	Sup. Ct. No.
	)	LA011426)
	)	
EDGARDO SANCHEZ-FUENTES,	)	
	)	
Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

A felony complaint in Los Angeles Municipal Court Case No. VA023036 filed on June 2, 1992, charged appellant (as Carlos Antonio Juarez), Jose Contreras and Benjamin Alberto Navarro with four counts and three special circumstances, including the murder of John A. Hoglund. (3SCT: 109-117.[1]) Another felony complaint in Case No. LA011426 filed on July 22, 1992, charged appellant, Contreras, Navarro and three others

[1] "SCT" refers to the Supplemental Clerk's Transcript, "CT" to the Clerk's Transcript, "RT" to the Reporter's Transcript and "Misc.Muni. RT" to one volume containing Reporter's Transcripts for various dates from July 22, 1992 through March 26, 1993.

with 54 counts, arising from various robberies, including the murder of Lee Chul Kim and one special circumstance. (7CT: 2054-2105.) On September 3, 1992, the court granted the prosecution's motion to consolidate these two cases. (8CT: 2262.) An amended felony complaint consolidating the two cases into Case No. LA011426 and charging 59 counts and five special circumstances was filed on October 13, 1992. (7CT: 1950-2004.)

Following the preliminary hearing, the court held appellant and his two co-defendants to answer on April 19, 1993. (8CT: 2382; 7CT: 1933-1945.) Based upon an information filed on May 3, 1993, the three were arraigned, entered pleas of not guilty and denied the special allegations on July 14, 1993. (8CT: 2144-2184; 9CT: 2409-2411; 1RT: 16-17.) On October 25, 1993, appellant orally joined Navarro's motion to set aside the information pursuant to Penal Code section 995.[2] (9CT: 2484, 2RT: 216.) The prosecution conceded that the magistrate had found that Magdalena Urrieta was not assaulted (9CT: 2526), and the court dismissed that count (9CT: 2534), and a count stemming from a robbery at the Chambers Market, where no one identified appellant. (5CT: 1301-1302; 8CT: 2158; 9CT: 2534; 2RT: 236-238, 242.)

On October 28, 1993, the case was assigned to Judge Jacqueline A. O'Connor for further proceedings. (9CT: 2471-2474.) Another information was filed on March 4, 1994. (8CT: 2106.) Appellant's motion for a trial or jury separate from his codefendants was denied on September 9, 1994. (10CT: 2975; 3RT: 425-428.)

The final amended information was filed on September 14, 1994,

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

against appellant, Contreras and Navarro. (7CT: 2005.) Appellant was charged with a total of 40 counts: two counts of murder under section 187, subdivision (a) (counts 1 and 6); one count of attempted willful, deliberate and premeditated murder under sections 664 and 187, subdivision (a) (count 5); four counts of attempted robbery under sections 664 and 211 (counts 7, 8, 9 and 38); 26 counts of robbery in the second degree under section 211 (counts 2-4, 10-17, 19-27, 29, 32, 34-36 and 39); five counts of assault with a deadly weapon under section 245, subdivision (a)(1) (counts 18, 28, 31, 37 and 40); and two counts of assault with a stun gun under section 244.5, subdivision (b) (counts 30 and 33). (7CT: 2005-2042.)

As to both murder counts, special circumstances were alleged of murder in the course of robbery within the meaning of section 190.2, subdivision (a)(17). (7CT: 2012, 2016.) As to count 1, three additional special circumstances were alleged: murder of a peace officer within the meaning of section 190.2, subdivision (a)(7); murder for the purpose of avoiding arrest within the meaning of section 190.2, subdivision (a)(5); and multiple murder, within the meaning of section 190.2, subdivision (a)(3). (7CT: 2011-2012; 4RT: 451-452.)

All counts were alleged to be serious felonies under section 1192.7, with appellant having personally used a firearm, i.e., a handgun, under sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a), and with a principal being armed under section 12022, subdivision (a)(1), except for count 7, which had no armed principal allegation under section 12022, subdivision (a)(1). (7CT: 2005-2042.)

Co-defendants Contreras and Navarro were charged with the same counts, special circumstances and allegations, except that Navarro was not charged with counts 6 through 9 and 37 through 40. (7CT: 2005-2009.)

On August 24, 1994, the court denied appellant's motion to continue the trial so that it could take place either with or following the trial of Oscar Paredes, a fourth defendant who was tried separately. (10CT: 2745-2747, 2753; 2RT: 306-308.)

Jury selection began on September 14, 1994. (10CT: 2986-2987; 4RT: 446, 468.) The court denied appellant's motion for sequestered voir dire and two motions made pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258. (10CT: 2986, 2996, 2997; 4RT: 447-449; 7RT: 944; 8RT: 1135-1136.) The jury and six alternates were sworn on September 21, 1994. (10CT: 2997; 8RT: 1140, 1217.) The following day all counsel stipulated to replacing Juror 12 with an alternate juror chosen by lot and witness testimony began. (11CT: 3008; 9RT: 1249-1250.)

All parties rested on October 17, 1994. (11CT: 3056; 20RT: 3593.) On the prosecution's motion, the court struck the allegation that the attempted murder in count 5 was premeditated. (11CT: 3057; 21RT: 3708.) Closing arguments took place on October 18 and 19, 1994. (11CT: 3057-3059.) The jury was instructed and started deliberating the next day, October 20, 1994, at 9:02 a.m. (11CT: 3059, 3067.) The jury reached its verdicts on October 25, 1994, at 3:35 p.m. (11CT: 3086.) Appellant and both co-defendants were found guilty as charged on all counts except counts 8 and 9, attempted robberies. (11CT: 3159-3298; 12CT: 3300-3406, 3408-3457.) Personal use allegations against appellant were found true except as to counts 18, 19, 35, 36, 39 and 40. (11CT: 3278, 3284; 12CT: 3380, 3386, 3400, 3404.)

The court denied appellant's renewed motion for separate penalty phase trials on October 20, 1994. (11CT: 3067; 23RT: 4004.) The penalty phase began on October 31, 1994, and the prosecution and co-defendant

Contreras presented evidence. (12CT: 3469.) Appellant presented his case on the following three court days and rested on November 9, 1994. (12CT: 3472-3474.) Navarro's mitigation witnesses testified on November 9, 10 and 15 and all parties then rested. (12CT: 3474, 3476-3478.) Over defense objection, the prosecution presented rebuttal evidence. (12CT: 3477, 29RT: 5226-5228.)

The jury started deliberations on November 17, 1994. (12CT: 3492.) After deliberating about a day and a half, the jury reached death verdicts for appellant on counts 1 and 6 but announced it could not reach verdicts as to Contreras and Navarro. (12CT: 3492-3494, 3508-3509.) After polling the jury, the court declared a mistrial as to both co-defendants. (12CT: 3518; 30RT: 5519.)

On March 3, 1995, the trial court denied appellant's motions for a new trial and for modification of the verdict pursuant to section 190.4, subdivision (e) and sentenced appellant to death plus a total determinate term of 54 years and six months. (12CT: 3594-3597; 31RT: 5590, 5600-5612, 5638-5642.) Contreras and Navarro were sentenced to Life Without the Possibility of Parole and determinate sentences of 50 years, 10 months, and 44 years, eight months, respectively. (12CT: 3600-3603.)

STATEMENT OF APPEALABILITY

Appellant's appeal is automatic. (Cal.Const., art. VI, § 11, Pen. Code § 1239, subd.(b).)

STATEMENT OF FACTS

GUILT PHASE

The Prosecution's Case

Outrigger Lounge, Counts 10 through 18

Appellant and both co-defendants were charged with eight counts of

robbery (counts 10 through 17) and one count of assault with a deadly weapon (count 18) arising out of this incident. Appellant disputed his guilt as to these counts at both phases of trial. (9RT: 1292 [guilt phase opening statement]; 22RT: 3827, 3857 [guilt phase closing argument]; 26RT: 4574 [penalty phase testimony].)

On December 31, 1991, at about 8:00 p.m., three to five men robbed the Outrigger Lounge in Sun Valley, Los Angeles. (12RT: 1902, 1936; 13RT: 2061, 2126.) With 25 to 35 people there, the bar was full. (13RT: 1984, 2103-2104.) At least two robbers came through the front door, armed, respectively, with a rifle (or shotgun) and a handgun, saying "this is a holdup," and one yelled at everyone to get on the floor. (13RT: 1991-1992, 2057, 2075-2078.)

A man with either a shotgun or a handgun jumped over the bar. (13RT: 1969, 1992, 2012, 2104, 2135.) He jumped on the bartender, taking his property and money from the cash register. (13RT: 2013, 2017.) The same suspect took cash from the unlocked floor safe in the storeroom. (13RT: 2017-2019.) The business lost $1,600 that night. (13RT: 2109.)

At about the same time that the man jumped over the bar, another man with either a handgun or rifle swept it across the bar, knocking down drinks. (See, e.g., 13RT: 1971, 1997, 2062.) Some robbers worked the front of the bar and some the back, telling the customers to take off their jewelry and turn over their property. (12RT: 1935; 13RT: 1981, 2036.) The robbery ended after eight to twenty minutes (13RT: 1984, 2108), when the men ran out the front door, taking food platters with them. (13RT: 1977.)

Evidence was presented regarding the taking of property at gunpoint for each of the relevant charged counts. (12RT: 1933-1939; 13RT: 2013,

2058-2060, 2076-2079, 2088-2089, 2109, 2102-2105, 2124, 2577; 16RT: 2607, 3028.)

Exhibit 189 was a color copy of a 16-pack of photos shown to Outrigger Lounge witnesses. (The 16-pack.) (13RT: 2146, 2150-2153.) The four photos in the top row consisted of appellant, his two co-defendants and one other person. Appellant was the last person on the right. (13RT: 2208-2210; Ex. 189.)

Praneet Gallegos identified appellant in the 16-pack six or seven months after the robbery as the person with a shotgun who robbed her and her boyfriend Eugen Englesberger. (16RT: 2607-2612.) However, she was not sure of her identification when she later viewed photos of the live lineups or in court at trial. (16RT: 2609, 2612-2613, 2617.) Engelsberger, who testified that the suspect had an automatic handgun (13RT: 2058-2059), picked appellant's photo out of the 16-pack as looking the closest to the person who robbed him, but was unable to identify appellant at the live lineup or trial. (13RT: 2064, 2069-2073.).

After one or two drinks, Anne Pickard came out of the rest room to find the robbery in progress. (12RT: 1904-1907.) She froze for a few seconds, saw one robber, then returned to the restroom until the robbery was over. (12RT: 1907-1910, 1916.) Pickard picked out appellant from the 16-pack because his "face looks familiar." (12RT: 1912-1913.) At the live lineup she picked appellant, stating "possibly I can't swear to it." (12RT: 1913-1914, 1923-1924.) By the preliminary hearing, she was 90 to 95 percent certain and had no doubt at all at trial. (12RT: 1915, 1927.)

Six months after the robbery, the waitress, Barbara Salazar, identified appellant in the 16-pack as looking familiar because of his haircut but did not identify him again. (13RT: 1978-1980, 1987.)

Salazar identified Navarro in court as the man who knocked over drinks on the bar with a rifle. (13RT: 1971.) He worked the front, yanking jewelry from women's necks and taking their purses and then stood by the front door dangling the purses from his rifle. (13RT: 1972, 1975, 1981.) Navarro dragged Salazar's boyfriend down to the floor and threw another much taller patron on top of him. (13RT: 1973-1974.) Navarro threatened some elderly people who were crying (13RT: 1974), and pointed a gun at Margaret Tucker's head. (13RT: 2035, 2040-2041.)

Patron Marjorie Livesley thought Contreras looked like the leader of the robbery who had jumped over the bar. (13RT: 2085; see also 2137-2138 [customer Sorenson similarly identified Contreras as jumping over bar].) This was consistent with Salazar's testimony that the man who jumped over the bar was taller than the person who swept the bar with a rifle.[3] (13RT: 1992-1995.) Walter DeWitt identified Contreras as the person in the back by the pool table who robbed him. (12RT: 1935, 1937, 1942.)

El Siete Mares Restaurant, Counts 24 through 27

Appellant and his two co-defendants were charged with four counts of robbery arising out of this incident. Appellant argued the evidence did not prove these counts. (22RT: 3881-3883 [guilt phase closing argument].)

There were about ten patrons and six or seven employees at the El Siete Mares restaurant on Whittier Boulevard in Los Angeles on April 18, 1992, at about 8:15 p.m. (15RT: 2496, 2517; 16RT: 2573, 2629.) After

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[3] Contreras was identified consistently as the tallest of the robbers. (See, e.g., 12RT: 1804, 1873 [Mercado Buenos Aires]; 15RT: 2373, 2395-2396, 2398-2399 [Ofelia's]; 9RT: 1405, 1408 [George's Market]; 16RT: 2598, 2601 [El Siete Mares].)

two men came in and sat down, two more came in. (16RT: 2574.) A third pair entered and Contreras was identified as one of them. He had a shot gun and said "take care of the guard." (16RT: 2574-2576, 2581-2583; Exs. 17, 18 and 208.) The first pair moved over to Rene Aguilar, the uniformed security guard, pulled guns on him and took his gun, handcuffs and baton. (15RT: 2498; 16RT: 2573-2576, 2578.) Aguilar identified Exhibit 157, handcuffs marked with his initials found in a search of Navarro's residence, as his. (11RT: 1717, 13RT: 2183, 16RT: 2582; Ex. 302.)

Aguilar failed to identify appellant in photos and first identified him in court at the preliminary hearing with about 75% certainty and then at trial, becoming more certain each time. (16RT: 2581-2586, 2589-2591.) Waitress Lupe Guizar also did not identify appellant until she saw him in court at trial, despite prior opportunities to identify him via photos a month after the robbery, at the live lineup and again when she viewed photos in April 1993. (16RT: 2619, 2630-2633, 2638-2642.) Despite multiple opportunities to identify appellant and his repeated, certain identifications of Navarro, patron Nelson Hernandez never identified appellant. (15RT: 2499, 2508-2515.)

Waitress Guizar saw a man with an automatic handgun wearing a long coat go into manager Magdaleno Urrieta's office. (16RT: 2623.) This was not one of the men with guns who approached the security guard. (*Ibid.*) Urrieta could not identify the man who grabbed him in the office and asked for all the money. (16RT: 2667-2668, 2673.) Urrieta gave him $5,000 to $5,500 in checks and cash. (16RT: 2668.) Urrieta was hit twice:

once by the man in the office and again by a suspect in the kitchen.[4] (16RT: 2669, 2671.)

Unidentified suspects threatened the customers and had them go to the kitchen, where other suspects took money and jewelry from them. (15RT: 2500-2504.) The robbery took about 15 minutes. (15RT: 2518; 16RT: 2629.) Evidence was presented regarding the taking of property at gunpoint for each of the relevant charged counts. (See 16RT: 2628, 2668, 2770, 2595; 15RT: 2503, 2513.)

Mercado Buenos Aires, Counts 19 through 23

Appellant and his two co-defendants were charged with five counts of robbery arising out of this incident. (12RT: 1792.) During his guilt phase closing argument, appellant conceded that the evidence showing his guilt of these robberies was solid. (22RT: 3856.)

At about 5:25 p.m. on April 28, 1992, three or four men with guns robbed Mercado Buenos Aires, a supermarket on Sepulveda Boulevard in Van Nuys. (12RT: 1796-1797, 1800, 1836, 1866.) The market owner, Manual Rodriguez, first saw two men with automatic weapons pointed at him and two employees. (12RT: 1797, 1799.) After pulling the slide back on their guns and announcing the robbery, the men told Manuel to go to the kitchen. (12RT: 1798, 1802.)

Paul Rodriguez, Manuel's son, identified appellant and Contreras as the two men who initiated the robbery. (12RT: 1866, 1871-1873.) Appellant pulled out a chrome .45-caliber automatic weapon and told Paul

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[4] A charge of assault with a deadly weapon as to Urrieta had been dismissed. (9CT: 2526, 2534; 2RT: 224, 242.)

to go to the bakery area and then to the kitchen.[5] (12RT: 1866, 1872-1873.) The suspects brought employees and one customer to the kitchen. (12RT: 1802.) Contreras and Manuel then went to the office, while Navarro stayed in the kitchen. (12RT: 1804, 1817-1819.)

Manuel gave Contreras money, checks and food stamps worth about $3000. (12RT: 1805.) Contreras, who told appellant to bring Manuel's wife, Clelia, to the office, threatened to cut off one of her fingers. (12RT: 1801, 1806-1807, 1812, 1861.) Both Contreras and appellant threatened to kill Clelia in order to get more money. (12RT: 1808, 1819.) Manuel told them that the rest of the money was in the safe in the front. (12RT: 1809.)

The suspects put the staff and customer in a small bathroom and told them not to come out for 30 minutes or they would be killed. (12RT: 1809-1810.) Manuel's other son returned from the bank after the robbers left and opened the bathroom door. (12RT: 1810.)

Evidence was presented regarding the taking of property at gunpoint for each of the relevant counts, except count 21, robbery of Arturo Flores.[6] (See 12RT: 1810-1811, 1825-1827, 1830, 1868-1869; 13RT: 2180-2181, 2187-2188; Ex. 157.)

Woodley Market, Counts 6 through 9

Appellant and co-defendant Contreras were charged in the Woodley Market crimes, i.e., count 6, the murder of Lee Chul Kim and counts 7, 8 and 9, attempted robberies of Kim, Guillermo Galvez and Eduardo Rivera,

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[5] Manuel was 60 to 70 percent certain that it was Navarro who pushed Paul with a weapon pointed to his back. (12RT: 1800-1801, 1814, 1842.)

[6] See Argument III.

respectively.[7] (7CT: 2015-2018.) Appellant conceded shooting Kim during guilt phase opening statement (9RT: 1292-1293), as well as during guilt phase closing argument and while testifying at the penalty phase. (22RT: 3885; 26RT: 4538.)

On May 4, 1992, Kim, the owner of the Woodley Market in Van Nuys, returned from the bank between 8:30 and 10:30 in the morning as he usually did, with the brown bag he used to carry money for the check-cashing service. (16RT: 2677, 2685-2689; 17RT: 2747; 19RT: 3264.) Kim kept the check-cashing money in a padlocked box inside the office. (19RT: 3261.) The market had a meat counter, behind which was the butcher's work area facing the wall. (19RT: 3265; Ex. 70A.) The office was on one end and the freezer on the other end of the meat counter area. (Ex. 70A.) When the events began to unfold, butchers Eduardo Rivera and Guillermo Galvez were in the butcher's work area behind the meat counter. (19RT: 3265-3266; 17RT: 2757.)

As Kim came in the front door, several people followed him, including a man identified as appellant, who had a black automatic handgun similar to a nine-millimeter gun. (7RT: 2749-2750.) Kim dropped the brown bag and some keys by the entrance to the office and then ran and hid himself in the freezer. (17RT: 2753.)

Appellant tried to open the door to the freezer, appearing to meet resistance. (16RT: 2694-2696, 2711-2712; 19RT: 3272.) At some point appellant opened the door and appellant and Kim struggled inside the freezer. (17RT: 2756, 2763.) Galvez, one of the butchers, heard Kim

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[7] Appellant was acquitted on counts 8 and 9, attempted robberies of Galvez and Rivera. (11CT: 3223, 3227.)

crying out in English to please not do anything to him, the keys were there and he would give them everything. (17RT: 2760). Another employee, Victor Cuautle Cisneros (Cuautle), who was outside of the meat counter area, heard a voice inside the refrigerator say "the keys, the keys" in Salvadoran Spanish.[8] (16RT: 2691-2693, 2706.)

Contreras, with a gun, approached Teresa Torres Velazquez, the cashier, at the register, moved the customers to the back, then went to the office area. (18RT: 2928, 2930, 2932-2934, 2937.) When appellant was halfway in the freezer, Contreras approached butchers Galvez and Rivera who were behind the meat department counter, holding a silver-colored gun on them. (16RT: 2693-2699, 2703-2705, 2712, 2715-2717; 17RT: 2741-2742, 2757.) He told them to turn so they would not see anything. (17RT: 2757.)

Contreras went into the office and tried unsuccessfully to open the cash box. (19RT: 3276-3277.) He also picked up the brown bag, looked at it and dropped it. (17RT: 2761.) Contreras then went over to the freezer and asked appellant to come help him open the box. (19RT: 3276-3278.) Appellant asked him to wait as he was trying to get Kim out of the freezer. (19RT: 3278.) Contreras went back and tried the cash box again. (19RT: 3278.)

After this second unsuccessful attempt, Contreras instructed Rivera and Galvez to follow him. (19RT: 3278, 3280.) At this point Contreras was about 20 feet from the freezer door, Rivera was about four feet behind Contreras and Galvez another four feet behind Rivera. (19RT: 3340-3341.)

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[8] Neither Galvez nor Rivera saw any of the suspects pick up Kim's keys. (17RT: 2761, 19RT: 3279.)

Rivera could see appellant pointing a gun at Kim. (19RT: 3288.) That was the last time Rivera saw either of them. (19RT: 3288.) About five seconds later, Rivera heard the first shot (19RT: 3288-3289), and saw a bullet hit the corner of the meat counter. (19RT: 3286.)

Galvez was also not looking at the freezer when the first shot was fired, but turned and saw the short man, appellant, shooting at Kim, who was kneeling facing him. (17RT: 2771; 2806.) Galvez saw one bullet hit Kim by the side of his right eye (17RT: 2769), but did not know who shot it. (17RT: 2792-2793.)

After Rivera heard the first shot, Contreras told Rivera and Galvez to wait and walked quickly toward the freezer entrance. (19RT: 3289-3290, 3341-3342.) Galvez knew Contreras was shooting because he saw his body jerking. (17RT: 2817-2818.) Rivera never saw Contreras point or fire his gun at Kim. (19RT: 3344.)

When the shooting started, Rivera ran from behind the counter heading to the back door while Galvez jumped over the counter toward the checkout stand. (19RT: 3290.) Rivera heard many more shots being fired. (19RT: 3296.) Witnesses heard between five and ten shots. (16RT: 2706; 17RT: 2770; 18RT: 2949; 19RT: 3296.)

There were at least two other unidentified suspects. One stayed near the checkout stand throughout the robbery. (18RT: 2936, 2943-2944.) Another had pointed a gun at employee Cuautle, who was near the back door. (16RT: 2691.) In Salvadoran-accented Spanish, the man told Cuautle that if he did not look, nothing would happen to him, then had him lie on the floor inside the store. (16RT: 2691-2693.)

The same voice that had said "the keys" said "let's go." (16RT: 2719.) After the shots stopped, all the suspects ran toward the back door.

(16RT: 2708-2709; 18RT: 2936-2937.)

Kim's wallet containing $665.14 was found next to his body. (18RT: 3093-3094; Ex. 328.) The personal effects inventory for Kim also included a brown holster, credit cards and a watch. (18RT: 3093-3094.) According to employee Rivera, "[d]ays before we had trouble, the riots with the black people." (19RT: 3334.) Kim then told his employees he carried a small gun in his pockets and planned to close the store at noon because of the problems.[9] (19RT: 3334.)

Stephen Scholtz, a Los Angeles County Deputy Medical Examiner, performed the autopsy on Kim. (18RT: 3059-3061.) Kim was hit with eight or nine shots and had eight penetrating wounds, which ranged from being fatal to potentially rapidly fatal. (18RT: 3072, 3079-3080.) Kim also had an abrasion on his right knee and a bruise on his lower left forearm. (18RT: 3080.) Gunshot residue on Kim's clothing indicated a weapon was within 20 feet and stippling, i.e., marking of the skin by powder particles, on the upper left abdominal wound suggested a weapon was fired within two feet. (18RT: 3063-3066, 3073-3074, 3081.)

Scholtz found four defects on the lower left front of Kim's shirt that did not appear related to the body wounds, which could be consistent with Kim firing a gun from under his shirt. (18RT: 3080, 3098.)

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[9] The May 4, 1992, Woodley Market crimes occurred right after the April 29, 1992, acquittal of four white police officers in the videotaped beating of black motorist Rodney King. (Wood, *L.A.'s Darkest Days,* Christian Science Monitor (Apr. 29, 2002).) Several months earlier, a Korean grocery store owner had shot and killed a 15-year-old black girl during a shoplifting incident. (*Ibid.*) There was a perception among some that Korean shop owners were particular targets during the five days of looting and violence that followed the officers' acquittals. (*Ibid.*)

Nothing in Schlotz's examination indicated there was more than one shooter or crossfire. (18RT: 3080.) However, the wounds were consistent with crossfire, because some of the wounds went from front to back and others left to right. (18RT: 3089.) The wound tracks also were consistent with Kim having been bent over, firing a gun, with return fire striking him, causing him to fall, with shots continuing as he fell to the ground. (18RT: 3099.) Scholtz was unable to say which scenario was more likely. (18RT: 3101.)

Casa Gamino Restaurant, Counts 28 through 36

Appellant and both co-defendants were charged with five counts of robbery (29, 32 and 34 through 36) and two counts of assault with a deadly weapon (28 and 31) as well as two counts of assault with a stun gun (30 and 33) on Armando Lopez and Maricella Mendoza arising out of this incident. During guilt phase opening statements, appellant conceded his presence at Casa Gamino and at the end of the guilt phase, conceded the robbery counts but argued that although he was an accessory, the evidence did not show he personally committed the gun and stun gun assaults. (22RT: 3866-3876.)

On Sunday, May 17, 1992, at 9:30 p.m., manager Armando Lopez and hostess Maricella Mendoza were at the front of the Casa Gamino Restaurant in Paramount, along with about 13 other employees and 50 customers. (14RT: 2224-2225, 2242.) Three men entered and one of them, appellant, put a black forty-five or thirty-eight-millimeter gun to Armando's stomach, telling him not to move or scream.[10] (14RT: 2225, 2226, 2228-2229, 2254.) One of the men grabbed Mendoza and put a gun to her side

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[10] Appellant uses first names for members of the Lopez family who testified, i.e., Armando Lopez, the manager, his brothers Arturo and Javier, and Javier's wife, Lucia Lopez. (14RT: 2336; 15RT: 2419.)

and another put a gun on a nearby waiter. (14RT: 2226-2227, 2284.) Five more men came in with guns and spread out to different parts of the restaurant. (15RT: 2437.)

Contreras patrolled the table area near the front of the restaurant with a semiautomatic gun. (15RT: 2435-2438, 2459-2463.) He also threatened to kill Javier. (15RT: 2404, 2408).

Armando identified appellant in court as the person who took him back to the office, showing him an electric stick or club and threatening to kill him if he said anything. (14RT: 2228-2229.) The stick looked like, and emitted a blue electrical flash like, Ex. 236.[11] (14RT: 2231.) There was another person in the small office and a third right outside. (14RT: 2229, 2233.) In response to appellant's demand for money, Armando gave him $20,000 in cash, the weekend's proceeds. (14RT: 2229, 2269-2270.) When Armando told appellant he did not know the combination to the safe, appellant applied the electrical device to Armando's side two or three times, causing Armando to scream in pain. (14RT: 2230, 2232.) As Armando continued to say that he could not open it, appellant placed the gun in Armando's mouth and threatened to kill him. (14RT: 2232.) Another suspect aimed a gun at Armando's head. (14RT: 2235.)

A man brought Mendoza to the door of the office and threatened to kill her if Armando did not open the safe. (14RT: 2234.) "They" hit her with an electrical device, which was thinner than Exhibit 236, the cattle prod stun gun. (14RT: 2287, 2295.) She was shocked about six times on her shoulders and back and hit with a gun on the side of her head. (14RT:

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[11] Exhibit 236, admitted over defense objection, was a "cattle prod stun gun," which was about 18 inches long with a three to four inch circumference. (14RT: 2215, 2219.)

2287-2288.)

An unidentified man then took Mendoza to the ice machines near the back door where he hit and threatened her. (14RT: 2289-2290.) He tried to kiss her, tore her skirt, threw her on the floor and tried to remove her stockings. (14RT: 2290.) When another man came and said Morro[12] was coming, her assailant went out the back door. (14RT: 2290-2292.)

Mendoza could not identify anyone, except for testifying that Navarro looked like one of the men in the office. (14RT: 2292.) She testified that the same man used the stun gun on her and Armando. (See 14RT: 2296.)

Appellant was still with Armando when Mendoza was screaming near the ice machine. (14RT: 2237.) When one of the other men told appellant that it was getting late and said something like, "let's go, Morro," appellant left. (14RT: 2237.) An unidentified man brought Armando to the front to open the cash register and took three to four hundred dollars.[13] (14RT: 2238, 2255-2256.) Armando was taken to the kitchen, where Contreras kicked him, hit him on the head with a gun and threatened to kill him. (14RT: 2239, 2249, 2278.) Other employees were taken to the kitchen and robbed. (14RT: 2305-2306.)

The robbery took about 25 minutes. (15RT: 2411.) Evidence was presented regarding the taking of property at gunpoint for each of the relevant robbery counts. (See 14RT: 2239, 2297, 2305-2306, 2332; 15RT: 2410.)

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[12] Morro was appellant's nickname. (19RT: 3178; 26RT: 4614.)

[13] Lucia Lopez identified this man as appellant. (14RT: 2339-2340, 2351.)

Ofelia's Restaurant, Counts 37 through 40

Appellant and co-defendant Contreras were charged with one count of robbery (count 39, Obdulia Garcia), one count of attempted robbery (count 38, Juan Saavedra) and two counts of assault with a deadly weapon (counts 37 and 40, Juan and Ofelia Saavedra) arising out of this incident. Appellant told the jury during opening guilt phase statements that the evidence against him as to the Ofelia's counts was strong. (9RT: 1292.) During guilt phase closing arguments, appellant conceded guilt on the robbery counts and as an aider and abettor as to the assault on Juan, and, if the jury believed Ofelia's testimony, of an assault on her as well. (22RT: 3877-3880.)

Juan and Ofelia Saavedra owned Ofelia's Restaurant in South Gate, Los Angeles County. (15RT: 2370, 2392.) Appellant and Contreras attempted to rob it on May 22, 1992, at about 11:00 a.m. (15RT: 2392, 2377-2382, 2398-2399.) Ofelia saw appellant following her husband toward the back door with a gun as the two spoke in Spanish. (15RT: 2392-2393, 2397.) Appellant was grabbing and hitting Juan as appellant told Juan to stop and the two struggled over a gun. (15RT: 2393-2394.)

Ofelia pointed a knife at Contreras when he appeared, but dropped it when he pointed a gun at her and said in Spanish, "that old idiot. She thinks I can't shoot a bullet at her." (15RT: 2394-2395, 2398-2399.) Contreras had her sit in a chair in the dining area, where she saw him take a chain from an employee. (15RT: 2395.) Contreras ran toward the back after Ofelia heard the sound of a shot. (15RT: 2395-2396.)

Meanwhile, Juan and Ofelia's daughter Leticia had come in the back door to find her father and appellant struggling over a small black automatic gun that appellant held. (15RT: 2371-2372.) Juan, who was much taller

than appellant, had his arms over appellant's shoulder and was holding appellant's hands. (15RT: 2372.) It was a standoff, with each afraid to let go of the gun. (15RT: 2383-2384.) Although both men had a grip on the gun, Leticia could tell that appellant pulled the trigger and shot two bullets into the floor, aiming at Juan's feet. (15RT: 2373, 2384-2385.)

When Contreras came in, he hit Juan in the head at least five times until Juan let go of the gun. (15RT: 2373-2374, 2387.) Contreras was going to hit Leticia, but appellant stopped him. (15RT: 2373.) Appellant and Contreras then ran away, leaving in a blue car and a red one. (15RT: 2375.) Leticia saw appellant's shoe fall off as he ran and identified it at trial. (15RT: 2356, 2375-2377.)

George's Market, Counts 1 through 5

Appellant and both co-defendants were charged with count 1, the murder of John Hoglund, with special circumstances of attempted robbery, avoiding arrest and intentionally killing a police officer; counts 2 through 4, the robberies of Linda and Tom Park and Gumersindo Salgado; and count 5, the attempted murder of Enrique Medina. During the guilt phase opening statement, appellant conceded he was guilty of the robbery-related counts. (9RT: 1290-1291.) At the end of the guilt phase, appellant conceded he was guilty of the robbery counts and of felony murder (22RT: 3833), but argued that the evidence did not prove that appellant shot Hoglund (22RT: 3834-3839), or attempted to kill Medina. (22RT: 3839-3852.)

Linda Park and her husband owned George's Market on 52nd Street in Maywood. (9RT: 1298.) She and her son, Tom Park, were behind the front counter on May 29, 1992, at about 1:30 p.m. (9RT: 1299.) Contreras approached, asked for a money order, then pointed a dark, semiautomatic gun at them. (9RT: 1300-1301, 1345.) Appellant came behind the counter,

pointed his gun at them, told Linda to be quiet and pushed her with his body to a corner where she sat down. (9RT: 1301-1303, 1378-1379.) There was a total of five robbers. (9RT: 1354.) Appellant and Contreras ransacked the counter area. (9RT: 1302-1303, 1379.)

Appellant demanded more money and Linda denied there was any more. (9RT: 1305, 1379, 1398.) Appellant took Tom to the back of the store and threatened to shoot him if he did not reveal the location of the money. (9RT: 1305-1306.) Appellant then brought Linda back and hit and slapped Tom's face. (9RT: 1309-1310.) Appellant twisted customer Elvira Acosta's arm and put a gun to her temple, but she was unable tell him where the money was. (9RT: 1400, 1406.)

The butcher, Gumersindo Salgado, pressed a silent alarm before a man with a gun took him and another employee to the kitchen, where they and some customers were told to lie on the floor. (9RT: 1307; 11RT: 1649-1651.) A suspect took Salgado back to the meat department to open up the cash register and took $200 or $300. (11RT: 1654.)

The men left after they found more money. (9RT: 1398.) Appellant showed Tom the gun the Parks hid behind the counter, telling him not to come out as he had their gun and was leaving. (9RT: 1310, 1360 [gun missing after robbery].) In total, the robbers took $3,000 from the cash registers, about $1,000 in food stamps and $6,000 and several hundred dollars from under the desk. (9RT: 1350, 1381-1382.)

Contreras took the video tape from one of the two VCRs located behind the front counter and Tom Park turned the second tape over to the police. The robbery had been recorded on the tape and the jury viewed that portion of the tape at trial. (9RT: 1308-1309, 1312-1316, 1383; Exs. 12-C and D.)

Tom never saw any of the robbers leaving, nor did he hear any gunshots. (9RT: 1346, 1362.)

The Shooting of John Hoglund

Luis Enrique Medina was double-parked on 52nd Street at the entrance to George's Market. (10RT: 1489-1490.) Medina noticed a man with a black and white shirt walking back and forth in front of the market. (10RT: 1490-1492.) A helicopter flew by and the man, identified as Navarro, spoke to other men from the market. (*Ibid.*) One of them said something like, "it's not a police helicopter" and they went back inside.

A police car approached slowly from the west on 52nd Street, the direction Medina was facing, and stopped in front of him. (10RT: 1492-1493; 11RT: 1590.) The red emergency lights went on when the car stopped. (11RT: 1589-1590.) A uniformed officer got out of his car and stood up. (10RT: 1493; 11RT: 1590.) Three to five people came out of the market, including Navarro and Contreras, and started running. (10RT: 1493, 1557; 11RT: 1595.) The officer started walking, screaming at the men to stop. (11RT: 1645-1646.) Two of the men, including Navarro, ran toward a red Mazda RX-7 and two others toward a blue Honda Accord. (10RT: 1441-1444, 1447; 11RT: 1596.) The red car was parked across the street behind Medina. (10RT: 1547-1548; 11RT: 1595-1596; Ex. 9.)

The last man out of the market came from behind Medina's car toward the officer. (10RT: 1494.) The man swore at the officer and began shooting him. (10RT: 1495.) Medina did not see where the shots hit the officer, but he believed one hit his shoulder and another his head. (10RT: 1495-1496.) When the man then aimed the gun at Medina, it was open and did not have any bullets in it. (10RT: 1496, 1545-1546.) The man took off running toward the red car, where his friends were calling him. (10RT:

1545, 1547.) Medina saw no one else shoot at the officer. (11RT: 1596-1597.)

Erik Sanchez viewed the events from his car one-half block away on 52nd Street facing the market. (10RT: 1431; Ex. 9.) As the officer got out of the car, Erik heard four or five shots and the officer fell half in and half out of the car. (10RT: 1431.) Erik Sanchez did not see the shooter, but saw a man with a red shirt running from the police car. (10RT: 1431, 1439-1440.) A red RX-7 Mazda drove right past Erik and a blue car went west. (10RT: 1431-1433, 1437-1438.)

Maywood police officer Kenneth Meisels was driving in a patrol car with William Wallace, a reserve officer in uniform. (10RT: 1449-1450, 1476.) At about 1:30 p.m., both Meisels and Hoglund received a broadcast to respond to a silent alarm at George's Market. (10RT: 1451-1452.) Hoglund radioed his approach and then his arrival to Meisels. (10RT: 1460.) Shortly after that transmission, Meisels saw a red sports car traveling east on 52nd Street at 60 to 80 miles per hour. (10RT: 1462-1464, 1473-1474, 1477.) Meisels unsuccessfully tried following the car. (10RT: 1463-1464.) He radioed Hoglund and received no response. (10RT: 1464.)

Meisels got to George's Market in 30 seconds. (10RT: 1465.) Hoglund's legs were dangling out the driver's side of his car, while his upper body was in front of the front seat with his head pointed toward the gas and break pedals. (10RT: 1482-1483.) His feet were out as if he had fallen back into the vehicle.[14] (*Ibid.*) His holster was unsnapped with the

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[14] A minute or two after the robbers left, Tom Park went outside and saw an officer slumped forward, his face on the steering wheel of the police car. (9RT: 1346.) Acosta went out after hearing the shots and saw the officer bleeding, hanging on to the door of the car. (10RT: 1426.)

gun in it. (10RT: 1472.) Meisels and Wallace started CPR until the paramedics arrived and took over, but no one ever got any vital signs. (10RT: 1466, 1484.)

Medina left the scene immediately, but came back an hour later and spoke to Deputy Perales that afternoon or evening. (10RT: 1549.) That same day, Medina saw a video of the robbery and gave a taped statement, which was played in court. (10RT: 1549-1550, 1554, 1556; Exs. 53 [tape] and 54 [transcript].) Medina pointed out the shooter as wearing the striped shirt in the video; this was appellant. (10RT: 1551-1552. 1557.) After initial hesitation, Medina also identified appellant in court as the shooter. (10RT: 1544; 11RT: 1587.)

Defense counsel impeached Medina with his failure to identify appellant at the preliminary hearing his first day on the stand. (10RT: 1563-1565.) Medina spoke to Perales and the prosecutor afterwards and on the second day of his preliminary hearing testimony he identified appellant as the shooter. (10RT: 1562, 11RT: 1635, 1641-1642.) No one told Medina to do this or made promises to him; he had been confused by all the people in the courtroom and afraid for himself and his family's safety. (10RT: 1561-1562; 11RT: 1599-1600, 1640.) Medina received $300 or $500, food boxes and assistance getting a job from the Maywood Police Department, but did not accept this in exchange for a promise to testify a certain way. (10RT: 1558-1560.)

Medical examiner Eugene Carpenter, Jr., described the path of Hoglund's three bullet wounds, which all had a left-to-right track. (10RT: 1498, 1506, 1511.) The bullet labeled number 1 went through both sides of the brain. (10RT: 1502-1503.) Bullet number 2 went through the chest, lung and heart and was recovered in the upper right arm. (10RT: 1505.)

Bullet number 3 went through the lung. (10RT: 1506.) The head wound would cause immediate loss of consciousness and the heart wound death from bleeding within a minute or so. (10RT: 1522-1523.) The wounds were consistent with a medium or large caliber bullet, such as the two nine-millimeter bullets recovered from the body. (10RT: 1508.) The shooter was beyond two to four feet away when wounds 2 and 3 were inflicted. (10RT: 1509.)

Hoglund had abrasions over his right wrist and nose. (10RT: 1506-1507.) The latter was a blunt force injury, consistent with hitting his head on the steering wheel. (10RT: 1533.)

The prosecution sought to show that appellant purposively inflicted a final shot directly to Hoglund's head. (See, e.g., 22RT: 3812 [closing argument].) Carpenter had insufficient information to have an opinion about the order of the shots. (10RT: 1536-1537.) The similar angles of wounds 2 and 3 were consistent with having been fired close in time. (10RT: 1510.)

Carpenter could not opine about the angle of the gun and body without knowing the position of one or the other. (10RT: 1510.) The prosecution posed various hypothetical questions and elicited testimony to support its theory that the shooter shot Hoglund first in the torso and then inflicted a coup de grace to Hoglund's head. (See 10RT: 1517, 1521, 1533-1536 and 21RT: 3793; 22RT: 3811-3812 [argument].) However, Carpenter also testified that the wounds were consistent with rapid fire shots hitting the lower part of the body first and then the head as the body fell (10RT: 1527-1528), which was the defense argument. (21RT: 3836-3837.)

Testimony of Rosa Santana

Over defense objection, the preliminary hearing testimony of

fourteen-year-old Rosa Santana was read at trial. (19RT: 3365 et seq.) She testified about events before and after the George's Market crimes. She was at appellant's apartment when all three defendants left with loaded guns, saying they were going to get drugs and needed guns because sometimes "the black guys and the cops would get in their way." (19RT: 3367; 20RT: 3445-3446, 3490-3492.) Later, they returned with a total of six men and split some money among them. (20RT: 3392-3393.) Someone played a video of a market robbery in which she recognized the defendants. (20RT: 3393-3396.) She overheard several incriminating statements, including appellant admitting to shooting a cop because he got in the way and already having shot eight or nine people in his country, and Navarro saying he shot in self-defense. (20RT: 3399, 3413, 3415, 3489, 3492.) Santana also identified appellant as Morro. (20RT: 3397.)

Arrest

Appellant was arrested without incident on the evening of May 31, 1992, following the arrests of Contreras and Navarro. (13RT: 2168-2169, 2173, 2176-2180.) He was arrested in a red Mazda (13RT:2178-2179), identified as similar to the car seen leaving Ofelia's and George's Market. (10RT: 1437-1438; 15RT: 2375, 2382; Ex. 143 A-C.)

Ballistics Evidence

Los Angeles Sheriff Department deputy and firearms examiner Dwight van Horn examined the ballistics evidence in the case and testified that slugs (expended bullets) originating from Woodley and George's Markets and Ofelia's Restaurant all came from the same nine-millimeter semiautomatic pistol. (17RT: 2880-2881; Ex. 280, p. 1.) Nine-millimeter cartridge casings from the same three places were all fired from a single pistol. (17RT: 2881; Ex. 280, p. 2.) Van Horn could not match slugs to

casings, but eyewitness testimony could support the conclusion that casings and slugs from one scene came from the same weapon. (17RT: 2901-2902.)

Based upon other expended bullets and casings found at the Woodley Market, Van Horn concluded that two nine-millimeter weapons and a .25-caliber weapon were used during the Woodley crimes. (17RT: 2891-2992; Ex. 280, p. 3.) Based upon casings found at the George's Market scene, Van Horn concluded that at least two nine- millimeter handguns were used there, along with a .22-caliber weapon that produced a single casing. (17RT: 2884-2285, 2891, 2895; Ex. 280, p. 4.)

The prosecution also presented evidence that one or more co-defendants used or possessed nine-millimeter guns. (See, e.g., 17RT: 2904-2906 [identifying guns in photos of Contreras as possibly a nine-millimeter weapon]; 15RT: 2461-2482, 2499 [identifying weapons held by a co-defendant at Casa Gamino and El Siete Mares as possibly nine-millimeter weapons].) The prosecutor used the ballistics evidence to argue that Contreras also shot at Kim and that there was evidence that two others also fired at Hoglund. (See, e.g., 21RT: 3775 [Kim]; 21RT: 3764 [Hoglund].)

The Rod's Coffee Shop Incident

Evidence of an incident at Rod's Coffee Shop was admitted pursuant to Evidence Code section 1101, subdivision (b). On November 7, 1990, five men who appeared Hispanic entered Rod's Coffee Shop in Arcadia shortly before the midnight closing time. (18RT: 3013-3015.) They only ordered two coffees and soon paid their check and left. (18RT: 3016-3017.) When the manager Brian Wellman saw the men congregating in the parking lot, he called the police, telling them he thought the men were casing the restaurant. (18RT: 3018-3019.) The police stopped the car appellant was

driving after it pulled out of the parking lot and found two revolvers and a black stun gun in it. (18RT: 3029-3034.)

The parties stipulated that the incident at Rod's Coffee Shop resulted in appellant being charged with misdemeanor possession of a loaded weapon in a motor vehicle. (21RT: 3663-3664.)

The Defense Case

Deputy Nicholas Cabrera interviewed Armando Lopez and other witnesses at the Casa Gamino the same night that the robberies took place. (20RT: 3578, 3580-3581.) Suspect number 1was described as a "cholo" type, some five feet four inches tall with hair slicked back and wearing a white T-shirt. (20RT: 3582.) Armando told Cabrera that suspect 1 was of Mexican descent, while the other suspects were Central Americans. (20RT: 3585.) Suspect 1 threatened and pistol-whipped Armando with a .45-caliber pistol and assaulted him with a black cattle prod. (20RT: 3583-3584.) Suspect 1 stopped his attack on Armando and the waitress when Armando was able to open one of the two safes and the suspect retrieved money from it. (20RT: 3584.) This same suspect led him to the front, ordered him to open the register and then yelled to the others, "where is Morro, let's go." (20RT: 3584-3585.)

Neither co-defendant presented evidence and the prosecution presented no rebuttal evidence. (20RT: 3593.)

PENALTY PHASE

The Prosecution's Case in Aggravation

The prosecution presented evidence under factor (c) of a prior conviction, possession of cocaine base for sale under an alias, Jose Luis Solarzano. (24RT: 4218, Ex. 334.) It also relied upon the Rod's Coffee shop incident presented previously as evidence of appellant's prior criminal

activity under factor (b). (24RT: 4213.) The prosecution introduced evidence of a prior robbery conviction for Navarro. (24RT: 4219, Ex. 335.)

The Defense Case in Mitigation - Appellant Sanchez-Fuentes

Family Members

Appellant's brothers, Francisco and Jose, his sister Argentina and his mother Melida testified. Appellant grew up in San Pedro Sula, Honduras, the youngest of ten children. (25RT: 4398-4400, 4446.) He was three when his parents separated. (25RT: 4440, 4402.) Appellant wanted to stay with his mother, but instead lived with his father, who was bitter about the separation and restricted appellant's visits to his mother. (25RT: 4400-4402, 4441-4442, 4456-4457.) His older sister Argentina was like a mother to him. (27RT: 4785.)

At age six, appellant began selling newspapers with his father. (25RT: 4403.) They got up at 4:00 a.m. to buy the papers at the factory, then sold them door to door until about noon or when they were sold out, after which appellant went to school. (25RT: 4403-4404.) Appellant stopped to work full-time after third grade. (27RT: 4769.) Tuition was free but appellant's parents could not afford the books and supplies. (25RT: 4450.) Most children in the village left school at age 13, with a sixth grade education. (25RT: 4419.)

Appellant moved back in with his mother for a while when he was between 10 and 12 years old. (25RT: 4451, 4457-4458.) Appellant never got in trouble in Honduras but their father placed appellant into a juvenile facility at age 14 because he had another wife and no place for appellant. (25RT: 4421-4422, 4424; 27RT: 4784-4785.) Appellant left for the United States when he was about 16 years old. (25RT: 4415.)

Appellant's mother did not take her children to church much when

they were young. (25RT: 4458.) Both of appellant's parents instilled the fear of God in their children. (27RT: 4771-4772.) Appellant's mother, who was living in Santa Ana, California, at the time of trial, visited appellant in jail every three or four weeks. (25RT: 4461-4462.) Appellant had always been very loving with his mother and encouraged her during her jail visits by reminding her that, "we're in the hands of God." (25RT: 4463.)

Appellant's brother Francisco had visited appellant in jail three times after not having seen him since appellant left Honduras at age 16. (25RT: 4405, 4415.) Appellant encouraged his brother Francisco to accept Christ and the two discussed the Bible, which comforted and encouraged appellant. (25RT: 4406.)

Through cross-examination, the prosecution established that appellant's father was loving; his parents taught them right from wrong; selling papers was easier than working in agriculture; and appellant sent no more than $200 to his mother during all of his time in the United States. (25RT: 4410-4412, 4415, 4420.)

Appellant's Testimony

After his arrest, appellant thought about suicide because he had lost his freedom and meaning in his life. (26RT: 4518-4519.) One day, alone in his cell, he heard someone say he would now begin to live. (26RT: 4520.) Appellant then came to his senses, got on his knees and prayed. (26RT: 4520.) After that, he was on a different, happy, path. (26RT: 4521.) Appellant spent his time studying the Bible, receiving encouragement and assistance from inmates and religious visitors. (26RT: 4521, 4524-4429.) Appellant also began writing Bible studies; he studied, fasted and prayed for guidance before writing, so that the result was not from his own mind. (25RT: 4534-4535.)

Appellant shot and killed Kim after Kim shot first. (26RT: 4538.) He shot Hoglund so he could get away. (26RT: 4539.) He knew the robberies and murders were wrong, but did them for the money. (*Ibid.*) Appellant did not show remorse when first arrested. (*Ibid.*) Having since realized that human life has infinite value, he asked God to grant him the opportunity to rescue others from their mistakes. (26RT: 4540-4541.)

The prosecutor extensively cross-examined appellant regarding whether he was remorseful and about his actions at each crime. (See, e.g., 26RT: 4549, 4552, 4574 [Outrigger]; 4575 [Siete Mares]; 4580-4582 [Mercado Buenos Aires]; 4596-4603 [Casa Gamino]; 4603-4606 [Ofelia's]; George's Market [4606-4608].) Appellant testified that by the grace of God, he had overcome remorse or unhappiness about his prior behavior, as harboring those feelings would interfere with God's work. (26RT: 4549-4550.) Expressions of remorse to Kim and Hoglund's families and friends would be meaningless to them, whereas appellant's prayers for their salvation were the greatest help he could give them. (26RT: 4551.)

Appellant would not have shot Kim if Kim had not shot first. (26RT: 4565.) Appellant struggled with Kim because he feared Kim had a wireless phone. (26RT: 4582, 4584.) When Kim handed over his wallet, appellant said he wasn't looking for that. (26RT: 4584.) While appellant went through Kim's pockets, Kim pulled a gun out of his pockets and shot appellant. (26RT: 4584-4585.) Appellant could not recall how many times he shot Kim. (26RT: 4585.) After appellant was shot, he went to a hospital where his wound was taken care of, though the bullet was never removed. (26RT: 4586, 4591.) Appellant denied being in a shootout elsewhere. (26RT: 4592.)

Appellant acknowledged lying regarding his case numerous times for

his own benefit, including by posing as a customer prior to robberies and when arrested. (26RT: 4559-4560.) However, he denied cursing at Hoglund or purposely shooting him in the head; he just fired the semiautomatic and did not know how many times it fired. (26RT: 4563-4565.) He also denied hitting Kim over the head with a gun (26RT: 4583); participating in the Outrigger robberies (26RT: 4574); knowing anything about the manager, Urrieta, being hit at the El Siete Mares robbery (26RT: 4575); bringing the stun gun to Rod's or Casa Gamino restaurants (26RT: 4597-4598); beating Armando Lopez with a gun (26RT: 4599-4600); using the stun gun on, or attempting to rape, Maricella Mendoza (26RT: 4601-4602); trying to shoot Juan Saavedra in the foot at Ofelia's (26RT: 4603-4604); or speaking to Santana or saying he had killed eight or nine people. (26RT: 4609.) Appellant had never used a stun gun before the Casa Gamino robberies and initially thought it would just frighten Lopez. (26RT: 4600.)

Appellant acknowledged that he was Morro, but testified that Morro was dead, because appellant had died and been reborn in Christ. (26RT: 4614.)

Religious Witnesses

Appellant's mitigation case was about his helping others in the future based upon his grasp of the Bible. (26RT: 4498-4499.) Julio Ruiz, a Pentecostal minister, had visited appellant in jail ten times over the previous year. (25RT: 4469, 4474.) Ruiz saw growth in appellant's understanding of the Bible and his unusual enthusiasm for the Word of God. (25RT: 4470-4472.) Appellant accepted his situation and always seemed to be in a good mood because he now had the security of being in God's hands. (25RT: 4473.)

Arturo Talamante, the Hispanic coordinator of the prison ministry program of the Psalm Ministry, had been corresponding with appellant for 18 months. (26RT: 4619-4621.) He was impressed with appellant's religious devotion and study of the Bible. (26RT: 4622-4623.) Pacifico Diaz, a jail chaplain, had met with appellant eight to ten times over the previous four months. (26RT: 4652-4654.) His role was to pray with appellant and help him spiritually, including asking whether he was repentant. (26RT: 4654-4655.) Based on his conversations with appellant and 19 years of experience with young people, Diaz thought that appellant was remorseful. (26RT: 4658-4659, 4662.)

Brother Luke Packel, a spiritual director in Mother Teresa's order, interviewed people to determine the level of their faith or conversion. (27RT: 4698-4699 and 4703-4705.) Appellant's lawyer asked Packel to assess whether appellant had had a real conversion experience. (27RT: 4718.) Packel met with appellant twice a few weeks prior to testifying and could see that due to the depth of appellant's feelings for God, he was "on fire," which cannot be faked. (27RT: 4706-4707, 4721.) He and appellant talked about asking God for forgiveness. (27RT: 4709.) Packel had no doubt that appellant had turned his life around. (27RT: 4710-4711.)

The Bullet in Appellant's Leg

Earl Landau, the chief radiologist for the Los Angeles Sheriff's Department, interpreted Exhibit 507, an October 1994 x-ray showing a bullet next to appellant's femur. (27RT: 4690-4692.) There were no abnormalities in the tissue due to the bullet. (27RT: 4695.) Landau could not determine the age of the wound or the caliber of the bullet. (27RT: 4694-4695.)

Defense Mitigation Case - Co-Defendants

Contreras

Michael Winkelman, a cultural anthropologist, examined the cultural dynamics of Contreras's community and family and how his behavior related to the cultural dynamics of society. (24RT: 4298-4299.) Winkelman visited El Conchal, the primitive and impoverished rural village in Honduras where Contreras grew up. (24RT: 4300-4301.) Seventy people traveled by foot to be interviewed when they heard through word of mouth that people could give testimony about Contreras. (24RT: 4303-4306.) Winkelman visited Contreras's school and interviewed teachers, former employers, relatives and friends. (24RT: 4306-4307.) Winkelman's testimony corroborated that of Contreras's family members. (See, e.g., 24RT: 4221-4226 and 24RT: 4308-4212.)

Contreras was abused by his father, who then abandoned their large family when Contreras was about eight years old. (24RT: 4223, 4307.) The family was very poor and had trouble getting enough to eat, despite his mother taking in laundry. (24RT: 4223.) Contreras quit school at about age nine and worked to support his family. (24RT: 4223, 4306.) He worked several jobs at once, gathering wood, picking corn, milking cows, cutting grass, working as a servant and fishing. (24RT: 4224, 4308-4311.) What Contreras did was extraordinary and beyond what people in his town thought a young child could do, even compared to his own brothers. (24RT: 4318-4320, 4325-4326.) Contreras left Honduras at about age 17 to improve life for his family and sent home $200 to $400 at various times. (24RT: 4225, 4328.)

Navarro

Navarro's mitigation case was presented through family members

and Dr. Richard Cervantes, a psychologist specializing in Hispanic immigrants, the mental health status of Central American refuges and risk factors associated with joining gangs. (28RT: 4936-4958.) Navarro came from a large and poor family in El Salvador. (27RT: 4794–4705 and 4798-4800.) Navarro suffered trauma growing up, including sexual and physical abuse, his parent's emigration to the United States without him and civil war, which led to the gruesome murder of his aunt. (27RT: 4801-4803, 4834-4841; 28RT: 4907, 4942-4945, 4998-4999.)

Navarro came to the United States at age 16 (27RT: 4801-4802), and lived in poor, gang-ridden areas with his alcoholic father, who failed to supervise him. (27RT: 4805-4806, 4811, 4841-42.) Because of the stresses caused by immigration and early childhood trauma, Navarro was not equipped to integrate into U.S. culture. (28RT: 4946.) Navarro's depression led to several suicide attempts, pre- and post-crimes. (28RT: 4949-4950.) Navarro expressed remorse to a consulting psychologist. (28RT: 4986, 5000.) Cervantes opined that Navarro may have been gang-associated but he could not conclude that he was a hard-core member. (28RT: 4994-4995.)

Appellant absented himself during the latter part of Cervantes' testimony as well as that of the prosecution's rebuttal witness. (29RT: 5103-5104, 5107.)

Prosecution Rebuttal

Robert Lopez, a Los Angeles Police Department (LAPD) detective supervisor for Northeast Community Resources Against Street Hoodlums (CRASH), testified to rebut mitigating evidence presented by Contreras and Navarro. (29RT: 5197-5198.) Mara Salvatrucha (MS) is a violent street gang whose members are primarily Salvadoran but also come from

Honduras and Guatemala. (29RT: 5200.) Lopez identified gang signs in photos of the two co-defendants based upon hand and gun positions and tattoos. (29RT: 5201-5204, 5208-5209.) Based on these photos, Lopez testified that Contreras and Navarro were both members. (29RT: 5203-5298; 5211.) Lopez opined that MS members doing a robbery together would be expected to do whatever it took to commit the crime and protect the other member. (29RT: 5207.) Moreover, a member would only take another trusted gang member to a take-over robbery. (29RT: 5207-5208.) However, Lopez acknowledged that he found nothing on Contreras or Navarro in the LAPD gang tracking system. (29RT: 5211, 5213.)

The prosecution also presented Exhibit 336, a certified copy of an identification card in appellant's name with a year of birth of 1968. (29RT: 5227-5228.)

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ARGUMENT

I.

THE TRIAL COURT'S DENIAL OF APPELLANT'S *WHEELER-BATSON* MOTION VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL

Appellant made two *Wheeler-Batson* motions below because the prosecutor consistently struck two-thirds of the Hispanic jurors, who made up only 19 percent of the available jurors. Despite this and the other factors strongly weighing on the side of inferring biased exercise of peremptory challenges, the trial court erroneously denied the motions. This violated appellant's rights to a fundamentally fair trial by an impartial jury drawn from a representative cross-section of the community, due process of law, equal protection and a reliable penalty verdict, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. Reversal of the entire judgment is required.

A. Factual Background

One hundred forty-one panel[15] members survived hardship screening and then filled out questionnaires.[16] (See 3RT: 348-349 [court's

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[15] "A 'venire' is the group of prospective jurors summoned from [the] list and made available, after excuses and deferrals have been granted, for assignment to a 'panel.' A 'panel' is the group of jurors from that venire assigned to a court and from which a jury will be selected to try a particular case." (*People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3.)

[16] Volume 2 of the Supplemental Clerk's Transcript contains 15 volumes of questionnaires. Although the last one is numbered 146 (Vol.15, 2SCT: 4314), five of the questionnaires were blank, so the total is 141.

hardship screening method described]; 4RT: 473-481, 501-507; 5RT: 520-529; 5RT: 548-556 [hardship excusals]; Vols.1-15, 2SCT: [questionnaires].) The court and parties worked with groups of 18 people, 12 of whom were seated in the jury box. (3RT: 353-357; 10CT: 2975.) All 18 were questioned, but only the 12 in the jury box were subject to challenge. (*Ibid.*) After seven prospective jurors had been removed - for cause or via peremptory challenge or stipulation - another seven were called up to replace them. (See, e.g., 3RT: 354-357 [court's method described]; 6RT: 620-622 and 7RT: 837-840 [as practiced in the first round of questioning and excusals].) Each defendant had 12 challenges and the prosecution had 36, with additional peremptory challenges available to all parties for the six alternate jurors to be chosen. (3RT: 358.)

The first group of 18 prospective jurors questioned included two Hispanic men, E.S. and P.G.[17] (6RT: 620-622.) The prosecution tried to remove both of them after they got into the box: the court denied the prosecution's cause challenge against E.S. (7RT: 831-833), and the prosecution exercised its first peremptory challenge against P.G. (7RT: 837.)

Only the prosecution exercised peremptory challenges - six - after the first round of questioning. (7RT: 837-840.) One prospective juror of the first 18 called was excused by stipulation during voir dire (6RT: 645); he and others similarly removed later by stipulation or for cause are excluded from appellant's analyses. These seven excused jurors were replaced by the additional jurors also questioned in round one, so that 17 jurors were subject to challenge by the end of it. At the end of this first

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[17] Jurors are referred to by their initials.

round of questioning and challenges, seven additional panel members were called up for questioning, including three Hispanics: E.A., T.M.[18] and M.M. (7RT: 840, 842.)

After the second round of questioning, the defense exercised two peremptory challenges, as did the prosecution, including its eighth strike against E.A., who was Hispanic. (7RT: 942-943.) Appellant objected under *People v. Wheeler* (1978) 22 Cal.3d 258, and *Batson v. Kentucky* (1986) 476 U.S. 79. (7RT: 944.) At this point, 21 prospective jurors had been in the box and subject to challenge: the 17 from round one noted above and four challenged during round two, including E.A. (7RT: 942-943.) Of these 21, three (15%) were Hispanic and the prosecution had removed two of them. (7RT: 837, 943.)

Defense counsel argued that based upon the questionnaires, there were relatively few Hispanics on the panel compared to Caucasians and African-Americans. (7RT: 944.) The two Hispanic jurors against whom the prosecution had exercised peremptory challenges (E.A. and P.G.) made up a substantial portion of the prospective Hispanic jurors at that point. (*Ibid.*) Counsel argued that because both were fair jurors, a prima facie case of discrimination had been demonstrated. (*Ibid.*)

After noting that P.G. and E.A. were both self-identified Hispanics, the court found no prima facie case "at this point," but invited the prosecution to state its reasons "for the record so you can preserve it." (7RT: 944-945.) The prosecution claimed to have dismissed E.A. because she came from a very disturbed background and was abused as a child,

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[18] Counsel referred to T.M. at one point by the last name of Chavez (9RT: 1243), which was her maiden name. (See Vol.5, 2SCT: 1264.)

though she said she could set that aside; was still suffering from medical problems and was on medication; and was very anti-death penalty on the questionnaire. (7RT: 945.) P.G. was "extremely against" the death penalty on the questionnaire and in court he said he didn't like it, though he ultimately equivocated. (7RT: 945.) The court again denied appellant's motion. (7RT: 945; 10CT: 2996.)

Three additional peremptory challenges were made by the end of round two (7RT: 946-947), none by the prosecution, and seven more prospective jurors were called up and subject to questioning, including Hispanic juror R.F.[19] (7RT: 947-948.)

After the third round of questioning (7RT: 948-1016), one juror was excused by stipulation or for cause and six others via peremptory challenge. (7RT: 1016, 1028-1031.) The prosecution's only strike during this round, its ninth, was against Hispanic juror R.F. (7RT: 1028.) Seven more prospective jurors then were called, none of them Hispanic. (See 7RT: 1031-1032 [names of final set of potential jurors called]; Vol.6, 2SCT: 1706, 1732 and Vol.7, 2SCT: 1758, 1784, 1810, 1836, 1862 [questionnaires with ethnicity of these individuals].)

During the fourth round of questions and challenges, three more jurors were excused by stipulation or for cause. (8RT: 1037-1042, 1077, 1126-1127, 1130.) The defense struck a juror and then the prosecution

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[19] R.F. did not indicate his ethnicity on the questionnaire. (Vol.6, 2SCT: 1524.) However, in *People v. Trevino* (1985) 39 Cal.3d 667, 676, 686 (disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221), this Court held that "Spanish surnamed" sufficiently describes the cognizable class Hispanic under *Wheeler* where no one knows at the time of the challenge whether the Spanish-surnamed prospective juror is Hispanic. (*People v. Trevino*, *supra*, 39 Cal.3d at pp. 676, 686.)

exercised its tenth peremptory challenge against prospective Hispanic juror T.M. (8RT: 1134.) Appellant then made a second *Wheeler-Batson* motion as to Hispanics, pointing out that the prosecution had excused four Hispanics. (8RT: 1135.) At that point, 32 jurors had been questioned and were subject to removal.[20] The prosecution had exercised peremptory challenges against four of the six Hispanic jurors (67%) who made up 19 percent of the 32 subject to removal at that point. The court again found no prima facie case but invited the prosecution to make a record with regard to T.M. (8RT: 1135-1136.) The court never asked the prosecution about prospective juror R.F.

The prosecution cited T.M.'s equivocation about the death penalty on her questionnaire; her comment there that police are fair most of the time but sometimes "I get the impression they prejudice people on how they look;" her work for the Department of Social Services, which would make her tend to be more sympathetic to the problems of the defendants in the penalty phase; the fact that she seemed more in tune with the defense attorneys than the prosecution when questioned; and indications on her questionnaire that she had problems with immunized witnesses. (8RT: 1136.)

After appellant's second *Wheeler-Batson* motion, a Caucasian juror (W.W.) took T.M.'s place. (8RT: 1138, Vol.7, 2SCT: 1810.) The

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[20] As stated above, by the time of the first *Wheeler-Batson* motion, 21 jurors were subject to removal. By the time of the second *Wheeler-Batson* motion, after the prosecutor challenged T.M., eleven additional jurors (including T.M.) had been subject to peremptory challenge. (7RT: 946-948, 1028-1032; 8RT: 1134.) Thus, 32 (21 + 11) jurors had been questioned and were subject to peremptory challenge at the time of the second *Wheeler-Batson* motion.

prosecution and defense each exercised an additional peremptory challenge against Caucasian jurors. (8RT: 1139; Vol.4, 2SCT: 1159 [defense challenge]; Vol.7, 2SCT: 1758 [prosecution challenge].) Jurors S.L. (Caucasian) and C.T. (African-American) replaced these struck jurors. (8RT: 1139; Vol.7, 2SCT: 1862, 1888.) Thus, following the second *Wheeler-Batson* motion three additional jurors were subject to challenge, two Caucasians and one African-American, and one was challenged. All parties accepted the jury, which was then sworn. (8RT: 1139-1140.) By the time the 12 jurors were sworn 35 prospective jurors had been through questioning and available for challenge. (See footnote 20.)

The jury as initially sworn consisted of six African-American jurors, five Caucasian jurors and one Hispanic juror, E.S.[21] (8RT: 1139-1140; 10CT: 2997 [jury sworn]; Vol.2, 2SCT: 553; Vol.3, 2SCT: 606; Vol.4, 2SCT: 948, 974, 1133; Vol.5, 2SCT: 1394, 1420; Vol.6, 2SCT: 1654, 1732; Vol.7, 2SCT: 1810, 1862, 1888 [jurors' ethnicities].)

B. Applicable Legal Principles

The United States Supreme Court has long held that the Equal Protection and Due Process clauses of the Fourteenth Amendment prohibit prosecutors from discriminating in the exercise of their peremptory challenges on the basis of a juror's race or membership in a cognizable group. (See, e.g., *Miller-El v. Dretke* (2005) 545 U.S. 231, 238, and authorities cited therein; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-88.) The prohibition against a prosecutor's discriminatory use of peremptory

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[21] African-American Jury T.T. was excused by stipulation before opening arguments and replaced with a Caucasian alternate, J.D., whose name was drawn at random. (9RT: 1249-1250; Vol.4, 2SCT: 974; Vol.8, 2SCT: 2148.)

challenges also rests on the defendant's state and federal constitutional rights to an impartial jury drawn from a representative cross-section of the community. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 86; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 265-273; accord, e.g., *People v. Lenix* (2008) 44 Cal.4th 602, 612, and authorities cited therein; U.S. Const., 6th Amend; Calif. Const., art. I, § 16.)

Whether under the Fourteenth Amendment to the federal Constitution, or for purposes of a representative cross-section analysis, Hispanics constitute a cognizable group and prosecutors are prohibited from intentionally striking potential Hispanic jurors on the basis of their ethnicity. (*Hernandez v. New York* (1991) 500 U.S. 352, 355; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154-1155.)

Under both the state and federal constitutional standards, the discriminatory striking of even a single member of a cognizable group is prohibited. (*Snyder v. Louisiana* (2008) 552 U.S. 452, 478; *Batson v. Kentucky, supra*, 476 U.S. at pp. 95-96; *People v. Silva* (2001) 25 Cal.4th 345, 386; *People v. Montiel* (1993) 5 Cal.4th 877, 909.) Thus, a constitutional violation may arise even if others in the group are ultimately seated as jurors or were excluded for genuine race-neutral reasons. (See, e.g., *Snyder v. Louisiana, supra,* 552 U.S. at p. 478 [declining to resolve whether prosecutor's dismissals of other African-American jurors were legitimately race-neutral because its determination that prosecutor's explanations for excusing one such juror were pretextual was sufficient to make out constitutional violation warranting relief]; *People v. Montiel, supra*, 5 Cal.4th at p. 909 [under California law, a constitutional violation may arise even when only one of several members of a cognizable group was improperly excluded].)

Challenging a prosecutor's dismissal of a potential juror for racial reasons under both the state and federal Constitution involves a well-established three-step process. (See, e.g., *Snyder v. Louisiana*, *supra*, 552 U.S. at pp. 476-477, and authorities cited therein; *Johnson v. California* (2005) 545 U.S. 162, 168; *People v. Bonilla* (2007) 41 Cal.4th 313, 341 [state and federal constitutional standards incorporate the same three-step procedure]; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-283.)

First, the defendant has the initial burden of establishing a prima facie case of discrimination by showing that the facts give rise to an inference that the peremptory challenges are being exercised for discriminatory reasons (step one). (See, e.g., *Johnson v. California, supra*, 542 U.S. at p. 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-97; *People v. Bell* (2007) 40 Cal.4th 582, 596-597; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) The threshold for establishing a prima facie case is "quite low." (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1145.)

It is not the function of a reviewing court at step one of the *Batson/Wheeler* analysis to determine if the prosecutor might have had race-neutral reasons. (*Johnson v. California*, *supra*, 545 U.S. at p. 171; see *Miller-El v. Dretke*, *supra,* 545 U.S. at p. 253.) Nor does it entail an evaluation of the prosecution's credibility. Rather, the reviewing court must, as this Court did in *People v. Cornwell* (2005) 37 Cal.4th 50, and as the Supreme Court did in *Johnson v. California, supra,* 545 U.S. 162, "resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on the basis of ethnicity. (*People v. Cornwell*, *supra*, 37 Cal.4th at p. 73; *Johnson v. California*, *supra*, 545 U.S. at p. 163.)

Once the trial court finds that a prima facie case has been shown, the burden shifts to the prosecutor to justify the challenges with facially race-

neutral explanations related to the facts of the case (step two). (*Purkett v. Elem* (1995) 514 U.S. 765, 767-768; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Fuentes* (1991) 54 Cal.3d 707, 715; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) At step two, "the issue is the *facial* validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral" and the analysis proceeds to step three. (*Purkett v. Elem, supra*, 514 U.S. at pp. 767-768, italics added, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 360.)

The third and final step of the analysis requires the trial court to make a "sincere and reasoned attempt to evaluate" the prosecutor's facially race-neutral explanations and decide whether they are bona fide or pretextual (step three). (*People v. Silva* (2001) 25 Cal.4th 345, 385, quoting *People v. Hall* (1983) 35 Cal.3d 161, 167-168.)

C. This Court Must Review the Record Independently to Resolve the Legal Question of Whether the Record Supports an Inference that the Prosecutor Excused a Juror on a Prohibited Discriminatory Basis

In order for a defendant to establish a prima facie case at step one of a *Wheeler-Batson* challenge at the time of appellant's trial, California courts required proof by a preponderance of the evidence that it was "more likely than not" that the challenge was based on impermissible group bias. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 73.) Since then, the United States Supreme Court has expressly disapproved this standard, holding that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case." (*Johnson v. California, supra*, 545 U.S. at p. 168.) Instead, an appellant need only present facts that "raise an inference" of discrimination. (*Ibid.*)

After *Johnson v. California,* this Court held that when it is unclear whether the trial court applied the correct "reasonable inference" standard in finding no prima facie case, the Court,

> review[s] the record independently "to apply the high court's standard and resolve the legal question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis.

(*People v. Bonilla, supra,* 41 Cal.4th at p. 342, citation omitted.) Thus, where, as here, it is unclear what standard the trial court used, this Court should not accord any deference to the trial court's finding.

D. The Trial Court Erroneously Failed to Find a Prima Facie Case of Discrimination Based on the Pattern of Strikes

As the United States Supreme Court has explained, "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California, supra,* 545 U.S. at p. 170.) "An 'inference' is generally understood to be a 'conclusion reached by considering other facts and deducing a logical consequence from them.'" (*Johnson v. California, supra,* 545 U.S. at p. 168, fn. 4, quoting Black's Law Dict. (7th ed. 1999) p. 781.)

The evidence of whether the circumstances of the prosecution's challenges raise an inference of exclusion based on race can take various forms, including a pattern of strikes against the group (*Batson v. Kentucky, supra,* 476 U.S. at p. 97; *People v. Howard* (2008) 42 Cal.4th 1000, 1018, fn. 10); the striking of most or all of the members of the identifiable group from the panel (*People v. Wheeler, supra,* 22 Cal.3d at p. 280); the prosecution's use of a "disproportionate number of peremptories against the group" (*People v. Wheeler, supra,* at p. 280); whether the defendant is a

member of the challenged group and the victim is a member of the group to which the majority of jurors belong (*People v. Wheeler, supra,* 22 Cal.3d at pp. 280-281); and whether the jurors in question share only one characteristic – their membership in the group – and in all other respects are as heterogeneous as the community as a whole. (*Id.* at p. 280.) All of these criteria are met in this case.

A pattern of exclusionary strikes is not necessary for finding an inference of discrimination. (See *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902 ["the Constitution forbids striking even a single prospective juror for a discriminatory purpose"].) But "[a] pattern of exclusion of minority venire persons provides support for an inference of discrimination." (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812, overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (en banc) (*Turner*).) A reasonable inference that the prosecution used its peremptory challenges in a racially discriminatory manner may be established by statistics alone. (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091; see also *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 [observing that in *Turner, supra,* the court relied only on the statistical disparities in finding a prima facie *Batson* violation].)

The record here shows several patterns from which, separately or together, one can infer group bias.

The Elimination Rate

The simplest method of analysis looks only at the number of group members challenged to see if the majority of the members of a cognizable group have been excluded. (See *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567, 584 ["statistical facts like a high proportion of African-Americans struck . . . can establish a pattern of exclusion on the basis of

race that gives rise to a prima facie *Batson* violation"].)

For example, the court in *Turner v. Marshall, supra,* 63 F.3d at p. 813, concluded that the prosecutor's exclusion of five out of nine available African-American venirepersons (56%) was sufficient to establish a pattern of discrimination. (See also *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 822, overruled on other grounds in *United States v. Nevils* (9th Cir. 2010) 598 F.3d 1158, 1167 [where two of four African-American jurors stricken, court assumes existence of a prima facie case].) "Although no particular number of strikes against [cognizable group members] automatically indicates the existence of a prima facie case," the court in *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, found a prima facie case where the defendant, on trial for a hate crime against an African-American family, struck three of four, or 75 percent, of the black venire members. (*Id.* at p. 925.)

In this case, the prosecution similarly struck a sufficient percentage of the available Hispanic jurors to infer a discriminatory intent, i.e., two of three (66%) at the time of the first motion (6RT: 621-622, 7RT: 944) and four of six (67%) at the time of the second motion. (7RT: 943, 8RT: 1135-1138.) This is sufficient to infer a prima facie case. (See *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [noting that the Ninth Circuit found an inference of bias in cases where the prosecutor used peremptory challenges to strike five out of six, four of seven, and five out of nine minority jurors, respectively].)

Exclusion Rate/Proportionality Analysis

The number of challenged members of a particular cognizable group becomes more significant if one compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the

pool of jurors subject to peremptory challenge. (See *People v. Bell* (2007) 40 Cal.4th 582, 598, fn. 4 [referring to this method as a "more complete analysis of disproportionality"]; see also *Jones v. West* (2nd Cir. 2009) 555 F.3d 90, 98 [discriminatory bias can be inferred from the "exclusion rate," i.e., when a party uses peremptory challenges to exclude a disproportionate number of members of a cognizable racial group].) Thus, where the prosecution struck four of seven minority venirepersons (57%) in a venire that was 29 percent minority, the court in *United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255, commented that a "challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under *Batson.*"

As noted above, when appellant made his first *Wheeler-Batson* challenge, three Hispanics (E.S., P.G. and E.A.[22]) had been seated in the box and the prosecution had exercised peremptory challenges against two of them. (7RT: 837, 943.) Appellant argued that the questionnaires showed there were relatively few Hispanics and more African-American and Caucasian jurors on the panel, so that the two dismissed Hispanics made up a substantial portion of the available Hispanic prospective jurors. (7RT: 944.) Thus, counsel notified the court that a principal factor existed to demonstrate a prima facie case, i.e., that the prosecutor was excluding Hispanics at a rate disproportionate to their representation on the panel. *(People v. Wheeler, supra,* 22 Cal.3d at p. 280; *Fernandez v. Roe, supra,* 286 F.3d at p. 1078.) At that point, of the 21 jurors in the box that had been questioned, only three (12.5%) were Hispanic and the prosecution removed

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[22] As noted above, the prosecution had sought unsuccessfully to remove E.S. for cause; he ultimately served on the jury. (7RT: 831-832.)

two of them (67%).

By the time of the second *Wheeler-Batson* motion, the prosecution had exercised peremptory challenges against two more Hispanics, T. M. and R.F., thus removing four of six, or 67 percent, of the potential Hispanic jurors who made up only 19 percent of the 32 potential jurors then available for challenge. A challenge rate more than three times that of the Hispanic percentage of the panel strongly supports a prima facie case under *Batson.* (See *United States v. Alvarado, supra,* 923 F.2d at p. 256.)

These statistical disparities were as or more egregious than those found sufficient, "standing alone, . . . to raise an inference of racial discrimination" in *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078 and other cases. The *Fernandez* court found a *prima facie* case where the prosecution used 21 percent of its challenges against Hispanic prospective jurors, who represented only 12 percent of the juror pool. In *Turner v. Marshall, supra,* 63 F.3d at p. 813, the court found a prima facie case where the prosecution used 56 percent of its peremptory challenges against African-Americans, where only about 30 percent of those called for voir dire had been African-American, holding that "[s]uch a disparity also supports an inference of discrimination." (*Ibid.*) In *United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1453-1454, the court ruled that a prima facie case was established where the prosecutor used three of six peremptories to strike three of nine Hawaiian/Polynesian potential jurors. (See also *Mahaffey v. Page* (7th Cir. 1999) 162 F.3d 481, 484 [court found prima facie case where state used seven of 13 strikes (54%) against all the African-American veniremembers]; *Jones v. Ryan* (3d Cir. 1993) 987 F.2d 960, 971 [holding that a prima facie case was made where minorities comprised 20 percent of the venire, but the prosecutor's exclusion rate was

75 percent].)

That the prosecution used a disproportionate number of its 10 strikes - four, or 40 percent - against the six Hispanics who at the time of the second *Wheeler-Batson* motion made up only 19 percent of the 32 potential jurors then subject to strike becomes more significant in light of the strike patterns as to other ethnic/racial groups. The prosecution struck one of the four Asian-Americans (25%), who were 12 percent of the jurors subject to peremptory challenges.[23] Eleven Caucasians comprised 34 percent of the 32 jurors subject to removal and the prosecution only struck one of them, i.e., nine percent.[24] Ten African-Americans comprised 31 percent of the 32

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[23] All four Asian-Americans were struck by the time of the second *Wheeler-Batson* motion. For **R.W.**, see Vol.4, 2SCT: 1079 (ethnicity) and 7RT: 839 (prosecution strike). For **R.G.**, see Vol.2, 2SCT: 501 and 7RT: 946-947. For **E.V.**, see Vol.5, 2SCT: 1185 and 7RT: 942. For **L.S.**, see Vol.6, 2SCT: 1680 and 7RT: 1031.

[24] Eleven Caucasian jurors were subject to strike by the time of the the second *Wheeler-Batson* motion. For **Raymond R.**, see Vol.4, 2SCT: 1000 (ethnicity) and 7RT: 839 (prosecution strike). Three of these jurors sat: **J.R.**, Vol.4, 2SCT: 1133 and 7RT: 839 (to box); **I.Z.**, Vol.5, 2SCT: 1394 and7RT: 943; **V.L.**, Vol.6, 2SCT: 1732 and 8RT: 1042.

Five of those remaining were struck: **M.M.**, Vol.4, 2SCT: 1052 and 7RT: 946 (struck); **Robert R.**, Vol.3, 2SCT: 844 and 7RT: 943; **H.S.**, Vol.3, 2SCT: 686 and 8RT: 1134; **C.G.**, Vol.6, 2SCT: 1602 and 7RT: 1029; **C.M.**, Vol.6, 2SCT: 1472 and 7RT: 1028.

Two Caucasian jurors were in the box at the time of the *Wheeler-Batson* motion and struck after it: **J.Y.**, Vol.7, 2SCT: 1758 (prosecution strike) and **M.B.**, Vol.4, 2SCT: 1159 (defense strike). (8RT: 1139.)

Two other Caucasian jurors who entered the box after the second *Wheeler-Batson* motion both sat on the jury. For **W.W.**, see Vol.7, 2SCT: 1810 and 8RT: 1138. For **S.L.**, see Vol.7, 2SCT: 1888 and 8RT: 1139.

jurors and the prosecution struck four of them, i.e., 40 percent.[25] This is summarized in the following table:

Proportionality Analysis as of Second *Wheeler-Batson* Motion: Number and Percentage of Jurors Subject to Peremptory Challenge, Actually Challenged by the Prosecution and as Percentage of Prosecution's Total Challenges

Race/Ethnicity	Total Jurors Subject to Challenge/as Percentage of Total Challengeable	Total Challenged/as a Percentage of DA's Total Challenges
African-American	10/31%	4/40%
Asian-American	4/12%	1/10%
Caucasian	11/34%	1/10%
Hispanic	6/19%	4/40%
Unknown[26]	1/3%	10/100%
TOTAL	32/99%[27]	10/100%

[25] Ten African-American jurors were subject to strike by the time of the second *Wheeler-Batson* motion. The prosecution struck four: **K.M.**, Vol.2, 2SCT: 527 (ethnicity) and 7RT: 838 (struck); **A.W.**, Vol.2, 2SCT: 579 and 7RT: 942; **D.K.**, Vol.3, 2SCT: 818 and 7RT: 839; **M.W.**, Vol.4, 2SCT: 1026 and 7RT: 838. The defense struck **D.C.**, Vol.6, 2SCT: 1628 and 7RT: 1029.

The five called prior to the motion who served were **R.H.**, Vol.2, 2SCT: 553 and 6RT: 621 (to box); **T.W.**, Vol.4, 2SCT: 948 and 6RT: 622; **T.T.**, Vol.4, 2SCT: 974 and 6RT: 622; **S.B.**, Vol.5, 2SCT: 1420 and 7RT: 946; **M.L.**, Vol.6, 2SCT: 1654 and 7RT: 1029. **C.T.**, Vol.7, 2SCT: 1862, was called to the box after the second *Wheeler-Batson* motion (8RT: 1139), and served.

[26] One prospective juror, J.C., did not fill in the ethnic background question. (Vol.5, 2SCT: 1446 and 7RT: 947 [defense strike].)

[27] Due to rounding, the total is 99% rather than 100%.

Thus, the prosecution used 40 percent of its strikes on Hispanics, who made up only 19 percent of those subject to strike, while striking African-Americans at a rate much closer to their proportion in the panel, and striking Caucasians at a much lower rate than their proportion in the panel. If the challenges were random, we would expect to see them dispersed randomly in the various racial/ethnic groupings. However, Hispanics were struck at a disproportionately high rate and Caucasians at a disproportionately low rate. This strengthens the inference that the strikes against the Hispanic jurors were discriminatory.

The results are similar if one analyzes the entire panel of 141 people who filled out questionnaires along with the 35 prospective jurors available to challenge by the time the juror was sworn. Of the 141 jurors who survived hardship and filled out questionnaires, 20 (14%) were Hispanic.[28] Fifty-four (38%) self-identified as African-American;[29] fifty-two (37%) as Caucasian; 11 (8%) identified as Asian-Americans; one (<1%) as Native American; and three (2%) did not designate ethnicity.[30]

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[28] See Vol.2, 2SCT: 397; Vol.3, 2SCT: 606; Vol.4, 2SCT: 922; Vol.5, 2SCT: 1211, 1264, 1316, 1368, 2733; Vol.6, 2SCT: 1524; Vol.9, 2SCT: 2341; Vol.10, 2SCT: 2649, 2677, 2845, 2899; Vol.12, 2SCT: 3344, 3453, 3537, 3288; Vol.13, 2SCT: 3703, 3731.

[29] Some jurors used descriptive terms synonymous with those appellant uses herein, i.e., African-American, Asian-American, Caucasian and Hispanic.

[30] See Vol.2, 2SCT: 423, 449, 475, 501, 527, 553, 579; Vol.3, 2SCT: 660, 686, 740, 766, 792, 818, 844, 870; Vol.4, 2SCT: 896, 948, 974, 1052, 1000, 1026, 1072, 1107, 1133, 1159; Vol.5, 2SCT: 1185, 1290, 1342, 1394, 1420, 1446; Vol.6, 2SCT: 1472, 1498, 1550, 1576, 1602, 1628, 1654, 1680, 1706, 1732; Vol.7, 2SCT: 1758, 1784, 1810, 1836, 1862, 1888, 1914, 1940, 1966, 1992, 2018; Vol.8, 2SCT: 2044, 2070, 2096, 2122, 2148, 2174,

As described above, 14 percent of the entire panel of 141 individuals was Hispanic; the prosecution struck four Hispanic jurors, thus using 36 percent of its 11 total peremptory challenges against Hispanics.[31] Caucasians made up 37 percent of the panel, yet the prosecution struck only two Caucasians (7RT: 839; 8RT: 1139; see also 2SCT: 1000, 1758 [showing ethnicity]), using 18 percent of its challenges. Four of the prosecution's total 11 challenges, or 36 percent, were used to strike African-Americans, which was similar to the percentage of African-Americans in the panel, which was 38 percent. (8RT: 1135; see Vol.2, 2SCT: 527, 579; Vol.3, 2SCT: 818; Vol.4, 2SCT: 1026 [ethnicity of these jurors].) The prosecution struck one Asian-American (7RT: 839; Vol.4, 2SCT: 1079 [ethnicity]), using nine percent of the 11 strikes, close to the eight percent of self-identified Asian-American jurors in the panel as a whole. Thus, African-Americans and Asian-Americans were struck in similar proportion to their overall presence in the panel, while a disproportionately high number of Hispanics and low number of Caucasians were struck.

2200, 2257, 2285, 2313; Vol.9, 2SCT: 2369, 2397, 2425, 2453, 2481, 2509, 2537, 2565, 2593, 2621; Vol.10, 2SCT: 2649, 2705, 2761, 2789, 2817, 2873, 2927; Vol.11, 2SCT: 2982, 3010, 3038, 3066, 3094, 3122, 3148, 3176, 3204, 3232; Vol.12, 2SCT: 3260, 3316, 3371, 3397, 3425, 3481, 3509; Vol.13, 2SCT: 3591, 3619, 3647, 3675, 3759, 3787, 3815, 3842; Vol.14, 2SCT: 3870, 3898, 3926, 3952, 3980, 4008, 4036, 4064; Vol.15, 2SCT: 4121, 4149, 4177, 4203, 4231, 4258, 4286, 4314.

[31] As noted above, after the second *Wheeler-Batson* motion was denied, three additional jurors were subject to strike, two Caucasians and one African-American, bringing the total number subject to strike to 35. (8RT: 1138-1139.) The prosecution exercised one of these strikes against a Caucasian juror, bringing its total number of peremptories exercised to eleven. (8RT: 1139; Vol.7, 2SCT: 1758.)

These results, based upon comparing the entire panel of 141 individuals to the 35 potential jurors whom the prosecution had the opportunity to challenge by the time the jury was sworn, are summarized in the following table:

Proportionality Analysis:
Number and Percentage of Jurors on the Entire Panel and Challenged at the Time the Jury Was Sworn

Race/ Ethnicity	Number on Panel/ Percent of Panel	Number of Peremptories DA Used Against Group / Percentage of DA Total Peremptories	Number/percent of Group Members on Initial Sworn Jury
African-American	54/38%	4/36%	6/50%
Asian-American	11/8%	1/9%	0/0%
Caucasian	52/37%	2/18%	5/42%
Hispanic	20/14%	4/36%	1/8%
Other	4/3%	0	0
Total	141/100%	11/99%[32]	12/100%

The ethnic/racial composition of the entire panel (141) was similar to that of the group of 35 who had been in the box at the time of the jury was sworn. (See first chart.) The proportionality analysis therefore has similar results, i.e., the prosecution struck a disproportionately high number of Hispanics and a disproportionately low number of Caucasians. From this, one can also infer that the prosecution's pattern of challenging potential

[32] Due to rounding, the total is 99% rather than 100%.

Hispanic jurors was not random or coincidental. Whether looking at the jurors in the box at the time of the motions, when the jury was sworn, or at the entire panel, and regardless of the method of analysis used, the record shows a consistent disproportionate pattern of removing Hispanics through peremptory challenges that was more than sufficient to infer a *prima facie* case. The prosecution's attempt to remove a fifth Hispanic juror through an unsuccessful cause challenge is further evidence of this pattern, despite the fact that this juror, E.S., ultimately sat on the jury. (7RT: 829-833)

E. The Trial Court Erroneously Failed to Find a Prima Facie Case of Discrimination Based on Other Factors

Other reasons strongly support a prima facie case. First, it is significant that the homicides were interracial offenses. Appellant and his two co-defendants were Hispanic (7RT: 944), and the homicide victims were Asian and Caucasian, respectively. (6RT: 682; Ex. 63, Hospital and Nursing Care Facility Report.) Numerous studies have shown that the risk of jurors injecting racial prejudice into their decision-making is particularly great in cases involving interracial crimes.[33] Therefore, in analyzing *Batson* issues, courts have taken into account the fact that the case involved an interracial offense or "racially-sensitive issues."[34]

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[33] See e.g., King, *Post Conviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions* (1993) 92 Mich. L. Rev. 63, 80-100 [summarizing studies].

[34] See, e.g., *Babbitt v. Woodford* (9th Cir. 1999) 177 F.3d 744, 747 [factual predicate for claim that trial counsel should have questioned jurors about potential racial bias and protested prosecutor's peremptory challenges included fact that it was an interracial crime]; *Jones v. Ryan* (3rd Cir. 1993) 987 F.2d 960, 971 [taking into account that African-American defendant was charged with a violent offense against a White victim in finding a prima facie case]; *Williams v. Chrans* (7th Cir. 1991) 945 F.2d 926, 944

A second factor weighing on the side of inferring biased exercise of peremptory challenges against Hispanics is the fact that appellant is the same race as the dismissed jurors. (7RT: 944.) As the Supreme Court noted in *Powers v. Ohio* (1991) 499 U.S. 400, "[r]acial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred." (*Id.* at p. 416.)

Third, whether the defendant is a member of the challenged group and the victim is a member of the group to which the majority of jurors belong are also factors relevant to determining whether a prima facie case has been established. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 281.) Here, one of the victims, Hoglund, was Caucasian (7SCT: 36), and thus a member of the group to which a significant number of prospective jurors belonged. And, as demonstrated above, the prosecution preferred Caucasian jurors at the expense of Hispanics when exercising peremptory challenges.

Another factor on which a defendant is entitled to rely in establishing a prima facie case is the fact, "as to which there can be no dispute, that

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["In a case where the defendant is African-American and the victim is White, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many White jurors as possible in order to enlist any racial fears or hatred those White jurors might possess."]; see also *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 192 ["It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise" a reasonable possibility that racial prejudice will influence the jury.].)

peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson, v. Kentucky, supra,* 476 U.S. 79, 96 [citation omitted].)

After reviewing the pattern of strikes and the above factors which make up "the totality of the relevant facts" (*Johnson v. California, supra,* 545 U.S. at p. 168), it is clear that appellant made out a prima facie case that discriminatory purpose motivated the prosecutor's challenges to the potential Hispanic jurors.

F. The Court Should Find Error

Reversal is required under *Wheeler* even if only one prospective juror is improperly struck on discriminatory grounds. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1295.) Similarly, under *Batson*, the striking of a single juror for racial reasons violates the equal protection clause, even though other minority persons are seated and even when there are valid reasons for striking other minority jurors. (*Ibid.*)

The foregoing statistics and facts raise an inference of discrimination. Under *Johnson v. California,* the defense burden is merely to establish grounded "suspicions and inferences that discrimination may have infected the jury selection process," that is, establish a "plausible" claim of discrimination. (*Johnson v. California, supra,* at pp. 172, 173; see also *id.* at p. 170 [burden of establishing a prima facie case is not onerous].) The trial court's failure to find that appellant established a prima facie case of discrimination with respect to the peremptory challenges exercised against the four Hispanic panel members therefore violated *Batson* and *Wheeler*. The trial court's erroneous denial of appellant's *Wheeler* motion deprived appellant of his rights under the Equal Protection Clause of the federal Constitution (*Batson v. Kentucky, supra,* 476 U.S. 79), as well as the

right under the California Constitution to a trial by a jury drawn from a representative cross-section of the community. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 272.)

G. The Court Should Not Rely on the Prosecutor's Stated Reasons for Striking the Prospective Hispanic Jurors to Resolve the Question of Whether Appellant Has Made a Prima Facie Case

As noted above, following its rulings that appellant had not shown a prima facie case, the court below invited the prosecution to state its reasons "for the record so we can preserve it." (7RT: 944-945; 8RT: 1135-1136.) For the reasons argued below, this Court should not rely upon these reasons when deciding appellant's *Wheeler-Batson* claim, except as part of a third-stage analysis.

Following the U.S. Supreme Court's decision in *Johnson v. California, supra,* 454 U.S. 162, this Court has continued to hold that:

> [w]hen a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling. [Citations.] We will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question.

(*People v. Guerra* (2006) 37 Cal.4th 1067, 1011.) The Court has also continued to find it proper for a trial court to request and consider a prosecutor's stated reasons for excusing a prospective jury even when it finds no prima facie case of discrimination. (*People v. Taylor* (2010) 48 Cal.4th 574, 61.) The Court itself also has continued to rely on the prosecutor's stated reasons when rejecting a defendant's claims under *Batson* in a first stage analysis. (See, e.g., *People v. Hawthorne* (2009) 46 Cal.4th 67, 80, abrogated on other grounds by *People v. McKinnon* (2011)

52 Cal.4th 610 [where court found no prima facie case but asked prosecutor to state reasons for the record, prosecutor's race-neutral reasons for the excusals confirmed the trial court's finding that there was insufficient evidence to support inference of discrimination].) Appellant respectfully submits that these rulings are improper under *Batson v. Kentucky* and its progeny, including *Johnson v. California.*

First, appellant submits that this standard - affirming "where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question" - misconstrues the United States Supreme Court's *Batson* jurisprudence and encompasses only part of the necessary analysis under *Batson.* "[T]o rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1108.) This is because a defendant may make out a "prima facie case of purposeful discrimination by showing that the *totality of the relevant facts* gives rise to an inference of discriminatory purpose." (*Batson v. Kentucky, supra,* at pp. 93-94, emphasis added.)

Second, *Batson* involves a burden-shifting framework with distinct tasks at each step. In *Johnson v. California, supra,* 545 U.S. at page 171 and footnote 7, the U.S. Supreme Court explained that stages one and two of the three-stage *Batson* procedure "can involve no credibility assessment because the burden-of-production determination necessarily precedes the credibility-assessment stage . . . . [Internal quotations and citations omitted.]"

Thus, the fact that the prosecution's proffered reasons "suggest[] grounds upon which the prosecutor might reasonably have challenged the

jurors in question," *People v. Guerra, supra,* 37 Cal.4th at p. 1011, is not determinative at stage one or even stage two of a *Batson* case.

> The second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral."

(*Purkett v. Elem, supra,* 514 U.S. at pp. 767-768, quoting *Hernandez v. New York, supra,* 500 U.S. at p. 360 (plurality opinion), *id.* at p. 374 (O'Connor, J., concurring in the judgment).)

It is not until the third step of the *Batson* procedure that the persuasiveness of the prosecutor's justifications become relevant. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d. 1102, 1106, citing *Johnson v. California, supra,* 545 U.S. at p. 171.) And in undertaking step three of the analysis, the trial court may *not* simply accept the prosecutor's explanation at face value. (See, e.g., *Miller-El, supra,* 545 U.S. at p. 248; *People v. Fuentes* (1991) 54 Cal.3d 707, 720; *Williams v. Rhoades* (9th Cir. 2004) 354 F.3d 1101, 1108, and authorities cited therein.) To the contrary, "the trial court must determine not only that a valid reason existed but also that the reason *actually* prompted the prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes, supra,* 54 Cal.3d at p. 720, italics added.) Because appellant's burden at step one is "not onerous," *Johnson v. California, supra,* 545 U.S. at p. 170, it is illogical to defeat it at stage one by accepting the prosecutor's reasons at face value when at stage three, where appellant has the burden of persuasion and not just of production, those reasons must be scrutinized and evaluated.

Appellant submits that by considering only whether the record

contains reasonable grounds to justify the prosecutor's strikes, this Court effectively turns first stage cases into second stage cases, but then stops prematurely, omitting the crucial third step. Without considering a prosecutor's proffered reasons in the way that *Batson v. Kentucky, supra,* and *Johnson v. California, supra,* mandate, a court gives its stamp of approval to the prosecution's showing, without putting it to the level of scrutiny that *Batson* demands. (See *Williams v. Runnels, supra,* 432 F.3d at p. 1108 [appellate court determination that record supported race-neutral grounds for prosecutor's peremptory challenges at first stage did not adequately protect defendant's rights under the Equal Protection Clause of the Fourteenth Amendment or "public confidence in the fairness of our system of justice," citing *Johnson v. California, supra,* 545 U.S. at p. 172, quoting *Batson,* 476 U.S. at p. 87].)

For these reasons, this Court should not rely upon the prosecutor's stated reasons for excusing the Hispanic jurors at issue, unless it does so as part of a full, three-stage *Batson* analysis.

H. Under the "Totality of Relevant Facts" Standard of *Batson*, This Court Should Engage in Comparative Analysis

In this Court's developing jurisprudence in *Wheeler-Batson* cases, the Court has declined to perform comparative analysis in cases it considers as first stage. In declining to do comparative analysis in *People v. Howard* (2008) 42 Cal.4th 1000, 1020, for example, the Court remarked that comparative analysis has "little or no use" in the first stage because whether a prima facie case is made out "does not hinge on the prosecutor's actual proffered rationales . . . ." (But see *People v. Salcido* (2008) 44 Cal.4th 93, 137 [explaining that in the alternative, where the prosecution has stated its reasons on the record, it can assume, without deciding, that the defendant

succeeded in the first step of *Batson*, and go on to steps two and three]; *People v. Cornwell* (2005) 37 Cal.4th 50, 69-71 [undertaking comparative juror analysis even though no prima facie case established, when prosecutor permitted to comment despite the lack of such a case].)

Appellant respectfully requests this Court to reconsider its position for the following reasons.

First, a court must consider the totality of relevant circumstances when judging whether a prima facie case has been established. (*Batson v. Kentucky, supra,* 476 U.S. at p. 96; see also *People v. Wheeler, supra,* 22 Cal.3d at p. 280 [moving party must show "from all the circumstances of the case" that challenges are being made because of group association].) Appellant is therefore entitled to rely upon a comparative juror analysis based upon the record below as one of the "relevant circumstances" in establishing a prima facie case.

Second, as demonstrated above, the Court must independently review the record where, as here, it is unclear whether the trial court used the correct "reasonable inference" standard. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 342.) The record necessarily encompasses all the relevant portions of the record, including the juror questionnaires and voir dire. (See Cal. Rules of Court, rule 8.610(a)(1)(P) & (2)(c).)

Third, as other persuasive authorities have pointed out, comparative juror analysis is often called for on appeal in a first stage case. This is because, inter alia, without it, a meaningful review of whether the trial court's ruling at either step one or step three violated *Batson* is not possible (*Boyd v. Newland* (9th Cir. 2006) 467 F.3d 1139, 1149); side-by-side comparisons of jurors are a "more powerful tool" than bare statistics (*id.* at p. 1145, citing *Miller-El, supra,* 545 U.S. at p. 241); and because "both

Johnson and *Miller-El* suggest that courts should engage in a rigorous review of a prosecution's use of peremptory strikes." (*Id.* at p. 1149.)

For all these reasons, the Court should engage in comparative juror analysis in appellant's case.

I. The Prosecutor's Reasons for Excusing Hispanic Jurors P.G., R.F., T.M. and E.A. Were Pretextual

1. P.G.

P.G. was in the first group of jurors seated in the box. (6RT: 621-622.) He was 45 years old, had a Ph.D. in sociology, worked as a university administrator at California State University at Long beach and belonged to various professional groups, including the National Association of Chicano Studies. His spouse worked as a program director for the Los Angeles Opera. (Vol.2, 2SCT: 397.)

The prosecution struck P.G. because he:

> was extremely against the death penalty on the questionnaire. Always, never, never on the questioning.
>
> And here in court he said he didn't like it. He ultimately equivocated, but he - his questionnaire showed he was extremely against it. We don't think he could be fair on the issue.

(7RT: 945.)

In fact, like various jurors not challenged by the prosecution, P.G.'s answers showed a strong willingness to impose it according to law, along with an initial misunderstanding of what the law required.

Asked his general feeling about the death penalty, P.G. wrote that he was not in favor of it because he did not "believe it has been applied in a

standard way to a diverse population of offenders."[35] Nevertheless, he had "never been moved to have the death penalty removed or put on the books," belonged to no organization that supported abolition of the death penalty and stated that race and ethnic background would not affect his decision to vote for or against the death penalty in this case. (Vol.2, 2SCT: 410, 414, 415.)

The court asked P.G. to explain what he meant by not being in favor of the death penalty and how he felt about being a "judge" in this case. (6RT: 629.) P.G.'s understanding was that when the death penalty was removed and then put back on the books, the arguments were about how it was applied to different individuals and not whether it was a deterrent or whether the state had a right to do it. (6RT: 629-630.) However, P.G. said he would not apply his past concerns in this case; he accepted that the death penalty was the law and that he might need to take it into account in this case. (6RT: 630-631.)

The prosecution's statement that P.G.'s questionnaire response showed he was "extremely against" the death penalty was therefore incorrect. (7RT: 945.) Moreover, when P.G. correctly understood death penalty eligibility, he was "almost always" in favor of sentencing the defendant to death. When asked in his questionnaire to describe what he

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[35] Studies consistently confirm this understanding. (See, e.g., Pierce & Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99* (2005) 46 Santa Clara Law Review 1, 19 [finding that race and ethnicity are key factors in determining who is sentenced to die; those who kill non-Hispanic Whites are over three times more likely to be sentenced to die as those who kill African Americans, while those who kill non-Hispanic whites are over four times more likely to be sentenced to die as those who kill Hispanics].)

had read recently in the newspapers about the death penalty, P.G. wrote that the "death penalty is applicable to special circumstances or multiple murders." (Vol.2, 2SCT: 410.) The next three questions gave the jurors different scenarios and asked whether in each a participant always, almost always, never or almost never "should get the death penalty." (See Vol.2, 2SCT: 411.) P.G. responded that as to a participant in a robbery where a police officer is murdered or one where a store owner is murdered, the participant should "almost never" get the death penalty, explaining "[a]s I understand the law, the prosecution would have to prove special circumstances." (Vol.2, 2SCT: 411.) However, when asked about a participant in a robbery where more than one person was murdered, he checked "almost always," explaining that this "statement coincides with the law as I understand it." (*Ibid.*)

Thus, P.G.'s responses to these questions demonstrate that he answered based upon his understanding that the death penalty could only be considered if there were special circumstances or multiple murders (Vol.2, 2SCT: 410), but that he did not correctly understand special circumstances. When P.G. did believe that the death penalty was applicable, as in the case of multiple murders, he thought the participant should "almost always" get the death penalty. (Vol.2, 2SCT: 410-411; 6RT: 632.) P.G.'s misunderstanding of what made up a special circumstance was later rectified. (6RT: 631-632.)

The next two items on the questionnaire asked the potential jurors to check whether they strongly agreed, agreed somewhat, strongly disagreed, or disagreed somewhat that anyone who intentionally kills another should "always" or "never" get the death penalty. (See, e.g., Vol.2, 2SCT: 412.) P.G. indicated that he "disagree[d] somewhat" with both statements. When

asked to explain his responses, P.G. wrote, as to both items, "[t]here are issues of mental abilities, degrees of intent, level of participation." (Vol.2, 2SCT: 412.) These were, of course, "trick" questions in that an intentional killing, without more, would never be death eligible. Given this, P.G.'s responded as best he could, indicating that in his mind, mental state and aider and abettor liability were related to death worthiness. In a more general sense, these responses as well as those to the three "scenario" questions above, demonstrate a correct understanding that there is nothing automatic about death penalty sentencing.

It was only later in the questionnaire, after these questions appeared, that the questionnaire informed the jurors that in a death penalty trial, a juror decides first whether a defendant is guilty of first degree murder and whether a "special circumstance" is true and only then has the opportunity to decide upon sentence, after listening to additional evidence relating to the crime and defendant's background. (Vol.2, 2SCT: 412-413.) However, the questionnaire did not give the jurors any examples of special circumstances.

The questionnaire next required jurors to respond to seven yes-or-no items as to whether they understood that death and life without the possibility of parole (LWOPP) were the choices at the sentencing phase; whether they would always vote for or against guilt so as to avoid or require a death penalty decision; whether they would, regardless of the evidence, always vote for either death or LWOPP if the defendant was found guilty of "intentional, deliberate first degree murder" and at least one special circumstance was found true; and whether their feelings about the death penalty would interfere with their objectivity at the guilt phase. (Vol.2, 2SCT: 413-414.)

P.G.'s responses to these questions indicated he understood the tasks

of a juror in a capital trial and could carry them out fairly. His responses to the final questions about the death penalty similarly demonstrated that he would follow instructions, had no personal feelings or religious, moral or ethical beliefs that would make it difficult for him to vote to impose the death penalty "under any circumstances," and could choose death or LWOPP as a punishment in the appropriate case. (Vol.2, 2SCT: 414-416.)

The prosecution thus misstated the record when it told the court that it had struck P.G. because he was "extremely against" the death penalty and responded ("always, never, never") to questions about the death penalty on the questionnaire. (See 7RT: 945.) As the foregoing shows, P.G.'s responses all demonstrated a willingness to vote for the death penalty if the circumstances presented themselves. Contrary to the prosecution's representation, P.G. did not respond categorically and negatively to the death penalty, and his responses showed a desire to apply the law as he understood (or misunderstood) it. His answer that he would "almost always" vote against death when a store owner or police officer was killed was based upon misunderstanding the law, and when he thought that the law allowed the death penalty, as with multiple murders during a robbery, he indicated he would "almost always" vote for it. (Vol.2, 2SCT: 411.) Moreover, after the court had explained what a special circumstance was and gave examples, e.g., more than one murder, an officer is killed in the line of duty, a murder in the course of a robbery (6RT: 586-588, 631), P.G. affirmed that he accepted the law and would make his decisions pursuant to the court's guidelines. (6RT: 630-631, 633-636.)

The above demonstrates that the prosecution's contentions that P.G. was "extremely against the death penalty" on his questionnaire and that P.G. "ultimately equivocated" about his position when questioned were

untrue and misleading. (7RT: 945.) "Equivocate" means "to use equivocal language esp. with intent to deceive" and "to avoid committing oneself in what one says." (Webster's 10th New Collegiate Dict. (1993) p. 393.) P.G. did not equivocate.

Also, contrary to the prosecution's assertions, P.G. did not change his position about the death penalty during voir dire. Rather, he repeated "his true feelings" that although he was not in favor of it, he accepted the law and would follow it. (6RT: 629-631, 635.) As explained above, what did change between the time P.G. filled out the questionnaire and his voir dire was that his misunderstanding about the meaning of special circumstances was cleared up. (6RT: 631-632.) And while he was uncertain when the court asked what he would "need to hear before" voting for death, he did not know because it was something he had never heard about or thought before. (6RT: 633, lines 4-5 and 634, lines 15-17.)

Thus, a fair reading of P.G.'s responses by themselves indicates that the record does not support the prosecution's claim that P.G. was "extremely against the death penalty" as shown by his "always, never, never" responses on the questionnaire or that he "ultimately equivocated" on the issue when questioned. That the prosecution's reasons were pretextual is further supported by similar responses from other jurors not challenged by the prosecution.

If any juror equivocated about the death penalty, it was sitting juror S.L. S.L. was a single, 36-year-old Caucasian woman who lived with her significant other, a realtor. S.L. had a B.A. in criminal justice and worked as a customer service analyst for the U.S. Post Office. (Vol.7, 2SCT: 1888-1889.) She felt "truly torn" on the issue of capital punishment and "waiver[ed] back and forth" on the issue. (Vol.7, 2SCT: 1901, 1903.) And,

while she was "almost always" for the death penalty in the three given scenarios (participant in a robbery where a police officer, store owner or more than one person was murdered), she would have a hard time giving it to a non-shooter or if the murder was not planned. (Vol.7, 2SCT: 1902.)

Significantly, S.L.'s views on the death penalty stemmed from questioning its basic validity (questioning whether anyone has the right to put someone to death, even as punishment, vs. why murderers should have an option about death, when their victims did not). (Vol.7, 2SCT: 1901.) In contrast, P.G.'s concern related only to the death penalty as applied. (Vol.2, 2SCT: 410, 6RT: 629-631.) He expressed no other qualms about the death penalty and could vote in favor of a death sentence. (6RT: 629-636.)

S.L.'s doubts about the death penalty also surfaced in her concerns about the burden of proof, where she gave at best an ambiguous response on the issue. While she indicated on her questionnaire that it was fair that the burden of proof in a death penalty case was the same as in other cases, she also suggested a standard of "no doubt" for capital cases. (Vol.7, 2SCT: 1898.) P.G., in contrast, had no hesitancies about using the same burden of proof in capital and noncapital cases. (Vol.2, 2SCT: 407.)

Moreover, S.L., unlike P.G., disagreed with the law on aiding and abetting in her questionnaire. (Vol.7, 2SCT: 1911.) After the court explained the concept, S.L. indicated she could accept it as to a robbery (8RT: 1089-1090), and later agreed, based on a scenario posited by the prosecution, that if robbers plan in advance that a victim could be killed if necessary, the non-killer was eligible for the death penalty. (8RT: 1124.) In that way, S.L. was like P.G. and other jurors, as described *infra* - her opinion on an issue changed after the court explained it to her.

Several other jurors not challenged by the prosecution could have been described as "equivocating" in that they refused to state positions on the ground that their decision would depend upon the evidence. Another Caucasian juror that sat, V.L., was a divorced travel consultant with one adult child. (Vol.6, 2SCT: 1732.) V.L.'s general feeling about the death penalty was that "a life taken for a life" seemed fair (Vol.6, 2SCT: 1745), and she characterized herself as "middle of the road" on the death penalty. (8RT: 1046-1047.) However, she refused to answer any of the scenario questions because the case facts were unknown to her. (Vol.6, 2SCT: 1746.) She voiced her disagreement with the idea that the "murdered person's profession should have [anything] to do with any penalty prescribed." (Vol.6, 2SCT: 1746.) She also could not say whether she would be more or less likely to find a defendant guilty or not guilty in a capital case, because the "decisions should be based on evidence." (Vol.6, 2SCT: 1749.) Like P.G., at times she refused to be pinned down to a position without knowing the evidence. (8RT: 1047, 1107-1108.) Also like P.G., she based her views on what she knew at the time she completed the questionnaire. (8RT: 1047; 6RT: 632.) And, like P.G., she had difficulty talking about what might go into a decision because "it's beyond my realm." (8RT: 1048; 6RT: 633.) However, unlike P.G., V.L. was Caucasian, not challenged by the prosecution and sat on the jury.

Another juror who expressed ambivalence about the death penalty, disagreed with the law on special circumstances on her questionnaire and relied heavily on the circumstances of each case in explaining her failure to respond to certain questions, was sitting juror C.T. She was single with one child, 49 years old, African American and a registered nurse. (Vol.7, 2SCT: 1862-1863.) Though she had sat on a rape-murder death penalty case that

went to the penalty phase six or seven years earlier (8RT: 1079-1080), she professed to have no particular view on the death penalty (Vol.7, 2SCT: 1875), explaining that she was not strongly for or against it, as it depended upon the evidence. (8RT: 1081-1082.) However, she checked "almost never" when asked whether someone involved in a robbery where a police officer, shop owner or more than one person is killed should get the death penalty, explaining that only the actual shooter should be considered for death. (Vol.7, 2SCT: 1876.) She felt that whether an intentional killer should always or never get the death penalty depended upon the circumstances. (Vol.7, 2SCT: 1877.) She reiterated her belief that death eligibility and the imposition of the death penalty depend upon circumstances. (8RT: 1121-1122.) C.T. gave virtually identical answers as P.G. to the remaining questions about the death penalty. (See Vol.7, 2SCT: 1878-1881 (C.T.) and Vol.2, 2SCT: 413-416 [P.G.'s and C.T.'s responses to pp. 17-19 of the questionnaire].)

Alternate juror S.N. was a 36-year-old married architect with two small children. (Vol.7, 2SCT: 1966-1967.) She felt that the death penalty was needed but, like P.G., she initially had problems with some of the special circumstances. Faced with the question of whether a participant in a robbery where a store owner or police officer was killed should always/never or almost always/almost never get the death penalty, she checked no boxes, stating that the fact that a person was murdered was what was important. (Vol.7, 2SCT: 1980.) However, unlike P.G., who checked "almost always" when asked about the death penalty as to a multiple murder in a robbery (Vol.2, 2SCT: 411), S.N. refused to indicate a choice, instead asking for a "middle position." (Vol.7, 2SCT: 1980.) S.N.'s response to the questions about intentional killers were very similar to P.G.'s. As noted

above, P.G. "disagree[d] somewhat" with the statements that anyone who intentionally kills another should "always" or "never" get the death penalty. (Vol.2, 2SCT: 412.) S.N. "agreed somewhat" that an intentional killer "should always" get the death penalty and "disagreed somewhat" that they "never" should. (Vol.7, 2SCT: 1981.)

Alternate juror P.B. also expressed serious reservations about the death penalty. She was a 32-year-old African-American female who lived with her husband and five-year-old son. She had a Master's degree in Public Administration and worked as a management assistant for the City of Los Angeles, formulating and monitoring the administration of civil service exams. (Vol.7, 2SCT: 1992-1993.) She believed in the death penalty in "some circumstances," i.e., if there "is not [*sic*] chance of rehabilitation and defendant has no remorse for his actions." (Vol.7, 2SCT: 2005.) In contrast to P.G.'s single general concern about the death penalty, P.B.'s concerns were specific and suggested that a showing of any chance that a defendant could, in some way, be rehabilitated, would be enough to stop her from voting to sentence a defendant to death. Despite demonstrating a very pro-life bias as to the penalty phase, the prosecution did not challenge alternate juror P.B.

P.B.'s problems with the death penalty are also shown by her rejection of death eligibility for accessories. She was "almost never" in favor of giving the death penalty to someone who participates in a robbery where a police officer is murdered and indicated further that "mere participation as an accessory" should not subject one to the death penalty in any of the three scenarios. (Vol.7, 2SCT: 2006; see also 2015.)

In summary, the prosecution's reasons for excluding P.G. do not hold up under scrutiny, whether one looks at just P.G.'s responses or the

responses of other jurors as well. P.G.'s questionnaire did not indicate that he was "extremely against" the death penalty, did not demonstrate a categorical refusal to apply it and he did not equivocate in court. The prosecution accepted non-Hispanic jurors who were in fact equivocal in their support for the death penalty, such as S.L. and P.B., or their willingness to state when they would apply it, such as V.L. and S.N. In terms of the prosecutor's reason that P.G.'s responses were "always, never, never" on his questionnaire, sitting and alternate jurors accepted by the prosecution gave far more categorical responses than did P.G., for example, C.T. and P.B.

2. T.M.

T.M. was a 41-year-old married Hispanic woman. Her spouse was a checker at Orowheat and she had three children ranging in age from 11 to 23. (Vol.5, 2SCT: 1264-1265.) She had an eleventh grade education and worked as a "senior typist clerk" at the Los Angeles County Department of Children's Services, where her duties included searching for missing parents. (Vol.5, 2SCT: 1264-1265). After the prosecution exercised its tenth peremptory challenge against T.M. (8RT: 1134), the defense made its second *Wheeler-Batson* motion, based upon the dismissal of Hispanic juror R.F., as well as of T.M. (8RT: 1134-1136.)

As it did in response to appellant's first *Wheeler-Batson* motion, the trial court stated that it was not finding a prima facie case but nevertheless asked the prosecution to give its reasons for challenging T.M. The prosecution justified removing her on the grounds that:

> She had some equivocation about the death penalty in her jury questionnaire. She indicated that police are fair most of the time. Sometimes I get the impression they prejudice people on how they look.

> She had mixed feelings about the death penalty. On page 20: Could you see yourself rejecting life and choosing the death penalty instead? She wrote no.
>
> She does work for the Department of Social Services. I think she would tend to be more sympathetic to the problems of the defendants in the penalty phase. She seemed more in tune with the defense attorneys than she was when the prosecution voir dired her. She had some problems with immunized witnesses on her questionnaire.

(8RT: 1136.)

As with P.G., the prosecution wrongly characterized T.M. as equivocal about the death penalty. T.M.'s general feelings about the death penalty were that it would be a "hard decision - However if it were my child who was killed I would want this." (Vol.5, 2SCT: 1277.) Moreover, T.M. "almost always" would want death for one who participated in a robbery involving the murder of an officer, store owner, or multiple victims. (Vol.5, 2SCT: 1278.) Here, she was anything but mixed, as compared to sitting juror V.L., who refused to answer the "scenario" questions because the facts were unknown to her (Vol.6, 2SCT: 1746), or alternate juror S.N., who likewise refused to check boxes when given the scenarios about punishment for a participant in a robbery involving store owner, police officer or multiple victims. (Vol.7, 2SCT: 1980.)

In other respects, T.M. was similar to jurors not challenged by the prosecution. For instance, T.M. strongly disagreed that an intentional killer should never or always get the death penalty, explaining that there are too many other factors to consider, "abuse, mentally insane, etc." (Vol.5, 2SCT: 1279.) In that respect she was similar to sitting jurors V.L. and C.T., who would not state positions without knowing the circumstances. (Vol.6, 2SCT: 1746 [V.L.]; Vol.7, 2SCT: 1877 [C.T.].) And, similar to sitting

jurors C.T. and S.L. (8RT: 1113), T.M. indicated that while the decision would be difficult, after hearing everything, she could vote for life or death. (7RT: 863-864.) She could cast the twelfth vote for death. (7RT: 940.)

The court asked T.M. about her questionnaire responses that, given the two options, she could see herself rejecting the death penalty and choosing LWOPP but not rejecting LWOPP and giving death. (8RT: 865; Vol.5, 2SCT: 1283.) T.M. explained that she was answering based upon "how we felt right then without hearing the whole case" and she could make the appropriate decision. (7RT: 865-866.) This was similar to sitting juror V.L., who based her views in the questionnaire on what she knew then. (8RT: 1047.)

T.M. was not the only potential juror who said something different about the death penalty during voir dire than he or she had on the questionnaire. The prosecutor recognized this when commending one juror, later removed for cause, as the "first person that maintained their philosophical view on the death penalty from the questionnaire to this time." (7RT: 1007.) The issue also surfaced when the prosecutors informed the court that during a recess, over their protestations, a prospective juror spoke to them as they left the courtroom, making a statement "to the effect that all these people are lying or . . . they can't stand by their convictions." (7RT: 903.)

T.M. reiterated later that she could vote for either penalty but had to hear the evidence first (7RT: 911), which was the same position taken by sitting juror V.L. (Vol.6, 2SCT: 1749; 8RT: 1047, 1048, 1107-1108.) Thus, T.M.'s position on the death penalty was no more mixed than other jurors the prosecution did not challenge, such as the "truly torn" S.L. (See Vol.7, 2SCT: 1901, 1903.)

And of course, the prosecution had no problem with jurors whose rehabilitation went the other way. For instance, although sitting juror S.B. had indicated on her questionnaire that the killing of a store owner in a robbery or an intentional killing always merited the death penalty, she gave assurances when questioned that she could consider life as well. (7RT: 883-885.) The prosecution did not consider her to be equivocal.

The prosecution also cited T.M.'s comment on the questionnaire that police are fair most of the time but sometimes, "I get the impression they prejudice people on how they look." (Vol.5, 2SCT: 1269). This reason cannot be credited because other jurors not challenged by the prosecution had more specific criticisms and concerns regarding the police than did T.M. Sitting juror S.L.'s boyfriend was frisked and treated like a criminal in the driveway of his own home. (Vol.7, 2SCT: 1892.) Alternate juror P.B. specifically mentioned the Rodney King incident. (Vol.7, 2SCT: 1997.) P.B. had trained in the sheriff's department and at the jail saw some "pretty bad beatings" that she felt were not warranted. (8RT: 1163.) She admitted to a "strong mind to determine what is right and wrong between police officer conduct." (8RT: 1163.) Unlike T.M.'s "impression" that police might form opinions based upon a person's appearance, S.L. had a specific, negative experience with the police and alternate juror P.B. admitted she had a "strong mind" when it came to police conduct, based on both the Rodney King case and what she had seen in the county jail.

Moreover, like many other jurors, T.M. would not automatically believe or disbelieve a police officer. Rather, because everyone has the ability to lie, she would have to hear all the evidence first. (Vol.5, 2SCT: 1269.) Sitting juror S.L. expressed the same idea when she wrote that "some [police officers] are more credible than others, as is true with the rest

of the population." (Vol.7, 2SCT: 1893.) Sitting juror S.B. likewise wrote that police officers "are just like anybody else. Sometimes they tell the truth, sometimes they don't." (Vol.5, 2SCT: 1425.) Alternate juror P.B. also would need to consider all the facts and evidence before determining credibility. (Vol.7, 2SCT: 1997)

The prosecution's third stated reason for challenging T.M. was her work for the Department of Social Services, which the prosecutor speculated would make T.M. more sympathetic to the problem of the defendants in the penalty phase. (8RT: 1136.) This reason also cannot withstand scrutiny. T.M. had a clerical position as a senior clerk typist. (Vol.5, 2SCT: 1264.) Her only contact with abused children was when she saw them as they went through the office or took them to court. (7RT: 924.) On the other hand, she searched for missing parents and sometimes served incarcerated parents with notices of hearings. (Vol.5, 2SCT: 1267.) Thus, she could just as well have held biases against accused, allegedly abusive adults who ended up in jail as feeling sympathetic toward the criminally accused. Moreover, she agreed with the prosecution that many abused children can get on track with help or through their own choice. (7RT: 924.)

Sitting juror S.L. had a bachelor's degree in criminal justice and had wanted to work with young offenders. (8RT: 1084; Vol.7, 2SCT: 1889.) This indicated a desire to help young offenders and a potential for sympathy at the penalty phase for the defendants. This is especially so when combined with S.L.'s deep ambivalence about the death penalty. After writing on her questionnaire "I am truly torn on this issue" (Vol.7, 2SCT: 1901), S.L. noted her own "indecision on the use of the death penalty at all." (Vol.5, 2SCT: 1903.)

Alternate juror P.B., when asked about the cause of crime, wrote that it "all starts in the home where all kids are raised and has to do with how they are raised - morals - values. Lots of other factors are involve[d] as well - societal values, etc." (Vol.7, 2SCT: 1996.) The prosecutor then explored P.B.'s feelings about the role of family background, and similarly to T.M., P.B. indicated that a bad childhood was not determinative. (8RT: 1200-1202.) Yet the prosecutor challenged T.M. but not P.B.

Even if the Court should find that the prosecutor's occupation-based reason for excusing T.M. was adequate, the fact that one or more of a prosecutor's justifications do not hold up under judicial scrutiny militates against the finding of sufficiency of a valid reason. (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1221.)

The prosecution's fourth reason for challenging T.M. - the fact that she seemed more in tune with the defense attorneys than the prosecution when questioned - simply cannot be credited based upon the record. Where the prosecutor proffers an explanation that cannot be reviewed based on the cold record – such as a juror's demeanor – and the trial court simply "allow[s] the challenge without explanation," a reviewing court cannot presume that the trial court credited the explanation and, thus, there is no factual finding to which to defer. (*Snyder v. Louisiana*, *supra*, 552 U.S. at p. 479 [where prosecutor offered one subjective, demeanor-based reason for challenging juror and a second, objective reason for challenging him, but trial court "simply allowed the challenge without explanation," Supreme Court refused to presume that trial court credited demeanor-based reason and, thus, presumed no factual finding to which deference was due].)

Finally, the prosecutor cited to T.M.'s supposed problems with immunized witnesses on her questionnaire. (8RT: 1136.) In fact, she

answered "no" to all three questions - the use of immunized testimony would not prejudice her against the prosecution; she did not believe the prosecution should never use such testimony and she would not automatically discount the testimony. (Vol.5, 2SCT: 1274.) She did write in two comments, "maybe that witness medically or mentally couldn't" and "medical-mentally someone might not be fair." (Vol.5, 2SCT: 1274.) These remarks in no way undercut her general agreement with the use of immunized testimony but merely indicate a misunderstanding that the prosecution never sought to clarify.

In contrast, sitting juror J.R. stated she did not like the use of immunized witnesses, adding that immunity could be necessary and she would not prejudge. (Vol.4, 2SCT: 1143.) That the prosecution accepted a juror with an actual, stated concern about immunity while challenging someone who accepted but misunderstood some aspect of it also shows the pretextual nature of the prosecution's reason for striking T.M.

An examination of the prosecution's reasons for dismissing T.M. shows that her feelings about the death penalty were no more mixed than those of any other juror accepted by the prosecution; that like others, she changed some responses after being educated in court about death penalty law and the trial process; that there was no evidence that her clerical worker job would make her more sympathetic to the defendants; and that in all other respects, she was similar to jurors not struck by the prosecution.

3. R.F.

Although the appellant made his second *Wheeler-Batson* motion based upon the prosecution's dismissal of R.F. and T.M. (8RT: 1134-1135), the court never asked the prosecution about prospective juror R.F.

R.F. was a 40-year-old single male who lived with his significant

other, a bookkeeper. He had a Master's degree in philosophy and had been working as a professor of philosophy at Santa Monica College for four years. (Vol.6, 2SCT: 1524-1525.) His general feeling about the death penalty was that "more time should be given to understanding this issue by the public and the court system." (Vol.6, 2SCT: 1537.) Like sitting juror V.L. (Vol.6, 2SCT: 1746), and alternate juror S.N., he did not check any responses regarding the scenario questions, instead saying that "it would depend on the case." (Vol.6, 2SCT: 1538.) He disagreed somewhat with the statements that an intentional killer should always or never get the death penalty. Like other jurors not challenged by the prosecution, he qualified his answer due to a lack of information. (Compare Vol.6, 2SCT: 1539 [R.F.] with Vol.7, 2SCT: 1747 [V.L.].)

The remainder of R.F.'s responses to the questions about capital punishment showed his evenhanded willingness to inflict either punishment with one exception. Asked if he could follow the instruction to "review and consider all of the circumstances surrounding a case" before deciding on punishment, R.F. circled "no." (Vol.6, 2SCT: 1541.) This response was an anomaly, as R.F. indicated that he could follow the instruction to review and consider all the circumstances regarding the defendant's background (Vol.6, 2SCT: 1541-1542), indicated he could follow the law as the court explained it (Vol.6, 2SCT: 1542), could see himself voting for either penalty in the appropriate case (Vol.6, 2SCT: 1543), and could otherwise follow the court's instructions (Vol.6, 2SCT: 1534-1546). In fact, when asked by the court about this response, R.F. could not recall what he had been thinking. (7RT: 967.) During voir dire, R.F. consistently indicated his acceptance of the death penalty and the court's instructions, as well as his ability to be fair. (See, e.g., 7RT: 964-968, 997, 1007-1009.)

Here, R.F. acted similarly to jurors not challenged by the prosecution, who made statements on their questionnaire that they changed or withdrew during voir dire, explaining that they had not understood the issue earlier. For example, sitting juror S.B. indicated on her questionnaire strong agreement that intentional killers should always get the death penalty and then explained in court that at the time, she was under the impression that the death penalty was the only option. (7RT: 884-885.) Sitting juror V.L. backtracked in court on her questionnaire response "strongly agree[ing]" with the death penalty for an intentional killing, explaining that it was based on ignorance and that, now educated, she would be open to both. (8RT: 1047.)

Like P.G. and T.M., R.F.'s responses put him squarely in line with other jurors not challenged by the prosecution.

4. E.A.

E.A. was 37 years old, had a B.A. in child development and worked as a claims adjuster for the Employment Development Department. (Vol.5, 2SCT: 1237-1238.) She was separated and had three children. (*Ibid.*) The prosecution exercised its eighth peremptory challenge against E.A. (7RT: 943.) When the court denied appellant's first *Wheeler-Batson* motion as to E.A. and P.G. (7RT: 944-945), it asked the prosecutor for its reasons for striking E.A., which were:

> Miss [E.A.] came from a very disturbed background and indicated she had recent surgery, was on medication. She was abused as a child, indicated she could probably set that aside, but she also indicated she had medical problems from the surgery. She was also very anti-death penalty on the questionnaire.

(7RT: 945.)

As it did with P.G., the prosecution erroneously described E.A.'s views as very anti-death penalty. Unlike sitting juror S.L., who as described above was "truly torn" and went "back and forth" about the death penalty (Vol.7, 2SCT: 1902-1903), E.A. had concluded that the death penalty was necessary. (Vol.5, 2SCT: 1250.) Although she did express a reluctance to serve on a death penalty jury on her questionnaire (Vol.5, 2SCT: 1244, 1250, 1254, 1261), the prosecutor did not cite this as a reason for excusing her. Morever, she also said she could follow the instructions, would not automatically vote in a particular way and would be a fair and objective juror. (Vol.5, 2SCT: 1253-1255.) In court, she stated several times that she could impose the death penalty. (See 7RT: 859-861.) In other respects, E.A.'s answers were similar to some of the sitting jurors as described above. For instance, like sitting juror V.L., E.A. did not answer some of the scenario questions because she needed to know the relevant facts. (Vol.5, 2SCT: 1251-1252 [E.A.]; Vol.6, 2SCT: 1746 [V.L.].)

As to medical problems, E.A. had received medical clearance for jury duty. (Vol.5, 2SCT: 1243; 7RT: 855.) Although she earlier had jury duty postponed to make sure she could perform as a juror, she now felt "fine" and had not missed work for two years despite her medical issues. (7RT: 854-855.) She was a strong person and could withstand a lot of stress. (*Ibid.*) She had also dealt with the abuse she had suffered for two years as a child at the hands of an older brother. (7RT: 851-852.) That brother was mentally ill and the police were always very helpful when the family had to call them. (7RT: 853.) E.A. distinguished between her family's problems due to her brother's mental illness and the issues at the trial. (7RT: 853, 858.) She would not identify with a defendant who came from an abused background; she herself was highly functional; took her

position as a juror seriously; and would not lean one way or another. (7RT: 859.)

As the U.S. Supreme Court stated, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem, supra,* 514 U.S. at p. 768.) This is the appropriate conclusion here, where none of the prosecution's purportedly race neutral explanations provide a credible basis for distinguishing between Hispanics struck by the prosecution and non-Hispanics it did not strike. Although appellant makes a complete *Batson* claim if he can show that any one venire member was excluded because of purposeful discrimination (*see Batson v. Kentucky,* 476 U.S. at p. 95), here the prosecution's proffered race neutral reasons for its strikes are inadequate to justify any of the four peremptory strikes at issue. In fact, every one of the reasons proffered by the prosecution to justify each of these four peremptory strikes applied equally to non-Hispanic panel members not removed by the prosecution.

This pattern of invoking certain characteristics to strike the Hispanic jurors when the same characteristics are ignored in other jurors presents a textbook case of "pretext." (See *Hernandez v. New York, supra,* 500 U.S. at p. 363; see also *McClain v. Prunty, supra,* 217 F.3d at pp. 1220 ["A prosecutor's motives may be revealed as pretextual when a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge"]; *Coulter v. Gilmore* (7th Cir. 1998) 155 F.3d 912, 921 ["A facially neutral reason for striking a juror may show discrimination if that reason is invoked only to eliminate (a particular group of) prospective jurors and not others who also have that characteristic"]; *Berry v. State* (Miss. 1999) 728 So.2d 568, 572 ["One of

the recognized indicia of pretext is disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge. (Internal quotations and citations omitted.)"].)

Moreover, in light of the large statistical disparities described above, these inconsistently applied rationales are "simply too incredible" to be believed (*Hernandez v. New York, supra,* 500 U.S. at p. 369), and must be rejected. (See, e.g., *McClain v. Prunty, supra,* 217 F.3d at pp. 1222-1223 [rejecting explanations regarding decision-making experience and education levels of African-American venire members where explanations also applied to Caucasians not excluded]; *Jones v. Ryan, supra,* 987 F.2d at pp. 973-974 [rejecting as pretextual the explanation that unmarried African-American women were struck to eliminate the possibility of attraction with defendant, where unmarried Caucasian women were allowed to serve]; see also *Berry v. State, supra,* 728 So.2d at pp. 572-573 [finding pretext where State said it struck African-American juror for being a housewife and similarly situated Caucasian juror was allowed to serve]; *People v. Morales* (Ill. 1999) 719 N.E.2d 261, 268-270 [finding state's reference to African-American venire member's concern about length of trial was pretext, where state permitted Caucasian venire member with same concern to serve].

For all these reasons, this Court should hold that under the totality of relevant circumstances, appellant has established a prima facie case of discriminatory exercise of peremptory challenges by the prosecution below.

J. The Judgment Must Be Reversed

Having established error, the question becomes one of remedy. As will be demonstrated below, the entire judgment must be reversed.

Up until recently, this Court repeatedly held that *Wheeler* error is

"prejudicial per se" and demands reversal of the ensuing judgment. (Cal. Const., art. I, § 16; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283 [defendants made a prima facie showing that the prosecutor was exercising peremptory challenges on the ground of group bias; error "prejudicial per se"]; see also *People v. Johnson* (2006) 38 Cal.4th 1096, 1105, fn. 2, conc. opn. of Werdegar, J. [same – collecting cases]; *People v. Snow* (1987) 44 Cal.3d 216, 226-227 [reversal per se applied to first step *Wheeler* error]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [same, refusing limited remand].)

However, in *People v. Johnson, supra,* 38 Cal.4th at p. 1100, the Court adopted the "federal approach," in which "the federal courts generally remand for further hearings." (*Id.* at p. 1099.) In *Johnson,* a step one case on remand from the United States Supreme Court, the Court rejected defendant's argument for a complete reversal and remanded the matter, ultimately back to the trial court. (*Id.* at p. 1103.) Here, however, a meaningful and reliable *Wheeler-Batson* hearing would demand that the trial judge, prosecutor and defense counsel have full recall of the voir dire, the potential jurors, their demeanor, their answers and the prosecutor's demeanor. The voir dire in this case concluded on September 21, 1994. (10CT: 2997.) A hearing on remand could not occur until well over 18 years later in light of the time required to complete briefing, hold oral argument, issue an opinion, adjudicate petitions for rehearing and petitions for certiorari and to remand, calendar and prepare in the trial court. That elapsed time would be substantially more than the seven to eight years in *Johnson.* That seven-plus year delay caused this Court "a concern, as we have explained in our previous cases refusing to order a limited remand" (*People v. Johnson, supra,* 38 Cal.4th at p. 1101), and the additional time

lapse in this case drastically increases the cause for concern. None of the state or federal cases cited in *Johnson* involved time lapses of ten years, much less the 18-plus years that will inevitably occur before a hearing could be convened in this case. (See *id.* at pp. 1101-1102.)

Indeed, as the United States Supreme Court recently observed in reversing for a third step *Batson* error that had occurred a decade earlier, there is no "realistic possibility that [the prosecutor's proffered explanations] could be profitably explored further on remand at this late date, more than a decade after petitioner's trial." (*Snyder v. Louisiana, supra,* 552 U.S. at p. 486; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1333, fn. 8, conc. & dis. opn. of Werdegar, J., joined by Kennard, J [observing that remand procedure approved in *People v. Johnson, supra,* 38 Cal.4th at p. 1011 has been "called into question in *Snyder*"].)

So, too, in this case, there is no realistic possibility that the trial judge, the prosecutor and defense counsel will *all* have sufficient recall of the proceedings, the demeanor of the potential jurors and the credibility of the prosecutor in offering his explanations, for a meaningful and reliable retrospective *Wheeler-Batson* hearing. (See, e.g., *People v. Snow, supra,* 44 Cal.3d at pp. 226-227 [reversing rather than remanding where six years had passed since the original *Wheeler-Batson* motion]; *People v. Hall* (1983) 35 Cal.3d 161, 170-171 [same – three years]; *People v. Allen* (1979) 23 Cal.3d 286, 295, fn. 4 [same]; *Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 293-294 [declining to remand and instead ordering new trial for *Batson* error given 13-year passage of time, making a meaningful hearing highly unlikely]. Hence, this Court should find that a remand is unfeasible in this case and reverse the judgment in its entirety.

II.

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR INDIVIDUAL SEQUESTERED DEATH QUALIFICATION VOIR DIRE VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

As explained below, the trial court's failure to conduct individual sequestered death-qualification voir dire and its unreasonable and unequal application of state law governing such voir dire, violated appellant's federal and state constitutional rights to due process, equal protection, trial by an impartial jury, effective assistance of counsel and a reliable death verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 15, 16.) It also violated appellant's right under California law to individual juror voir dire where group voir dire is not practicable. (Code Civ. Proc., § 223.) The trial court's failure to exercise the discretion to conduct individual voir dire resulted in a miscarriage of justice under Section 13 of Article VI of the California Constitution.

A. Factual Background

Prior to jury selection, appellant filed a motion requesting individual sequestered death-qualification voir dire to be conducted by counsel. (10CT: 2980-2984.) *Hovey v. Superior Court* (1980) 28 Cal.3d 1 (*Hovey*) had mandated sequestered individual voir dire for death qualification in capital trials but Proposition 15, effective on June 6, 1990, had the effect of abrogating the *Hovey* sequestration rule. (*People v. Stitely* (2005) 35 Cal.4th 514, 536.) The new rule, in effect at the time of appellant's trial, was that voir dire "shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases." (10CT: 2981, quoting Code Civ. Proc., § 223.) Appellant argued that the change

did not cure the underlying unfairness in the group voir dire process identified in *Hovey*, so that sequestered voir dire or a substitute remedy was still required. (10CT: 2983; 4RT: 447-449.) Sequestered voir dire was especially necessary given the unique facts of the case, i.e., the killing of a policeman and a store owner, the defendants' undocumented status, the media coverage of the O.J. Simpson trial taking place simultaneously in the courtroom next door and "a disparity in the degree of moral guilt" among the three co-defendants. (10CT: 2983-2984.)

The court denied the motion on the grounds that individual sequestered voir dire was not practical and that the questionnaires, written without any possible influence from other prospective jurors, served to elicit the jurors' actual views. (10CT: 2986; 4RT: 447-449.) Trial counsel renewed the motion during jury selection. (7RT: 1025.)

The prospective jurors who survived hardship screening received a 25-page questionnaire, including seven pages on "Attitudes Toward Capital Punishment," which they filled out at the courthouse. (See, e.g., 4RT: 481-485, 507-511.) After filling out the questionnaire, they all were instructed to return the following Monday, September 19, 1994, for voir dire. (4RT: 459, 465, 484, 510, 5RT: 534-535.) All the jurors, including those that ultimately sat, then heard all the voir dire of all the prospective jurors who were questioned, including those who were excused. (See 10CT: 2995-2997.) The court instructed these prospective jurors to listen to "everything being said" during the voir dire of the jurors being questioned and to promise that if they had "a radically different opinion," or a "a strong reaction to something," they would volunteer that information when their turn came. (6RT: 622-623.)

B. A Voir Dire Procedure That Does Not Allow Individual Sequestered Voir Dire on Death-qualification Violates a Capital Defendant's Constitutional Rights to Due Process, Trial by an Impartial Jury, Effective Assistance of Counsel and a Reliable Sentencing Determination[36]

A criminal defendant has federal and state constitutional rights to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; *Morgan v. Illinois* (1992) 504 U.S. 719, 726; Cal. Const, art. I, §§ 7, 15 & 16.) Prospective jurors whose views on the death penalty prevent or substantially impair their ability to judge in accordance with a trial court's instructions are not impartial and constitutionally cannot remain on a capital jury. (See generally, *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510; see also *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 733-734; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279.) Death qualification voir dire plays a critical role in ferreting out such bias and assuring the criminal defendant that his constitutional right to an impartial jury will be honored. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) The right to an impartial jury mandates voir dire that adequately identifies those jurors whose views on the death penalty render them partial and unqualified. (*Ibid.*) Anything less generates an unreasonable risk of juror partiality and violates due process. (*Id.* at pp. 735-736, 739; *Turner v. Murray* (1986) 476 U.S. 28, 37.) A trial court's insistence upon conducting the death qualification portion of voir dire in the presence of other jurors

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[36] Appellant acknowledges that his contention that the federal Constitution requires sequestered death-qualification voir dire of every prospective juror in a capital case has been rejected frequently by this Court. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 101-102; *People v. Stitely* (2005) 35 Cal.4th 524, 536-537.) Appellant includes this claim to ensure federal review.

necessarily creates such an unreasonable risk.

As this Court recognized in *Hovey, supra,* 28 Cal.3d at pp. 74-75, superseded by statute as stated in *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1170, the problem with group voir dire is:

> that jurors will be less forthright and revealing of their attitudes during voir dire, will be desensitized (by repeated discussion of a possible death sentence) to the onerousness of the penalty decision, or will be discouraged (by seeing prospective jurors who express opposition to the death penalty dismissed for cause) from employing their own doubts about the death penalty in deliberations.

(*People v. Brasure* (2008) 42 Cal.4th 1037, 1050; see also *Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1173.)

Given these risks, restrictions on individual and sequestered voir dire on death-qualifying issues – including those imposed by Code of Civil Procedure section 223 – are inconsistent with constitutional principles of jury impartiality. (See, e.g., *Morgan v. Illinois*, *supra*, 504 U.S. at p. 736, citing *Turner v. Murray*, *supra*, 476 U.S. at p. 36.) Nor are such restrictions consonant with Eighth Amendment principles mandating a need for the heightened reliability in the processes leading to a death sentence. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) In addition, because the right to an impartial jury guarantees voir dire adequate to identify unqualified jurors and provides sufficient information to enable the defense to raise peremptory challenges (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 729; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188), the negative influences of open death qualification voir dire violate the guarantee of effective assistance of counsel under the Sixth Amendment and Article 1, section 15 of the California Constitution.

An appellate court applies the abuse of discretion standard of review

to a trial court's granting or denial of a motion on the conduct of the voir dire of prospective jurors. (*People v. Waidla* (2000) 22 Cal.4th 690, 713-714.)

C. The Trial Court Erred in Denying Appellant's Repeated Request for Individual Sequestered Voir Dire

Even if individual sequestered death qualification voir dire is not constitutionally compelled in *all* capital cases, under the circumstances of this case, the trial court's insistence on conducting the death qualification portion of voir dire in the presence of other jurors violated appellant's constitutional rights to an impartial jury and due process of law.

As stated above, the Court recognized in *Hovey* that individual sequestered voir dire on death penalty issues is the "most practical and effective procedure" to minimize the negative effects of the death qualification process. (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 80-81.) The proper exercise of a trial court's discretion under Code of Civil Procedure section 223, therefore, must balance the competing interest in judicial efficiency with the defendant's constitutional right to a fair and impartial jury. (See, e.g., *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 ["exercises of legal discretion must be . . . guided by legal principles and policies appropriate to the particular matter at issue"].)

In this case, the problems recognized in *Hovey* were abundantly clear to all in the courtroom as jury selection got underway. While discussing its proposed method for conducting voir dire and possible time limits, the court stated "at a certain point, [the jurors] all figure out what the right answers are." (2RT: 314.) After the first group of 18 prospective jurors was questioned, the prosecution reported that during a break, a prospective juror had made statements to the effect that "all these people [the prospective

jurors] are lying or they cannot live – they can't stand by their convictions" and "[p]eople were standing out there telling lies and can't do anything about it." (7RT: 903.) Counsel for one of appellant's co-defendants commented, "[h]e is stating the truth. Everyone else knows." (7RT: 904.)

The problem of forthright expression of views about the death penalty was also recognized by the prosecutor, who told one juror, "I want to commend you on your honesty. You are the first person that maintained their philosophical view on the death penalty from the questionnaire to this time." (7RT: 1007.) Thus, statements by the court, prosecutor, a co-defendant's counsel and even one of the prospective jurors all demonstrated that prospective jurors did not reveal their true feelings and attitudes toward the death penalty during the group voir dire process at appellant's trial. (Cf. *People v. Brasure, supra,* 42 Cal.4th at p. 1053 [nothing in record to support defendant's contention that jurors dissembled by adhering falsely to a form of words they discerned would pass muster].)

In his argument in support of his motion for sequestered voir dire before the commencement of jury selection, appellant's counsel argued that discussions during rehabilitation and follow-up expose jurors to the negative effects of death qualification. (4RT: 448.) The court curiously responded that because most attorneys can "turn a juror around," rehabilitation is not "a test of whether or not we get the jurors' true opinions." (4RT: 449; see also 7RT: 1026 ["You can twist and turn these jurors anyway you want, whether it's in front of other jurors or not."].) The court expressed its view that "the best we can do is to try to get unadorned opinions before anyone tells them or triggers or somehow signals to them what the correct answer is." (4RT: 449.) The court did not recognize that a court's questioning of the prospective jurors could have the same or even

greater effect on the "turning around" of a juror's responses.

The court took a different view as jury selection progressed, however. When defense counsel argued jurors should be held to the death penalty views expressed in their questionnaires, rather than the "correct answers" they had learned to parrot during voir dire, the court, in contrast to its prior statements on the matter, insisted that it chose to credit the sincerity of the jurors' in-court responses. (See, e.g., 7RT: 829-830, 1016, 1016, 1027.)

In summary, while the court indicated that jurors' responses during voir dire could not be trusted because they were subject to attorney manipulation, the court credited the responses anyway. Thus, the court explicitly recognized the serious problems presented by group voir dire but then ignored them in practice, even when it was brought to the court's attention during the voir dire process that the very problems that appellant's counsel and the court predicted were in fact occurring. This was clear error. Under these circumstances, the court's denial of appellant's motion, and its failure to reconsider the motion and change its ruling, was an abuse of discretion.

Because the trial court denied appellant's motion for sequestered voir dire, the prospective jurors, who, as stated above, included all the sitting jurors, were exposed to comments such as "I can't see feeding, housing someone who has certainly killed other people" (6RT: 668); "If you are guilty of killing several people, why continue living or getting three meals in prison" (7RT: 975); "I feel if you continue to kill people for whatever reason, then your life should be taken also" (7RT: 975); "an eye for an eye" (6RT: 721, 7RT: 951); "if it's more than one victim, that reaches the point of being unconscionable" (6RT: 721); assertions about the

value of the death penalty as a deterrent (7RT: 951, 976); and that a mistrial could lead to different verdicts on guilt by the next jury. (7RT: 940.) The court exacerbated the problem of exposure to prejudicial comments by reading aloud such comments from the questionnaires in front of the entire panel. (See, e.g., 7RT: 975, 981, 985, 986.)

The court did advise the prospective jurors that policy issues of deterrence and cost regarding the death penalty should not figure into the jury's decision. (6RT: 619-620, 668; 7RT: 976.) However, the other comments, e.g., "an eye for an eye," were not subject to admonition and were the type of remark that underlie this Court's concerns set forth in *Hovey.* (See *Hovey v. Superior Court, supra,* 28 Cal.3d at p. 75 [repeated exposure to the idea of taking a life].) Because all of the prospective jurors were in the courtroom for all of the group voir dire, they were repeatedly exposed to these prejudicial statements. Individual voir dire would have eliminated the risk that these biased or irrelevant views would taint the views of other prospective jurors.

The court exacerbated the risk of "group-think" in other ways. Its exhortation to the panel early on to listen to what the other prospective jurors said and to volunteer if they had a "radically different opinion" (6RT: 622-623), let the jurors know that such opinions would place them outside the group norm. The court also told one prospective juror (and hence all the sitting jurors), that "if we don't have alternates and something happens, $10,000 a day, all of this goes right out the window," and another that she could not "stop a trial with the costs involved on the taxpayer." (8RT: 1154, 1158.)

The record supports trial counsel's arguments that prospective jurors were in fact influenced by the responses elicited during group voir dire.

Among those who went from being automatic or very pro-death penalty jurors to expressing flexibility were two prospective jurors who sat, Jurors R.H. and S.B. Juror S.B. indicated in her questionnaire that a participant in a robbery where a police officer, a store owner or more than one person is murdered should always get the death penalty, but after sitting through the voir dire of over 20 people, told the court she could still consider both punishments. (Vol.5, 2SCT: 1434; 7RT: 883-884.) Juror R.H. indicated he had strong feelings about the death penalty because he could not "see feeding and housing someone who's hurt and kill[ed] other people." (Vol.2, 2SCT: 566.) He was almost always for the death penalty in the above three scenarios. (Vol.2, 2SCT: 567-568.) Nevertheless, in response to leading questions, he assured the court that he could sentence someone to life in appropriate circumstances. (6RT: 669-670.)

This Court has supported the use of individual death-qualification voir dire in numerous cases. For example, this Court has found no abuse of discretion where a court asked "sensitive" questions about capital punishment at the bench so other prospective jurors could not hear the exchange (*People v. Stitely, supra,* 35 Cal. 4th at pp. 537-538); conducted sequestered death-qualification voir dire for any juror who expressed particularly strong views about the death penalty (*People v. Jurado, supra,* 38 Cal.4th at p. 101); allowed counsel to question certain prospective jurors privately (*People v. Ramos* (2004) 34 Cal.4th 494, 514); and agreed to sequestered voir dire when a juror made an affirmative response to a group inquiry involving a sensitive matter such as a "death-" or "life-" qualifying questions. (*People v. Box* (2000) 23 Cal.4th 1153, 1180-1181.)

The record demonstrates that rather than merely a risk of bias, there was widespread recognition that numerous prospective jurors were not

expressing their true thoughts and feelings about using the death penalty. Additionally, the entire panel was exposed to pro-death penalty views that expressed not merely that the death penalty was an appropriate penalty, or the Old Testament sentiment of "an eye for an eye" for a murderer, but prejudgment of those that had killed more than one person. (See, e.g., 6RT: 668, 721, 7RT: 975-976.) For all these reasons, the court's failure to allow individual sequestered voir dire, especially in light of appellant's repeated requests for reconsideration as problems manifested (7RT: 829, 1017-1019, 1025), was an abuse of discretion.

D. The Trial Court's Unreasonable And Unequal Application Of The Law Governing Juror Voir Dire Requires Reversal Of Appellant's Death Sentence

Under Code of Civil Procedure section 223, reversal is required where the trial court's exercise of discretion in the manner in which voir dire is conducted results in "a miscarriage of justice, as specified in section 13 of article VI of the California Constitution." (Code Civ. Proc., § 223.) Code of Civil Procedure section 223 also provided appellant an important procedural protection and liberty interest (namely, the right to individual juror voir dire on death penalty issues where group voir dire is impracticable) that is protected under the federal due process clause. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, the trial court's unreasonable application of Code of Civil Procedure section 223 in appellant's case must be assessed under the *Chapman* standard of federal constitutional error, and respondent has the burden of showing that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under either standard, the trial court's failure to conduct individual, sequestered juror voir dire on death penalty issues requires reversal of appellant's death sentence.

The trial court's failure to carefully consider the practicability of group voir dire led to a voir dire procedure that denied appellant the opportunity to adequately identify those jurors whose views on the death penalty rendered them partial and unqualified, and generated a danger that appellant was sentenced to die by jurors who were influenced toward returning a death sentence by their exposure to the death qualification process. (See *Hovey v. Superior Court, supra*, 28 Cal.3d at pp. 74-75.) These risks infringed upon appellant's rights to due process and an impartial jury (see *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729), and violated Eighth Amendment principles mandating a need for the heightened reliability of death sentencing proceedings. Errors that infringe on these rights are "the kinds of errors that, regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' (or, in other words, a fair trial)[.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 501; see also *People v. Diaz* (1951) 105 Cal.App.2d 690, 700 ["The denial of the right to trial by a fair and impartial jury is, in itself, a miscarriage of justice"].)

The trial court's refusal to conduct sequestered death-qualification voir dire cannot be dismissed as harmless. (See *People v. Cash* (2002) 28 Cal.4th 703, 723.) The record demonstrates that prospective jurors were, in fact, parroting "correct answer[s]" (4RT: 449), during voir dire that became the basis for inclusion on the petit jury and that the sitting jurors were exposed to multiple prejudicial statements that "desensitized them to the intimidating duty of determining whether a person should live or die." (*Covarrubias v. Superior Court , supra,* 60 Cal.App.4th at p. 1173.) Because the particular group voir dire procedure employed by the trial court below was inadequate to identify those jurors whose views on the death

penalty rendered them partial and unqualified, it is impossible for this Court to determine from the record whether any of the individuals who were ultimately seated as jurors held disqualifying views on the death penalty that prevented or substantially impaired their ability to perform their duties in accordance with the court's instructions. The jurors' exposure to death qualification of other jurors leads to doubt that appellant was sentenced to death by a jury empaneled in compliance with constitutional impartiality principles and that doubt requires reversal of appellant's death sentences. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

III.

COUNT 21 MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF THE ROBBERY OF ARTURO FLORES

Appellant was convicted of Count 21, the robbery of Arturo Flores, an employee at the Mercado Buenos Aires. (11CT: 3296; 12RT: 1799, 23RT: 4103.) The prosecution presented no evidence that property was taken from Flores. The conviction therefore violated appellant's rights to due process, to a fair trial by jury and to a reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15 and 17 of the California Constitution.

A. Applicable Legal Principles

The right to due process under the Fifth and Fourteenth Amendments and the right to jury trial under the Sixth Amendment require the prosecution to prove beyond a reasonable doubt every element of a crime. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) A conviction

that is not supported by evidence sufficient to prove each element beyond a reasonable doubt violates the due process clauses of the Fourteenth Amendment of the United States Constitution (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *In re Winship* (1970) 397 U.S. 358, 364), and article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) The supporting evidence for each element must be "reasonable, credible, and of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 35.)

On appeal, under both state and federal law, the test for sufficient evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Rowland, supra*, 4 Cal.4th at p. 269, quoting *Jackson v. Virginia, supra*, 443 U.S. at p. 319.)

Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." "The taking element of robbery itself has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.)

B. There Was Insufficient Evidence That Property Was Taken from Arturo Flores

The witnesses who testified regarding the five Buenos Aires Market robbery counts were Manuel Rodriguez and Paul Rodriguez. (See 12RT: 1793 et seq. and 12RT: 1865 et seq.) They testified about property taken from themselves and from Clelia Rodriguez and Dario de Luro, counts 19, 20, 22 and 23. (12RT: 1805, 1810-1811, 1825-1827, 1868-1869.)

However, there was no testimony or other evidence that property was taken from Arturo Flores. Paul specifically responded "no" when asked whether he saw property taken from any employee other than Dario de Luro. (12RT: 1869.) Manuel likewise saw property taken from de Luro "but for the others, I think they did it before." (12RT: 1811.) No one else testified that any property was taken from Flores and no evidence was presented that any items belonging to Flores had been recovered from appellant or the codefendants or their residences, or from any other location. Thus, there was no evidence presented that property was taken from Arturo Flores.

C. Because There Was Insufficient Evidence to Support Count 21, Appellant's Conviction for the Robbery of Arturo Flores Must Be Reversed

Because there was insufficient evidence offered in support of the robbery charged in Count 21, appellant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations were violated by the jury's verdict. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17, 31; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 & fn. 13; *People v. Rowland, supra,* 4 Cal.4th at p. 269.)

"[A]fter viewing the evidence in the light most favorable to the prosecution," no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rowland, supra*, 4 Cal.4th at p. 269, quoting *Jackson v. Virginia, supra*, 443 U.S. at p. 319.) When this Court reviews the entire record below, it must conclude that the prosecution failed to present substantial evidence of the elements of robbery as to Count 21, Arturo Flores. Accordingly, appellant's conviction on that count must be reversed.

IV.

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTIONS TO DISMISS AND STRIKE EVIDENCE OF COUNT 5, THE ATTEMPTED MURDER CHARGE

Count 5 of the second amended information charged appellant with the attempted murder of Luis Enrique Medina in violation of sections 664 and 187, subdivision (a). (7CT: 2015.) Appellant unsuccessfully moved to strike key but speculative testimony relating to the attempted murder charge: that appellant made a gesture "as if" to reload the gun. Appellant then moved to dismiss Count 5 pursuant to section 1118.1, arguing that the evidence was insufficient to prove each element beyond a reasonable doubt because the gun aimed at Medina was empty and incapable of being fired. (20RT: 3573.) The court denied appellant's motion (20RT: 3575), and the jury convicted appellant of attempted murder. (11CT: 3192.) Because it was based upon insufficient evidence, appellant's conviction for attempted murder violated his state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17, 31.) Accordingly, appellant's conviction on Count 5 should be reversed.

A. Factual Background

Luis Enrique Medina was double-parked in his car outside the entrance to George's Market on May 29, 1992, when a police car drove toward him and stopped in front of him. (10RT: 1489-1490, 1493; 11RT: 1590.) The officer got out of his car and stood up and three to five men came running out of the market. (10RT: 1493, 11RT: 1595.) The police officer screamed at them to stop. (10RT: 1494, 11RT: 1645.) The last man out of the market came from the back of Medina's car and got between

Medina and the officer. (11RT: 1591.) He said something like "you shit cop, son of a bitch," removed a gun from his waistband, charged it, and began shooting the officer. (10RT: 1494-1495.) The shooter had his right hand straight out from the shoulder with his fist parallel to the ground (10RT: 1543), and shot as the officer fell. (10RT: 1495-1496.) There were no more shots after he fell. (*Ibid.*) When the man aimed the gun at Medina "as if he wanted to kill" him, the gun was open and did not have any bullets in it. (10RT: 1495-1496, 1545.) The man then took off running. (10RT: 1545.)

Medina estimated he was about eight feet from both the shooter and the officer. (10RT: 1543-1544.) Medina's car door was open slightly and he had one foot out of the car when the man pointed the gun at him. (11RT: 1588, 1591-1592.)

The shooter had a black nine-millimeter gun. As a former member of the army and police force in Mexico, Medina was familiar with guns, including semiautomatic weapons. Medina knew the gun was empty because the slide stayed open. The last bullet opens the slide. (10RT: 1545-1546, 1567-1568.)

The shooter looked at Medina when he pointed the gun at him and Medina saw his finger on the trigger. (10RT: 1547.) Medina's recollection was refreshed with his preliminary hearing testimony that the shooter kept trying to pull the trigger. (11RT: 1602-1603.) Medina identified appellant as the shooter. (10RT: 1544, 1550-1552.) Medina testified for the first time on re-cross-examination that he knew the shooter wanted to reload because he made a gesture to remove the clip, but ran when his friends called him. (11RT: 1614-1615.) Appellant's motion to strike the testimony as to the gesture was denied. (11RT: 1615-1616.)

Appellant argued that the attempted murder charge should be dismissed pursuant to section 1118.1 because appellant had no bullets or means of committing the crime, so the appropriate charge was a misdemeanor violation of section 417 (brandishing) rather than an attempted murder. (20RT: 3573.) The court denied the motion. (20RT: 3575.)

The court instructed the jury on attempted murder, exhibiting a firearm in violation of section 417, subdivision (a)(2), and assault with a deadly weapon. (11CT: 3120-3123; CALJIC Nos. 8.66, 16.290 and 9.02).

B. Applicable Legal Principles

The right to due process guaranteed by the federal Constitution's Fifth Amendment and the right to jury trial guaranteed by the Sixth Amendment, both made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a crime. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277–278.) A conviction that is not supported by evidence sufficient to prove each element beyond a reasonable doubt violates the due process clause of the Fourteenth Amendment (*Jackson v. Virginia* (1979) 443 U.S. 307, 319) and article I, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) A conviction cannot stand if it is based on speculation (*People v. Marshall, supra,* 15 Cal.4th 1, 35), or if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 319-320.)

On a motion for judgment of acquittal under section 1118.1, the trial court applies the same standard as an appellate court reviewing the

sufficiency of the evidence. (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) On appeal, under both state and federal law, the test for sufficient evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rowland, supra*, 4 Cal.4th at p. 269, quoting *Jackson v. Virginia, supra*, 443 U.S. at p. 319.)

Attempted murder requires a specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Smith,* (2005), 37 Cal.4th 733, 739; see also §§ 21a & 664.) Specific intent to kill usually is derived from "the circumstances of the attempt, including the defendant's actions." (*People v. Smith, supra,* 37 Cal.4th 733, 741.) In addition, "there must exist a union, or joint operation" between the act and the specific intent. (§ 20; *People v. Alvarez* (1996) 14 Cal.4th 155, 220.)

C. The Court's Refusal to Strike Medina's Testimony Regarding Appellant's Gesture Was an Abuse of Discretion

It is impermissible to infer guilt from an incriminating circumstance by piling conjecture upon conjecture. (*People v. Flores* (1943) 58 Cal.App.2d 764, 770.) An inference must be the product of logic and reason. (*People v. Berti* (1960) 178 Cal.App.2d 872, 875-877; Evid. Code, § 600, subd. (b).)

Medina's initial statement that he <u>believed</u> appellant wanted to put another clip in the gun was stricken as speculation both on direct and redirect examination. (10RT: 1547, 11RT: 1602.) It was after this - during cross-examination on his second day of testimony - that Medina embellished his testimony with additional speculation:

> Yes, he was trying to shoot, but there were no bullets in the gun. So he tried to change the clip. Well, it seems logical if somebody is pressing the trigger and there is no bullets inside the gun, then one tries to reload the gun again.

(11RT: 1614.) The defense motion to strike as speculative was denied. (*Ibid.*) Medina continued: "if there had been bullets inside the gun, I wouldn't be talking to you here today." (*Ibid.*) The court then denied appellant's renewed motion to strike as speculative Medina's next statement, that appellant "made a gesture as if to remove the clip that was there." (11RT: 1614-1616.) The court's rationale for the ruling demonstrates the flimsiness and speculative nature of this testimony. First, according to the trial court, "we have a language problem . . . so the examination is not as precise as it could ever get with English." (11RT: 1621.) Secondly, the court said that although it did not think Medina's testimony that appellant tried to change the clip and referred to a gesture was clear, it decided to leave this "for the jury to figure out." (11RT: 1621-1622.) Neither reason supports a denial of appellant's motion to strike.

With regard to the court's first stated reason, evidence elicited through an interpreter is not evaluated under a different standard from that elicited from an English-speaking witness. Testimony that is unclear and "not as precise as it could ever get in English" (11RT: 1621), is not reasonable nor of credible and solid value. (See *People v. Marshall, supra,* 15 Cal.4th at p. 35.)

Furthermore, although Medina testified that appellant made a gesture "as if" to remove the clip, (11RT: 1614-1615), he never described the gesture itself. (See 11RT: 1621.) The jury therefore had no factual basis upon which to make any inferences. The most the jury could do is make an

inference from Medina's own speculative inference about the significance of the gesture. "'An inference is not reasonable if it is based only on speculation.'" (*People v. Hughes (*2002) 27 Cal.4th 287, 365 quoting *People v. Holt* (1997) 15 Cal.4th 619, 669.)

If the testimony supporting the elements of the attempted murder charge was imprecise or unclear, the prosecution bore the burden of clearing up any lack of clarity in order to prove the required elements of the charge. (See *In re Winship, supra*, 397 U.S. at p. 364.) However, after the court pointed out that Medina had not described the gesture (11RT: 1621), the prosecution failed to elicit from Medina a description of the gesture. The testimony thus remained solely speculative. Because there was no description of the gesture, Medina's speculative comment about it was not competent evidence, and the prosecution failed to adduce a factual description of the gesture, the court abused its discretion in overruling appellant's motion to strike Medina's testimony.

D. There Was Insufficient Evidence That Appellant Had the Specific Intent to Kill Medina

Appellant's actions and the surrounding circumstances demonstrate that appellant knew the gun was empty and therefore lacked the specific intent to kill. Medina was familiar with weapons and knew immediately that there were no bullets in the gun aimed at him. (See 10RT: 1496, 1545-1546; 11RT: 1616 ["of course" Medina knew that with slide back, gun could not operate].) Deputy Perales, who carried a nine-millimeter gun, also testified that it was "obvious" when one was empty. (11RT: 1747.) The prosecution presented evidence that appellant had a nine-millimeter weapon at four of the incidents. (See, e.g., 16RT: 2575, 2581 [El Siete Mares restaurant robbery]; 12RT: 1813-1814 [Mercado Buenos Aires

robbery]; 17RT: 2852, 2856, 3359 [Woodley Market robberies and Kim murder]; 22RT: 3814, 3961 [nine-millimeter casings from Woodley, George's and Ofelia's all came from the same weapon, which the prosecution then argued appellant fired at all three locations].) Thus, according to the prosecution, appellant was thoroughly familiar with a nine-millimeter handgun and would have known it was incapable of being fired when he aimed it at Medina.

In re Jerry R. (1995) 29 Cal.App.4th 1432, involved the willful discharge of a firearm. Because "willfully" means that the prohibited conduct must be performed purposefully or intentionally, the court held that "[p]roof of an intentional discharge of the firearm was required, and an honest belief that a gun is empty negatives the mental element of an intent to fire the gun. The two mental states cannot co-exist." (*Id.* at p. 1440.) Similarly, appellant cannot have had the specific intent to kill Medina where it was obvious that the gun was empty and incapable of shooting, even if he was pulling the trigger. (See *also People v. Jordan* (1971) 19 Cal.App.3d 362, 370 [indictment charging assaults on police officers, with intent to commit murder (former Penal code section 217) was constitutionally infirm where it could not be ascertained whether assault committed with unloaded weapon]; cf. *People v. Smith* (1986) 187 Cal.App.3d 666, 672, 680-681, abrogated on other grounds by *People v. Carter* (2003) 30 Cal.4th 1166, 1197 et seq. [no prejudice from jury instruction on witness credibility where defendant testified accomplice's revolver unloaded when they embarked upon robbery, given irrelevance of nonviolent intent under felony-murder rule].)

Thus, one with knowledge that a gun is empty cannot actually intend to harm someone by pointing the gun at a person, even if one pulls the

trigger. Therefore no reasonable trier of fact could find beyond a reasonable doubt that appellant acted with intent to kill Medina or knowledge that his alleged act of pulling the trigger "would, to a substantial certainty, result in [Medina's] death [citation]." (*People v. Smith, supra,* 37 Cal.4th at p. 743, citation omitted.)

Moreover, the multiple factors during a course of conduct the courts rely on to infer specific intent, such as threats and retrieving and firing of weapons, are missing here. (See, e.g., *People v. Felix* (2009) 172 Cal.App.4th 1618, 1625-1626 [sufficient evidence that attempted murder defendant had intent to kill where within about an hour, he twice threatened the victim, armed himself, drove to victim's house, parked outside and fired two shots into the bedroom from close range with glow of television visible].) The purposeful "use of a lethal weapon with lethal force" generally gives rise to an inference of intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 742, quoting *People v. Arias* (1996) 13 Cal.4th 92, 162; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 769 [sufficient evidence of intent to kill to support attempted murder conviction where defendant fatally shot a police officer in the face at close range, and moments later, while fleeing, fired his gun twice at another officer's pursuing patrol car].) Here, however, appellant did not verbally threaten Medina, fire his gun, or otherwise use lethal force against him.

This is not a factual impossibility case, where one charged with an attempted crime cannot escape liability because the criminal act could not be completed due to impossibility the person did not foresee. (*People v. Pham* (2011) 192 Cal.App.4th 552, 560.) Here, appellant knew the gun was empty and incapable of killing anyone. This means that appellant could not and did not have the specific intent to kill Medina and that there was no

"extrinsic fact unknown to" appellant that prevented him from completing the crime of murder. (*Ibid.*) Thus, the factual impossibility doctrine is inapplicable.

For all these reasons, there was insufficient evidence upon which to find that appellant intended to kill Medina.

E. Medina's Belated Testimony That Appellant Made a Gesture as If to Remove the Clip Was Insufficient to Support Either Element of the Attempted Murder Charge

The evidence supporting a conviction must be substantial. The term substantial:

> clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.

(*People v. Bassett* (1968) 69 Cal.2d 122, 138-139, quoting *Estate of Teed* (1968) 138 Cal.App.2d 638, 644.) Medina's belated testimony that appellant "made a gesture as if to remove the clip that was there," "but then he took off running" (11RT: 1614-1615), does not meet these criteria.

To establish the actus reus of attempted murder, the prosecution must prove that there was "a direct but ineffectual act toward accomplishing the intended killing" that goes "beyond mere preparation and show[s] that the killer is putting his plan into action." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 8.) "Something more is required than mere menace, preparation or planning. [Citation.]" (*People v. Miller* (1935) 2 Cal.2d 527, 530.) As with the specific intent element, courts usually rely on multiple factors to find that a crime has gone beyond preparation.

In *People v. Morales* (1992) 5 Cal.App.4th 917, for instance, the

defendant threatened the victim twice, went home, loaded his gun, drove to the victim's neighborhood and hid so as to have a clear shot if the victim left the house. The defendant had gone beyond "mere preparation." (*Id.* at pp. 926-927.) Similarly, in *People v. Parrish* (1948) 87 Cal.App.2d 853, 856, the court held that the defendant went beyond the preparatory stages when he stated his intention, went to the victim's house with a loaded gun and was stopped only by a feigned accomplice.

In contrast, Medina said only that appellant made a gesture "as if" to remove the clip, but never described the gesture itself. (11RT: 1614-1615) In *People v. Williams* (1971) 5 Cal.3d 211 (superseded by statute on another point as stated in *People v. Romero* (1997) 55 Cal.App.4th 147, 153), this Court found insufficient evidence that the defendant had knowledge that a white pill on the floor of a car where he was sitting was a restricted dangerous drug. (*Id.* at pp. 215-216.) Although knowledge can be imputed from actions, the Court found that the defendant's "supposed 'motion' toward the center of the seat was, at best, an ambiguous gesture" that could not be characterized as the required "consciousness of guilt." (*Id.* at p. 216.)

Here, Medina's reference to appellant's gesture was not just ambiguous; it was a complete cipher. Thus, his belated and speculative comment about the significance of an unknown gesture is not evidence that is "reasonable, credible, and of solid value" so as to support any element of the attempted murder charge. (See *People v. Marshall* (1997) 15 Cal.4th 1, 35.)

Medina's testimony about the gesture was also insufficient in the context of his testimony as a whole. Medina was on the stand for portions of two days and went through three rounds of direct and cross-examination.

(See 10RT: 1489, 1562; 11RT: 1597, 1611, 1640, 1647.) Medina tried twice to testify, but was prevented by objection, that he believed appellant wanted to put another clip in the gun. The gesture testimony came after this, during the second round of cross-examination on Medina's second day on the stand. (10RT: 1547, 11RT: 1602.) Medina had not mentioned the gesture at any point previously. He did not mention it to the police in his initial statement the evening of the George's Market crimes (see Exhibit 53 [tape]; Exhibit 54 [transcript]; 10RT: 1556 [Exhibit 53 played for jury]), nor during his lengthy preliminary hearing testimony, nor during the first rounds of direct or redirect examination.

F. Because the Evidence was Insufficient, Appellant's Conviction for Attempted Murder Must be Reversed

Because there was insufficient evidence of attempted murder, appellant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations were violated. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. 1, §§ 1, 7, 12, 15, 16, 17, 31; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 & fn. 13; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) The trial court's use of a different standard for testimony given through an interpreter violated appellant's rights under the Equal Protection Clause of the Fourteenth Amendment. (U.S. Const., 14th Amend.; Cal. Const. art. 1, § 31; see also *Castro v. State of California* (1970) 2 Cal.3d 223, 242 [California Constitution's former English literacy requirement for otherwise qualified voters violated right to the equal protection of the laws].)

Although this Court views the evidence in the light most favorable to the judgment, it "does not . . . limit its review to the evidence favorable to the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) Instead, it

"must resolve the issue in light of the whole record – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*Ibid.*, quoting *People v. Bassett* (1968) 69 Cal.2d 122, 138.) When this Court reviews the entire record below, including the evidence that appellant pointed an obviously unloaded gun at Medina, Medina's belated testimony about appellant's unknown gesture, the prosecution's failure to adduce additional evidence regarding the gesture, and the trial court's own characterization of Medina's testimony as unclear and imprecise, it must conclude that the prosecution failed to present substantial evidence of the elements of attempted murder. Accordingly, appellant's conviction on Count 5 must be reversed.

V.

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING ROSA SANTANA'S PRELIMINARY HEARING TESTIMONY IN LIEU OF LIVE TESTIMONY

Rosa Santana testified under a grant of partial immunity at the preliminary hearing to statements implicating appellant as the person who shot Hoglund after the George's Market robbery, implicating him in an uncharged robbery (see Argument VI), and to hearing appellant say he had shot eight or nine people in his country. (See Argument XV.) The prosecution secured this testimony by holding Santana as a material witness and treating her as a hostile witness. Santana repeatedly changed addresses in the months prior to appellant's trial and the prosecution had to locate her anew several times. Despite only very limited efforts by the prosecution to find Santana shortly before trial was set to begin, the court ruled that effort diligent and admitted Santana's preliminary hearing testimony at the guilt phase of the trial. The admission violated appellant's rights under both the

state and federal constitutions to confront the witnesses against him and his right to a reliable penalty verdict. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 15, 16, 17.)

A. Factual Background

Thirteen-year-old Rosa Santana was arrested with co-defendant Navarro on May 31, 1992, two days after Hoglund's death. (13RT: 2175-2176; 20RT: 3527-3528.) At the police station, Santana viewed a tape of a robbery in a market and identified appellant and his two co-defendants on the tape. (20RT: 3411, 3413.) She spoke to two officers, giving a taped statement in their presence. (Vol.2, 6SCT: 212-220.)

During the preliminary hearing at the Van Nuys court house in March 1993 the prosecution informed the court that they had been unable to find Santana until she was arrested in Pomona for robbery. (1CT: 208; 3/24/93 RT: 3-5, 16 [formerly sealed transcript inserted in 1CT].) The prosecution characterized Santana as a hostile witness and requested that she be held to testify as a material witness under section 1332.[37] (*Id.* at pp. 3-5, 14.) The court ordered sureties in the amount of $20,000. (*Id.* at p.

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[37] Section 1332 provides in relevant part that "a) . . . when the court is satisfied, by proof on oath, that there is good cause to believe that any material witness for the prosecution or defense, whether the witness is an adult or a minor, will not appear and testify unless security is required, at any proceeding in connection with any criminal prosecution . . ., the court may order the witness to enter into a written undertaking to the effect that he or she will appear and testify at the time and place ordered by the court or that he or she will forfeit an amount the court deems proper.

(b) If the witness required to enter into an undertaking to appear and testify, either with or without sureties, refuses compliance with the order for that purpose, the court may commit the witness, . . . if a minor, to the custody of the probation officer or other appropriate agency, until the witness complies or is legally discharged."

20.) Without notice to the defense, Santana appeared in court, invoked the Fifth Amendment, was granted partial immunity and ordered to testify. (2CT: 349-351, 368, 373.) The prosecution asked for permission to ask Santana leading questions, on the ground that she was a hostile witness. (2CT: 402.) The court granted the request, in part because of Santana's youth. (*Ibid.*)

At trial, the prosecution claimed it was unable to locate Santana. After a hearing, the court found that the prosecution had been diligent in its efforts to locate her[38] and that Santana was unavailable and permitted the prosecution to present portions of her preliminary hearing testimony. (19RT: 3170-3171.) Deputy Sheriff Investigator Delores Perales read Santana's preliminary hearing testimony at trial.

Santana's preliminary hearing testimony included the following information: Two days prior to her arrest with Navarro after the George's Market robbery and Hoglund shooting, Santana went with Navarro to appellant's apartment where she saw all three defendants leave with loaded guns, saying they were going to get drugs and needed guns because sometimes "the black guys and the cops would get in their way." (19RT: 3367, 3445-3446, 3490-3492.) They returned about two hours later with money. (19RT: 3368, 20RT: 3392-3393, 3490-3491.) There was a total of six men who came to the apartment and split the money six ways. (20RT: 3392-3393.)

Someone played a video of a market robbery. On it, Santana recognized appellant and his two co-defendants. (20RT: 3394-3396.)

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[38] The details of the prosecution's efforts are set forth in the argument below.

While they were watching the video, someone said appellant "shot a cop." (20RT: 3397.) Appellant himself said "I shot a cop." (20RT: 3399.) During this time, the men were all talking together; they were "tripping," i.e., giggling and talking. (20RT: 3488-3489.) Appellant also mentioned that he had already shot eight or nine people in his country.[39] (20RT: 3489.) Appellant also said he shot the officer because he got in his way. (20RT: 3413.) While driving around, Navarro showed Santana another market he had robbed. He bought his car with money from an earlier robbery. (20RT: 3405-3406.)

When Perales and the prosecutors interviewed Santana the day before she testified at the preliminary hearing, she identified the defendants in photos. On the back of appellant's photo, she wrote his name, El Morro, and what he said in Spanish ("ijole le di a el jura"), which she translated as "shit, I hit the cop." (20RT: 3409-3410, 3538.)

During cross-examination, Santana denied receiving any promises or needing any favors regarding her Pomona case in exchange for her preliminary hearing testimony. (20RT: 3417.) Santana lied about her name and age when she was arrested in Pomona for being the lookout for a robbery because she did not want to go home. (20RT: 3419-3421.) She declared her innocence in the Pomona case and denied that she or the person she was with had a gun when arrested. (20RT: 3424, 3426.) She had one prior arrest as a runaway, two years earlier. (20RT: 3442-3443.) At the time Santana testified, she was fourteen years old and had been living away from home since June 1992, about a year. (19RT: 3365-3366.)

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[39] The court instructed the jury that this statement was limited to declarant's state of mind when the statement was made. (20RT: 3415.)

The jury received accomplice instructions as to Santana. (11CT: 3109-3110; 21RT: 3622–3624, 3712-3713.)

B. Applicable Legal Principles

Admission of the former testimony of an absent witness requires a showing of unavailability. (*Crawford v. Washington* (2004) 541 U.S. 36, 68; Evid. Code, § 1291, subd. (a).) A trial court finding that a declarant is unavailable as a witness requires a showing that the declarant is "absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

According to the United States Supreme Court, "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Hardy v. Cross* (2011) 565 U.S. ___ [132 S.Ct. 490, 493], quoting *Barber v. Page* (1968) 390 U.S. 719, 724-725.) Moreover,

> [I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. 'The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.

(*Ohio v. Roberts* (1980) 448 U.S. 56, 74-75, overruled on other grounds by *Crawford v. Washington, supra*, 541 U.S. 36.)

The term "reasonable" or "due" diligence[40] "is incapable of a

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[40] Although Evidence Code section 240 refers to "reasonable diligence," this Court also uses the term "due diligence." (*People v.*

mechanical definition, but it connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." (*People v. Cromer* (2001) 24 Cal.4th 889, 904, quoting *People v. Linder* (1971) 5 Cal.3d 342, 346-347, internal quotation marks omitted.) Relevant considerations include whether the proponent reasonably believed prior to trial that the witness would appear willingly (*People v. Sanders* (1995) 11Cal.4th 475, 524), whether the search was timely begun, whether leads were competently explored and the importance of the witness's testimony. (*People v. Cromer, supra,* 24 Cal.4th at p. 904.) This Court evaluates the trial court's resolution of disputed factual issues under the deferential substantial evidence standard and independently reviews whether the facts demonstrate prosecutorial good faith and due diligence. (*Id.* at pp. 902-903.)

C. The Prosecution Failed to Establish Santana's Unavailability Under California Statute and the Sixth and Fourteenth Amendments

1. The Material Witness Hearing, Santana's Constant Movement and the Record on Diligence

During appellant's preliminary hearing, on March 22, 1993, the prosecution appeared ex parte before the preliminary hearing judge to inform him that they may have located Santana, a fourteen-year-old runaway, who changes "locations on an hourly or daily basis" and would be asking for a 1382 undertaking. (The correction citation is to section 1332.) (1CT, 3/22/93 RT: 3 [formerly sealed transcript inserted in 1CT].)

At the material witness hearing conducted pursuant to section 1332, Perales described Santana's role in the case and testified that after speaking

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Cromer (2001) 24 Cal.4th 889, 898, citing Evid. Code, § 240, subd. (a)(5).)

to the police, Santana, a runaway, was released to her father. Two days later she again ran away from home and investigators had tried unsuccessfully many times to find her: the Sheriff's Department had been searching for her for months and the district attorney investigator for weeks. (1CT, 3/24/93 RT: 15-18.)

The prosecution argued that Santana was "very capable of evading" the sheriff and district attorney and "would certainly flee" if released. (1CT, 3/24/93 RT: 18.) The court found that Santana was a material witness and required a $20,000 undertaking, in addition to $20,000 bail in Pomona, in light of Santana's status as a runaway, her use of an assumed name and date of birth when arrested, her efforts to avoid service, the seriousness of the charges against her and the materiality of her testimony. (1CT, 3/24/93 RT: 18, 20.)

Two days later, the prosecution sought to deny Santana bail entirely, arguing again that she had not been located despite ten months of "very concentrated effort" and because when arrested in Pomona, she indicated she wanted to stay on the street rather than return home or resurface in appellant's case. (Misc. Muni RT: 252-253.)

At the due diligence hearing on October 13, 1994, the prosecution insisted that Santana was a willing witness, in order to make its deficient efforts to find her appear reasonable. (See 19RT: 3141, 3142.)

At the due diligence hearing, the prosecution presented information that in April 1994, Perales looked for Santana for proceedings involving Oscar Paredes, a fourth suspect in the crimes at issue who was tried separately. (19RT: 3157, 3169.) The district attorney and Perales visited Santana on May 4, 1994. (19RT: 3157.) They served her with a subpoena to appear at a line up for Paredes on May 16, 1994, and she appeared on

that date. (19RT: 3158.)

The prosecution presented information that on May 4 and 16, 1994, the prosecution served Santana with subpoenas for appellant's trial, set to start on September 7, 1994. (19RT: 3157-3159.) During the prosecution's meeting with Santana on May 4, 1994, Santana was "very friendly, cooperative," and while she did not want to appear, she would "be available." (19RT: 3157-3158.)

The prosecution then presented information at the due diligence hearing that in June 1994 the prosecution again searched for Santana. (19RT: 3153.) In approximately July 1994 the prosecution again spoke to Santana, who had a new address. (19RT: 3158.) Throughout this time period, Santana had an outstanding warrant on her Pomona robbery case, but the prosecution took no action other than urging her to turn herself in. (19RT: 3158.)

The prosecution asserted that in August 1994 it had learned that Santana was no longer at her July address, had turned herself in, was in custody and had reached a disposition (Pen. Code, § 459) in the Pomona case. (19RT: 3159-3160.) The prosecution agreed with the Pomona authorities that Santana could be released to her parents with electronic monitoring. However, as the prosecution later learned, on August 19, 1994, the Pomona authorities released Santana to her parents and she ran away immediately before electronic monitoring was set up. (19RT: 3148-3151.)

The prosecution cited "contacts" on 11 different days between August 31, 1994, and September 21, 1994, as evidence of its diligence in trying to locate Santana. (19RT: 3143-3144.) On August 31, 1994, District Attorney investigator Abram began the search for Santana, unsuccessfully visiting an address in Montclair. (19RT: 3145, 3158.) Abram contacted the

Department of Public Social Services (DPSS); Santana was receiving checks from DPSS because she had had a child the prior January. (19RT: 3143, 3145-3146.) Abram followed up on leads from DPSS, checking out two addresses and talking to former landladies. (19RT: 3146-3151.) Abram also asked DPSS to hold Santana's check and inform him if Santana contacted them and made calls to juvenile court, the Pomona authorities and the probation department. (*Ibid.*)

On September 8, 1994, the prosecution learned that Santana had run away after being released in her Pomona case a few weeks earlier. (19RT: 3147-3151.) An arrest warrant had been issued (19RT: 3143), and the district attorney in Pomona promised to notify the prosecutor in appellant's case if Santana was picked up, because the Pomona sentencing was being delayed until after Santana testified at appellant's trial. (19RT: 3151.)

On September 12, 1994, the court issued an Attachment for Defaulter because Santana had failed to appear at appellant's trial pursuant to subpoena. Bail was fixed at $25,000. (10CT: 2976.)

The court ruled that the prosecution's decision to let Santana go in August was reasonable and that its efforts to secure her presence at trial were reasonably diligent. (19RT: 3170.)

2. The Trial Court Erred in Finding Due Diligence

The prosecution argued it was reasonable to believe that Santana would appear at appellant's trial because on May 4, 1994, she was served with a subpoena for, and then appeared at, a proceeding in the Paredes case on May 16, 1994. (19RT: 3151-3152, 3157-3159.) The prosecution's assertion was at best unreasonable and more likely disingenuous as demonstrated by the above history. This includes the prosecution's inability to locate Santana despite ten months of "very concentrated effort" prior to

her 1993 Pomona arrest, (Misc. Muni. RT: 252-253); the prosecution's knowledge that Santana was a runaway who could change location on "an hourly or daily basis," (1CT, 3/22/93 RT: 3); the prosecution's asserted need to resort to the material witness statute to secure her testimony at appellant's March 1993 preliminary hearing; and its difficulty relocating Santana in May 1994.

All this precluded any reasonable belief that her appearance at a proceeding in May 1994 for the Paredes case less than two weeks after being subpoenaed (19RT: 3157-3158), supported an assumption that she would appear four months later at appellant's trial. Moreover, her appearance for Parades's separate case was irrelevant to a showing of due diligence in securing her presence at appellant's trial. (See *In re Chuong D* (2006) 135 Cal.App.4th 1301, 1313 [attempts to get witness to attend an earlier hearing do not establish diligence in securing attendance for current appearance so as to justify a continuance to secure presence of witness].)

The prosecution's position that Santana became a willing witness after its meeting with her on May 4, 1994, also strains credulity. (See 19RT: 3157-3158.) The prosecution advanced no logical or credible reason for Santana's supposed change of heart. The prosecutor's belief that Santana would be more stable because she had had a baby several months prior (19RT: 3143), was, at best, wishful thinking. The prosecution had to search for Santana prior to its contact with her in May and again in June/July 1994. (19RT: 3153, 3157-3159.) Santana had three different known addresses between May and July 1994. (See 19RT: 3157-3158, 3146-3147.) Thus, after the prosecution's May and July contact with her, there was no reasonable basis to believe that Santana was any more "stable" than she had been earlier.

The prosecutor also argued that at their May 1994 meeting, Santana expressed her willingness to appear. (19RT: 3157-3158.) However, as the defense pointed out, the prosecution knew of Santanta's outstanding Pomona warrant when it had contact with her then and again in July. (19RT: 3158, 3166-3167.) It is simply not reasonable to believe that a witness who ignores a warrant for months is, in fact, trustworthy and actually cooperative. This is borne out by the prosecutor's acknowledgment at the due diligence hearing that she knew of Santana's propensity to disappear. (19RT: 3169.)

Nor were the prosecution's efforts timely. Citing *People v. Watson* (1989) 213 Cal.App.3d 446, the prosecution argued that it was entitled to rely on the fact that it had served a trial subpoena on Santana in May, four months before trial was to begin. (19RT: 31551-3152.) *Watson* is inapposite, as the question there was whether due diligence required serving a federal subpoena where a state subpoena was served prior to a witness leaving the country. (*People v. Watson, supra,* at pp. 452-453.) The fact is that the prosecution's assigned investigator did not start looking for Santana until August 31, 1994, just one week before trial had been scheduled to begin.[41] (2RT: 252, 9CT: 2632.) Therefore, under the circumstances, the search was not timely begun.

The prosecution failed to conduct a complete and competent search for Santana. It never utilized several standard methods to locate her such as trying to contact Santana's friends and acquaintances, a standard component of a due diligence search. (See, *e.g., People v. Wilson* (2005) 36 Cal.4th

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[41] Trial had been set for September 7, 1994. (9CT: 2632.) On August 24, 1994, trial was trailed until September 14, 1994, which is when it began. (10CT: 2753, 2986.)

309, 341-342 [finding due diligence where detective attempted to locate known associates of witness]; *People v. Bunyard* (2009) 45 Cal.4th 836, 849, 855-856 [same]; *People v. Sanders* (1995) 11 Cal.4th 475, 523-525 [due diligence not established where, among other things, proponent failed to look for friends of witness].) Looking for friends was especially important given that Santana was estranged from her parents and a young woman who seemed to rely upon friends and acquaintances to get by. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 312-313, disapproved on another ground in *People v. Cromer*, *supra,* 24 Cal.4th at p. 901 [given lifestyle of witnesses sought (prostitute and fugitive from justice) interviewing friends was among methods that would have shown due diligence].)

Abram did not try to talk to Sergio Rojas, Santana's crime partner in her Pomona case and the purported father of her baby, despite knowing that Rojas has been convicted in that case (and thus might be in custody) and that he and Santana had been on good terms at least through July 1994. (19RT: 3154-3156.)

The prosecution also failed to check with local hospitals or medical establishments in an effort to find Santana. In addition to contacting friends, checking with local hospitals or medical establishments is recognized in numerous cases as part of a reasonable due diligence search. (See, e.g., *Hardy v. Cross, supra,* 132 S.Ct. at p. 492; *People v. Bunyard, supra,* 45 Cal.4th at p. 855; *People v. Cromer, supra,* 24 Cal.4th at p. 904; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706-707; *People v. Salas* (1976) 58 Cal.App.3d 460, 469-470.) Conducting such a search would likely have been especially effective in this case, because Santana may have sought care at a public clinic for her baby, for whom the prosecution had a name

and date of birth. (19RT: 3147.)

When the prosecution finally started the search for Santana on August 31, 1994, it failed to enlist the help of the Sheriff's Department, as it had prior to the preliminary hearing, (19RT: 3157, 3169), or peace officers from other nearby jurisdictions, such as Montclair, where Santana had lived in July. (19RT: 3158; cf. *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1556-57 [proponent unreasonably confined search to Los Angeles County and did not check neighboring counties]; *People v. Diaz, supra,* 95 Cal.App.4th at pp. 706-707 [part of due diligence effort included asking patrol officers on three shifts to look for the witness].)

The prosecution also could not reasonably rely upon the efforts of its counterparts in Pomona to keep track of Santana as it did when it assented to Santana's release in August 1994 pending pick up by the community detention program. The Pomona district attorney handling Santana's case had specifically asked the prosecution below, "what do you want to do with her?" (19RT: 3142.) The prosecution claimed that it agreed to a release with electronic monitoring because it thought Santana now had an address separate from her parents. (*Ibid.*) However, this was apparently never communicated to the authorities in Pomona, who released her to her parents. (*Ibid.*) True to her pattern, Santana ran away the same day, before the community detention program went into effect. (19RT: 3143.) Under the circumstances, the prosecution's agreement to a plan which resulted in release to her parents does not establish due diligence. (Cf. *People v. Bunyard, supra,* 45 Cal.4th at p. 849 [where prosecution supports trial court's release of material witness from custody, resulting in witness becoming unavailable, prosecution may be held to have not exercised reasonable diligence].)

The defense argued that the prosecution should have asked the Pomona juvenile court to keep Santana in custody until she could testify at appellant's trial, rather than releasing her. (19RT: 3167.) While the prosecution is not required to keep "tabs" on every material witness in a criminal case (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342), the prosecution's knowledge regarding flight risk and the time of trial are important caveats. In *Wilson*, the court noted that the prosecution is not required to take adequate preventive measures to keep the witness from disappearing *absent knowledge of a "substantial risk that [an] important witness would flee*." (*Ibid.,* italics added.) Here, as demonstrated above, there was a substantial risk that Santana, an important witness, would disappear. In *People v. Hovey* (1988) 44 Cal.3d 543, 564, the court noted that "it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply 'disappear,' *long before a trial date is set*." (Italics added).) The time period in question below was a matter of weeks: when the prosecution agreed to Santana's release from custody in Pomona in August 1994 (19RT: 3142), the trial was set to start on September 7, 1994. (9CT: 2632; 10CT: 2753, 2986.) Thus, reasonable diligence required that the prosecution keep Santana in custody for the weeks between her surrendering herself in Pomona in the latter part of August and appellant's trial.

This Court must also take into account Santana's credibility. "[T]he requirement of due diligence is a stringent one for the prosecution. It is more stringent still, when, as here, the absent witness is vital to the prosecution's case and his credibility is suspect." (*People v. Louis* (1986) 42 Cal.3d 969, 991, citation and quotation marks omitted.) This is because of the special importance of cross-examination for certain kinds of

witnesses. As this Court has observed,

> Defendant was to go on trial for his life; Tolbert was a critical prosecution witness, and was known to be both unreliable and of suspect credibility - the very type of witness that requires, but is likely not to appear to submit to, cross-examination before a jury.

(*Ibid.*) Moreover, a prosecutorial agent reading a cold record may be better for the prosecution than the live testimony of a dubious witness. (See *id.* at p. 989, quoting trial court's observation that the witness "would probably not look as good in person as he does in reading out of the transcript.") Certainly Santana was such a witness.

On the stand during the preliminary hearing, Santana had the benefit of her attorney explaining her answer (19RT: 3209; 2CT: 429) and objecting and interjecting himself during cross-examination (19RT: 3173-3174, 3190, 3215, 3221; 2CT: 413, 421, 428, 440-442, 473, 462), even where it could not have exposed her to any charges. The hesitations, objections and consultations were cut out of the transcript of Santana's testimony over defense objection before it was read and submitted to the jury. (See, e.g., 19RT: 3173-3174, 3215, 3223 [appellant's objections].) These improper redactions eliminated from full consideration by the jury a significant part of her demeanor while testifying and the credibility of her testimony. (*Ibid.*) The jury was deprived of the opportunity to hear and see Santana's inability or unwillingness to answer questions on her own and therefore prevented from adequately assessing her credibility.

Santana's status as the possible or actual beneficiary of favorable prosecutorial treatment in exchange for her testimony must also be considered in assessing her credibility and the benefit to the prosecution of her absence at trial. At the preliminary hearing, the prosecution denied any

connection between appellant's case and the pending case against Santana in Pomona. (2CT: 357, 360-361.) By trial, however, this facade had crumbled: the prosecution postponed Santana's sentencing in Pomona until she testified and promised to tell the Pomona sentencing judge of Santana's cooperation with the prosecution in appellant's case. (20RT: 3542-3543.)

The prosecution's understanding of the shakiness of Santana's testimony was apparent from the beginning, when the prosecution insulated Santana, resisting all efforts to allow her to have contact with the defense, or even with her own lawyer, prior to the material witness or preliminary hearings. (2CT: 390, 430-431, 437; 1CT, 3/24/93 RT: 11-12.) There is no doubt that the prosecution benefitted from her absence at trial.

In light of Santana's lack of credibility, the constitutional imperative of confrontation, the proffering of Santana's former testimony against appellant in a capital case and of the routine investigative efforts that the State unreasonably failed to pursue, the prosecution's due diligence showing here was unreasonable and inadequate, the trial court erred in determining that Santana was unavailable as a witness, and Santana's preliminary hearing testimony was improperly admitted.

D. Appellant Was Prejudiced by the Trial Court's Erroneous Admission of Santana's Preliminary Hearing Testimony

The prosecution's position early on was that Santana was very important to its case. (Misc.Muni. RT: 252 ["extremely material"]; 19RT: 3165 ["extremely important"].) This was borne out by its subsequent use of her testimony.

The prosecutor argued that Santana's testimony that appellant or a co-defendant said they needed guns in case an officer got in their way prior to the George's Market robbery and Hoglund shooting demonstrated that

appellant had the intent to kill. (22RT: 3817.) Intent to kill was needed for the special circumstance related to murder of a peace officer. (21RT: 3792, 22RT: 3814-3815.) Santana's testimony therefore prejudiced appellant as to the peace officer special circumstance.

The prosecution also argued that Santana corroborated appellant's identity as "Morro;" the defendants' possession of a video tape from George's Market; the approximate amount of money taken in some of the robberies; and appellant's use of the red car. (21RT:3772; 22RT: 3818-3819.) In both opening statements and closing arguments at the guilt phase, the prosecution emphasized Santana's testimony that the defendants said they were taking guns to buy drugs "in case of blacks or cops getting in the way." (9RT: 1286; 21RT: 3763, 3791.) As appellant argued below, the prosecution used the racial reference to manipulate the jurors' emotions and to predispose them against appellant at the penalty phase. (22RT: 3893.)

The prosecution also introduced a theme he would return to at the penalty phase:

> And ultimately, what did we hear from Rosa Santana? It was a laughing matter. They were tripping. After they came home from killing Officer Hoglund, after putting a bullet to the back of his head while he was on the ground, on his knees, they came home and it was a laughing matter.

(21RT: 3760.)

The court admitted into evidence Santana's statement that appellant said he had killed eight or nine other people, stating that it was relevant to the jury's consideration at the penalty phase of appellant's state of mind in connection with the circumstances of the crime under factor (a). (19RT: 3204-3206.) At the penalty phase, the prosecutor then cross-examined

appellant about this statement as well as Santana's claim that appellant laughed over the killing of the officer, which appellant denied. (26RT: 4608- 4609.)

Then the prosecutor argued:

> He denies giggling about the killing afterwards, or having ever spoken with Rosa Santana, who was there. And he denies cursing Hogland. He's denying the true testimony of Santana and Enrique Medina. He took an oath to God, that he's now supposedly devoted to, and then lied, reduced or mitigated his responsibility for every incident. You can't consider his lying, if you believed he did, as aggravation, but you can consider it as lack of remorse, and the facts and circumstances of the crime as indicated in his character.

(30RT: 5326-5327.)

Thus, Santana's preliminary hearing testimony that the men who came to appellant's apartment were "tripping," i.e., giggling and talking (20RT: 3488-3489), became the basis for the prosecution's cross-examination and specific charge that appellant himself laughed about killing Hoglund. Appellant's denial that he laughed over killing the officer, and that he had killed eight or nine people, became the basis for the prosecution's very damaging argument at the penalty phase that appellant not only engaged in this horrendous behavior, but lied about it to the jury and lacked remorse, all of which were reasons to vote for death.

The admission of Santana's testimony was highly prejudicial to appellant at both the guilt and penalty phases of appellant's trial. Appellant also incorporates by reference Arguments VI (regarding Santana's statement that appellant committed another robbery) and XV (regarding Santana's statement that appellant said he shot eight or nine other people). As argued therein, the prejudice from Santana's statements extends to the

robbery counts appellant disputed and on which the evidence was weak, i.e., the Outrigger counts 10 through 18 and the El Siete Mares robbery counts 24 through 27, as well as to the penalty phase decision.

Because admission of Santana's prior testimony violated appellant's right to a reliable determination of the appropriate penalty under the Eighth and Fourteenth Amendments (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 587), and his Sixth Amendment Confrontation Clause rights, the error is of federal constitutional dimension and this Court must determine whether the prosecution can show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [applying *Chapman* to confrontation clause violations].) For the reasons stated above, the prosecution cannot carry its burden of establishing that the error was harmless beyond a reasonable doubt and counts 10 through 18, 24 through 27 and the death sentences must be reversed.

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VI.

EVEN IF SANTANA WAS A CONSTITUTIONALLY AVAILABLE WITNESS, THE TRIAL COURT ERRED BY ADMITTING HEARSAY STATEMENTS THROUGH HER IN VIOLATION OF THE *ARANDA/BRUTON* RULE AND RESTRICTING APPELLANT'S CROSS- EXAMINATION OF HER IN VIOLATION OF THE SIXTH AMENDMENT

Over appellant's objection, the court admitted Santana's taped statement that co-defendant Navarro told her that appellant had received $14,000 from a prior robbery and bought his car with the proceeds. The admission of her unredacted statement against appellant and the limits placed on appellant's cross-examination of Santana violated his Sixth Amendment rights under the United States Constitution and parallel provisions of the state constitution. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15; *Bruton v. United States* (1968) 391 U.S. 123, 126-128 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).)

A. The Court's Erroneous Admission of Santana's Taped Hearsay Statements Violated Appellant's Rights to Confront and Cross-Examine Witnesses

After her arrest (13RT: 2175-2176), Santana gave a taped statement at the Carson Sheriff's Station. (Vol.2, 6SCT: 212-220.) On the tape, Santana said that she learned from Navarro that appellant bought his car three to four months earlier with money from another robbery; he and Navarro had received about $14,000 each. (Vol.2, 6SCT: 219-220.) Appellant objected to admission of this statement on the basis of *Aranda* (2CT: 428; 10RT: 3196; 19RT 3233-3234), and argued that the tape was

hearsay that had not been subject to cross-examination.[42] (19RT: 3374-3376.) The trial court overruled the objections (*ibid.*), and the jury received copies of the transcript (Exhibit 48) and heard the tape (Exhibit 47). (20RT: 3414-3415.)

In *Aranda, supra,* 63 Cal.2d 518, 530-531, this Court held that a codefendant's extrajudicial statement cannot be admitted into evidence unless certain precautions are taken to remedy its prejudicial effects on other codefendants. Three years after *Aranda*, in *Bruton, supra*, 391 U.S. 123 at page 126, the Supreme Court held that the admission of a nontestifying defendant's confession, facially implicating (i.e., by name) his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, despite a limiting instruction to the jury to consider the statement against the declarant defendant only.

The statements above, that Navarro said appellant had shot a cop, commited another robbery, received $14,000 and bought a car with the proceeds, directly implicated appellant. Appellant was unable to cross-examine the purported source of the statements, co-defendant Navarro, who did not testify. Under *Aranda* and *Bruton,* the admission of these statements violated appellant's Sixth Amendment right to confront the witnesses against him.

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[42] Appellant objected to the tape at the preliminary hearing and, with the court's permission, renewed his unsuccessful objections at trial. (See, e.g., 19RT: 3195-3198, 3222; 2CT: 423-428.)

B. The Court's Limits On Appellant's Cross-Examination of Santana Violated His Rights to Confront and Cross-Examine Witnesses Under the Sixth and Fourteenth Amendments

Appellant sought to cross-examine Santana regarding all contacts with prosecutorial agents in Pomona as well as in the Van Nuys courthouse prior to her preliminary hearing testimony. The prosecution objected to appellant asking Santana who told her she was charged with "putting a gun on a lady" in Pomona. (2CT: 470-471.) Appellant explained that he sought to explore whether she received any favors in her pending robbery case in exchange for her testimony at the preliminary hearing. (2CT: 471.) The court sustained the objection on the grounds that the questioning went to matters that were irrelevant and collateral under Evidence Code sections 352 and 787. (*Ibid.*) The court also sustained the prosecution's objection to questioning Santana about her contacts after arriving at the Van Nuys courthouse on the ground that it went to discovery. (2CT: 480-482.)

Appellant objected to these limitations on cross-examination as violating his federal constitutional right to confront and cross-examine witnesses (2CT: 433-434, 481) and renewed at trial all his preliminary hearing objections regarding Santana's testimony. (19RT: 3222.)

The court's rulings were incorrect. As appellant argued, the prohibited questioning was relevant to whether or not Santana had any expectations of a deal in exchange for her testimony (2CT: 471), which was a permissible ground for impeachment. A defendant is permitted to explore avenues of potential bias with a prosecution witness. (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1173-1174 [error to prohibit question to police officer witness where defendant sought to explore possible bias]; Evid. Code, § 780 [allowing a court or jury to consider the "existence or

nonexistence of a bias, interest, or other motive" when determining the credibility of a witness].) In particular, permissible grounds of inquiry on cross-examination include fear or susceptibility to pressure. (*Davis v. Alaska* (1974) 415 U.S. 308, 317-318 [trial judge improperly restricted cross-examination of witness on his probationary status as a juvenile delinquent; defendant entitled to show susceptibility of the witness to undue pressure].)

Because the court limited appellant's cross-examination which was "designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" his rights under the Confrontation Clause were violated. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, quoting *Davis v. Alaska, supra,* 415 U.S. at p. 318.)

C. Individually and Cumulatively, the Errors Prejudiced Appellant

Navarro's unconfronted accusation that appellant committed another robbery and bought a car with the proceeds invited the jury to convict appellant of one or more robberies based upon improper evidence. As this Court has recognized, "evidence that the defendant committed other violent crimes 'is often of overriding importance ... to the jury's life-or-death determination.'" (*People v. Anderson* (2001) 25 Cal.4th 543, 589, citation omitted.)

The "powerful, incriminating evidence" (*Bruton v. United States, supra,* 391 U.S. at p. 135), in the form of Navarro's accusations through Santana that appellant committed another robbery and netted about $14,000 from which he bought a car, was prejudicial, as it made it more likely that

the jurors would find appellant guilty on the robbery counts that he disputed and on which the evidence was weak or insufficient, i.e., the robbery of Arturo Flores, count 21; Outrigger counts 10 through 18; and El Siete Mares robbery counts 24 through 27, as well as the attempted robbery of Rod's Coffee Shop under section 190.3 at the penalty phase. Appellant incorporates by reference the arguments and prejudice discussions in Arguments III (insufficient evidence of robbery of Arturo Flores) and X (erroneous instruction as to eyewitness identification, discussing prejudice as to the Outrigger and El Siete Mares robbery counts).

The restricted cross-examination then undercut appellant's ability to impeach Santana, an "extremely important" witness for the prosecution (19RT: 3165), with evidence of bias on the ground that she received favorable treatment from the prosecution in her Pomona case in exchange for her testimony. The prejudice extended to the penalty phase, where her statement that appellant had killed eight or nine others was admitted. Petitioner incorporates by reference the prejudice discussion in Argument XV.

The introduction of this inadmissible evidence also rendered appellant's trial fundamentally unfair and violated his rights to due process of law, to a fair trial and to reliable determinations of guilt and special circumstance allegations. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68 [recognizing fundamental fairness standard but finding no due process violation]; *Dubria v. Smith* (9th Cir. 2000) 224 F.3d 995, 1001 [same].)

Because appellant has a state-created liberty interest under the Evidence Code that Santana's statements would be admitted against him only if they met the requirements of the above cited sections of the

Evidence Code, their introduction violated appellant's Fourteenth Amendment right to due process. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *People v. Webster* (1991) 54 Cal.3d 411, 439.)

The admission of this evidence also violated the Eighth Amendment prohibition against cruel and unusual punishment, which gives rise to a "special need for reliability in the determination that death is the appropriate punishment in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, citations and quotations marks omitted.) This is because the death penalty's qualitatively different character from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [penalty phase].)

The record before this Court establishes that the errors above were not harmless beyond a reasonable doubt, either individually or cumulatively. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In addition, this Court cannot determine that there is no reasonable possibility that the above described federal constitutional and state law errors affected the verdict at the guilt and penalty phases. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Jones* (2003) 29 Cal.4th 1229, 1265, fn. 11.) Counts 10 through 18, 21, 24 through 27 and the death sentences must be reversed.

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VII.

THE COURT PREJUDICIALLY ERRED BY ADMITTING EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT UNDER EVIDENCE CODE SECTION 1101, SUBDIVISION (b)

The prosecution proffered evidence of an incident at Rod's Coffee Shop ("Rod's") in Arcadia on November 7, 1990, as prior crimes evidence to prove appellant's identity during the robberies charged in the capital case and as the person who assaulted two people with a stun gun at Casa Gamino Restaurant on May 17, 1992. Over objection, the evidence was admitted under Evidence Code 1101, subdivision (b), under the theories of identity, continuing scheme or plan and that appellant possessed the means to commit the charged crime. Ultimately, the jury was permitted to consider this evidence to prove any of the 40 offenses charged against appellant. Because the Rod's evidence was not similar to the charged offenses, admission of the evidence allowed the jury to convict appellant based upon the prohibited theory that he had a propensity to commit crimes. The court's admission of the evidence was an abuse of discretion which tipped the scales toward conviction and violated appellant's right to a fair trial under the Sixth Amendment, rendered the trial fundamentally unfair in violation of his Fifth and Fourteenth Amendment rights to due process of law and further undermined his right to a reliable guilt and penalty determination as guaranteed by the Eighth Amendment proscription against cruel and unusual punishment. (U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.)

A. Factual Background

The prosecution moved to introduce the Rod's evidence under Evidence Code section 1101, subdivision (b), and proffered the following

evidence. (10CT: 2919-2922.) Appellant and four others entered Rod's about ten minutes before closing time, ordered coffee and left without finishing it. Suspicious that they were casing the place for a robbery, the manager called the police. The police stopped their vehicles and found weapons, including a revolver under the cover of the driver's seat where appellant sat and a stun gun under the front passenger seat. (10CT: 2920.)

The prosecution argued that these events constituted "other crimes" evidence admissible to prove appellant's identity during the robberies charged in the capital case because of shared, distinctive, common marks. (10CT: 2921; 9RT: 1229.) These shared characteristics were multiple armed perpetrators committing take-over robberies of restaurants. (10CT: 2921.) According to the prosecution, appellant's possession of a stun gun during the Rod's incident along with the other "distinctive marks" raised the inference he committed the Casa Gamino robbery and also corroborated his identity as the suspect who assaulted two people with a stun gun there. (10CT: 2921-2922.)

Appellant countered that there was insufficient evidence of a group modus operandi: neither of the co-defendants were involved in the 1990 incident; there was insufficient evidence of even an attempted robbery; and the authorities filed only a misdemeanor weapons possession charge against appellant. (9RT: 1230, 14RT: 2258-2259.) Other dissimilarities were the time lag between the two incidents, the different devices used and the location of the stun gun in 1990 under a seat where someone else had been sitting. (9RT: 1230, 14RT: 2221-2222, 15RT: 2363-2264, 16RT: 2566.) Appellant also proffered evidence that there were 43 crimes similar to the ones appellant was charged with in the Los Angeles area involving Central American men. (9RT: 1232-1233.)

The court ruled the evidence admissible unless appellant conceded his identity as to the Casa Gamino crimes. (9RT: 1237.) Ultimately, appellant conceded his identity as to the robberies, though no formal stipulation was entered. (9RT: 1237, 1239, 1291, 22RT: 3866.) However, he disputed his guilt of the stun gun assaults. (14RT: 2257-2260.) The court allowed the introduction of the Rod's incident evidence at the guilt-innocence phase because it was "so unique and so unusual. In fact, in all my years in the justice system, whichever side of the bench I was on, I have never seen an electrical device being used." (16RT: 2567.)

Brian Wellman, the manager at Rod's in Arcadia on November 7, 1990, testified at trial that shortly before the midnight closing time, five men of Hispanic appearance came in. (18RT: 3013-3015.) They chose a different table than the one offered them, were tight-lipped and looked around and Wellman felt uneasy immediately. (18RT: 3015-3016.) They ordered but did not finish two coffees, paid their check and left (18RT: 3016-3017.) Wellman saw the men congregating in the parking lot behind the restaurant with one of their cars parked improperly in the driveway facing the street. (18RT: 3017-3018.) Wellman called and told the police he thought he was being cased. (18RT: 3019.) Later, the police took him to where they had stopped two cars and Wellman identified the men there as the same ones who were in the restaurant. (18RT: 3019-3120.) Wellman was unable to identify appellant or the codefendants. (18RT: 3021.)

During cross-examination, Wellman denied that the men's Hispanic ethnicity had contributed to his concern, even though Arcadia was primarily an Anglo and Asian community. (18RT: 3023.)

Randy Kirby, an Arcadia Police Department Sergeant, testified that at about midnight on November 7, 1999, he responded to a broadcast that

the manager of Rod's reported male Hispanics in two cars behind the restaurant, casing it. (18RT: 3027-3028.) Kirby arrived at the scene in under 30 seconds and stopped the car appellant drove. (18RT: 3028, 3030, 3035.) Appellant was the shortest of the four men the police took into custody. (18RT: 3037.) Three people exited the car and the one in the passenger seat fled on foot. (18RT: 3030-3031.) Kirby found a .38-caliber two-inch revolver under the cover of the driver's seat and on the floor beneath the front passenger seat, a loaded two-inch .22-caliber revolver and a black stun gun, labeled "Paralyzer," which was like the stun guns shown in the newspaper advertisement in Exhibit 236A. (18RT: 3032-3034; 4SCT: 186, 188; Ex. 236A.) Two male Latinos, 20 to 25 years old, were in the other car that was stopped, along with a loaded .357 magnum under the passenger seat. (18RT: 3047-3048, 3052.)

Kirby testified that he could not find the guns and stun gun to bring to court, so relied on his report for the description of the stun gun. (18RT: 3042-3043.) Kirby had not previously found a stun gun alongside a weapon in the past. (18RT: 3045.) Exhibit 236A was an advertisement depicting a Paralyzer brand stun gun 4.1 inches long, labeled "world's smallest stun gun." (4SCT: 186, 188; Ex. 236A.) It looked similar to the one that Kirby booked into evidence that evening. (18RT: 3048-3049.) The parties stipulated that the incident at Rod's resulted in appellant being charged with misdemeanor possession of a loaded weapon in a motor vehicle. (21RT: 3663-3664.)

Prior to Brian Wellman's testimony the court instructed the jury with CALJIC No. 2.50. The jury was informed that it would hear evidence

> for the purpose of showing the defendant, Edgardo Sanchez Fuentes committed a crime other than that for which he is on

> trial. . . . Such evidence, if believed, is not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes . . . . [but] only for the limited purpose of determining if it tends to show:
>
> The identity of the person who committed the crime, if any, of which the defendant is accused;
>
> That the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;
>
> And the crime charged is part of a larger continuing plan, scheme or conspiracy.

(18RT: 3011-3012; see also 11CT: 3102-3103, 21RT: 3682 [final instructions].)

B. Applicable Legal Principles

Subdivision (a) of Evidence Code section 1101 prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Subdivision (b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition such as motive, opportunity, intent, preparation, plan, knowledge or identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) The required degree of similarity between the current offense and the other offense depends upon the purpose for which the evidence is to be admitted. (*Id.* at p. 402.)

However, even if evidence of an uncharged crime is relevant to one or more of these issues, Evidence Code section 352 requires that it be excluded if it lacks *substantial* probative value or if its probative value is

"'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404, quoting Evid. Code, § 352.) Trial court rulings as to the admissibility of evidence under Evidence Code section 1101, subdivision (b), and under section 352 are reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code, § 352].)

Under California law, other crimes evidence must be evaluated with extreme caution and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) The admission of irrelevant and inflammatory evidence may so infect the trial with unfairness that the right to due process is violated. *(McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385.)

C. Because Appellant Did Not Dispute His Guilt as to the Casa Gamino Robberies, the Rod's Incident Evidence Was Inadmissible for That Purpose

A plea of not guilty puts "the elements of the crime in issue for the purposes of deciding the admissibility of evidence under Evidence Code section 1101, unless the defendant has taken some action to narrow the prosecution's burden of proof." (*People v. Daniels* (1991) 52 Cal.3d 815, 857-858.) The trial court initially, and appropriately, indicated that because the only relevant issue was identity, the court would disallow the evidence about Rod's if appellant conceded identity. (9RT: 1237.) Appellant did so, telling the jury during opening statements at the guilt phase that the Casa Gamino evidence identification would be strong. (9RT: 1237, 1239, 1291.)

Because appellant's commission of the Casa Gamino robberies (Counts 29, 32, 34, 35 and 36) was not in dispute, evidence of the Rod's

incident was not material to any fact sought to be proved with regard to the counts. (See *People v. Daniels, supra,* 52 Cal.3d at p. 858 [prior robbery incident was relevant to intent where defendant offered no concessions limiting the issues, so the prosecution had the burden of proving all the elements of the crime]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 757-758 [prior conduct offered to prove homicidal intent and premeditation was admissible where defendant's alibi defense was not revealed until after close of prosecution's case].) Minimally, the evidence was cumulative as to this point. (See *People v. Balcom* (1994) 7 Cal.4th 414, 422-423 [because rape victim's testimony that defendant put gun to her head constituted compelling evidence of intent despite defendant's consent defense, evidence of uncharged similar offense was cumulative on issue of intent].)

For this reason alone, the evidence of the incident at Rod's was inadmissible at appellant's trial to prove that appellant committed the robberies at Casa Gamino or others he conceded in his opening statement, i.e., those at George's Market, Woodley Market and Ofelia's Restaurant. (9RT: 1290-1293.) This inadmissible evidence was prejudicial, as demonstrated elsewhere in this argument, including section G below.

D. The Rod's Incident Evidence Was Inadmissible under Evidence Code Section 1101, Subdivision (b), to Show Common Scheme or Plan as to the Robbery or Stun Gun Assault Counts

1. Robbery Counts

What is required to establish a common design or plan is not just a similarity in results, but "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402, quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1979)

§ 304, p. 249, italics omitted.) The plan need not be distinctive or unusual but the presence of unusual or distinctive shared characteristics may increase the probative value of the evidence. (*People v. Balcom, supra,* 7 Cal.4th at pp. 424-425.)

a. The evidence was cumulative and prejudicial and therefore inadmissible as to the robbery counts under a common plan theory

In most prosecutions for crimes such as burglaries and robberies, the primary issue is whether the defendant was the perpetrator. (*People v. Ewoldt, supra*, 7 Ca1.4th at p. 406.) But evidence of common design or plan is admissible only to establish that defendant engaged in conduct alleged to constitute the charged offense, not to prove other matters, such as defendant's intent or identity as to a charged offense. (*Ibid.*) Because it is beyond dispute here that the Casa Gamino and other robberies occurred, common plan evidence was "merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value." (*Ibid.*)

For this reason as well, the evidence of the incident at Rod's was inadmissible at appellant's trial to prove that appellant committed the robberies at Casa Gamino or elsewhere.

b. There were insufficient similarities between the Rod's incident and any of the charged robberies

People v. Ewoldt and the common plan cases cited therein also demonstrate that there are insufficient similarities between the incident at Rod's and the Casa Gamino robberies to support admissibility under the common plan exception. In *People v. Ewoldt,* for example, the victims of both the uncharged and charged acts were the defendant's stepdaughters, who lived with the defendant and were a similar age when molested. Some

of the molestations occurred "in an almost identical fashion" with the defendant offering a similar excuse when discovered. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) These and other common features between the charged and uncharged offense were found to be similar enough to support a finding of common design or plan, for the inference that the defendant committed the charged offenses in accordance with the same plan used in the uncharged offense. (*Ibid.*)

Similarly, a long line of California cases demonstrates that only where the prior conduct consists of a completed crime sharing strong similarities with the charged crime is it properly admitted to show a common plan. (See, e.g., *People v. Ewoldt, supra,* 7 Cal.4th at pp. 394-397, citing *People v. Lisenba* (1939) 14 Cal.2d 403, 427-428 [evidence that defendant killed his former wife admissible on charges of murdering another wife, where both women drowned at home and defendant had insurance policies on both]; *People v. Ing* (1967) 65 Cal.2d 603, 612 [where defendant on trial for injecting female patient with drugs impairing consciousness then raping her, testimony of two prior patients who came in for the same treatment and had same experience properly admitted]; and *People v. Archerd* (1970) 3 Cal.3d 615, 620 [evidence that defendant administered lethal doses of insulin to kill a former wife and two others admissible in trial for killing two other wives and a nephew by the same method].)

Contrast these fact patterns with the dissimilarities between the incident at Rod's and robberies at Casa Gamino. At Rod's, five Hispanic men ordered coffee in a near empty restaurant right before closing time, acted oddly and soon left. The police found weapons and a stun gun that looked like the 4.1 inch stun gun advertised as "the world's smallest stun

gun" under the passenger seat of a car driven by one of the men. (18RT: 3032, 3033, 3049, 4SCT: 488; Ex. 236A.) There was no robbery at Rod's and in fact, the prosecution declined to file charges for even attempted robbery. (18RT: 2988.) The "other crime" actually charged against appellant was possession of a loaded weapon in a motor vehicle. (21RT: 3663-3664.)

In contrast, the Casa Gamino evidence described completed robberies that occurred at 9:30 p.m. in a crowded restaurant. (14RT: 2224, 2242.) The Hispanic perpetrators fit in; the restaurant staff were also primarily Spanish speaking. (See, e.g., 14RT: 2223, 2283-2284, 2298, 2335.) A long stun gun, said to resemble a cattle prod, was used to assault two people. (14RT: 2215, 2228, 2235.) Thus, the evidence did not show that the uncharged acts were committed in a "markedly similar manner" to the charged offense. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.)

Appellant also offered to present evidence of many other similar robberies committed by groups of Central American perpetrators. (9RT: 1232-1233.) The court countered that it was the stun gun that distinguished the prior incident and charged crimes. (9RT: 1236-1237.) However, the fact that a stun gun was not used at the four charged robberies[43] that occurred between the incidents at Rod's and Casa Gamino, nor afterwards at George's Market, completely negates the inference that appellant possessed a scheme to commit robberies using a stun gun in November

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[43] These occurred at the Outrigger Lounge on December 31, 1991; El Siete Mares on April 18, 1992; Mercado Buenos Aires on April 28, 1992; Woodley Market on May 4, 1992; Ofelia's on May 22, 1992; and at George's Market on May 29, 1992. (12RT: 1902, 1796-1797; 16RT: 2667; 17RT: 2745; 15RT: 2392; 9RT: 1377.)

1990 and then carried out that plan at the Casa Gamino restaurant robberies 18 months later. (See *People v. Balcom, supra,* 7 Cal.4th at p. 426 [similarities between charged offense and later uncharged offense support inference that either defendant possessed the plan before the charged offense or developed it during the charged offense].)

2. The Stun Gun Assaults

For these same reasons, the Rod's incident evidence was inadmissible to show a common scheme or plan to commit stun gun assaults. One cannot infer from the Rod's incident evidence a plan to commit stun gun assaults, which appellant then carried out at Casa Gamino 18 months later, based upon the dissimilarities in the two events and the intervening charged robberies, none of which involved a stun gun. The court itself recognized the tenuous logic when it denied the prosecution's request to use the Rod's incident evidence against appellant's co-defendants. The court pointed out the time lag between the two incidents, that the stun gun had not been used and it was not even clear whether it was intended to be used. (16RT: 2569.) Thus, the Rod's incident evidence does not "support the inference that the defendant employed that plan in committing the charged offense [i.e., the stun gun assaults]." (*People v. Ewoldt, supra,* at p. 403.)

E. The Rod's Incident Was Inadmissible Under Evidence Code Section 1101, subdivision (b), to Show Knowledge or Possession of the Means for the Charged Offenses

The court relied upon the presence of the stun gun in admitting the Rod's incident evidence. (See 9RT: 1237 [court inclined to allow evidence because of the highly unusual nature of possession of stun gun]; 16RT: 2567, 2570 [evidence should come in; stun gun unique].) The jury was instructed that it could consider the Rod's evidence as tending to show that

appellant "had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged." (11CT: 3102-3103, 21RT: 3682.)

1. The Stun Gun at Rod's Was Not a "Signature" to Show Appellant's Identity as the Stun Gun Assailant at Casa Gamino

Under a "signature" theory of admissibility, evidence of a defendant's possession of apt tools on a prior occasion increase the probability of his identity as the perpetrator of the charged crime committed with the same or similar tools, as some people do not possess such tools. (Imwinkelreid, Uncharged Misconduct Evidence (2006) § 3.30, p. 3-187.) However, an examination of each step of the inferential chain reveals the fallacy of the prosecution's argument and the court's reasoning, both of which relied upon the presence of the stun gun under a seat in a car appellant drove after leaving Rod's.

a. The prosecution did not show by a preponderance of evidence that appellant possessed the stun gun in 1990.

As appellant argued, his connection to the stun gun in 1990 was attenuated. (16RT: 2566.) And the court itself remarked in one of the earlier discussions on the issue, "How does that role [at Casa Gamino] change with this incident a year ago? He doesn't have the stun gun under his seat, it's under the passenger's seat." (9RT: 1238.) Two other men in that car also had access to the stun gun. (18RT: 3030-3032.) The evidence regarding who possessed the stun gun under these circumstances was at most "evenly balanced," which failed to meet the preponderance of the evidence standard. (See CALJIC Nos. 2.50.1 and 2.50.2 at 11CT: 3103 [defining preponderance of evidence standard].) Thus, there was

insufficient evidence upon which to infer that appellant possessed the stun gun in 1990.

b. Possession of a stun gun or its use in a robbery in the early 1990s was neither unusual nor unique.

Despite the court's lack of personal experience in the courtroom with stun guns and other electrical shock devices (16RT: 2567), they were neither unusual nor unique in the greater Los Angeles area or elsewhere in California in the early 1990s. (See, e.g., Kennedy, *A Weapon for the 'Average Guy' - Cheaper and safer than a pistol, the stun gun is selling fast*, S.F. Chronicle (April 14, 1985).) Sergeant Richard Dedmon, the prosecution's use of force expert, had taken robbery reports where stun guns were used as weapons. (18RT: 3002; see also *People v. Rackley* (1995) 33 Cal.App.4th 1659, 1663 [1991 San Jose robberies where young men invaded and robbed stores, using stun guns against resisting victims]; *People v. White* (1995) 35 Cal.App.4th 758, 761-762 [three men commit 1992 robberies in Stockton, shocking two victims with stun guns].) In fact, police officers recommended them for personal safety. (*M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 708; *Falls v. Superior Court* (1996) 42 Cal.App.4th 1031, 1039.) They were also used as weapons in other circumstances. (See *People v. Rosenkrantz* (1988) 198 Cal.App.3d 1187, 1192 [describing a fight involving a stun gun in a 1985 Los Angeles murder case]; *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Education* (1991) 235 Cal.App. 3d 1182, 1184 [student expelled for using stun gun during a 1989 altercation]; *People v. Heffner* (1977) 70 Cal.App.3d 643, 652 [Inglewood defendant carrying a Taser could be convicted of carrying a loaded firearm].)

The fewer the shared marks, the more distinctive the marks must be

to justify admission of prior crimes evidence. (*People v. Harvey* (1984) 163 Cal.App.3d 90, 101.) Here, there was one such "mark," the presence of a stun gun in the car appellant drove in 1990 and of a very different model at the Casa Gamino robberies. As the cases above show, this mark was neither unusual nor a sufficiently distinct basis upon which to infer that appellant possessed a tool so unique as to infer he committed the Casa Gamino stun gun assaults.

c. There were insufficient other distinctive common marks.

Even if the stun gun was distinctive, it needed to be combined with other common, distinctive marks to attain enough probative value to be admissible to show knowledge or possession of the means for the charged offense. (See *People v. Jackson* (1980) 102 Cal.App.3d 620, 625.) Trial courts admit prior act evidence related to weapons or tools used in the charged offense when the same tool is linked to both the prior and current crime. (See, e.g., *People v. Wrest* (1992) 3 Cal.4th 1088, 1110 [evidence that the rifle used in the charged crime was stolen in a burglary and defendant's prints found at the burglary scene properly admitted to show identity].) Here, in contrast, the devices were different and there was little evidence that appellant possessed the one found in the car at Rod's.

Where proof is lacking that the weapon in the prior misconduct was the same weapon used in the charged crime, case law requires significant additional factors that increased the independent logical relevance of the prior similar act. (See, e.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1124 [defendant's statement that he carried a loaded .22-millimeter gun in his truck properly admitted where the weapon could have been the Colt revolver used in the charged robbery and murder 13 days later].) In

contrast, where, as here, the evidence linking appellant to the stun gun in 1990 was weak, different devices were used 18 months apart, stun gun use was not uncommon and there are no other additional, shared distinctive factors, the prior crimes evidence is not admissible. (See *U.S. v. Pisari* (1st Cir. 1981) 636 F.2d 855, 859 ["The single fact that in committing a robbery, one invokes the threat of using a knife falls far short of a sufficient signature or trademark upon which to posit an inference of identity"].)

For all these reasons, the Rod's evidence was inadmissible to show appellant's knowledge or possession of means for the charged offenses.

F. The Rod's Incident Was Inadmissible Under Evidence Code Section 1101, Subdivision (b), to Show Identity

The greatest degree of similarity is required to prove identity; the common features of the other offense and the current offense must be sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) Thus, if the pattern and characteristics of the prior and current crimes are not similar enough to show a common plan or scheme, they certainly are not "so unusual and distinctive as to be like a signature," the test for admissibility of evidence to show identity. (See *id.* at p. 403, quoting 1 McCormick, § 190, pp. 801-803.) Two examples of this Court's more exacting standards for admission of prior bad acts evidence on an identity theory serve to make this point.

In *People v. Prince* (2007) 40 Cal.4th 1179, 1271-1272, a witness's testimony that the defendant singled her out and followed her home was admissible on issues of identity. Six murder victims had been stalked and killed, two in same apartment complex as the witness's. The murders occurred at same time of day as the witness's incident and the witness was

similar in age and the same race and gender as all the murder victims. In *People v. Catlin* (2001) 26 Cal.4th 81, 120-121, the court properly admitted evidence regarding the murder of the defendant's fifth wife in the prosecution for the first-degree murders of his mother and fourth wife to show identity. Each victim was a previously healthy close female relative of the defendant, who stood to gain financially from their deaths. Expert evidence based on the clinical course of each woman's illness established that each victim died from paraquat poisoning.

In contrast, there were insufficient "shared characteristics" between the incidents at Rod's and the Casa Gamino restaurant to raise a sufficiently strong inference that they were committed by the same person. (*People v. Rivera* (1985) 41 Cal.3d 388, 392.) Therefore, the Rod's incident evidence should not have been admitted to identify appellant as the perpetrator of any of the charged crimes or for any other purpose.

G. The Admission of the Rod's Incident Evidence Was Prejudicial Error

A trial court "must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." (*People v. Schader* (1969) 71 Cal. 2d 761, 775.) The court here did not do so and abused its discretion in admitting the evidence both because, as argued above, it lacked substantial probative value and what probative value it had was "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

The prosecution took full advantage of the court's error in admitting

the evidence. It urged the jury to infer appellant's guilt of the charged offenses based on the Rod's incident evidence. The prosecutor began by saying:

> We want to make sure we know we got the right guy here working with that stun gun. Here is the booking photo from Rod's. Remember, Officer - Sergeant Kirby, Officer Anderson told you about the stun gun seized out of the car that Mr. Sanchez was driving. He got charged with a misdemeanor in November, 1990. Well, the D.A.'s in that case or whoever charged him, *they didn't know what we know*, ladies and gentlemen.

(21RT: 3781 (italics added).) Thus, the prosecutor was telling the jury to infer that appellant committed an attempted robbery in 1990 based upon "what we know," i.e., the later charged crimes. Under this circular logic, appellant is guilty of a crime in 1990 based upon crimes in 1992 and guilty of crimes in 1992 based upon actions in 1990. The problem is magnified here because the prior incident resulted only in a misdemeanor charge of possession of a loaded weapon in a motor vehicle. (19RT: 3663-3664.) Prejudice is increased when the uncharged acts do not result in a criminal conviction because the jury may be tempted to convict regardless of guilt, in order to punish appellant for the prior offense. (*People v. Balcom, supra,* 7 Cal.4th at p. 427.)

The prosecutor went on to argue that appellant went to Rod's to commit a robbery:

> Do you have any doubt in your mind that he was there to do a robbery? It was a little late, it's only a coffee shop, not as nice as the Casa Gamino. Got some special attention from the manager, who definitely knew they were casing the place. Do you have any doubt in your mind what they were doing there? Do you think they all went in to drink that half a cup of coffee that only two of them ordered?

(21RT: 3781-3782.)

The prosecutor did not, because he could not, try to marshal evidence in support of this argument. The prosecutor immediately went on to finish with a non sequitur:

> It was Mr. Sanchez Fuentes and Mr. Sanchez Fuentes whose hands [were] on the stun gun, the cattle prod.

(21RT: 3782.)

The prosecutor could not argue a series of inferences, point to intermediate facts or otherwise advance a logical theory linking the Rod's incident to Casa Gamino because there weren't any. Rather, the prosecutor's argument invited the jury to base its decision on character evidence. As Wigmore explained:

> The impulse to argue from A's former conduct directly to his doing or not doing of the deed charged is perhaps a natural one. But it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. (¶) This intermediate step is always implicit, and must be brought out.

(*People v. Thompson* (1980) 27 Cal.3d 303, 316, fn. 16, quoting Wigmore, The Science of Judicial Proof (3d ed. 1937) pp. 102-103.) Because, as shown above, there were no permissible or possible inferences based upon identity, common scheme/plan or knowledge or possession of the means for commission of the charged crimes, the only link between the Rod's evidence and appellant's role at the Casa Gamino was that of criminal propensity, which is prohibited under Evidence Code section 1101, subdivision (a). The admission of the evidence, coupled with the prosecution's argument, prejudiced appellant.

Moreover, as argued *post* in Argument XIII, the trial court never

informed the jury as to which of the 40 charged crimes the prior crimes evidence could apply. (See jury instructions at 18RT: 3011-3012; 11CT: 3102-3103, 21RT: 3683.) The jury was therefore free to use the prior acts evidence to determine appellant's guilt as to any of the charged robberies or any other charged crime. Because of the varied nature of the charged crimes - robberies, attempted robberies, assaults and homicides - which took place over six different incidents, the only theory under which the prior acts evidence was relevant was the very theory prohibited under Evidence Code section 1101, subdivision (a), a propensity theory. This prejudiced appellant as to the counts that he disputed or on which the evidence was weak and/or insufficient, i.e., attempted murder of Medina, count 5; robbery of Arturo Flores, count 21; Outrigger counts 10 through 18; and El Siete Mares robbery counts 24 through 27. Appellant incorporates by reference the arguments and prejudice discussions in Arguments III (insufficient evidence of robbery of Arturo Flores), IV (insufficient evidence of attempted murder of Enrique Medina) and X (erroneous instruction as to eyewitness identification, discussing prejudice as to the Outrigger and El Siete Mares counts).

H. The Admission of the Evidence Violated Appellant's Constitutional Rights and Reversal Is Required

The trial court in this case violated appellant's right to a fair trial as guaranteed by the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, by allowing the prosecution to introduce irrelevant and inflammatory evidence and then compounding the error and resulting prejudice by instructing the jury, and allowing the prosecutor to argue, that the jury could consider this irrelevant evidence as proof of appellant's identity on any of the charged crimes. (See *McKinney v. Rees* (9th Cir.

1993) 993 F.2d 1378, 1384 [propensity evidence, including prior possession of knives, deprived defendant of fair trial and violated his right to due process]; *People v. Castro* (1985) 38 Cal.3d 301, 313 [due process demands that inferences be based on rational connection between fact proved and fact to be inferred].)

In addition, the admission of the inflammatory evidence violated appellant's Fifth Amendment due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (See *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [arbitrary denial of state law right may violate Due Process Clause]; *Hicks v. Oklahoma* (1970) 447 U.S. 343, 346 [same].) By ignoring well-established state law which allows only evidence of substantially similar crimes to be admitted for identity, which prevents the state from using evidence admitted for a limited purpose as general propensity evidence, and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant of a state-created liberty interest in due process.

Accordingly, reversal of counts 5, 10 through 18, 21 and 24 through 27 and the death verdicts is required because the prosecution cannot show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the issue is reviewed only under California statutory law (Evid. Code, §§ 1101, 352), these convictions must be reversed because it is reasonably probable that the error contributed to these verdicts. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

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VIII.

THE INSTRUCTIONS PREJUDICIALLY FAILED TO PROPERLY LIMIT THE JURY'S CONSIDERATION OF THE ROD'S INCIDENT EVIDENCE

The trial court erred in (a) failing to limit consideration of the prior Rod's Coffee Shop evidence to the Casa Gamino crimes and (b) instructing the jury such that the prosecution's burden of proof was lowered. These errors deprived appellant of the right to a jury trial, to a fair trial, to due process of law and to a reliable determination of penalty and also lightened the prosecution's burden of proof, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution. As a result, appellant's convictions for the counts that he disputed must be reversed and his death sentences vacated.

A. Factual Background

As described above in Argument VII, the court admitted the Rod's incident evidence under Evidence Code section 1101, subdivision (b). The court instructed the jury with CALJIC Nos. 2.50 and 2.50.1. (11CT: 3102-3103; 18RT: 3011-3012; 21RT: 3681-3682 [CALJIC No. 2.50 (Evidence of Other Crimes)]; 11CT: 3103; 21RT: 3682-3683 [CALJIC No. 2.50.1 (Evidence of Other Crimes by Defendant Proved by a Preponderance of the Evidence)].)

The following version of CALJIC No. 2.50 was read to the jury:

> Evidence has been introduced for the purpose of showing that the defendant, Edguardo [*sic*] Sanchez Fuentes, committed a crime other than that for which he is on trial. As you were instructed, this evidence is to be considered only as to Mr. Sanchez Fuentes.

Such evidence, if believed, was not received, and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.

Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:

The identity of the person that committed the crime, if any, of which the defendant is accused;

That the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged, or

The crime charged is a part of a larger continuing plan, scheme or conspiracy.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all the other evidence in this case. [¶] You are not permitted to consider such evidence for any other purpose.

(21RT: 3681-3682.)

The jurors were then instructed as follows, pursuant to CALJIC No. 2.50.1:

Within the meaning of the preceding instruction, such other crime purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that the defendant committed such other crime or crimes. [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence.

(21RT: 3682-3683.)

Finally, the "preponderance of the evidence" standard was defined in CALJIC No. 2.50.2. (11CT: 3103; 21RT: 3683.)

B. Applicable Legal Principles

Penal Code section 1259 allows the court on appeal to review any instruction which affects the defendant's substantial rights or is an incorrect statement of law, with or without a trial objection. (*People v. Cleveland* (2004) 32 Cal.4th 704, 749.) Where a jury is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant is deprived of due process. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence . . . ." (*Cool v. United States* (1972) 409 U.S. 100, 104.) If a jury instruction is deemed "ambiguous," it will violate due process when a reasonable likelihood exists that the jury has applied the challenged instruction in a manner that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

C. The Court Failed to Limit the Jury's Consideration of the Evidence

It is the court's duty to identify the precise evidence to which other crimes testimony relates. (*People v. Key* (1984) 153 Cal.App.3d 888, 899.) Here the court instructed the jury that the evidence could be used to show appellant's identity as the perpetrator of "the crime charged," as proof of a common scheme or plan and/or as proof that appellant possessed the means for the charged crime. (18RT: 3011-3012; 21RT: 3681-3682; 11CT: 3102-3103.) But the court never instructed the jury to which of the 40 charged crimes the prior crimes evidence could apply. (See 18RT: 3011-3012; 21RT: 3683; 11CT: 3102-3103.) The jury was thus free to use the prior acts evidence to determine appellant's guilt as to any of the charged crimes.

In *People v. Key, supra*, the trial court gave a modified version of CALJIC No. 2.50 that prejudicially implied to the jury that it could use the prior crimes evidence of defendant's guilt to prove charges (kidnaping and assault) other than those to which it should have been confined (rape). (*People v. Key, supra,* 153 Cal.App.3d at p. 898.) The error here, involving potentially 40 crimes, was far more prejudicial.

Because of the varied nature of the charged crimes - robberies, attempted robberies, assaults and homicides - which took place during seven different incidents, the only theory under which the prior acts evidence was relevant was the very theory prohibited under Evidence Code section 1101, subdivision (a), a propensity theory. This prejudiced appellant as to the counts he disputed or on which the evidence was weak or insufficient, i.e., counts 5 (attempted murder); 21 (robbery of Arturo Flores); counts 10 through 18 (Outrigger crimes) and 24 through 27 (El Siete Mares robberies).

D. CALJIC Nos. 2.50 and 2.50.1 Lowered the Prosecution's Burden of Proof in Appellant's Case

The interplay of CALJIC Nos. 2.50 and 2.50.1 in the instant case prejudicially lowered the prosecution's burden of proof. Appellant is aware that this Court has rejected this argument and respectfully requests it reconsider for the reasons argued below. (See *People v. Lindberg* (2009) 45 Cal.4th 1, 35-36.)

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, the Ninth Circuit held that giving CALJIC No. 2.50.01 together with CALJIC No. 2.50.1 (6th ed. 1996) was erroneous because the instructions permitted the jury to find the defendant guilty of the charged offenses by relying on facts found only

by a preponderance of the evidence.[44] There, the defendant was charged with several sexual offenses against his spouse and a child. The court admitted evidence of prior uncharged sexual assaults he had allegedly committed against his spouse under Evidence Code section 1108 and instructed the jury pursuant to CALJIC Nos. 2.50.01 and 2.50.1. (*Id.* at p. 817.)

The jury in *Gibson* "received only a general instruction regarding circumstantial evidence [CALJIC No. 2.01], which required proof beyond a reasonable doubt and a specific, independent instruction [CALJIC No. 2.50.1] relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence." (*Gibson, supra,* 387 F.3d at p. 823; see also *id.* at pp. 821-822.) CALJIC No. 2.50.1 carved out of the general reasonable doubt standard a specific exception for other crimes evidence, which carried only a preponderance burden. (*Id.* at p. 823.)

The Ninth Circuit held that the interplay of the two instructions allowed the jury to find that the defendant "committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Gibson, supra,* 387 F.3d

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[44] A later case purported to "overrule" that part of the *Gibson* panel's decision holding that the error was structural and holding that such errors were subject to the harmless error rule based in part upon the intervening decision of *Hedgepeth v. Pulido* (2008) 555 U.S. 57. (*Byrd v. Lewis* (2009) 566 F.3d 855, 864, 867; see also *Doe v. Busby* (9th Cir. 2011) 661 F.2d 1001, 1018-1023 [harmonizing and distinguishing *Gibson* and *Byrd*].) Appellant does not dispute that the harmless error standard applies to the error at issue here.

at p. 822, original italics.) The instructions provided "no explanation harmonizing the two burdens of proof discussed in the jury instructions." (*Id.* at p. 823.) Therefore, Gibson's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Ibid.*) CALJIC Nos. 2.50.01 and 2.50.1 "told the jury exactly which burden of proof to apply. However, contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Id.* at p. 822.)

Although Gibson involved the interplay of CALJIC Nos. 2.50.01 and 2.50.1, the interplay of CALJIC Nos. 2.50 and 2.50.1 in this case resulted in error for essentially the same reasons. The jurors in the instant case were instructed that they could use the other crimes evidence, which needed to be proved only by a preponderance of the evidence, to infer appellant's identity as "the person who committed the crime, if any" of which he had been accused; that he possessed the means for the "crime charged," and/or that the "crime charged" was part of a common scheme or plan. (18RT: 3011-3012; 11CT: 3102-3103; 21RT: 3681-3682.) However, the instructions provided no "explanation harmonizing the . . . burdens of proof." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 823.) Instead, it is reasonably likely that the jury believed that CALJIC No. 2.50.1 carved out an exception to the general reasonable doubt standard; at the very least, appellant's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Ibid.*)

In *People v. Lindberg* (2009) 45 Cal.4th 1, 35-36, this Court distinguished *Gibson* on the ground that CALJIC No. 2.50 as given

expressly prohibited the jurors from considering other crimes evidence as proof that the defendant had a disposition to commit crimes. (*Id.* at p. 35.) CALJIC No. 2.50 further told the jurors to weigh the other crimes evidence as it did all the other evidence in the case and that they were not permitted to consider the evidence for any other purpose. (*Ibid.*) More specifically, the jurors were instructed that the prosecution bore the burden of proving beyond a reasonable doubt the special circumstances at issue and were given the standard instructions on reasonable doubt and the sufficiency of circumstantial evidence to prove guilt. (*Ibid.*) Looking at the instructions as a whole, the Court found no reasonable likelihood that the jury was led to believe that the prosecution was not required to prove all the elements of the relevant counts beyond a reasonable doubt. (*Ibid.*, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

Appellant respectfully disagrees with this Court. The version of CALJIC No. 2.50.01 discussed in *Gibson* was found to be defective even though it made clear that the evidence at issue could only be considered for a limited purpose. (*Gibson v. Ortiz, supra,* 387 F.3d at p. 817.) Moreover, the language regarding the limited purpose of other crimes evidence does not directly relate to the defect addressed in *Gibson,* particularly, as discussed above in subsection E, above, the failure to advise the jury that if it found by a preponderance of the evidence that appellant had committed the uncharged misconduct, that was not sufficient to prove beyond a reasonable doubt that he had committed the charged offenses.

Significantly, the jury here was not instructed with the cautionary language added to CALJIC No. 2.50.1 in 1999, after appellant's trial:

> If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded

> that before a defendant can be found guilty of any crime charged [or any included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

This cautionary language might have preserved the constitutionality of appellant's convictions. (See *Gibson v. Ortiz, supra*, 387 F.3d at p. 819 [noting that this Court upheld the constitutionality of Evidence Code section 1108 by relying in part upon the cautionary language that was added to CALJIC No. 2.50.01].) However, no such language was included in the instructions given in this case. (But see *People v. Lindberg* (2009) 45 Cal.4th 1, 36 ["Nothing in the 1999 revision to CALJIC No. 2.50.1 implied or suggested the omission of such language rendered the prior version of the instruction infirm."].)

E. The Failure of the Instructions to Properly Limit the Jury's Consideration of Other Crimes Evidence Prejudiced Appellant and Requires Reversal of His Conviction

It is presumed that jurors follow instructions. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1044.) Given the recognized, necessary fiction that proper instructions can cure errors that occur at trial, it is imperative that the jurors at least be given correct instructions on how to use evidence. (See *People v. Garcia* (1984) 160 Cal.App.3d 82, 91, fn. 8 [recognizing that in the view of "some distinguished judges," the theory that the jury ordinarily understands and adheres to instructions is a "legal fiction"].) Thus, where, as here, a jury is misdirected as to the use of evidence, the likelihood becomes overwhelming that the evidence will be misused. Misleading or ambiguous instructions violate due process where there is a reasonable likelihood the jurors misunderstood the applicable law. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72; *Boyde v. California* (1990) 494 U.S.

370, 380-381.) There was at least a reasonable likelihood that the jurors misapplied the instructions in this case.

Considering the due process implications involved in the introduction of character evidence combined with the universal recognition of its prejudicial impact, the failure to prevent the improper use of this evidence deprived appellant of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and parallel provisions of the state constitution. This prejudiced appellant as to the counts that he disputed or on which the evidence was insufficient and/or weak, i.e., attempted murder of Medina, count 5; robbery of Arturo Flores, count 21; Outrigger counts 10 through 18; and El Siete Mares robbery counts 24 through 27. Appellant incorporates by reference the arguments and prejudice discussions in Arguments III (insufficient evidence or robbery of Arturo Flores), IV (insufficient evidence of attempted murder of Enrique Medina) and X (erroneous instruction as to eyewitness identification, discussing prejudice as to the Outrigger and El Siete Mares robbery counts).

In so far as these incorrect instructions violated appellant's right to due process of law, the proper standard for judging prejudice is that standard established by *Chapman v. California, supra*, 386 U.S. at p. 24, which provides that reversal is required unless the error was harmless beyond a reasonable doubt. That cannot be shown in this case. Instructions "may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.) The errors set forth above allowed the jury (1) the unfettered discretion to use the other crimes evidence for any of the enumerated purposes in CALJIC No. 2.50 as to any of the 40 charges

against appellant; and (2) to convict appellant on constitutionally insufficient proof.

In short, the misdirection of the jury through the faulty instructions was prejudicial, thereby requiring a reversal of the convictions on counts 5, 10 through 18, 21 and 24 through 27 and the death verdicts entered below.

IX.

THE TRIAL COURT'S FAILURE TO INVESTIGATE JUROR M.L.'S EMOTIONAL REACTION TO RACIALLY CHARGED EVIDENCE WAS AN ABUSE OF DISCRETION THAT DENIED APPELLANT HIS RIGHTS TO A FAIR TRIAL, AN IMPARTIAL JURY AND RELIABLE GUILT AND PENALTY PHASE DETERMINATIONS

The trial court prejudicially abused its discretion by denying appellant's request to conduct an inquiry into juror misconduct. The court's action violated the requirements of 1089 as well as appellant's rights to a fair and impartial jury trial, due process and a reliable determination of guilt and penalty, under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Reversal of appellant's death sentence is therefore required.

A. Factual Background

The testimony of Rosa Santana read to the jury included a statement that prior to what turned out to be the crimes at George's Market, including the shooting of Officer Hoglund, appellant and Navarro put bullets in guns and told her they were leaving to pick up some drugs and "sometimes the black guys and the cops would get in their way. That's why they took their guns." (20RT: 3446, 3490-3491.) Almost immediately following the reading of this testimony, appellant asked the court to hold a hearing on juror M.L.'s reaction to this testimony. Counsel for appellant and Navarro

had seen M.L. adamantly shaking her head up and down at the comment both when the prosecutor highlighted it during opening statements and when that portion of Santana's testimony was read. (20RT: 3448-3449.) Appellant argued that M.L. had prejudged the case because of her perception of violence against blacks. (20RT: 3449.) The court denied the motion on the grounds that it was gross speculation, that there were no African-American witnesses or victims or defendants and that appellant did not try to excuse M.L. during the *Wheeler* motions. (20RT: 3450.)

During the next recess, the prosecutor indicated that he saw M.L. constantly rock back and forth without nodding, but counsel for appellant and Navarro noted that this behavior was different from what they had observed earlier. (20RT: 3501-3502.) Moreover, as the court recognized, by that time juror M.L. had probably realized she was being talked about. (20RT: 3502.) Later, the court put on the record that it had watched Juror M.L.'s reaction following references to cops or blacks getting in the way, which the prosecution mentioned two more times in its closing argument. (22RT: 3964; see also 21RT: 3763, 3791 [prosecution closing argument].) The court noted that M.L. had just continued to rock in her chair and every time she rocked, her head nodded. (22RT: 3964.) Appellant argued M.L.'s behavior had changed. (22RT: 3965.)

Juror M.L. was an African-American woman. (20RT: 3450; Vol.6, 2SCT: 1654.) Her son worked in law enforcement for the California Youth Authority. (Vol.6, 2SCT: 1654, 1658.)

B. Applicable Legal Principles

Every person accused of criminal conduct has a federal and state constitutional right to trial by a fair and impartial jury. (U.S. Const., 6th and 14th Amends.; Cal.Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391

U.S. 145, 149; *People v. Collins* (2001) 26 Cal.4th 297, 304.)

Section 1089 permits a sitting juror to be dismissed and replaced with an alternate if "at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty." (§ 1089.) When the court is alerted to the possibility that a juror cannot properly perform her duty, it is obligated to conduct a reasonable inquiry, one sufficient to determine the facts. (*People v. Burgener* (1986) 41 Cal.3d 505, 520, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753.) The decision whether to investigate the possibility of juror bias, incompetence or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Osband* (1996) 13 Cal.4th 622, 675.) A court's decision to remove a juror must be supported by evidence showing a "demonstrable reality" that the juror is unable to perform her duties, (*People v. Barnswell* (2007) 41 Cal.4th 1048, 1052), but "the duty to *inquire* as to juror misconduct is activated by a lower threshold of proof." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349, emphasis in original.)

C. The Court's Failure to Voir Dire Juror M.L. Was an Abuse of Discretion

In *People v. Williams* (1997) 16 Cal.4th 153, 230-231, the defense argued that the juror's "body language" showed he had reached a premature decision in the case, because the juror "turned away from," and "was not paying any attention" to, defense witnesses. (*Id.* at p. 230.) The court declined defendant's request to question the juror, which the defense argued on appeal was reversible error. (*Ibid.*) This Court looked at three factors in determining whether the trial court was put on notice that good cause

existed to discharge the juror for prejudging the case: the consistency of the defense's factual allegations in support of its request; the trial court's own observations of the juror; and the juror's behavior itself.[45] (*Id.* at p. 230-231.)

Here, from opening statements on September 26, 1994, to Santana's testimony on October 17, 1994, toward the end of the first phase of trial, counsel consistently observed the same behavior by M.L. when she heard the comment at issue. (19RT: 3448-3449; see also 9RT: 1286 [opening statement]; 20RT: 3446 [Santana testimony].) Moreover, appellant's paralegal also observed M.L.'s reaction during opening statements. (20RT: 3502.) The court should have credited the observations of counsel who were, as attorneys, "officers of the court," so that their statements were "virtually made under oath. [Citation.]." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 486.)

As to the second factor, the trial court's failure to observe the same behavior that counsel for appellant and Navarro saw is explained by the record. Counsel were quite clear that the reaction they observed to the prosecutor's comments during opening statements and Santana's testimony - M.L. adamantly shaking her head up and down - was different from what the prosecutor and the court saw later, which was Juror M.L. rocking in her chair with her head nodding. (20RT: 3451, 3501-3502; 3964-3965.) Also, Juror M.L. likely had become aware that counsel and the court were talking about her (20RT: 3502), and her behavior may have changed for that reason. And because the prosecution repeated the statement multiple times,

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[45] Based on the record before it, the Court in *Williams* found no duty arose to conduct an inquiry. (*People v. Williams, supra,* 16 Cal.4th at p. 231.)

it may no longer have provoked a visible shock. (See 9RT: 1286 [opening statement]; 20RT: 3446 [Santana testimony]; 21RT: 3764, 3791 [closing argument].)

The third factor looks at the behavior of the juror. (*People v. Williams, supra,* 16 Cal.4th 153, 230-231.) Juror M.L. had a strong, visible and negative reaction to the prosecution's statement about, and presentation of, a racially charged statement attributed to appellant. This reaction, consistently observed by two attorneys and a paralegal, was sufficient to put the trial court on "notice of the possibility [that] a juror [was] subject to improper influences," triggering a "duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged." (*People v. Burgener, supra,* 41 Cal.3d at p. 520.)

Juror M.L.'s reaction to appellant's alleged statement was a concern for another reason. Her son worked in law enforcement for the California Youth Authority. (Vol.6, 2SCT: 1658.) Thus, it is very likely that Juror M.L. was affected by both aspects of the statement attributed to appellant – the reference to blacks and the reference to law enforcement officers. Having a relative in law enforcement "may be evidence suggestive of juror partiality." (*People v. Wheeler, supra*, 22 Cal.3d at p. 275.) The particularized observations and what the court and parties knew about Juror M.L. were factors that triggered the need to investigate the possibility that Juror M.L. had improperly prejudged the case based upon Santana's testimony. Because the court was alerted to the possibility that Juror M.L. prejudged the case based upon a strong and visible reaction to emotionally and racially charged evidence, the court was obligated to conduct an inquiry when appellant requested it. (See *People v. Burgener, supra,* 41 Cal.3d at p. 520.)

The trial court's other reasons for denying the request for a hearing do not hold up. Its statement that there were no African-American witnesses, victims, or defendants involved in the case (20RT: 3450), suggests that the court believed that negative racial comments attributed to the defendants could not possibly have an impact on the jurors' consideration of the evidence. This demonstrated at best the court's misunderstanding of the essence of appellant's concern, which was that Juror M.L., who was African-American, reacted strongly and visibly to Santana's statement that appellant was prepared to kill "black guys and the cops" who got in the way. (20RT: 3446, 3448-3449.) Another of the court's stated reasons for denying appellant's motion for a hearing on M.L.'s ability to sit as an impartial juror - that appellant had not tried to use a *Wheeler* motion to excuse Juror M.L. (20RT: 3450) - was illogical, as juror M.L.'s reaction had not, of course, occurred at that time.

Without additional information, the court could not make an informed decision about whether Juror M.L. had prejudged the case. The court abused its discretion by failing to make an adequate inquiry, rendering a decision with inadequate information and basing its decision on illogical reasons. (See *People v. Surplice* (1962) 203 Cal.App.2d 784, 791 ["To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision"]; see also *People v. Crandall* (1988) 46 Cal.3d 833, 862, abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [if a trial judge fails to engage in a "reasoned exercise of judgment," then there is an erroneous failure to exercise judicial discretion].)

D. The Judge's Failure to Determine Juror M.L.'s Ability to Be Impartial Violated Appellant's Federal Constitutional Rights And Was Prejudicial

Juror M.L.'s repeated, strong, emotional reactions to Santana's testimony about appellant bringing a gun to the George's Market robbery because sometimes "black guys and cops" get in the way, (20RT: 3448-3449), perhaps exacerbated by her personal connection to the issue given that her son was an African-American peace officer, demonstrated a clear possibility that she became partial upon hearing this statement. Appellant's rights to due process and to an impartial jury secured by the Sixth and Fourteenth Amendments were therefore violated, as these constitutional provisions guarantee appellant the right to "a fair trial by a panel of impartial, 'indifferent' jurors" (*Irvin v. Dowd* (1961) 366 U.S. 717, 722), "and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) The trial court's failure to exercise its discretion unacceptably increased the risk that the jury would not decide the case in a manner satisfying the heightened need for reliability required by the Eighth Amendment in capital sentencing. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329, 340)

Because the uncorrected misconduct violated appellant's constitutional rights, the state must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, the court's failure to inquire into the misconduct makes the prejudice impossible to measure. Because it is possible that Juror M.L. was so biased against appellant upon hearing the statement Santana attributed to appellant that it influenced her to determine that he was guilty of any of the charged crimes before hearing the remainder of the evidence, the error cannot be

shown to be harmless beyond a reasonable doubt.

Prejudice exists even under the lower standard set forth in *People v. Watson, supra*, 46 Cal.2d 818. It is reasonably probable, therefore, that the uncorrected jury misconduct led to the ultimate verdicts. (See *id.* at p. 836.)

X.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY, PURSUANT TO CALJIC NO. 2.92, THAT A WITNESS'S CONFIDENCE IN HER IDENTIFICATION IS A RELEVANT FACTOR FOR THE JURY TO CONSIDER IN ASSESSING THE ACCURACY OF THAT IDENTIFICATION

The trial court instructed with CALJIC No. 2.92 (5th ed.) in relevant part:

> In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of defendant, including but not limited to, any of the following: [¶] . . . [¶] The extent to which the witness is either certain or uncertain of the identification.

(11CT: 3106-3107.)

This instruction erroneously informed the jurors that the degree of certainty claimed by an eyewitness at trial was a relevant factor to consider in assessing the accuracy of that eyewitness's identification testimony. CALJIC No. 2.92 is based, in part, on an erroneous interpretation of case law holding that a witness's level of certainty demonstrated at the initial confrontation (identification procedure) is a relevant consideration for the trial court to consider in determining the admissibility of evidence. The portion of CALJIC No. 2.92 instructing jurors that the level of witness certainty at trial is an indication of accuracy also lacks scientific support

and factually erroneous.[46]

Appellant's conviction on Outrigger counts 10 through 18 and El Siete Mares counts 24 through 27 is based on the belated confidence expressed by key witnesses. The instructional error therefore cannot be regarded as harmless. And because the court delivered this instruction, the penalty phase proceeding lacked the heightened degree of reliability required by the Eighth and Fourteenth Amendments and led to convictions and death sentences based upon unreliable evidence in violation of federal due process and the parallel provisions of the state Constitution. (U.S. Const., 8th & 14th Amend.; Cal.Const., art. I, § 7, 15 & 16.)

A. CALJIC No. 2.92 Incorrectly Expresses the "Certainty" Factor Derived from *Neil v. Biggers*

In *Neil v. Biggers* (1972) 409 U.S. 188, the United States Supreme Court considered whether the initial out-of-court confrontation (show-up) between a crime victim and a single suspect violated the defendant's due process rights. The *Biggers* Court enumerated the factors to be considered by a trial judge in assessing whether an identification procedure was sufficiently reliable so that evidence of the identification was admissible under the Constitution. The Court indicated that under the "totality of the circumstances test,"

> the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, *the level of certainty demonstrated by the witness at the confrontation,* and the length of time between the crime and the confrontation.

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[46] Although defense counsel did not object to this instruction, appellant's claims are still reviewable on appeal. (See § 1259 and *People v. Famalaro, supra,* 52 Cal.4th 1, 35.)

(*Neil v. Biggers, supra,* at pp. 199-200; italics added.)

The "certainty" referred to in *Biggers* is therefore that degree of confidence that a witness expresses at the initial confrontation (lineup or one-person show-up) between the witness and the suspect, not the level of confidence expressed by the witness in court. This distinction is an important one because:

> At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's ability to attack the eyewitness' credibility. *Stovall,* 388 U.S., at 298. This in turn jeopardizes the defendant's basic right to subject his accuser to meaningful cross-examination. See *Wade,* 388 U.S. at 235 (parenthetical omitted).

(*Perry v. New Hampshire* (2012) ___ U.S. ___ [132 S. Ct. 716 at p. 732] (dis. opn of Sotomayer, J.).)

Further, the United States Supreme Court and this Court have judicially confirmed what common sense teaches, i.e., that the level of certainty demonstrated by a witness after several pre-trial identification procedures and under the conditions of trial may have very little to do with the actual recollection of the witness and a great deal to do with the suggestive features of the trial environment and of the established tendency of witnesses to defend on the trial stage their prior assertions of identity, whether accurate or not. (See, e.g., *Simmons v. United States* (1968) 390 U.S. 377, 383-384 [eyewitnesses exposed to picture of accused retain image of photo rather than person actually seen, reducing trustworthiness of subsequent identifications]; *People v. Bustamante* (1981) 30 Cal.3d 88, 98, abrogation on other grounds recognized in *People v. Johnson* (1992) 3 Cal.4th 1183, 1222-1223 [once identifications are made, witnesses'

decisions may well become unshakeable, even if erroneous]; *People v. Gould* (1960) 54 Cal.2d 621, overruled on another ground in *People v. Cuevas* (1995) 12 Cal.4th 252, 257 [identification made in court after suggestions of others and circumstances of trial may intervene to create a fancied recognition in the witness' mind].)

B. The Erroneous Instruction on the Witness Certainty Factor Failed to Safeguard Appellant from the Fallibility of Eyewitness Identification and Unreliable Evidence

The U.S. Supreme Court recently emphasized the importance of jury instructions on "the fallibility of eyewitness identification" as a means with which to test the reliability of such evidence in cases where no improper law enforcement activity is involved. (*Perry v. New Hampshire, supra,* 132 S.Ct. at p. 721.) The Court denied Perry's request to extend "pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement." (*Ibid.*) The Court instead held that in such cases "it suffices to test reliability through the rights and opportunities generally designed for that purpose." (*Ibid.*) These include eye-witness specific jury instructions, which "warn the jury to take care in appraising identification evidence." (*Id.* at pp. 728-729.) The Court based its decision "in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence." (*Ibid.*)

As explained above, the witness-certainty portion of CALJIC No. 2.92. is an incorrect statement of the certainty factor as enunciated repeatedly by the U.S. Supreme Court. (See, e.g., *Perry v. New Hampshire, supra,* 132 S.Ct. at p. 725, fn. 5.) The instruction given below was one of the "safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability."

(*Perry v. New Hampshire, supra*, 132 S.Ct. at p. 728.) Because this safeguard failed, this Court should find error.

C. CALJIC No. 2.92 Improperly Reinforces the Commonly Held Misperception That Eyewitness Confidence Indicates Reliability

The assertion that witness confidence, especially as expressed at trial, is an indication of accuracy in eyewitness identification is unsupported.[47] Some courts therefore have recognized that substantial doubt exists regarding the confidence-to-accuracy relationship that jury instructions express. (See, e.g., *United States v. Bartlett* (7th Cir. 2009) 567 F.3d 901, 906 ["An important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate"]; *United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 141-142; *State v. Henderson* (N.J. 2011) 27 A.3d 872, 888-889; *People v. LeGrand* (N.Y. 2007) 867 N.E.2d 374, 376, 380 [lack of correlation between witness confidence and accuracy of identification generally accepted by relevant scientific community]; *Commonwealth v. Jones* (1996) 423 Mass. 99, 110, fn. 9; *State v. Long* (Utah, 1986) 721 P.2d 483, 490.)

The "confidence equals accuracy" equation suggested by CALJIC No. 2.92 is prejudicial because it reinforces and exploits a common lay

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[47] See, e.g., Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?* (2001) 42 Canadian Psychology 92, 93 ("eyewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, is among the least reliable forms of evidence"); Kassin, *the General Acceptance of Psychological Research on Eyewitness Testimony: a Survey of Experts* (1989) 44 Am Psychologist 1089 (majority of psychologists surveyed agreed that confidence is not an indicator or accuracy).

juror misconception about the eyewitness process.[48] Surveys conducted of the general public in the United States also indicate there is a substantial erroneous lay belief that confidence predicts accuracy.[49] As a result of the strongly held lay misconception that confidence equals accuracy, a defendant is likely to be convicted based upon a confidently expressed eyewitness identification, even if the identification is erroneous and despite the fact the witness may have been impeached.[50]

D. This Court Should Reconsider Its Prior Caselaw on CALJIC No. 2.92 And Witness Certainty

In *People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232, this Court rejected the argument that the witness certainty factor should have been deleted in light of the expert testimony that witness confidence in identification does not positively correlate with its accuracy. The Court reasoned, in part, that the trial court was not permitted to instruct the jury to view the evidence "through the lens" of the expert's testimony, though the jury remained free to accept her testimony. (*Ibid.*; see also *People v. Ward* (2005) 36 Cal.4th 186, 213 [no sua sponte duty to modify "level of certainty" language in CALJIC 2.92; assuming error, it was harmless due to

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[48] See, e.g., Kassin & Barndollar, *The Psychology of Eyewitness Testimony: a Comparison of Experts and Prospective Jurors* (1992) 22 J. Applied Psychology 1241 (51% of prospective jurors believed confidence indicates accuracy).

[49] See Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications* (1983) 7 Law & Human Behavior 19-30; Schmechel et al, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence* (2006) 46 Jurimetrics 177, 198-199.

[50] See e.g., Hagen, *When Seeing Is Not Believing* (1993) 81 Georgetown L. J. 741, 749-750.

strength of identification testimony and expert testimony regarding the lack of correlation between witness certainty and identification accuracy].)

The conclusion reached in *Johnson* is not applicable here for several reasons. First, the authorities referenced above demonstrate the lack of correlation between witness confidence and accuracy such that CALJIC No. 2.92 affirmatively misleads jurors. Second, there was no expert testimony on the topic. Consequently, the present case does not represent a situation where expert testimony counterbalanced the misinformation in CALJIC No. 2.92.

Appellant respectfully requests this Court to reconsider its holding in *Johnson* regarding the accuracy-certainty correlation. In any case, as explained above, *Johnson* does not preclude this Court granting relief to appellant.

E. The Instructional Error, Which Violated Appellant's State and Federal Constitutional Rights, Was Prejudicial and Reversal on the Outrigger and El Siete Mares Counts Is Required

The erroneous witness-certainty portion of CALJIC No. 2.92 was an incorrect statement of the law that permitted the jurors to "place undue weight on eyewitness testimony of questionable reliability." (See *Perry v. New Hampshire, supra,* 132 S.Ct. at p. 728.) A conviction that is obtained through the use of unreliable evidence violates federal due process and the parallel provisions of the California Constitution. (*Chambers v. Mississippi* (1973) 410 U.S. 284, pp. 302-303; U.S. Const., 14th Amend.; Cal.Const., art. I, § 7, 15 & 16.) The instruction was also erroneous under the Eighth and Fourteenth Amendments and parallel provisions of the California Constitution that require that the procedures leading to a death sentence comport with a heightened degree of reliability. (U.S. Const., 8th & 14th

Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

The error was prejudicial. Only four of eleven[51] Outrigger witnesses testified regarding appellant, including the prosecution's lead witness, Anne Pickard. Picard had had one or two drinks and came out of the rest room in back of the bar to find the robbery in progress. (12RT: 1904-1907.) She froze for a few seconds and saw a man with a Beatles haircut in jeans and a jeans jacket, standing between the bar stools and tables holding a long shotgun pointed down. (12RT: 1907-1910.) She then returned to the restroom until the robbery was over. (12RT: 1909-1910, 1917-1918.) Six months later, Pickard picked out appellant from the 16-pack, remarking "face looks familiar, I need to see him in front to be sure." (12RT: 1912-1913; Exs. 188, 189.) Two months after that, she picked appellant out at a live lineup, stating "possibly I can't swear to it." (12RT: 1913-1914, 1924, Ex. 190.) However, as time went on, she could "swear to it:" at the preliminary hearing, she was 90 to 95 percent certain of her identification of appellant and had no doubts at all at trial. (12RT: 1915.)

Although Pickard discussed the events with the other Outrigger customers present that evening as she continued to patronize the bar, including when the detective came to show photos to them, and after the lineup, she denied that the conversations were substantive. (12RT: 1930-1932.)

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[51] The witnesses who did not identify appellant were Walter DeWitt, 12RT: 1939-1948; Jeanette Luett Johan, 13RT: 2110; Robert Lehman, 12RT: 2024; Margaret Livesley, 13RT: 2079-2089; Margaret Tucker, 13RT: 2041-2052; Dennis Sorenson, 13RT: 2137-2139; John Tucker, 13RT: 2125.

Picard's testimony illustrates perfectly the problems with the certainty-accuracy portion of CALJIC No. 2.92. She saw a suspect only briefly while under the influence of alcohol, but over the course of four identifications went from saying appellant's face "look[ed] familiar" six months after the crime to absolute certainty at trial that he was one of the perpetrators.

In contrast, the other three witnesses' identifications of appellant were quite weak. Praneet Gallegos had been sitting on a bar stool for a half-hour to an hour and had had one drink when the robbery occurred. (16RT: 2604-2605.) Six or seven months after the incident she identified appellant's photograph in the 16-pack photo show-up. (16RT: 2610-2612; Ex. 320.) She identified him in court as the person with a shotgun standing in the bar who told people to take out their jewelry. (16RT: 2609.) The same man robbed her boyfriend, Eugen Englesberger. (16RT: 2607.) However, she was "not sure" of her identification of appellant when she viewed photos of the live lineups in April 1993 or when she saw appellant in court at trial. (16RT: 2609, 2612-2613, 2617; Ex. 199.)

Engelsberger, on the other hand, recalled being at the bar for just ten minutes when the robbery occurred, and had not yet had a drink. (13RT: 2067-2068.) The suspect who robbed him and Gallegos held a gray or chrome automatic gun on top of the bar. (13RT: 2058-2061.) Engelsberger could only describe the suspects to the police as Hispanic. (13RT: 2067.) Six months later, he went to the bar and picked appellant's photo out of the 16-pack because it was the one that looked the closest to the person who robbed him, not because he was sure. (13RT: 2063, 2069-2070, 2073.) He noted that, "I will know him in person." (13RT: 2063-2065, Ex. 201.) However, he was unable to identify appellant at the live lineup or in court at

trial. (13RT: 2070-2072.).

Waitress Salazar's viewing opportunities were limited because she was told to lay down on the floor by the bar right after the robbery started. (13RT: 1970-1971, Ex. 183.) Over six months after the robbery, she picked out a photograph of appellant as "look[ing] a little familiar," because of his haircut rather than his face, but did not identify him again in a live lineup or at trial, nor could she recall what role he may have played in the robbery. (13RT: 1978-1981, 1987.)

The prosecution's case against appellant as to the Outrigger counts thus depended upon Pickard's testimony, given the uncertainty or inability of the other three witnesses to identify appellant. In fact, the prosecutor cited only to her testimony when arguing that appellant was present at the Outrigger. (21RT: 3776.)

Similarly, the flawed eyewitness jury instruction was prejudicial as to the El Siete Mares robbery counts 24 through 27. After viewing several mug shot six-packs on April 15, 1993, Aguilar, the security guard, identified Contreras and Navarro but not appellant. (16RT: 2581-2584, 2586-2587; Exhs. 17, 18 and 208.) In court at the preliminary hearing Aguilar identified appellant for the first time with 75% certainty as one of the first pair who approached him. (16RT: 2581, 2589-2590.) Aguilar was more certain at trial on October 4, 1994, because he became more positive with each identification and "so that justice be done." (16RT: 2589-2592, 2655.)

Waitress Lupe Guizar identified Contreras and Navarro, but not appellant, in the photo-mug shots she saw about a month after the robbery. (16RT: 2631-2633, 2641-2642; Exs. 17, 18, 206 and 207.) She did not identify appellant when she attended the live lineup at the county jail, nor

when she again saw photos in April 1993. (16RT: 2639-2641; Exs. 23 and 504.) For the first time at trial she identified appellant as the one who "probably" put a gun on the guard. (16RT: 2630, 2641-2642.) Guizar interpreted for the other girls during the police interviews right after the robbery so could not recall if she gave her own initial descriptions. (16RT: 2635.)

Patron Nelson Hernandez repeatedly identified Navarro as one of two armed men who surrounded the security guard and as the person who accosted he and his wife with a dark .45-caliber or 9-millimeter automatic gun. (15RT: 2497-2499, 2507-2509, 2512.) He identified Navarro in the June 25, 1992, photo six-packs (15RT: 2508-2509, Exs. 18, 209); at the August 25, 1992, live lineup (15RT: 2509, 2511-2512;Ex. 212); at the preliminary hearing (15RT: 2513-2514); and in court at trial. (15RT: 2499.) Despite viewing the George's Market robbery video before seeing photos on June 25, 1992, and having all the same opportunities to identify appellant, Hernandez never did so. (See 15RT: 2508, 2515; Ex. 209.)

Thus, appellant was convicted of counts 24 through 27 largely or entirely as a result of the testimony of Aguilar, who only made in-court identifications about which he expressed increasing certainty because he wanted to make sure the perpetrator got convicted and so that "justice be done." (16RT: 2590-2591.) It was therefore prejudicial that the jury was instructed that it could rely on Aguilar's expressed certainty as to his identification to find appellant guilty on these counts.

For these reasons, the instructional error unfairly bolstered the government's case and undermined appellant's defense of misidentification. (See, e.g., 22RT: 3827.) Thus, there is no basis for the government to satisfy its heavy burden of proving -- beyond a reasonable doubt -- that the

trial court's instructional error did not contribute to the jury's verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The error was prejudicial to the penalty determinations as well because it permitted the prosecutor to rely on the Outrigger and El Siete Mares witnesses' unreliable, though confident, identifications of appellant in court when arguing the aggravating nature of the circumstances of these incidents to the jury.

During the penalty phase closing argument, the prosecutor made much of appellant's denial that he took part in the Outrigger robberies. (26RT: 4574, 30RT: 5317.) The prosecutor also argued that the Outrigger was part of the "reign of terror" perpetrated by appellant and that he and others came into the Outrigger "like storm troopers," shouting obscenities and knocking glasses from the bar with rifles to "induce terror in their victims." (29RT: 5264-5265.)

In addition, the prosecutor argued that the jurors might think they were safe at a restaurant with a security guard, but at El Siete Mares the guard was disarmed and hit with a gun, after which followed a methodical and menacing robbery. (29RT: 5265-5266.) When denying appellant's motion under section 190.4, subdivision (e), the court relied on the prosecution's argument, noting that despite the presence of an armed guard, appellant led the robbery at El Siete Mares. (31RT: 5607.)

The instructional error was prejudicial under both *Chapman v. California, supra*, and *People v. Watson, supra,* 46 Cal.2d at pp. 836-837 (reasonable probability that error or misconduct contributed to the outcome.) There was more than a "reasonable chance" or an "abstract possibility" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715), that the jury would have conducted a more careful analysis of the

prosecution's eyewitness testimony and concluded that there was at least a reasonable doubt of appellant's guilt as to the Outrigger and El Siete Mares counts, had it not received a judicial instruction suggesting that it weigh the certainty of identifications of appellant by Picard, Aguilar and other witnesses in assessing the accuracy of their identifications.

The use of witness confidence as a factor for jurors to use in assessing the accuracy of eyewitness testimony should be disapproved or at least modified to conform with *Neil v. Biggers, supra,* 409 U.S. at pp. 199-200, and appellant's convictions on counts ten through 18 and 24 through 27 should be reversed.

XI.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the bedrock principle at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Instructions violate these constitutional requirements if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.01, 2.21.1, 2.21.2, 2.22, 2.27 and 8.83. (11CT: 3099, 3102, 3119-3120.) These instructions violated the above principles and thereby deprived appellant of

his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 677-678 [CALJIC Nos. 2.21.2, 2.22, 2.27]; *People v. Famalaro* (2011) 52 Cal.4th 1, 36 [CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059 [CALJIC Nos. 2.01, 2.22, 2.27, 8.83].) Nevertheless, he raises them here and respectfully urges this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.

A. The Instructions on Circumstantial Evidence – CALJIC Nos. 2.01 and 8.83 – Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 8.83 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (11CT: 3099 [CALJIC No. 2.01, Sufficiency of Circumstantial Evidence – Generally]; 11CT: 3119-3120 [CALJIC No. 8.83, Special Circumstances – Sufficiency of Circumstantial

Evidence - Generally].) These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (11CT: 3099, 3120.) These instructions informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)[52]

First, the instructions compelled the jury to find appellant guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (11CT: 3120.) An interpretation that appears reasonable, however, is not the same

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[52] Although defense counsel did not object to the giving of these two instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§ 1259; see *People v. Famalaro* (2011) 52 Cal.4th 1, 35.)

as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally-mandated one.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when such an inference appeared "reasonable." In this way, the instructions created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

The instructions had the effect of reversing, or at least significantly lightening, the burden of proof, since they required the jury to find appellant guilty of the charged counts and the special circumstances true unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. Appellant contested his guilt on count 5, the attempted murder of Enrique Medina; the Outrigger counts, 10 through 18; and the El Siete Mares counts, 24 through 27. (See defense closing argument at 22RT: 3827, 3847-3848, 3857-3865 and 3881-3883.) As to these counts, the jury may have found appellant's defenses unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions,

the jury was required to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. The instructions thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship, supra*, 397 U.S. at p. 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Here, the instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (11CT: 3099, 3120.) In *People v. Roder, supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. The jury instruction at issue informed the jury that if it found that the defendant was a dealer in secondhand merchandise who bought or received stolen property under circumstances that should have caused him to make a reasonable inquiry of the seller's legal right to sell the same, it should presume the defendant bought or received such property knowing it to be stolen, unless from all the evidence it had a reasonable doubt that the defendant knew the property was stolen. (*Id.* at pp. 495–496.) Because the jury could have interpreted the instruction to mean that the prosecution's case on the issue of knowledge was established as a matter of law unless the defense raised a reasonable doubt, this Court found constitutional error. (*Id.* at p. 504.) Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes that were supported by a reasonable

interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of Counts 5, 10 through 18, and 24 through 27, and the special circumstances true on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.1, 2.21.2, 2.22 and 2.27 Also Violated the Reasonable Doubt Standard.

The trial court gave five other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.1 (Discrepancies in Testimony); 2.21.2 (Witness Wilfully False); 2.22 (Weighing Conflicting Testimony) and 2.27 (Sufficiency of Testimony of One Witness). (11CT: 3102).[53] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 authorized the jurors to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless,

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[53] Although defense counsel did not object to these instructions, appellant's claims are still reviewable on appeal. (See § 1259 and *People v. Famalaro, supra,* 52 Cal.4th 1, 35.)

"from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (11CT: 3102.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[54] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

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[54] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, which found no error in an instruction that arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

(11CT: 3102.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (11CT: 3102), was likewise flawed. The instruction erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty

unless every element of the disputed offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

C. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, as indicated above, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings* (1991) 53 Cal.3d 334, 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions

are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden* (1994) 9 Cal.4th 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt.

D. Reversal on the Disputed Counts Is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least,

because all of the instructions violated appellant's federal constitutional rights, reversal is required as to disputed counts 5, 10 through 18, 21 and 24 through 27, and as to the penalty verdicts, unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt on the relevant counts was weak or insufficient, as discussed elsewhere in this brief. Appellant incorporates by reference Arguments III (insufficient evidence of robbery of Arturo Flores), IV (insufficient evidence of attempted murder of Enrique Medina) and X (erroneous instruction as to eyewitness identification, discussing prejudice as to the Outrigger and El Siete Mares robbery counts). Because these instructions distorted the jury's consideration and use of circumstantial evidence and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's convictions as counts 5, 10 through 18, 21, and 24 through 27 and the judgment must be reversed.

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XII.

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE IT IS BASED UPON THE IMPROPER AND PREJUDICIAL ADMISSION OF EDUARDO RIVERA'S PRELIMINARY HEARING TESTIMONY IN LIEU OF LIVE TESTIMONY

Eduardo Rivera testified at the preliminary hearing about witnessing the shooting of Kim at the Woodley Market. Prior to trial, the prosecution determined that Rivera, a Mexican national, was living in Mexico and ceased its efforts to secure his testimony. It then successfully argued that because the Mutual Legal Assistance Cooperation Treaty with Mexico contained no provisions that would compel Rivera to return to testify, it did not need to show due diligence. The trial court's ruling admitting Rivera's testimony was erroneous because "unavailability in the constitutional sense . . . takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the *voluntary* assistance of another government." (*People v. Herrera* (2010) 49 Cal.4th 613, 628, citing *Mancusi v. Stubbs* (1972) 408 U.S. 204, 211-213, italics added.)

Because under the Treaty in question there were alternate, cooperative means with which to obtain Rivera's testimony at appellant's trial, the prosecution failed to meet its burden of proof. The admission of Rivera's preliminary hearing testimony at appellant's trial violated his right to confront and cross-examine the witnesses against him under the Confrontation Clause of the Sixth Amendment and Article 1, section 15 of the California Constitution. Because Rivera's testimony had such a prejudicial impact at the penalty phase, reversal of appellant's sentences is required.

A. Factual Background

Eduardo Rivera, a butcher at Woodley Market, testified at the preliminary hearing. (19RT: 3256, 3259 et seq.) By the time of appellant's trial, Rivera was in Mexico and the prosecution sought to use his preliminary hearing testimony in lieu of live testimony. The following was established at the due diligence hearing, where the defense stipulated to the prosecution's offer of proof in lieu of witness testimony. (19RT: 3131.)

In about January 1994 Rivera told former co-workers from Woodley's Market that he was returning permanently to Mexico. (19RT: 3127.) Two detectives looked for Rivera in about April 1994 when the prosecution held a lineup in the case of a co-defendant tried separately, but they were told he had left and was no longer at his former address, job or phone number. (19RT: 3127-3128.) Between April 1994 and the due diligence hearing, the prosecution's investigator, Abram, again checked Rivera's local addresses, phone numbers and work locations and the results were negative. (19RT: 3128.) Abram "did the usual due diligence in searching for him in the community" but could not locate Rivera. (19RT: 3128.)

About a month prior to the due diligence hearing, the prosecution learned from the Immigration and Naturalization Service that Rivera was a Mexican National. (19RT: 3128-3129.) On September 23, 1994, 20 days prior to the hearing, the prosecution located Rivera's brother in San Francisco. According to him, Rivera was living in a small village outside of Guadalajara, Mexico, with no "definite plans" to return. (19RT: 3129-3130.) The brother made several attempts to leave messages for Rivera at the only phone in the village asking Rivera to return the call, to no avail. (19RT: 3130.)

At the hearing, the prosecutor argued that it "need not show any due diligence" because the Mutual Legal Assistance Cooperation Treaty with Mexico contains no provision by which to compel Rivera to return and testify at appellant's trial. (19RT: 3132; see also 11CT: 3045 [citing the prosecution's "diligent investigation" showing Rivera had returned to Mexico in support of its Treaty argument].)

Appellant countered that the due diligence showing was insufficient. Just as the defense went to Honduras to look for mitigation witnesses in a small town with no telephone, so could the prosecution in Mexico. (19RT: 3131.) Moreover, the prosecution had not hesitated to send police officers to Central America to look for "dirt" on appellant and his co-defendants. (*Ibid.*) There were daily flights from Los Angeles to Guadalajara and the prosecution investigators could drive out to Rivera's village and ask him to come back. (19RT: 3132.)

The court ruled that due diligence had been shown. (19RT: 3136.)

B. Applicable Legal Principles

Appellant incorporates by reference as though fully set forth herein the authorities and legal analysis set forth in Argument V., above, regarding the prosecution's failure to exercise due diligence to locate Santana for trial. Under Evidence Code section 1291, subdivision (a)(2), Rivera's preliminary hearing testimony is admissible under the hearsay rule if Rivera is unavailable as a witness, appellant was a party to the action in which the former testimony was given and appellant had the right and opportunity to cross-examine Rivera with an interest and motive similar to that at trial. (See Evid. Code, § 1291, subd. (a)(2).)

Unavailability is governed by Evidence Code Section 240, stating, inter alia, that a declarant is unavailable if the declarant is "[a]bsent from

the hearing and the court is unable to compel his or her attendance by its process" (Evid. Code, § 240, subd. (a)(4)) or "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process" (Evid. Code, § 240, subd. (a)(5)). "Even assuming, however, that [the witness] was unavailable under section 240(a)(4), unavailability in the constitutional sense nonetheless requires a determination that the prosecution satisfied its obligation of good faith in attempting to obtain [his] presence." (*People v. Herrera, supra,* 49 Cal.4th at p. 623.) The question here is whether Rivera was constitutionally unavailable as a witness.

C. In Order to Show Due Diligence, the Prosecution Was Required to Utilize the Cooperative Methods Available via the Mutual Legal Assistance Cooperation Treaty with Mexico to Secure Rivera's Testimony at Trial

The Mutual Legal Assistance Cooperation Treaty provides cooperative means to bring witnesses to the United States to testify. (See *People v. Herrera, supra,* 49 Cal.4th at p. 626.) This treaty was analyzed in *People v. Sandoval* (2001) 87 Cal.App.4th 1425, which was discussed with approval in *People v. Herrera.* (*People v. Herrera, supra,* 49 Cal.4th at pp. 626-627.)

In *People v. Sandoval,* a Mexican citizen, Zavala, was one of two witnesses to a 1997 attempted robbery and fatal shooting. (*People v. Sandoval, supra,* 87 Cal.App.4th 1425, 1428-1429.) Zavala testified at the preliminary hearing but was living in Mexico by the time of trial. (*Id.* at p. 1432.) Evidence at the due diligence hearing established that the prosecution's investigator had contacted Zavala by telephone in Mexico. (*Ibid.*) Zavala was willing to testify if he could get a passport and visa to

return to the United States and about $100 to travel to Mexico City to apply for these documents. (*Ibid.*) The prosecution decided not to assist Zavala and did no more to secure his attendance at trial. (*Ibid.*) The trial court found that Zavala was a citizen of a foreign country, implying that because of that, his preliminary hearing testimony could be used. (*Id.* at pp. 1432-1433.)

After reviewing the U.S. Supreme Court authorities discussed *infra*, the *Sandoval* court noted that the reasonable steps the prosecution must take to secure the presence of a witness change over time. (*People v. Sandoval, supra,* 87 Cal.App.4th at pp. 1438-1439.) Relevant to the determination of reasonableness in *Sandoval* was the Treaty on Cooperation Between the United States of America and United Mexican States for Mutual Legal Assistance (the Treaty), effective on May 3, 1991.[55] (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1438-1439.) The Treaty outlines several cooperative methods through which a Mexican resident's testimony can be obtained, either in Mexico or in the United States. (*Id.* at p. 1439.) Article 7 allows a prosecutor to request that a witness in Mexico be compelled to testify in Mexico. (*Ibid.* & fn. 5.) Article 9 allows the prosecution to request assistance from the Mexican authorities to invite a person in Mexico to come to California to testify and inform the person as to what expenses will be paid. (*Ibid.* & fn. 7.)

The *Sandoval* court rejected the Attorney General's argument that

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[55] This treaty is also referred to as the Mutual Legal Assistance Cooperation Treaty with Mexico, as it was below. (See 11CT: 3045 and Resnick & Zagaris, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement* (1997) 14 Ariz. J. Int'l & Comp. L. 1, 5 and fn. 4.)

the prosecution did not have a duty to make a good-faith effort to obtain Zavala's presence at the trial simply because the court could not compel his presence under the Treaty. (*People v. Sandoval, supra,* 87 Cal.App.4th at pp. 1440-1441.) Because the prosecution had several reasonable alternatives to use to attempt to secure Zavala's presence, including resort to the Treaty, the *Sandoval* court found a lack of due diligence and that the use of Zavala's preliminary hearing testimony violated the confrontation clause. (*Id.* at pp. 1443-1444.)

As in *Sandoval*, the prosecution below could have used Article 7 of the Treaty to gain the aid of Mexican authorities to compel Rivera to appear in Mexico to testify at trial via teleconference. (See *People v. Sandoval, supra,* 87 Cal.App.4th at p. 1443.) Alternatively, the prosecution could have invoked Article 9 of the Treaty to facilitate Rivera's attendance at trial. (See *id.* at pp. 1442-1443.) Instead, the prosecution never even took the step of contacting authorities in Mexico to get help communicating with Rivera. (Cf. *People v. Herrera, supra*, 49 Cal.4th at p. 620 [prosecution contacted El Salvadoran agency that would search a database and send officers out to look for the witness].) The prosecution, which had the burden of proof (*Ohio v. Roberts*, *supra*, 448 U.S. at pp. 74-75), failed to show due diligence and the trial court erred in admitting Rivera's preliminary hearing testimony at trial.

D. Under the Authorities Relied Upon by the Prosecution and Court Below, the Prosecution Failed to Show Due Diligence and the Court Erred in Admitting the Preliminary Hearing Testimony of Eduardo Rivera

As this Court made clear in *People v. Herrera, supra*, 49 Cal.4th at pp. 625-628, the prosecution's argument below - that the lack of a treaty with Mexico that would have compelled Rivera's return made him per se

unavailable without violating the Sixth Amendment - was incorrect. (See 11CT: 3045, citing *People v. Ware* (1978) 78 Cal.App.3d 822, *People v. St. Germain* (1982) 138 Cal.App.3d 507 and *People v. Denson* (1986) 178 Cal.App.3d 788.)

Herrera analyzed the development of the case law on what constitutes "unavailability" in the constitutional sense. (*People v. Herrera, supra,* 49 Cal.4th 613, 622 et seq.) In *Barber v. Page* (1968) 390 U.S. 719, the prosecution had made no effort to secure the presence of the witness other than to determine he was in a federal prison in another state. (*Id.* at p. 723.) Although at one time this would have been enough to demonstrate unavailability, more recent developments, including statutes and prison policies, meant states now could get the cooperation of federal courts or authorities to secure a witness at a state trial. (See *People v. Herrera, supra,* 49 Cal.4th at p. 623.) In light of these developments, the prosecution's lack of any "good faith" effort to seek the witness's presence in *Barber* violated the Sixth Amendment right of confrontation. (See *People v. Herrera, supra,* 49 Cal.4th at p. 624.)

In *Mancusi v. Stubbs* (1972) 408 U.S. 204, 205, the witness, who was a naturalized U.S. citizen, had returned to become a resident of his native Sweden by the time of the retrial at issue. Use of his prior testimony at the retrial did not violate the confrontation clause because there was no process or "established procedures depending upon the voluntary cooperation of another government" at the time to secure the witness's presence. (*Id.* at pp. 211-212; see also *People v. Herrera, supra,* 49 Cal.4th at pp. 624-625.)

People v. Herrera found that California decisions are in accord with the *Barber/Mancusi* analysis under which the existence of good-faith efforts

may depend upon whether or not there are processes or established procedures through which the prosecution can attempt to bring a witness to trial. (*People v. Herrera, supra,* 49 Cal.4th 613, 625.) In particular, this Court interpreted the cases cited by the prosecution below (11CT: 3045), in light of U.S. Supreme Court precedent.

In *People v. Ware* (1978) 78 Cal.App.3d 822, 829, a sexual assault victim returned to Spain after testifying at the preliminary hearing and was unavailable at trial. "While acknowledging that mere absence from the jurisdiction was no longer sufficient to dispense with the right of confrontation (citation), *Ware* found its facts comparable to *Mancusi,* in that no alternative means were available at the time to secure the victim's attendance at trial (citation)." (*People v. Herrera, supra,* 49 Cal.4th at p. 625, citing *People v. Ware, supra,* at pp. 837-838.) Thus, the interpretation of *Ware* by the prosecution below as holding that a foreign citizen outside of the United States can be considered per se unavailable if there are no means to compel his attendance is incorrect. (See 11CT: 3045.) Rather, the availability of means other than court compulsion must be taken into account.

People v. St. Germain (1982) 138 Cal.App.3d 507, 516, 518, involved two witnesses who were unwilling to return to testify at trial. One, a non-citizen living in the Netherlands, was properly declared unavailable because no treaty or agreement with the Netherlands existed. (*People v. Herrera, supra,* 49 Cal.4th at p. 626, citing *St. Germain, supra,* at pp. 517-518.) The other, a U.S. permanent resident, was <u>not</u> unavailable, although she also lived in the Netherlands, because the prosecution could have used a federal subpoena to attempt to secure her presence. (*Ibid.*)

This Court specifically disapproved of the third case cited by the

prosecution below (11CT: 3045), *People v. Denson* (1986) 178 Cal.App.3d 788, 793, because it "stated bluntly that no showing of due diligence is required if the witness is a foreign citizen outside of the United States at the time of trial," which is contrary to the good-faith requirement and overall reasonableness necessary for constitutional unavailability. (*People v. Herrera, supra,* 49 Cal.4th at p. 628, fn. 10; see also 11CT: 3045.)

Herrera itself involved a witness from El Salvador, Portillo, who testified at a 2006 preliminary hearing that the defendant had confessed to shooting the murder victim. (*People v. Herrera, supra,* 49 Cal.4th at p. 617.) The due diligence hearing evidence established that Portillo had been deported in September 2006 to El Salvador, a country with which the United States has no treaty providing for the witness to come to this country to testify as a witness. (*Ibid.*) The prosecution had contacted INTERPOL, the agency in El Salvador that would check databases and search for the witness, but it was unable to locate Portillo in El Salvador. (*Id.* at p. 631.)

The trial court found Portillo to be unavailable and allowed his testimony to be read at trial. (*People v. Herrera, supra,* 49 Cal.4th at p. 620.) The Court of Appeal reversed, emphasizing that the prosecution had not begun its attempts to locate the witness until the last business day before the trial was scheduled to start. (*Id.* at pp. 629-630.) This Court pointed out that what was relevant was the fact of Portillo's deportation eight months before trial and the lack of any applicable treaty between the United States and El Salvador. (*Id.* at pp. 629-630.) Earlier efforts to locate Portillo in California would have been futile and thus unnecessary (*id.* at p. 630, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 74), and there was no evidence that given more time, INTERPOL could have done more to locate Portillo in El Salvador. (*People v. Herrera, supra,* 49 Cal.4th at p. 631.) The Court

reversed the Court of Appeal and held that Portillo's prior testimony had been properly admitted. (*Id.* at p. 632.)

Here, unlike in *Herrera,* there was an applicable treaty, but the prosecution never tried to use it. Moreover, the prosecution never even contacted law enforcement authorities in Mexico to try to locate Rivera. (19RT: 3127-3129 [prosecution's offer of proof].) Because of this and the reasons above, the trial court erred when it ruled that due diligence had been shown and admitted Rivera's preliminary hearing testimony.

E. The Admission of Rivera's Preliminary Hearing Testimony Prejudiced Appellant Requiring Reversal of the Death Sentences

At the due diligence hearing, the prosecution argued the importance of Rivera's testimony. He was the only witness who identified appellant at both the live lineup and in court. (19RT: 3132.) He saw appellant firing in the freezer. (*Ibid.*) He corroborated the testimony of Guillermo Galvez and had the most consistent identifications. (19RT: 3132-3133.)

In addition, Rivera's descriptions of Kim were far more vivid than those provided by Galvez. Both saw Kim and appellant struggle, but only Rivera described Kim as appearing surprised or fearful and terrorized. (19RT: 3273.) Appellant conceded at both phases of trial that he shot and killed Kim during a robbery. (22RT: 3885-3886 [closing argument]; 26RT: 4538 [appellant's penalty phase testimony].) Rivera's testimony was nevertheless prejudicial because it became the basis for irrelevant prosecution argument at both phases of the trial, made to appeal to the prejudice and passions of the jury.

From Rivera's testimony, the prosecutor emphasized during closing arguments at the guilt phase that Kim had been terrorized. (21RT: 3773,

3774; 22RT: 3812-3813.) He suggested that the jury imagine what Kim had been through. (21RT: 3774 ["Can you imagine the terror? Mr. Rivera described it. Sheer terror of the man because they won't give up."]; 22RT: 3812 ["You think about Mr. Kim and you know the terror he went through at the freezer."); 22RT: 3813 ["He was terrorized . . . ."].) During penalty phase argument, the prosecution stepped up the inflammatory language, repeatedly arguing that there was "terrorism" at each location, that appellant and his co-defendants "terrorized" people and inflicted a "reign of terror" (29RT: 5264); and induced terror in their victims. (29RT: 5265; see also 29RT: 5286, 5289; 30RT: 5315, 5334, 5360, 5367, 5377 and 5385.) Rivera's testimony thus prejudiced appellant.

The erroneous admission of Rivera's preliminary hearing testimony violated appellant's right to confront and cross-examine Rivera. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) "To deny or significantly diminish this right deprives a defendant of the essential means of testing the credibility of the prosecution's witnesses, thus calling 'into question the ultimate "integrity of the fact-finding process."'" (*People v. Cromer* (2001) 24 Cal.4th 889, 897, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) Admission of Rivera's prior testimony also violated appellant's right to a reliable determination of the appropriate penalty under the Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 587.) The error is therefore of federal constitutional dimension and this Court must determine whether the prosecution can show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [applying *Chapman* to confrontation clause violations].) Because the error here cannot be deemed harmless, appellant's death sentences must be reversed.

XIII.

THE TRIAL COURT DEPRIVED APPELLANT OF A FAIR AND RELIABLE SENTENCING DETERMINATION BY REFUSING TO GRANT A SEVERANCE, SEPARATE JURIES OR SEQUENTIAL PENALTY PHASE TRIALS

Although the prosecution claimed repeatedly that its theory was that all three co-defendants were equally culpable (see, e.g., 3RT: 423-425; 23RT: 3998), it had already decided based upon preliminary hearing testimony that appellant was the dominant and most violent of the defendants. (See 10CT: 2944, 2963.) It was for this reason that appellant moved for severance prior to trial and numerous times as the trial proceeded. Appellant argued that separate proceedings were necessary to preserve the jury's ability to impartially consider and give effect to appellant's individual mitigating evidence and death-worthiness.

The court abused its discretion in denying appellant's pretrial and subsequent motions to sever. As a result, the joint proceeding detrimentally shifted the jury's focus to appellant's actions in comparison to those of the co-defendants; invited the jury to weigh appellant's mitigating evidence against that of the co-defendants; and allowed his case in mitigation to be negated by their evidence, including evidence that would have been inadmissible in a severed proceeding.

Viewed from either a pre- or post-trial perspective, the joint trial denied appellant's rights to due process, a fair trial, effective assistance of counsel and a reliable penalty determination, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the California Constitution. (Cal. Const., art. I, §§ 1, 7, 15, 16 and 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-

638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

A. Applicable Legal Principles

Penal Code section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be jointly tried, unless the court orders separate trials." Generally, the decision whether to grant severance is left to the discretion of the trial judge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) However, "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice." (*People* v. *Keenan* (1988) 46 Cal.3d 478, 500.) This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (*See, e.g., Mills v. Maryland* (1988) 486 U.S. 367, 376.)

While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.) Severance should be granted "if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States* (1993) 506 U.S. 534, 539.) Regardless of any statutory preference for joint trials, a court may sever cases "in the interests of justice." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

Determining the prejudicial impact of joint trials and balancing other considerations is a "highly individualized exercise." (*Williams v. Superior Court, supra,* 36 Cal.3d 441, 452.) Denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling (*People v. Hardy* (1992) 2

Cal.4th 86, 167), as is the denial of a request for impanelment of separate juries to try guilt/death eligibility and penalty. (*People v. Rowland* (1992) 4 Cal.4th 238, 268.) On appeal reversal is required where the joinder actually resulted in gross unfairness amounting to a denial of due process even if severance was not initially warranted at the time the motion was made. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

B. The Trial Court Abused Its Discretion in Denying Appellant's Pre-Trial Motion to Sever or in the Alternative for Separate Juries

In his pre-trial motion to sever his case from that of his co-defendants or to grant separate juries, appellant argued that a joint trial would violate his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See 10CT: 2924, 2927-2928, 2935, 2940 and authorities cited therein.) As the sole defendant accused of actually shooting and killing two people, and citing the facts as laid out in the prosecution's Special Circumstance Penalty Evaluation Memorandum (10CT: 2944-2963), appellant predicted the prosecution would portray him as the dominant and most violent of the three defendants. (10CT: 2925-2926, 2931.) In particular, the fact that appellant alone was accused of taking the life of a police officer meant that in the "small universe of the worst of the worst," appellant would stand out. (3RT: 416.) The prosecution also intended to introduce evidence of a prior similar robbery attempt by appellant alone, bolstering the claim of his leadership role. (10CT: 2925.) Thus, a joint trial would permit the prosecutor to establish a hierarchy with appellant as the most culpable defendant. (3RT: 417-418; 10CT: 2926, 2937-2938.)

Appellant also argued that any co-defendant mitigating evidence

lacking in appellant's case would be seen as a reason to sentence appellant to death. (29CT: 2933.) A joint trial would reduce the impact of life history mitigation, as each of the three defendants was from an impoverished Central American country and would likely present similar evidence of their difficult upbringings. (3RT: 415-416; 10CT: 2929-2930, 2964.) And, given the difficulties of imposing a death sentence, the jurors could "trade off" and be merciful toward the co-defendants while still imposing a death sentence on appellant. (3RT: 416, 424.) Moreover, social science study data confirmed that joinder in a three-defendant penalty trial leads to less individualized sentencing. (10CT: 2974.)

As to limiting instructions, appellant presented social science research suggesting that jurors have difficulty understanding instructions, and even when they do understand the instructions, they have difficulty following instructions with regard to severance. (10CT: 2967-2968.)

In arguing against the motion, the prosecution insisted that the three defendants stood in comparable positions, that all three were alleged to be shooters or attempted shooters and that the jury would be instructed to reach individual verdicts as to penalty. (3RT: 423-424.)

Appellant's concerns about relative legal and moral culpability were confirmed when the co-defendants opposed his severance motion, which the trial court agreed supported his argument. (3RT: 419-420, 424.) Nevertheless, the court denied the motion on the grounds that all three defendants were similarly culpable but even if they were not, multiple juries would not solve the problem because the evidence of "who did what" would go to the jury regardless. (3RT: 425-428; 10CT: 2975.)

The court abused its discretion in denying the motion for severance or separate juries because appellant made a "clear showing of potential

prejudice" through his pre-trial motion. (See 10CT: 2941, citing *Frank v. Superior Court* (1989) 48 Cal.3d 632, 638; 3RT: 424.) In denying the motion, the court failed to address adequately appellant's key point - that he would be portrayed as the dominant and most violent of the three defendants and that inevitably the jury would compare the three at sentencing to appellant's detriment. (See 29CT: 2933; 3RT 416.)

Moreover, the court told appellant, "[y]ou do concede that we can't discuss actual prejudice. It seems to me we are talking about speculation." (3RT: 425.) This demonstrated a misunderstanding of the correct legal principles and placed too heavy a burden on appellant. Because the trial had not yet taken place, appellant was required to show potential, not actual, prejudice. (*People v. Bean* (1988) 46 Cal.3d 919, 939-940.) It is only on appeal that the courts look to the evidence actually introduced at trial to determine whether "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 940, quoting *People v. Turner* (1984) 3 Cal.3d 302, 313.) Because the trial court's discretionary decision was influenced by an erroneous understanding of the applicable law or reflected that it was unaware of the full extent of its discretion (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.8), the court here did not properly exercise its discretion under the law.

Moreover, appellant's argument was not speculative, but rested on the prosecution's Penalty Phase Evaluation Memorandum, itself based in large part upon the preliminary hearing testimony. (See Memorandum at 10CT: 2947, 2950, 2954, 2963 [citing court testimony].) It ended by stating that,

> [appellant] appeared to occupy the dominant role in the commission of these crimes. He was frequently characterized

as the 'leader' by eyewitnesses and was usually the most violent participant in the commission of the crimes.

(10CT: 2963.)

The court suggested that the defendants may want to absent themselves during a co-defendant's penalty phase presentation. (3RT: 428-429.) The court thus tacitly admitted that appellant might very well be prejudiced by the joint proceeding and unfairly put the burden on him to avoid the harm by absenting himself from what was still his own trial by forfeiting his right to be present at trial.

For all these reasons, the court abused its discretion when it denied appellant's pre-trial severance motion.

C. The Joint Guilt Phase Trial Denied Appellant His Right to Due Process of Law and a Fair Trial and Penalty Determination

Appellant renewed the motion to sever as the guilt phase proceeded and the court denied the motion each time. Appellant objected when the prosecution filed the Second Amended Information dropping Navarro from counts 6 through 9 (the Woodland Market robberies, including murder of Kim) and 37 through 40 (Ofelia's Restaurant counts). (4RT: 449, 453-454.) Appellant argued that the fact that Navarro faced only one murder count heightened the need for separate juries. (4RT: 453.)

Appellant renewed the motion each time the court admitted significant and prejudicial evidence limited to the co-defendants, i.e., a gun tied to Navarro but not to the crimes at issue (11RT: 1676-1677); a photo of the co-defendants making possible Mara Salvatrucha gang signs (13RT: 2202-2204); and numerous photos showing Navarro and/or Contreras posing with guns. (16RT: 2825, 2829-2829, 2841; 19RT: 3371-3373.)

With regard to the gun photos in particular, appellant argued that the

evidence otherwise would not come in against him, had little probative value and "dirtie[d] him up" by association. (17RT: 2828-2829.) The prosecution contended that because neither co-defendant was identified as a shooter of Hoglund at George's Market, the photos were necessary to show that they had the requisite mental state for the special circumstances, i.e., intent to kill or reckless disregard for human life. (17RT: 2830-2831.) The prosecutor's reliance upon these photos, rather than on evidence from the crimes themselves, was a concession of the weakness of the special circumstance case against the co-defendants, thereby contradicting the prosecutor's insistence on equal culpability.

Appellant's concerns about relative culpability and the efforts by the prosecution to taint him as the most violent and dominant of the three defendants were borne out during the joint guilt trial. The co-defendants' cross-examinations and arguments minimized their participation in the capital and noncapital crimes, thereby making appellant more culpable. (See, e.g., 11RT: 1596-1597 [Navarro challenges evidence that he shot at Hoglund]; 15RT: 2447-2455 and 22RT: 3900-3911, 3913-3914, 3920 [argument stressing Navarro's minimal role at various crimes, absence at Ofelia's Restaurant and Woodley Market where Kim was killed, and the implausibility of Santana's statement against him]; 17RT: 2742; 19RT: 3331, 3344 [Contreras cross-examination showing Guillermo Galvez only witness to testify Contreras shot at Kim]; 17RT: 2793-2796, 2800, 2813-2814, 2817-2820 [Contreras impeachment of Galvez]; 17RT: 2790-2791, 18RT: 2937, 2944-2946 [Contreras cross-examination establishing his nonviolent and nonthreatening treatment of a witness pregnant at the time of the robbery].)

In addition to the robberies at Woodley and George's Markets,

which resulted in the death of Kim and Hoglund, the parties focused on the events at the Casa Gamino Restaurant, especially the stun gun assaults. Navarro argued his lack of involvement with the stun gun at the Casa Gamino Restaurant. (22RT: 3906.) Contreras's cross-examination of Armando Lopez focused on Armando's weak identification of Contreras, versus his certainty that appellant was the one who pistol-whipped him and shocked him with the stun gun at Casa Gamino Restaurant. (14RT: 2275-2276.)

The prosecution finished its guilt phase closing argument by characterizing appellant as the "designated hitter"and killer of Hoglund and Kim, Contreras as a killer of Kim and Navarro as mere "assistant" in all the crimes except for those at Woodley Market. (22RT: 3961-3962.)

Under these circumstances, where the co-defendants' efforts to exculpate themselves served to heighten appellant's moral culpability, the denials of each of appellant's additional motions to sever were an abuse of discretion.

D. The Trial Court Abused its Discretion in Denying Appellant's Motions for Severance, a Separate Penalty Phase Jury or Sequential Penalty Trials

1. Motion at the End of the Guilt Phase

Appellant moved for a separate trial or separate juries as the jury deliberated on the guilt phase verdicts. (11CT: 3067, 23RT: 3994-4003.) Appellant again argued that the penalty phase requirement of individual sentencing was contrary to the prosecution's theory of joint responsibility and that he would be portrayed as the "heavy," with danger of a jury compromise, returning a death verdict only for him. (23RT: 3996-4000.) Appellant pointed out that the parties had been jockeying throughout the

trial as to who did what during each robbery to set up the inference in the jurors' minds that one was less culpable than another. (23RT: 4003.) The court responded that this concern was covered by factor (j), whether or not the defendant was an accomplice and his participation may have been relatively minor. However, as appellant replied, this supported his argument. (23RT: 4003.)

The court denied the motion to sever, stating that it was proper to argue "equal participation" as part of the circumstances of the crime and that it did not "see a real disparate quality of culpability of the defendants." (23RT: 4001-4002.) The court's view is belied by its later ruling when it denied appellant's motion for modification of the verdict under section 190.4, subdivision (e). (See 31RT: 5600-5611.) At the point it ruled on the motion for a separate penalty trial, the court already knew that there was very little aggravating evidence other than the circumstances of the crime. (See 23RT: 3989.) Thus, although only a prior conviction for sale of cocaine base under Health and Safety Code section 11351.5 was added to the case in aggravation during the penalty phase (24RT: 4214, 4218), the court declared after the trial that appellant "conducted himself at all times as the leader of a larger group of men" (31RT: 5604), and was the most violent. (31RT: 5605-5607, 5610.)

The court's complete about face - declaring it did not see disparate culpability among the defendants and then, despite the lack of new evidence, forcefully announcing that appellant's particular role and actions completely justified his death sentence - demonstrates that the court's reasons for denying the motion for a separate penalty trial was, at the very least, arbitrary and hence an abuse of discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 [exercise of legal discretion

must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the matter at issue].)

In the alternative, appellant joined Contreras's motion for sequential penalty phases. (23RT: 4036-4040.) Contreras argued that because the parties had agreed there would be no victim impact evidence, there would be little if any repetition in separate trials and they were also ahead of the trial schedule given to the jury. (23RT: 4035-4040.) The court agreed that time was not an issue, but nevertheless denied the motion. (23RT: 4048.) Because nothing, including efficiency, was gained by holding a joint trial at that point, and the prejudice to appellant was well established, the denial of sequential penalty phase trials was an abuse of discretion. (See *People v. Keenan* (1988) 46 Cal.3d 478, 500-502 [where minimal potential prejudice did not justify expenditure of resources that would be necessary at start of capital trial, no abuse of discretion in denial of severance motion].)

2. Motions During the Co-Defendants' Mitigation Cases

As the penalty phase proceeded, appellant made additional motions for severance when Contreras and Navarro introduced evidence that was either irrelevant or inadmissible as to him and that set up an inevitable comparison to appellant's mitigation case. He finally made it a continuous one. (28RT: 4872.) Appellant renewed the motion based upon the expected testimony of the prosecution's rebuttal witness, which ended up being introduced, that the co-defendants were Mara Salvatrucha gang members and gang members only do crimes with other trusted gang members. (24RT: 4178; 28RT 5001, 5003; 29RT: 5198 [limiting instruction as to appellant].) To avoid prejudice from the prosecution's attack on Navarro's expert, appellant unsuccessfully requested that he be

permitted to argue and submit his case to the jury before Navarro's case concluded. (28RT: 5059.)

Appellant renewed the motion for separate juries when his co-defendants' mitigation evidence harmed him in exactly the way appellant had predicted. Mitigation witnesses' testimony about bad associates leading a co-defendant astray implied that appellant was the bad friend. (28RT: 4871.) Navarro's sister's plea for his life on the ground that Navarro was a robber but not a killer again made a comparison as to moral guilt that worked against appellant. (28RT: 4871.) Evidence that Navarro was a drug dealer and user added credence to Santana's statement that the defendants told her they were going to buy drugs prior to the George's Market crimes; this in turn improved the credibility of her other statements against appellant. (28RT: 4870-4871.) Moreover, because appellant was unable to cross-examine Navarro, admission of evidence of statements Navarro made regarding his drug use violated the *Aranda/Bruton* rule.[56]

At closing arguments, Navarro continued his earlier theme that he was an inept robber, not a killer. (30RT: 5405-5406, 5422-5424.) He emphasized Dr. Cervantes's testimony that he was a follower. (30RT: 5422.) He challenged the evidence that he had shot at Hoglund and pointed out that throughout the robberies he never assaulted or tortured anyone. (30RT: 5409-5413.)

Co-defendant Contreras presented lay witness and expert testimony regarding the cultural dynamics of his community and family in Honduras. (See Statement of Facts, *ante*.) Among other things, his expert testified that

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[56] *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518.

seventy people had traveled by foot to give mitigating statements about Contreras. (24RT: 4304-4306.) Although abused and abandoned by his father, Contreras's hard work at multiple jobs as a child stood out among his family and peers. (24RT: 4224, 4308-4311, 4318-4320, 4325-4326.) Co-defendant Navarro presented evidence through expert and lay witnesses of trauma he experienced growing up from physical and sexual abuse, living amidst a civil war and difficulties immigrating, all of which led to psychological problems. (See Statement of Facts, *ante*.) The prosecutor would not have been permitted in a separate penalty trial of appellant to offer this evidence. (*People v. Boyd* (1985) 38 Cal.3d 762, 774 [holding that in its penalty phase case-in-chief the prosecution cannot introduce evidence that is not relevant to any of the specific factors enumerated in Penal Code section 190.3].)

Additionally, appellant's mitigation case was weak in comparison. (See Statement of Facts, *ante*.) He did not present an expert to explain his childhood experiences or place them in larger context. There was therefore nothing to buttress the testimony of his family members, whose testimony was significantly impeached. (See, e.g., 25RT: 4410-4412, 4415, 4420.) His penalty phase presentation focused on his post crime religious conversion, as testified to by himself and four religious witnesses.

3. The Prosecution's Penalty Phase Argument Belied Its Earlier Insistence that All Three Defendants Were Equally Culpable

In addition, the prosecution's penalty phase argument belied its earlier insistence that all three defendants were equally culpable. When the prosecutor focused specifically on each defendant's mitigation case, she spent a little more than two pages on Contreras (30RT: 5309-5311), seven

pages on Navarro (30RT: 5341-5348), and almost 30 pages on appellant. (30RT: 5311-5341.) The prosecutor argued that appellant was the "hit man," the leader and "the most violent of the three defendants as evidenced by the prior six robberies." (29RT: 5274, 5278.) Appellant "tasted blood at the Woodley Market and he liked it." (29RT: 5276.) He killed Hoglund in such a way to show "he is the baddest of the bad and he will take a cop down no matter what." (29RT: 5277.) Appellant's cursing of "the officer for all eternity . . . . is truly evil." (29RT: 5278.)

Appellant objected to this line of argument, reminding the court that his original severance motion was based on the prosecution portraying him as the most cold, calculated and violent and therefore the most deserving of death. (30RT: 5296.) Although similar evidence might come in before separate juries, the jury would not be in a position of seeing one person as more deserving of death than the others. (30RT: 5296-5297.) The court overruled the objection (30RT 5297), and the following day, the prosecutor continued, telling the jurors that appellant was a "mass killer and leader of marauding robbers . . ." (30RT: 5311), and "the leader and the major participant in the robberies . . . [and] violence, and killed" Kim and Hoglund. (30RT: 5362.)

Finally, the prosecution's view of the case was demonstrated when the jury hung on penalty for the co-defendants and the prosecution subsequently agreed to LWOPP sentences without a waiver of appeal rights. (31RT: 5589.)

By denying appellant's motions, the trial court abused its discretion and allowed a fundamentally unfair penalty phase presentation against appellant.

E. Under Both California Law and the United States Constitution, the Trial Court's Failure to Sever the Trials of Appellant and His Co-defendants or Conduct Sequential Proceedings Was Error

1. Failure to Sever

Appellant's death sentence was the direct result of joinder. Evidence of the codefendants' backgrounds and comparisons between appellant and his codefendants would never have been permitted if appellant were tried separately. Under California law, only evidence pertaining to the statutory factors is admissible in aggravation. (See *People v. Boyd, supra,* 38 Cal.3d 762, 771-776; Pen. Code, § 190.3.) Evidence of a codefendant's lesser sentence has repeatedly been found inadmissible and irrelevant to a defendant's capital sentencing. (See *People v. Morris* (1991) 53 Cal.3d 152, 225, citing *People v. Carrera* (1989) 49 Cal.3d 291, 343.)

2. Sequential Penalty Trials

The court should have granted at least sequential penalty trials before the same jury. As the court itself recognized by the end of the guilt phase when it denied the motion for sequential penalty phases, time was no longer a consideration. Consecutive sentencing trials facilitate the individual consideration of each defendant's punishment and are minimally repetitive where, like here, the jury has already heard circumstance of the crime evidence and there is little other crimes evidence. (See *United States v. Taylor* (N.D. Ind. 2003) 293 F.Supp.2d 884, 889-900 [ordering sequential penalty phase hearings where most of aggravating evidence would be presented in guilt phase, presentation of other factors would be highly individualized and to the extent time would be taken for common evidence, it is "a small price to pay" to ensure individualized consideration of penalty]; see also *United States v. Catalan-Roman* (2005) 376 F.Supp.2d

96, 104-105 [collecting federal capital cases with joint trials but sequential penalty hearings].)

For these reasons, the trial court's failure to sever or try the case with separate juries or sequentially, was error under California law and the federal and state constitutions.

F. The Trial Court's Erroneous Failure to Sever the Trials of Appellant and His Co-defendants or Conduct Sequential Proceedings Was Prejudicial and Requires Reversal

In assessing a claim of improper denial of severance, an appellate court "[m]ust weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (*People v. Massie* (1967) 66 Cal.2d 899, 923.) As noted above, the errors here led to admission of irrelevant and inadmissible evidence that prejudiced appellant. Joinder is particularly prejudicial where, as here, the irrelevant mitigating evidence presented by the codefendants was more compelling than appellant's evidence, which viewed on its own may have been sufficient to move the jury to a life without possibility of parole sentence.

This evidence in aggravation consisted almost entirely of the circumstances of the crime. Appellant had no prior convictions for crimes of violence and most of the crimes took place in a six-week period. The evidence in aggravation was far less than that introduced in *People v. Gonzalez* (2006) 38 Cal.4th 932, 938-939, 962, in which this Court concluded that although the crime (a gang motivated murder of two people where defendant was the actual shooter) was egregious, a death verdict was not a foregone conclusion. "The aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates and

possession of a shank in jail), although serious, was not overwhelming." (*Ibid.*) Moreover, at about 22 years of age, appellant was quite young at the time of the crimes, another factor in his favor. (See Ex. 147 [DMV receipt; *People v. Sturm* (2006) 37 Cal.4th 1218, 1222, 1230, 1244 [noting the young age of the defendant in that case, who was at least 20 years old, as a factor to be considered in concluding that a death sentence in that case was not a "foregone conclusion" despite the murder of three people in robbery.)

The joint trial violated the Eighth Amendment, which requires that in determining whether a death sentence is appropriate the jury must make an "individualized determination" based on the character of the defendant and the circumstances of the crime. (See, e.g., *Zant v. Stephens* (1983) 462 U.S. 862, 879.) For these reason as well as all the reasons argued above, the failure to sever resulted in gross unfairness amounting to a denial of due process, requiring reversal. (See *People v. Mendoza, supra,* 24 Cal.4th 130, 162.)

For all of the foregoing reasons, appellant's Fifth, Sixth, Eighth and Fourteenth Amendments rights to fundamental fairness, a fair and reliable guilt determination and a reliable, fair and individualized sentencing proceeding as well as his corresponding rights under California law were violated as a result of the trial court's erroneous denial of appellant's severance motions. Reversal is required because there is no basis for the government to satisfy its heavy burden of proving that the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24-25.) Reversal is also required under the state standard for error at the penalty phase because there is a reasonable possibility that the errors affected the verdicts. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

XIV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REMOVING AN INTERPRETER BECAUSE SHE COMMUNICATED EMOTION WHILE INTERPRETING FOR APPELLANT AS HE TESTIFIED DURING THE PENALTY PHASE

On motion of the prosecutor, the interpreter translating for appellant during his testimony was relieved of her duties because her translation reflected the emotion relayed by the speaker. The removal of the interpreter was without legal basis and violated appellant's rights under the federal and state constitutions to an interpreter, to due process and a fundamentally fair trial, to testify in his own defense, to Equal Protection, to the effective assistance of counsel and to a reliable death verdict. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7, 14, 15, 16, 17.) His judgment of death must be vacated.

A. Factual Background

During the penalty phase, appellant testified on his own behalf. (26RT: 4517 et seq.) He testified on direct examination regarding his religious conversion and activities and previously held views and gave some details on the murders of Kim and Hoglund. (26RT: 4518-4539.) The prosecution's cross-examination began by contrasting the peace appellant found through God with the terror he imposed upon the victims and their families (26RT: 4548-4552), and elicited appellant's testimony regarding his failure to show remorse in a photo taken the day after Hoglund was killed (26RT: 4552-4554), whether he stole the cross he wore around his neck in another photo (26RT: 4554), lies he told prior to his arrest (26RT: 4558-4560), why he was unable to follow the commandment, "thou shalt not kill," (26RT: 4561-4563), and the shootings of Kim and

Hoglund. (26RT: 4563-4565.)

The court then broke for lunch and afterwards, the court stated it had learned that the prosecutor did not like the way the interpreter was interpreting the prosecutor's questions and appellant's responses. (26RT: 4567-4568.) The court agreed that while the prosecutor's voice was loud, the interpreter was "literally shouting the questions." (26RT: 4568.) Appellant countered that the prosecutor was shouting as well, but the court responded, "[t]he interpreter should just be interpreting, there should be no hand motions, simply the interpretation without a change in voice." (26RT: 4568-4569.) Over appellant's objection, the court switched interpreters. (26RT: 4569-4570.)

During the motion for new trial, appellant argued that the court's decision to remove the interpreter unlawfully interfered with his presentation of mitigation evidence. (31RT: 5570.) The court stated that "no witness has a right to have an interpreter act out their emotions" and that "it was the inflection, the emotional addition to the statements, as well as the gestures" that formed its basis for removing the interpreter. (31RT: 5594-5595.)

B. Applicable Legal Principles

Article I, section 14, of the California Constitution provides in pertinent part: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." The right to an interpreter is also guaranteed by a number of state and federal constitutional rights, including the right to due process, confrontation, effective assistance of counsel and to be present at trial. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1011-1012; see also *United States v. Mayans* (9th Cir. 1994) 17 F.3d 1174, 1181 [interpreter may be required to

effectuate the defendant's Fifth Amendment right to testify on his own behalf].)

The competence of the interpreter is ordinarily for the trial court to determine. (*People v. Mendes* (1950) 35 Cal.2d 537, 543; see also *People v. Rebolledo* (1949) 93 Cal.App.2d 261, 264 [selection of an interpreter is within the discretion of the trial court].)

C. The Court's Removal of the Interpreter and Order to Replacement Interpreters to Interpret Without Changes in Tone Was Contrary to the Applicable Standards for Interpreters

Verbal communication depends on more than just spoken words. (*Riley v. Murdock* (E.D.N.C. 1994) 156 F.R.D. 130, 131.) In addition to words, people communicate through "facial expressions, voice inflection and intonation, gestures, [and] 'body language,'" which may all express a message to persons present. (*Ibid.*) Intonation in particular is a critical aspect of communicating meaning. (See, e.g., *United States v. Hawkins* (N.D. Tex. 2008) 554 F. Supp. 2d 675, 680-681 [due to defendant's intonation and demeanor, his statement to officers after *Miranda* rights, "could I get my lawyer to come now?" interpreted as mere request for information].)

In addition to understanding and translating the words spoken by an individual, an interpreter must be able "to understand and reflect in the target language the nuances, intonations of speech, and jargon used by the speaker." (Annual Survey of American Law (1997) Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, p. 294 [hereinafter Report on Working Committees]; accord, Grabau, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation* (1996) 30 New England L.Rev. 227, 242, fn. 49

[interpreter required to render verbatim the form and content of the linguistic and paralinguistic elements of a discourse, including all pauses, hedges, self-corrections, hesitations, and emotion as they are conveyed through tone of voice, word choice and intonation[57]].)

This principle that interpretation includes intonation and other nonverbal elements of communication has been adopted in California via the standards governing interpreters.

> Humans convey their emotions not only in words but also in facial expressions, posture, tone of voice, and other manifestations. These nonlinguistic means of expression are very closely tied to culture and language, so when people do not speak the same language they may misunderstand the emotional content of a message.

(California Administrative Office of the Courts, Professional Ethics and the Role of the Court Interpreter (1994[58]) pp. 8-9 [hereinafter "AOC Interpreter Ethics"].)

According to the AOC Interpreter Ethics, a court interpreter "has an obligation to convey emotions that seems natural in the target language . . . . Thus, when an aggressive attorney is bearing down on a witness for the sake of intimidation, you should be equally forceful." (AOC Interpreter Ethics at p. 9.) These guidelines also cautioned that an interpreter may need to convey emotions expressed by a witness in a "slightly attenuated form" if a witness expresses emotions in an overt way such as crying or screaming

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[57] Tone is "the pitch of a word often used to express differences of meaning." Intonation is a "manner of utterance; specifically: the rise and fall in pitch of the voice in speech." (Merriam Webster Dictionary <http://www.merriam-webster.com/dictionary> [as of April 18, 2011].)

[58] While this publication itself is undated, the copy at the Hastings Law Library is dated 1994.

out loud, but stressed that the interpreter should not "merely repeat[] words like an automaton." (*Ibid.*) Thus, contrary to the court's ruling below, it was appropriate and correct for the interpreter to reflect the prosecutor's intonation during appellant's cross-examination.

Regarding gestures, the AOC Interpreter Ethics explained that imitating a gesture may mischaracterize it. (AOC Interpreter Ethics at p. 9.) Because the jurors and judge can see a gesture for themselves, interpreters were therefore advised to refrain from reproducing it. (*Id.* at pp. 9-10.)

Pursuant to these standards, the court was incorrect in stating that the interpreter should provide "simply the interpretation without a change in voice." (26RT: 4568.) While the court could have requested the interpreter to be less dramatic in her tone or to refrain from repeating the prosecutor's gestures, it was error for the court to remove an interpreter who was attempting to accurately translate both the words and intonation of the prosecutor.

The court's other reason for removing appellant's penalty phase testimony interpreter, i.e, "to take the pressure off the interpreter," also lacked legitimacy. (26RT: 4569.) This rationale had no legal basis. Moreover, any "pressure" on the interpreter came from the prosecutor, who during the lunch hour reportedly had "verbally attacked" the interpreter and threatened to have her removed from the case. (26RT: 4567, 4569.) It was improper to remove the interpreter based upon the prosecutor's misconduct. (See Argument XVIII, *post*, regarding prosecutorial misconduct and *United States v. Anguloa* (1979) 598 F.2d 1182, 1184 [prosecutor's ex parte replacement of interpreter because of perceived incompetence without informing opposing counsel and court constituted misconduct].)

The court's removal of the interpreter for hand motions or gesturing,

which were not described for the record, was also erroneous and demonstrated an improper bias toward the prosecution. (26RT: 4568, 31RT: 5594-5595.) On other occasions, when the defense objected to interpreter gestures, the court simply admonished the interpreter or requested that the defense point out problems. (14RT: 2281-2282; 17RT: 2773-2774.) The court thus ruled inconsistently and in a manner that prejudiced appellant: in this case, the court should similarly have admonished appellant's interpreter but not removed her.

D. The Ruling Violated Appellant's Right to Present and Have the Sentencer Fairly Consider Mitigating Evidence

The court's ruling prohibited the interpreter from translating the emotion conveyed by the speaker, which, as explained above, limited and distorted the meaning that could be communicated by the testifying witness. The ruling thereby violated appellant's right to present and have the sentencer fairly consider relevant mitigating evidence. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 114-115; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; see also *People v. Mickey* (1991) 54 Cal.3d 612, 693 [any barrier to the jury's consideration of relevant mitigating evidence constitutes federal constitutional error].)

In *United States v. Nippon Paper Industries* (Mass. 1998) 17 F.Supp. 2d 38, a criminal antitrust action, the court recognized the significance of the emotional content of a translated cross-examination. The court noted that "during the Government's heated examination" of a witness, "the prosecution's sharp language and tone were tempered by the time it took to translate questions, the cadence of the interpreter and the complexities associated with translating rhetorical questions into a language that is structured differently than English." (*Id.* at p. 41, fn. 5.)

This situation caused concern for the *Nippon Paper Industries* court because it could lead to dilution of the defendant's confrontation right. (*United States v. Nippon Paper Industries*, *supra,* 17 F.Supp.2d at p. 41.) The court recognized that the prosecutor's "sharp language," tone and rhetorical questions were an integral part of the cross-examination and that the process of interpretation could remove key elements, so that the questions the witness actually heard and responded to would be diminished in emotional content and thus different. (See *ibid.)*

The court below failed to recognize these distinctions. The prosecutor questioned appellant using a sharp tone during a heated cross-examination. (26RT: 4569.) The court improperly denied the defense requests to admonish the prosecutor for his very emotional cross-examination of appellant and then compounded the error by ordering these emotional elements removed from the interpretation. (26RT: 4555-4556, 4569.) This meant that the jurors saw, heard and were able to understand the full impact of the cross-examination, but appellant was not. This left him at a significant disadvantage in terms of defending himself on cross-examination.

In fact, the prosecutor's tone was so extreme during appellant's cross-examination that early on, during a side bar, the court asked the prosecutor if he wanted to "calm down for a second." (26RT: 4555.) The prosecutor refused, saying "I need this energy." After the interpreter was removed at the start of the afternoon session on the first day of appellant's testimony, and the court had instructed the interpreters to interpreter "without a change in voice" (26RT: 4568-4569), the prosecutor continued his sarcastic and attacking cross-examination of appellant. (See, e.g., 26RT: 4574, 4581-4583, 4595-4596, 4618.) However, appellant no longer

had the benefit of hearing additional cues to the emotional content of the prosecutor's questions. Not surprisingly, he had difficulty at times understanding the questions (see, e.g., 26RT: 4562, 4563, 4600, 4603, 4609), and responding to the sarcasm and rhetorical questions. (See, e.g., 26RT: 4608, 4615.)

Cross-examination, with its emotional embellishments, is an example of a type of verbal communication in which "the words themselves do not autonomously represent the speaker's meaning. 'Speakers in face-to-face situations circumvent this ambiguity by means of such prosodic and paralinguistic cues as gestures, intonation, stress, quizzical looks, and restatement.' *Jurors and trial judges are presumed to be able to decipher these cues.*" (Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction* (2004) 57 Vand. L. Rev. 437, 446 [footnotes omitted, italics added].) Thus, while the jury had full access to the prosecutor's meaning, because the court order had the effect of stripping paralinguistic cues such as intonation and stress from the interpretation of the prosecutor's questions, appellant did not. In order to testify on his own behalf and best present his case in mitigation, appellant too should have had the opportunity to understand the entire context of the prosecutor's questions and respond accordingly.

After the court prohibited the interpreter from expressing the emotional content of the speaker's words, appellant continued his testimony and three additional defense witnesses testified through interpreters: prison ministry coordinator Arturo Talamante, 26RT: 4619; pastor Pacifico Diaz, 26RT: 4651; and appellant's sister, Maria Argentina Sanchez Fuentes. (27RT: 4763.) The prohibition against the interpreters expressing emotion as they interpreted for these witnesses inured to the benefit of the prosecutor

for the same reasons as explained above. The court's erroneous prohibition on the interpreter's conveying emotion when interpreting for him and his mitigation witnesses, especially when the same prohibition did not apply to testimony provided by prosecution witnesses, violated his right to present and have the jury fairly consider relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments.

E. The Error Also Violated Appellant's Right to an Interpreter and to Due Process, Equal Protection, a Fundamentally Fair Trial and to Present a Defense

Although removal of an interpreter is within the trial court's discretion (*People v. Mendes* (1950) 35 Cal.2d 537, 543), here the court's removal of the interpreter was an abuse of discretion that violated appellant's rights under the federal and state constitutions.

The trial court's unjustified removal of the interpreter and the arbitrary and improper limits it imposed upon interpretation violated appellant's rights under the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment to a "meaningful opportunity to present a complete defense." (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325; *Ake v. Oklahoma* (1985) 470 U.S. 68, 76 and fn. 3 [Fourteenth Amendment's due process guarantee of fundamental fairness requires states to assure defendant has a fair opportunity to present his defense]; Cal. Const. art. I, §§ 7, 14, 15.) The trial court's ruling imposed a different standard upon testimony given through an interpreter and thus violated appellant's rights under the Equal Protection Clause of the 14th Amendment and article 1, sections 7, 14 and 31 of the California Constitution. (See also *Castro v. State of California* (1970) 2 Cal.3d 223,

242 [California Constitution's English literacy requirement for otherwise qualified voters violated right to the equal protection of the laws].)

The ruling also violated appellant's rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, because states cannot exclude anything from the sentencer's consideration that might serve "as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plurality opinion).)

The court's error created a risk that the jury's death verdict was not a reliable determination that death was the appropriate punishment, violating appellant's rights under the Eighth Amendment and article 1, section 17 of the California Constitution. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 587.) In addition, the trial court's arbitrary deprivation of appellant's right to an interpreter under state law violated the Due Process Clause of the Fourteenth Amendment. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.)

F. The Removal of Appellant's Interpreter and the Prohibition Against the Witness Interpreters Relaying the Witnesses' Emotional Content During the Testimony of Appellant and Other Penalty Phase Defense Witnesses Prejudiced Appellant

The fact that appellant faced a barrage of shouted and belittling questions but lacked the nonverbal cues needed to understand and respond appropriately was especially prejudicial because appellant's testimony was the centerpiece of the defense case at penalty. Although family members testified, the major defense penalty phase theme was appellant's jailhouse religious conversion, which was presented through his testimony and then corroborated through four religious witnesses. (See, e.g., 25RT: 4470-4474 [appellant's deep spiritual growth and enthusiasm in the Word observed by

Pentecostal pastor Julio Ruiz]; 26RT: 4619-4624 [appellant's high level of love for God observed by Arturo Talamante, Hispanic Coordinator for the Psalm Prison Ministry]; 26RT: 4651-4656; 27RT: 4677-4678 [sincerity of appellant's conversion according to Pacifico Diaz, priest and jail chaplain]; 27RT: 4698, 4705-4712 [sincerity of appellant's conversion according to Brother Luke Packel, Catholic missionary]; see also 25RT: 4406 and 4444 [positive impact of appellant's conversion on appellant's brother Francisco].)

The jury was instructed with CALJIC No. 2.20, according to which they could assess appellant's credibility based upon "the character and quality" of his testimony, his "demeanor and manner . . . while testifying," and/or his "attitude . . . toward the giving of testimony." (11CT: 3101; 21RT: 3678.) This Court assumes the jury followed the instructions. (*People v. Cook* (2006) 39 Cal.4th 566, 610.) That a witness responds both to the words and to the manner in which he is cross-examined and has his credibility judged accordingly is well-established. (See e.g., *In re Bell* (2007) 42 Cal.4th 630, 640; *United States v. Yida* (9th Cir. 2007) 498 F.3d 945, 951.) Studies have shown that failure to accurately reflect mood, emphasis or the formality of speech can have a significant effect on the credibility of a witness and incorrect interpretations of small but important bits of testimony can affect the outcome of a case. (Report of the Working Committees, *supra,* at p. 296.) Appellant's ability to understand and respond to the true import of the prosecution's cross-examination was hampered by limits on the interpreter, which had a deleterious impact upon his demeanor and manner while testifying, leading to a more negative assessment of his credibility.

Appellant's death sentences must be vacated because there is no

basis for the government to satisfy its heavy burden of proving -- beyond a reasonable doubt -- that the trial court's errors did not contribute to the jury's verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24-25.) Reversal is also required under the state standard for error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), because there is a reasonable possibility that even a single juror might have reached a different decision absent the errors. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984.)

XV.

THE TRIAL COURT PREJUDICIALLY ERRED BY ADMITTING AT THE PENALTY PHASE AN ALLEGED OUT-OF-COURT STATEMENT BY APPELLANT THAT HE HAD KILLED EIGHT OR NINE OTHER PEOPLE

Over appellant's objection, the trial court admitted 13-year-old Rosa Santana's statement that appellant said he had shot eight or nine people in his country. Admission of the statement at the penalty phase violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution and reversal is required.

A. Factual Background

The prosecutor sought to admit Santana's preliminary hearing testimony that she overheard appellant say he had already shot eight or nine people as relevant to "state of mind" and intent as to the murders. (19RT: 3200, 3202.) Appellant argued that the testimony was hearsay, irrelevant, unreliable and more prejudicial than probative. (19RT: 3200, 3242; 20RT: 3387-3389.) The prosecution also sought to introduce an audio tape and transcript of Santana's initial statement to the police, in which Santana

stated that "he" said "he's killed like eight or nine persons." (19RT: 3195, Vol.2, 6SCT: 217.) Appellant objected to admission of the tape at the preliminary hearing on various grounds and renewed his unsuccessful objections at trial. (See, e.g., 19RT: 3195-3198, 3222; 2CT: 423-427.)

The court admitted both Santana's preliminary hearing testimony and the tape at the penalty phase, though not the guilt phase, ruling that the prejudice calculus under Evidence Code section 352 was different for the former. (19RT: 3201-3206, 3241-3243.) The court ruled the statement was relevant under factor (a) as evidence of appellant's state of mind at the time of "the crime" (which crime was unspecified) or shortly thereafter "even if it's puffing." (19RT: 3205.) Following this ruling, appellant chose to have the statement come in at the guilt phase, rather than having that portion of the testimony read at the penalty phase. (19RT: 3246.) The court denied appellant's second and third requests to prohibit the introduction of this evidence (19RT: 3242-3246; 20RT: 3387-3390), and again reiterated the importance of its ruling on the issue when it denied appellant's motion under section 190.4, subdivision (e). (31RT: 5560, 5595-5596.)

At the guilt phase, Exhibit 47, an audio tape of Santana's statement to the police was played as the jurors read along on Exhibit 48, a transcript of the tape. (20RT: 3414-3415.) The relevant portion of the transcript reads:

Q: You said something earlier about Hector told Morro that the cops were looking for him.[59]
A: Yes. But Morro seemed like he did not care.
Q: Were you there when – when he told him?
A: Yes, I went with 'em in the car.

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[59] Santana knew Navarro as "Hector" and appellant as "Morro." (20RT: 3396-3397.)

Q: Did he say that he'd shot anybody before?
A: Yes.
Q: What did he say?
A: He's killed about eight or nine persons.
Q: So he didn't care that the police were after him.
A: He said still they wouldn't catch him.
Q: They won't catch him. Was he planning on leaving the area –
A: Yes.
Q: – or the country?
A: He was planning to leave to El Salvador.

(Vol.2, 6SCT: 217.)

The court admonished the jury that the reference in the tape to appellant killing eight or nine people was not offered for its truth, but as evidence of his state of mind at the time the statement was made; there was no evidence that there were eight or nine people "or anybody else killed." (20RT: 3415.) The court also generally instructed the jury at the end of the guilt phase, but not the penalty phase, to consider any evidence introduced for a limited purpose for that purpose only. (CALJIC No. 2.09; 11CT: 3100; 21RT: 3674.)

The jury also heard Santana's preliminary hearing testimony that when appellant and others came back from what she believed to have been a robbery, they were all talking at the same time. (20RT: 3488-3489.) After saying he shot the police officer, appellant mentioned that "[h]e had already shot like eight or nine people in his country." (20RT: 3489.)

During his cross-examination, appellant denied making the statement Santana said he made. (26RT: 4609.) The prosecution argued that appellant's denial was a lie, which, along with bragging to someone they barely knew, was evidence of lack of remorse, demonstrating his character, as relevant to the nature and circumstances of the crimes. (29RT: 5287-

5288; 30RT: 5326.)

B. Applicable Law

Penal Code section 190.3, factor (a), authorizes the introduction of evidence regarding "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Penalty phase evidence must meet the heightened reliability requirement of the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) The court retains discretion at the penalty phase to exclude particular evidence that is irrelevant, misleading, cumulative or unduly inflammatory. (*People v. Box* (2000) 23 Cal.4th 1153, 1201; *People v. Edwards* (1991) 54 Cal.3d 787, 831.)

C. The Trial Court Abused Its Discretion and Violated Appellant's Constitutional Rights When It Admitted Santana's Statement That Appellant Had Already Killed Eight or Nine People

The court erred in admitting the statement because it was unreliable, irrelevant and prejudicial.

1. The Statement Was Unreliable

The statement that Santana attributed to appellant about having previously killed eight or nine people was unreliable because of the content of the initial statement itself, the circumstances under which it was obtained and those surrounding Santana's subsequent testimony.

As appellant argued below, when the statement about already having killed eight or nine people initially appeared in Santana's taped statement, it was unclear whether appellant or Navarro had said it and there was no indication of when the statement was made. (20RT: 3388-3389; Ex. 48, p. 223.) The surrounding dialogue was confusing and, with its dearth of

proper nouns, had a "who's on first" quality to it.[60] According to Santana, the person who made the statement was planning to returning to El Salvador (*ibid.*), which was Navarro's homeland, not appellant's. (*Ibid.*, 27RT: 4794-4795.) It was not until the preliminary hearing that the statement was cleaned up and Santana testified in a manner that separated her initial statement into two unrelated portions: she said that appellant made the statement at the apartment after returning with money and that at an unspecified point Navarro said he was going to El Salvador. (20RT: 3405, 3489.)

Santana was 13 years old when she was arrested with Navarro two days after the George's Market crimes and questioned by various police officers. (13RT: 2175-2176; 20RT: 3467-3470.) The susceptibility of underage individuals to police pressure has long been recognized by case law. (See, e.g., *J.D.B. v. North Carolina* (2011) ___ U.S. ___ [131 S.Ct. 2394, 2397] and cases cited therein.)

Moreover, Santana's role in the underlying events was such that the court instructed the jury on accomplice liability. (20RT 3598; 21RT: 3712-3716; 11CT: 3109-3110.) As California law recognizes, accomplice testimony is to be viewed with "care, caution and suspicion because it comes from a tainted source and is given in the hope or expectation of leniency or immunity." (*People v. Wallin* (1948) 32 Cal.2d 803, 808; see also Pen. Code, § 1111 [prohibiting a conviction based on accomplice testimony without corroboration connecting defendant to the crime.) The

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[60] "Who's on First?" is a skit popularized by comedians Abbott and Costello. Abbott identifies players on a baseball team to Costello, who is confused by their ambiguous names. (<http://www.baseball-almanac.com/humor4.shtml> [as of Nov. 9, 2011].)

circumstances surrounding Santana's initial statement make it highly untrustworthy, due to her age, fear, police pressure, coercion or a combination of these factors.

The events following Santana's taped statement cast further doubt upon its reliability as it appeared in her testimony. Santana was arrested for taking part in a robbery and was spirited into court at appellant's preliminary hearing. (1CT, 3/24/93 RT: 6-7, 15-16; 2CT: 350, 353.) At the prosecution's insistence, she was held in custody until she completed her preliminary hearing testimony. (19RT: 3180.) At the preliminary hearing, she was considered a hostile witness and ultimately testified under a partial grant of immunity after invoking her Fifth Amendment right. (3/24/93RT: 3, 15-16; 2CT: 368, 373.) On the stand, she repeatedly consulted with her attorney and had trouble answering questions on her own (2CT: 413, 421, 428-429, 440-442, 473, 462), and admitted lying to the authorities about her name and age when arrested. (20RT: 3420.) Although she denied under oath that she was receiving anything in exchange for her testimony (20RT: 3417), by the time of trial it was known that her sentencing in her own robbery case was put off until after she testified at appellant's trial. (20RT: 3541-3542.)

Based on all the evidence above, demonstrating Santana's immaturity, dishonesty, evasiveness and difficulties expressing herself, combined with the tremendous pressure put on her by the prosecution both at the time of her initial interrogation and at the preliminary hearing, the statement at issue cannot be deemed sufficiently credible or reliable for use at appellant's penalty trial.

2. The Statement Was Irrelevant and More Prejudicial Than Probative

This Court has allowed the admission at the penalty phase of evidence of a defendant's statements about the capital murder under factor (a). In *People v. Ramos* (1997) 15 Cal.4th 1133, 1163, over a relevancy objection, the prosecution presented the prior testimony of Lam, a jail house informant, who had died by the time of trial. (*Ibid.*) Lam testified that he heard the defendant admit to shooting the victims and enjoying hearing them beg for their lives. (*Ibid.*) Noting that a surviving victim had testified that he and the decedent had begged for their lives, the Court rejected defendant's claim that the testimony was irrelevant to any statutory factor in aggravation under section 190.3, factor (a), reasoning that it "reflected directly on defendant's state of mind contemporaneous with the murder." (*Id.* at p. 1164.) In *Ramos,* in contrast to appellant's case, the statement at issue concerned the capital murder and there was corroborating evidence such that this Court could draw a direct link between the murder and the statement.

In *People v. Michaels* (2002) 28 Cal.4th 486, 533, the defendant claimed in his confession that he was a contract killer and had committed 10 to 15 contract murders. The prosecutor argued that the statements showed that one of the motives for the capital murder was to enhance the defendant's street reputation as a dangerous man. (*Ibid.*) This Court approved admission of the evidence under factor (a) because it was admitted to show mental state and motive, rather than as improper evidence of other crimes as defendant suggested. (*Id.* at p. 534.)

Michaels is also distinguishable from appellant's case. Motive was closely tied to the circumstances of the crime, so it strengthened the

probative nature of the statement about committing contract murders over its prejudicial nature. In contrast, there was no connection between appellant's purported statement and the crime at issue - the Hoglund shooting.

Appellant's purported statement was not probative, but it was highly prejudicial because "it might lead the jury to believe that defendant had committed other murders . . . ." (*People v. Michaels, supra,* 28 Cal.4th 486, 535.) Evidence suggesting that appellant committed eight or nine other murders is "of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to punish him because of the jurors' emotional reaction." (See *People v. Branch* (2001) 91 Cal.App.4th 274, 286.) The evidence was unduly prejudicial and should not have been admitted because of the substantial likelihood the jury used it for an improper purpose. (See *ibid.*)

D. The Limiting Instructions Were Inadequate and the Prosecutor Used the Statement for an Improper Purpose

In finding the defendant's statement in *Michaels* admissible, this Court pointed out that the prosecutor used the statements only for the allowable purpose, i.e., arguing that the defendant's confession showed his motive was to enhance his reputation. (*People v. Michaels, supra,* 28 Cal.4th 486, 535.) Here, however, the prosecutor asked appellant during cross-examination at the penalty phase if he felt "in a humorous mood as you recalled killing those eight or nine other people in your country." (26RT: 4609.) As the court recognized, the prosecutor asked the question "with the force and effect as if he knew that to be the truth." (27RT: 4742-4743.) At appellant's request, the court again told the jury the statement

was not admitted for its truth, there being no evidence that appellant had killed other people. (28RT: 4877-4878.) The prosecutor did not stop there, however, but carefully timed other comments, questions and argument to lead the jury to suspect or believe the statement was true.

The prosecutor was permitted to ask appellant whether he had been involved in a shoot-out between December 31, 1991, and April 18, 1992. (26RT: 4595-4596.) The prosecutor also improperly and repeatedly asked appellant's sister what appellant was doing in Honduras in early 1992. (27RT: 4775-4782.) The prosecutor then argued at the penalty phase that petitioner was a "mass killer" (30RT: 5311), who had denied talking to Santana "about the eight or nine people that he killed." (30RT: 5325.) The prosecution's improper use of the evidence after the court's limiting instruction therefore removed "any reasonable expectation" that the jury would limit their consideration to proper purposes. (*United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.)

E. The Error Requires Reversal

There is a reasonable probability that absent Santana's statement and surrounding and resulting prejudice, the result at the penalty phase would have been different. Appellant presented evidence of growing up in poverty in a third world country with few opportunities in the midst of a broken family. (25RT: 4403, 4450, 4400-4402, 4441-4442, 4456-4457; see *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1134 [recognizing poverty and dysfunctional family dynamics as significant mitigating factors].) Appellant's own testimony and that of four religious witnesses evidenced his reformation, faith and desire to help others through his religious beliefs. (26RT: 4518-4521, 4540-4541 and Statement of Facts, infra.) As this Court has recognized, evidence from religious witnesses about the ability of life-

sentenced individuals to reform and change can make a difference in outcome at the penalty phase. (See *People v. Gonzalez* (2007) 38 Cal.4th 932, 953-954, 962 [reversing penalty phase retrial where due to discovery violation, defendant did not present testimony from priest regarding capacity for life prisoners to change that he had presented in first penalty trial where jury hung].) Moreover, even mitigation evidence that is not "overwhelming" may make the difference between a life or death verdict. (*Id.* at p. 962.)

Santana's improperly admitted statement failed to meet the "heightened reliability" requirement of the Eighth Amendment as described in *Beck v. Alabama, supra*, 447 U.S. 625, 637-638, and its progeny. It fails under this test both because of its unreliable nature and because of its dubious probative value in assisting the jury in properly reaching its decision as to whether appellant should live or die. The improper admission of the evidence also offended the due process clause of the Fourteenth Amendment because it was so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 913 and *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) In addition, violation of Evidence Code section 352 in this context also violated the Fourteenth Amendment by depriving appellant of a state-created liberty interest affecting appellant's substantial rights. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

State law error at the penalty phase of a capital trial is prejudicial if there is a "reasonable possibility" that the error affected the verdict. Appellant submits that there is more than a "reasonably possibility" under the state law standard for penalty phase error that the inflammatory

evidence affected the jury's death verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) Moreover, under the federal constitutional standard, the prosecution cannot show that error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The judgment must therefore be reversed, especially when viewed in conjunction with the other penalty phase evidentiary errors described in this brief. (*People v. Hill* (1998) 17 Cal.4th 800, 844-846.)

XVI.

THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT UNDER SECTION 190.3, FACTOR (b)

Over appellant's objection, the court admitted the Rod's evidence as criminal activity involving violence within the meaning of section 190.3, factor (b), even though it was insufficient to establish the elements of an attempted robbery or possession of a stun gun indicating express or implied violence. The erroneous admission of this evidence under factor (b) violated appellant's state statutory rights and his rights under both the state and federal constitutions to due process, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

A. Factual Background

Over defense objection, the court permitted the prosecution to use the Rod's Coffee Ship evidence from the guilt phase, described more fully above in Argument VII, as evidence in aggravation under section 190.3, factor (b), at the penalty phase. Appellant argued that the evidence did not prove an attempted robbery: appellant and his companions went into Rod's late at night and ordered coffee; the owner became suspicious and called the

police; the police found guns and a stun gun in the men's cars. (14RT: 2258-2259.) Appellant proffered alternate scenarios, e.g., they could have been casing it for a later robbery or just getting coffee, but in any case, there was no evidence appellant went beyond the planning stage of a crime. (14RT: 2259; 24RT: 4180.) The court ruled there was sufficient evidence of a robbery attempt, citing the men's "obvious artificial presence" in the restaurant, their mingling in the parking lot when there was no reason to remain, the location of the cars, including one car blocking the driveway and the possession of weapons. (14RT: 2259; 24RT: 4180-4181.)

Appellant also argued that the stun gun possession was a nonviolent act, but the court ruled there was "enough for the attempted robbery, and by definition it includes definition of the stun gun as implied violence" (29RT: 5086), even if the jury found insufficient proof of an attempted robbery. (29RT: 5086-5087.)

The court instructed the jury that the Rod's evidence was introduced for the purpose of showing that appellant had "committed the following criminal acts relating to Rod's Coffee Shop: attempted robbery, and possession of a stun gun, such acts which involved the express or implied use of force or violence or the threat of force or violence." (12CT: 3502; 29RT: 5246-5248.)

B. Applicable Law

Factor (b) of section 190.3 permits the introduction of evidence of the presence or absence of criminal activity by the defendant that involved the express or implied use or attempted use of force or violence. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.) The trial court must first determine whether there is substantial evidence of other violent criminal activity, i.e., evidence that would allow a rational trier of fact to find the

existence of such activity beyond a reasonable doubt. (*People v. Griffin* (2004) 33 Cal.4th 536, 584-585.) Evidence is substantial if it is reasonable, credible and of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139.) The Court reviews the trial court's ruling to admit factor (b) evidence for abuse of discretion. (*People v. Griffin, supra,* 33 Cal.4th at p. 587.)

"An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission. Under general attempt principles, commission of an element of the crime is not necessary. As such, neither a completed theft nor a completed assault, is required for attempted robbery." (*People v. Medina* (2007) 41 Cal.4th 685, 694-95 (citations omitted).)

C. There Was Insufficient Evidence of an Attempted Robbery to Allow a Rational Fact Finder to Find the Existence of Such Activity Beyond a Reasonable Doubt

To distinguish preparation from the overt act necessary for an attempted robbery when faced with a scenario that lacks an unequivocal action (such as something as direct as the robber demanding property), courts have relied upon factors that otherwise make manifest the defendant's intent to act immediately. For instance, in *People v. Anderson* (1934) 1 Cal. 2d 687, 690, this Court held that the defendant's "conduct in concealing the gun on his person and going to the general vicinity of the Curran Theatre with intent to commit robbery" constituted "mere acts of preparation." However, when the defendant entered the theater and pulled out the gun, his conduct went beyond preparation and "constituted direct and positive overt acts that would have reasonably tended toward the perpetration of the robbery had the gun not exploded, for one reason or another, and frustrated the plan to consummate the offense." (*Id.* at p. 690;

see also *People v. Amaya* (1953) 40 Cal.2d 70, 80 [sufficient evidence of attempted robbery where defendant opened door to store, pulled a handkerchief over part of his face, took out a gun, then ran and jumped in a waiting car to escape].)

Where no weapons are drawn, courts look for other overt acts. In *People v. Bonner* (2000) 80 Cal.App.4th 759, evidence showing that after making detailed preparations to rob hotel managers, the defendant went armed to a hotel, put on a mask, waited in hiding along the managers' expected route and gave up only when discovered was sufficient to sustain convictions for attempted robbery. (*Id.* at pp. 761-763, 767.) In *People v. Vizcarra* (1980) 110 Cal.App.3d 858, the court held there was a sufficient direct act to support convictions for attempted robbery where the defendant approached a liquor store with a rifle and was attempting to hide on a pathway immediately adjacent to the liquor store when a customer observed him. (*Id.* at p. 862.)

Here, there were no masks, no hiding and no display of weapons. Rather, a group of people went into the restaurant and some of them ordered coffee, which they did not finish. After paying the bill and leaving, the men paused in the parking lot prior to getting in their cars to go their separate ways. (18RT: 3015-3017.) Individually and together, these are all common activities which undoubtedly occur many times over the course of a day in the Los Angeles area and elsewhere. Notably, the men were already in their cars and starting to leave the lot when Sgt. Kirby pulled up 30 seconds after receiving the broadcast. (18RT: 3028-3029.) There was no evidence that it was his arrival that prompted the men to leave: it was only after observing the cars leave the lot that Kirby turned on his red light. (18RT: 3029.)

Even if appellant and his companions were, as restaurant manager Wellman believed, "casing" Rod's for a robbery (18RT: 3019), such an act constitutes only planning or preparation. "Case" means "to inspect or study especially with intent to rob." (<http://www.merriam-webster.com/dictionary/casing> [as of December 22, 2010].) The classic case of *Terry v. Ohio* (1968) 392 U.S. 1, illustrates where "casing" fits on the spectrum of conduct ranging from harmless to criminal. In *Terry*, the defendant was appealing a conviction for carrying a concealed weapon. An officer observed Terry and another man for 10 to 12 minutes, as they took turns walking back and forth looking into a store window, stopping to confer with each other and a third man. (*Id.* at pp. 6, 23.) Concerned that they were casing the store to rob it, the officer stopped the men and patted down Terry, finding a gun. (*Id.* at pp. 6-7.) This scenario led to the approval of the investigatory *Terry* stop, whereby an officer with a reasonable suspicion that "criminal activity may be afoot" supported by specific, articulable facts that are reasonably consistent with criminal activity, may stop and frisk a suspect. (*Id.* at p. 30; *People v. Wells* (2006) 38 Cal.4th 1078, 1083.)

The "casing" activity in *Terry* was quite obvious, yet the premise of the case was that there was not even probable cause for arrest (reasonable grounds to believe that a criminal venture has been launched or is about to be launched) until the officer found a gun on Terry during the pat-down. (*Terry v. Ohio, supra, 392 U.S.* at pp. 15, 26, 39.) Notably, like appellant after his arrest at Rod's, Terry was charged with a weapons offense, not attempted robbery. (See *id.* at pp. 6-7.)

The prosecution's refusal to file attempted robbery charges against appellant after his arrest at Rod's due to insufficiency of the evidence, (18RT: 2988), further supports appellant's position. Because the most a

rational fact finder could find beyond a reasonable doubt was mere preparation, the court abused its discretion when it admitted the evidence under factor (b) as an attempted robbery. (See *United States v. Bolden* (D.C. Cir. 1975) 514 F.2d 1301, 1307, fn. 10 [even if defendants were casing store, the requisite intent to rob would not yet have arisen because felony must have progressed beyond mere preparation to an indictable attempt before the homicide occurs].)

D. The Presence of a Stun Gun in the Same Car As Appellant After He Left Rod's Coffee Shop Was Not an Implied Use or Threat of Violence

Appellant argued that by itself possession of a stun gun was a nonviolent act inadmissible under factor (b). (29RT: 5086-5087.) The court ruled that there was implied violence and that the jury could consider the alleged stun gun possession as either part of an attempted robbery, or by itself, as long as the jurors were convinced that appellant "possessed it for all the wrong purposes." (29RT: 5087.) The trial court erred, because simple possession of the stun gun was not inherently violent and appellant's purpose was immaterial because the surrounding circumstances did not imply threats of violence.

As with possession of a firearm, it is the surrounding circumstances that dictate whether the possession is an act committed with actual or implied force or violence for purposes of factor (b). (See *People v. Bacon, supra,* 50 Cal.4th at p. 1127.) These additional circumstances include the fact that a person is in custody, the inherent dangerousness of the weapon, whether the circumstances suggested the defendant would use it and the illegal nature of the weapons possession. (*Ibid.*) In *People v. Garceau* (1993) 6 Cal.4th 140, 203, the defendant was an ex-felon in possession of an

"arsenal" including a machine gun, silencer and concealable handguns. The Court found "such an arsenal" to be factor (b) evidence. (*Ibid.*) In *People v. Michaels* (2002) 28 Cal.4th 486, 531-536, defendant illegally possessed knives and a concealed handgun in his car. The implied threat to use force or violence stemmed from the illegal possession, the type and size of various knives, which were "normally used only for criminal purposes," the use of the same gun in a robbery and the defendant's use of a knife to kill the victim. (*Id.* at p. 536; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1235-1236 [evidence of possession of a gun admissible under factor (b) where defendant was an escaped ex-felon fleeing a murder charge when discovered with a loaded firearm].)

The circumstances under which weapon possession offenses can be deemed crimes of violence under factor (b) do not exist here. First, appellant was not in custody. Second, even if appellant did possess[61] the stun gun found in the car he was driving outside of Rod's, a stun gun is not a "classic instrument" for perpetrating violence against people, and as such, his possession of it was improper. (See *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186-1187 [finding that defendant's possession in custody of a sharpened 8.5 inch table knife was admissible under factor (b) because it is a "classic instrument of violence" normally used only for criminal purposes].) In fact, police authorities sometimes have encouraged possession of a stun gun for personal protection. (See, e.g., *M.B. v. City of San Diego* (1991) 233 Cal.App.3d 699, 708; *Falls v. Superior Court* (1996) 42 Cal.App.4th 1031, 1039.)

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[61] Appellant has argued to the contrary in Argument VII.

Third, legal possession of a weapon, when not directed against particular victims, militates against its use as factor (b) evidence. (See *People v. Belmontes* (1988) 45 Cal.3d 744, 809, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [evidence inadmissible under factor (b) where defendant's suggesting he had a handgun and stating it was "all the protection he needed," was not illegal conduct and any implied threat was not directed at a particular victim].)

Regardless of whether the jury found by a preponderance of evidence that appellant committed an attempted robbery of Rod's, the evidence that appellant possessed a stun gun and that such possession involved the express or implied use of violence was so insubstantial that no rational trier of fact could so find beyond a reasonable doubt. Under these circumstances, the court therefore abused its discretion in admitting the Rod's Coffee Shop evidence under this theory as factor (b) evidence.

E. The Admission of the Rod's Coffee Shop Evidence Under Factor (b) Violated Appellant's Rights Under the Fifth, Eighth and Fourteenth Amendments

Because appellant was entitled under state law to have the aggravating evidence introduced against him in the penalty trial limited to the factors enumerated in section 190.3 (*People v. Boyd* (1985) 38 Cal.3d 762, 775), the Rod's Coffee Shop evidence constituted nonstatutory factors in aggravation that violated his right to due process under the Fourteenth Amendment of the United States Constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) Improper admission of the evidence denied appellant the right to argue the absence of prior violent criminal activity

under Section 190.3 in violation of his Eighth Amendment right to have the jury consider "any aspect of a defendant's character or record . . ., that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) These errors further violated appellant's federal constitutional rights under the Fifth, Eighth and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, nonstatutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 885, 887, fn. 24 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].)

F. The Trial Court's Erroneous Admission of the Rod's Coffee Shop Evidence Under Factor (b) Was Prejudicial

When the trial court's error occurs at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" that the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Because the erroneous admission of the Rod's evidence violated appellant's rights under the federal Constitution, the state must prove the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) As this Court has recognized, "evidence that the defendant committed other violent crimes is often of overriding importance ... to the jury's life-or-death determination." (*People v. Anderson* (2001) 25 Cal.4th 543, 589, internal quotation marks and citations omitted.) Here, the prosecution presented and argued its case such that the Rod's Coffee Shop incident evidence was prejudicial for several reasons.

First, as appellant had predicted (9RT: 1230), the prosecutor used the Rod's evidence to lengthen the time period over which appellant committed

robberies, and in addition, to exacerbate the aggravating nature of the stun gun assaults. The prosecutor argued:

> We have also produced evidence for you under factor (b) of the factors in aggravation which was the incident at Rod's Coffee Shop which shows a long standing pattern of criminality and the use of implements of torture that was contemplated two years [*sic*] earlier at that incident, namely, the stun gun.

(29RT: 5291.)

The prosecutor began by linking the stun gun use at the Casa Gamino with "torture" (29RT: 5268, 5280, 5291), and she then moved on to generalized descriptions of appellant as a torturer. (See, e.g., 30RT: 5377, 5380, 5385.) Thus, the prosecutor was permitted to extend the crime spree, and weapons use, to a time beginning 18 months earlier. This was certainly prejudicial to appellant.

The Rod's incident evidence also bolstered the weak evidence as to the Outrigger (counts 10 to 18). Appellant denied being present at the Outrigger (26RT: 4574), and as the court acknowledged, the evidence against appellant on those counts was weak. (31RT: 5606.) The Rod's evidence was prejudicial because it made it more likely the jury would reject appellant's lingering doubt argument as to the Outrigger counts based upon the weakness of the identifications there. (See 31RT: 5453-5454.)

The Rod's evidence also gave the prosecutor the opportunity to elicit appellant's denial that he was the one to bring a stun gun to Rod's (26RT: 4597), which the prosecutor argued several times to the jury during closing argument. (30RT: 5320, 5326.)

> Do you understand that Mr. Sanchez came to court in front of all of you and he took - raised his hand and took an oath to God, the man that he has now said he is devoted to and who

> [he] has in his heart and he now serves, and he swore to tell the truth, but then he proceeded to lie or reduce or mitigate his responsibility for each and every incident, including the one for Rod's Coffee Shop.

(30RT: 5326.) This contributed to one of the prosecutor's major themes at the penalty phase: that appellant's lack of remorse was shown by his lies to the jurors during his testimony (30RT: 5326), as well as to the "men of God" who testified on his behalf at the penalty phase. (30RT: 5332; see also 30RT: 5311-5333 [argument on appellant's deception].)

Aside from the crimes at issue, appellant had no other record of violence in his background. Without the Rod's evidence, appellant would have been able to argue the absence of prior violent criminal activity, a powerful mitigating factor. (See *People v. Crandall* (1988) 46 Cal.3d 833, 884, abrogated on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [recognizing that the absence of aggravating evidence under factors (b) and (c) constitutes "significant mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past."]) Thus, the Rod's evidence transformed into an aggravating factor what otherwise would have been a powerful mitigating factor -- absence of prior violence. Given in addition the prejudice described above, the jury's improper consideration of it cannot be considered harmless. Accordingly, appellant's death sentences must be vacated.

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XVII.

THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING THE PROSECUTOR TO IMPEACH APPELLANT ABOUT DETAILS OF THE CRIMES IN RESPONSE TO HIS PENALTY PHASE TESTIMONY OF RELIGIOUS REFORMATION

Over appellant's objections, the court erroneously ruled that his testimony regarding his jailhouse religious conversion opened the door to cross-examination regarding the crimes the jury had considered and rendered verdicts upon at the guilt phase. The prosecution's subsequent devastating cross-examination of appellant violated his rights to due process, a fundamentally fair trial and to reliable death verdicts. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. Factual Background

Appellant argued that appellant's testimony regarding his religious conversion and potential to help others in the future did not entitle the prosecution to "rehash the facts of the case and present closing argument by cross-examining [appellant about] the details of each and every crime." (26RT: 4498.) Appellant proposed various ways to limit direct testimony in order to restrict the scope of cross-examination. He proposed to testify about his conversion in jail and acceptance of responsibility for what he had done (24RT: 4200-4202); or simply his conversion and plans for the future, without discussing remorse (26RT: 4496-4497); or only about the knowledge he had gained through his religious study and his ability to help others, without talking about the sincerity of his conversion (26RT: 4501-4502); or finally, to take the stand only to authenticate the document he wrote about his religious beliefs. (26RT: 4497; Ex. 505(a), original Spanish and Ex. 505, English translation, of appellant's religious writing.)

The court ruled that any one of these approaches opened the door to cross-examination about the specifics of the crimes because testimony about appellant's current religious feelings was "essentially presenting to the jury the fact that he is remorseful" (26RT: 4496), giving the prosecution the right to cross-examine him about what he was remorseful about (24RT: 4202), as well as about his life prior to the crimes, in order to test the sincerity of his current beliefs. (26RT: 4496, 4502-4503.) Even if appellant only testified in order to authenticate his religious writing, the court ruled that the document implied that appellant was a "good person" now, allowing the prosecution to question the sincerity of that by cross-examination about the crimes. (26RT: 4500.)

Based on the court's ruling, appellant testified on direct examination about some of the facts of the case, but the court ruled that this did not waive his prior objections. (26RT: 4570; see 26RT: 4495-4496, 4498-4499, 4502-4503 [objections].)

B. Applicable Legal Principles

Prosecution rebuttal to defense good character evidence is admissible to disprove any disputed fact of consequence to the action; the prosecution is not bound by the statutory aggravating factors. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) However, "good character" evidence "does not open the door to any and all 'bad character' evidence the prosecution can dredge up." (*Id.* at pp. 792, fn. 24.) Penalty phase rebuttal evidence is "'restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt.'" (*People v. Crew* (2003) 31 Cal.4th 822, 854, quoting *People v. Daniels* (1991) 52 Cal.3d 815, 859.)

Because under state law, a defendant is entitled to have the aggravating evidence introduced against him in the penalty trial limited to the factors enumerated in section 190.3 (*People v. Boyd* (1985) 38 Cal.3d 762, 774-775), the admission of a nonstatutory factor in aggravation violates his statutory rights and his right to due process under the Fourteenth Amendment of the United States Constitution. (*Hicks v. Oklahoma, supra*, 447 U.S. 343, 346; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 [capital sentencing proceedings must satisfy Due Process Clause].)

C. The Impeachment of Appellant with Questions About the Crimes Was Improper Rebuttal

This Court has approved cross-examination following a defendant's testimony on his religious conversion where it relates to actions or beliefs following the time of the conversion. For example, in *People v. Espinoza* (1992) 3 Cal.4th 806, 826, the defendant testified he had become a "born again" Christian after the killing of the two victims and had conducted religious activities in jail while awaiting trial. (*Ibid.*) The Court held that the prosecutor's penalty phase argument, pointing out instances of the defendant's dishonesty since his conversion, was proper to rebut the implication that the defendant's post-conversion behavior had been exemplary. (*Ibid.*; see also *People v. Danielson* (1992) 3 Cal.4th 691, 715-716, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [no misconduct where prosecutor asked defendant what penalty he would vote for as a juror after defendant read a statement explaining his conversion to Christianity, extent of remorse and hope that the jury would render a fair judgment]; *People v. Montiel* (1993) 5 Cal.4th 877, 934 [where defendant testified he had accepted Christianity in prison, read the Bible and felt remorse, obtaining concession on cross-examination and

then arguing that defendant did not literally agree with "an eye for an eye" maxim was proper rebuttal].)

The same principle applies when a defendant presents evidence other than his own testimony of his religious beliefs or activities. A fellow jail inmate who testified to the defendant's religious faith in custody and good influence on other inmates could be properly impeached with questions about defendant's gambling with, and extracting money from, other inmates. (*People v. Payton* (1992) 3 Cal.4th 1050, 1064-1067.) A mitigation witness who testified about the defendant's in-custody religious commitment and activities was properly impeached with questions about his possession of shanks in custody. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1172-1173.) Good character evidence that at the time of the charged offenses the defendant had converted to Christianity and conquered his addiction was properly impeached with evidence of subsequent shoplifting to obtain money for drugs. (*People v. Zapien* (1993) 4 Cal.4th 929, 991.)

The above cases allow rebuttal of a defendant's religious conversion and activities only with post-conversion evidence. This comports with the limits on rebuttal which "must be specific, and evidence presented or argued as rebuttal, must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 792, fn. 24.) The trial court therefore erred when it ruled that virtually any testimony by appellant regarding his religious conversion in jail opened the door to broad questioning about the crimes.

The court's ruling also violated the rule limiting rebuttal evidence to responding to a defendant's new evidence or to "assertions that were not implicit in his denial of guilt." (*People v. Crew, supra,* 31 Cal.4th at p. 854.) In *Crew,* the Court held that jail house informant testimony about the

defendant's escape plan was proper rebuttal to his mitigating evidence of good jail conduct. (*Ibid.*) Rebuttal testimony that the defendant admitted killing the victim and burying the body was improper, however, because it did not counter defendant's new evidence, nor had the defendant made assertions during his testimony not implicit in his denial of guilt. (*Ibid.*)

As in *Crew,* the prosecutor's cross-examination of appellant regarding the crimes would not counter appellant's proposed new evidence, nor did appellant propose to challenge his earlier positions regarding guilt. (See also *People v. Siripongs* (1988) 45 Cal.3d 548, 578 [defendant could introduce evidence of being a "devout Buddhist" in Thailand without fear of impeachment with prior Thai convictions for dishonesty if he did not introduce evidence that one of the characteristics of such a Buddhist was truth or honesty].) The court's ruling that any religious conversion testimony by appellant, even if only to authenticate his religious writing, would open the door to questioning about the crimes was therefore erroneous. (26RT: 4496-4497, 4501-4502.)

D. The Error Violated Appellant's Constitutional Rights

The cross-examination on the crimes was devastating to appellant's mitigation case. As described above in the Statement of Facts and discussed below, the prosecution cross-examined appellant about each crime and whether he was remorseful; elicited appellant's admissions that he had lied during some of the crimes and when arrested; and elicited denials as to some of the crimes or certain aspects of them. (See Statement of Facts, above, Appellant's Testimony.)

During closing argument, the prosecutor put portions of the cross-examination of appellant as to remorse on a chart and extensively quoted from it. (See 30RT: 5311-5315.) The prosecutor then excoriated appellant

for his failure to discuss or admit the crimes to anyone, to return any of the stolen goods, to tell the police where the outstanding guns were, to help bring outstanding accomplices to justice, or to express remorse during his testimony. (30RT: 5315-5317.) The prosecutor also presented a chart including portions of appellant's testimony regarding the commission of the offenses, emphasizing appellant's denial of the Outrigger crimes (30RT: 5317; counts 10-18), of hitting Armando Lopez with a gun and of using the stun gun on Mendoza (30RT: 5321-5322; counts 28 and 33). She also highlighted the instances where appellant refused to ascribe to the prosecution's version of what he did during some of the crimes. (See, e.g., 30RT: 5317-5318 [denies he pistol whipped Urrieta[62]]; 5318 [amount taken from Mercado Buenos Aires]; 5318-5320 [interactions with Kim prior to shooting]; 5320-5321 [denies he brought the stun gun to Rod's or Casa Gamino]; 5322-5323 [denies trying to shoot Juan Saavedra in the leg]; 5324-5326 [denies aiming at Hoglund's head or saying anything when he shot him]; and 5325 [denies speaking to Rosa Santana or laughing over killing the officer].)

Based on the above, the prosecutor argued that appellant repeatedly lied under oath, which he would not have done if he had truly found God. (30RT: 5326-5327.) The prosecutor went on, "[appellant] lied to you for the same reason that he concocted the conversion defense here" because "without these lies and this conversion, he knows he will get the death penalty he deserves." (30RT: 5327.)

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[62] Both the preliminary hearing judge and trial court found insufficient evidence to support a charge of assault on Urrieta (7CT: 1890; 9CT: 2526; 2RT: 224), and the court thereafter granted the prosecution's motion to dismiss the count. (2RT: 242; 9CT: 2534.)

The prosecution also repeatedly cross-examined two of appellant's religious witnesses about whether appellant's conversion was sincere if he lied under oath about the crimes of which he was convicted. (See 27RT: 4684-4789, 4716, 4731.) The prosecutor then argued that those witnesses had been impeached (30RT: 5327-5328), and went further: "Mr. Sanchez . . . deceived and manipulated these men of God, these good, God fearing, decent people. . . . It's immoral and . . . despicable and . . .an insult to all religious people everywhere to use the clergy in this fashion." (30RT: 5332-5333.)

The improper cross-examinations discredited important mitigating evidence introduced by the defense, thereby violating appellant's right to present, and have the sentencer fairly consider, relevant mitigating evidence (*Eddings v. Oklahoma, supra*, 455 U.S. at pp. 114-115), including evidence that reflects positively on the defendant's character. (See, e.g., *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, 8-9; see also *People v. Mickey* (1991) 54 Cal.3d 612, 693 [any barrier to the jury's consideration of relevant mitigating evidence constitutes federal constitutional error].)

This error further violated appellant's federal constitutional rights under the Fifth, Eighth and Fourteenth Amendments to a fundamentally fair and reliable penalty trial, based on a proper consideration of relevant sentencing factors and undistorted by improper, nonstatutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, fn. 24 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process."].)

In addition, all of the evidence derived from the improper cross-examination was far more prejudicial than probative and its admission,

coupled with the prosecutor's exploitation of it during argument, so infected the sentencing proceedings with unfairness that appellant was deprived of the fair trial required by due process of law. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [unduly prejudicial penalty phase evidence that renders the trial fundamentally unfair violates the Fourteenth Amendment Due Process Clause].) The court's error violated appellant's rights to due process, a fundamentally fair trial and to reliable death verdicts. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

E. The Error Was Prejudicial and Reversal Is Required

Without the improper and erroneous cross-examinations, the case in aggravation consisted of the circumstances of the crime. (See, e.g., 29RT: 5262-5279 [prosecutor argument].) The mitigation case would have been unscathed because there was no post-conversion misconduct with which to impeach appellant. (Cf. *People v. Espinoza, supra,* 3 Cal.4th at p. 826.) The mitigation case consisted of the testimony of appellant's family members regarding his difficult upbringing in poverty in Honduras and their pleas for his life and evidence of his new found religious faith and activities as told by his family members, the religious witnesses and in some limited way, by appellant himself.

The error thus impaired the core of appellant's mitigation case so must be deemed prejudicial. As this Court has recognized, evidence from religious witnesses about the ability of life-sentenced individuals to reform and change can make a difference in outcome at the penalty phase and even mitigation evidence that is not "overwhelming" may make the difference between a life or death verdict. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 953-954, 962.) Moreover, the jury hung as to the co-defendants, demonstrating that they were open to mitigating evidence. The

constitutional violations therefore cannot be found harmless beyond a reasonable doubt (*Chapman v. California* (1967) 381 U.S. 18, 24), and there is a reasonable probability that the violations of state law affected the penalty verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447-448). Accordingly, the death judgments must be reversed.

XVIII.

THE PROSECUTOR'S IMPROPER CROSS-EXAMINATION OF DEFENSE MITIGATION WITNESSES AND OTHER MISCONDUCT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND RELIABLE PENALTY VERDICT

The prosecution's improper cross-examination of defense mitigation witnesses repeatedly subverted prior court rulings, insinuated that appellant had committed prior murders and attacked the heart of appellant's mitigation theme. The prosecution's actions constituted misconduct, depriving appellant of a fair and reliable penalty trial.[63] As a result, appellant's death sentences are unlawful and were obtained in violation of his rights to a fundamentally fair trial and due process of law, to confront the evidence and witnesses against him, to the effective assistance of counsel, to be free from outrageous governmental conduct and to a reliable and appropriate penalty determination, as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. Appellant therefore should receive a new, misconduct-free penalty trial.

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[63] Two different prosecutors were involved in the misconduct described herein as they cross-examined different witnesses.

A. Applicable Legal Principles

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. As the United States Supreme Court has explained, though a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the Due Process Clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Hill* (1998) 17 Cal.4th 800, 819, internal quotations and citation omitted.)

A prosecutor's behavior is misconduct under California law when it involves the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury," even if such action does not render the trial fundamentally unfair. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) A showing of bad faith or knowledge of the wrongfulness of his or her conduct is not required to establish prosecutorial misconduct. (*Id.* at pp. 822-823 & fn.1.)

A defendant cannot generally complain on appeal of misconduct by a prosecutor at trial unless a timely objection was made, the objectionable comment was assigned as misconduct and defendant requested that the jury

be admonished to disregard the impropriety. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) An objection and/or request for admonition will be excused if either would have been futile or if the defendant had no opportunity to request an admonition because the court overruled the objection. (*People v. Hill, supra,* 17 Cal.4th at p. 820.) An appellate court has discretion to consider an inadequately preserved misconduct issue. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

B. The Prosecutor Improperly Insinuated that Appellant Had Committed Prior Murders

The rule is well established that the prosecuting attorney may not question witnesses solely "for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given. [Citation.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) Under California law and federal constitutional principles, it is misconduct for a prosecutor to ask a question suggesting the existence of facts prejudicial to the defendant in the absence of a good faith belief that the questions will be answered in the affirmative, or of a belief that the facts could be proved if their existence should be denied by the witness being questioned. (*People v. Warren* (1988) 45 Cal.3d 471, 480; *People v. Blackington* (1985) 167 Cal.App.3d 1216, 1221-1222.)

As described above in Argument XV., over objection the prosecutor was permitted to introduce Santana's statement that she overheard appellant saying he had already shot eight or nine people in his country. (19RT: 3204-3206.) The court limited the statement to penalty phase evidence of appellant's state of mind. (19RT: 3201-3206, 3242-3243.)

The prosecutor nevertheless asked appellant,

Q: Did you feel especially in a humorous mood as you recalled killing those eight or nine other people that you had killed?

A: Which eight or nine other people?

Q: The ones that you talked about when you were giggling and laughing over killing the officer.

A: I never did say that. I never said that to Rosa Santana. I know that she said that but I have never spoken with her.

(26RT: 4609.)

Later, appellant objected because the "prosecutor asked the question with the force and effect as if he knew that to be the truth." (27RT: 4742.) The court agreed, stating it would have sustained the objection and would admonish the jury as appellant requested. (27RT: 4743.) Appellant asked the court, pursuant to *People v. Bolton*,[64] to specifically mention that "the prosecution implied by their question that they had information to support the truthfulness of those charges. In fact, the prosecution has no such evidence . . . ." (28RT: 4873-4874.) The court refused the latter formulation on the ground that the prosecution had restated the question so "it came out" properly. (28RT: 4874.) The court then merely reminded the jury that the statement had been offered "not for the truth of eight or nine people killed, there is no such evidence," but as to appellant's state of mind. (28RT: 4877-4878.)

The court was wrong. The prosecutor's follow-up question did not repudiate the prior one. The prosecutor merely answered, improperly, the question he had asked appellant. Although appellant responded by denying that he made the statement, the original implication behind the prosecutor's question remained. The risk that a jury might speculate about inadmissible

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[64] *People v. Bolton* (1979) 23 Cal.3d 208.

factors is particularly acute in the area of a defendant's criminal history. (See, e.g., *People v. Bolton, supra,* 23 Cal.3d 208, 212-213 [misconduct to invite jury to speculate about, and possibly base a verdict upon, insinuations that defendant had a prior criminal record].) The court should therefore have given an instruction admonishing the prosecutor pursuant to *People v. Bolton*, as appellant requested. The jury would then have been told that, "the prosecutor has just made certain uncalled for insinuations about the defendant. . . . [which] amount to an attempt to prejudice you against the defendant. . . . " and that the remarks must be disregarded. (*Bolton, supra,* 23 Cal.3d 208 at p. 215, fn. 5.) By contrast, the weak curative instruction here failed to cure the harm and rewarded the prosecution's misconduct.

Morever, the prejudice was compounded when the prosecutor was permitted to ask appellant whether he had been in a shoot-out between December 31, 1991 (the date of the Outrigger robberies), and April 18, 1992 (the date of the El Siete Mares robberies). (26RT: 4595-4596; 12RT: 1902; 15RT: 2496.) This further suggested to the jurors that appellant may have shot others or been involved in a crime not presented at trial.

The fact that appellant denied the prosecutor's assertions did little to dispel the prejudice engendered by the question and the prosecutor's prior misconduct. "The impropriety of the prosecutor's conduct in this case was not cured by the fact that his questions elicited negative answers. . . . [because] the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner, supra,* 13 Cal.3d at p. 619.)

The prosecution continued to defy the court's order when it persistently, in the face of sustained objections, tried to establish through the cross-examination of appellant's sister, Argentina Sanchez, what appellant

was doing in Honduras in early 1992. (27RT: 4775-4782.) The court sustained appellant's objections because the prosecution went beyond its stated purpose. (27RT: 4782.) The questions were also improper because the prosecutor was subverting the earlier ruling that prohibited the prosecutor from cross-examining witnesses about whether appellant was involved in a shoot-out in Honduras in February 1992. (25RT: 4191-4193.) Given the court's prior refusal to admonish the prosecutor during appellant's cross-examination, any attempt to secure an assignment of misconduct and admonishment of the prosecutor would have been futile.

The United States Supreme Court has recognized that a prosecutor's attempt to get before a jury information not properly admissible as evidence violates a defendant's rights under the Confrontation Clause of the Sixth Amendment. (*Douglas v. Alabama* (1965) 380 U.S. 415, 420.) And as this Court has noted, "[t]he admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Holt* (1984) 37 Cal.3d 436, 450, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 314.) The prosecutor's misconduct here thus violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments.

C. The Prosecutor Repeatedly Violated the Court's Ruling Limiting Cross-Examination to Appellant's Own Actions and Role in the Instant Crimes

Improper questions that violate a previous ruling by the trial court are particularly inexcusable forms of misconduct. (*People v. Johnson* (1978) 77 Cal.App.3d 866, 873-874.) The court below limited the prosecution to asking appellant about his own actions and prohibited cross-examination on the actions or roles of other defendants or perpetrators. (26RT: 4511-4513, 4571.) The court told the prosecutor that this was irrelevant to appellant's

remorse and "as I think about it, the whole point of the penalty phase is to determine his culpability." (26RT: 4571.)

Just moments after that ruling, the prosecutor directly violated it multiple times. The prosecution asked appellant whether he had provided any information to law enforcement officers regarding his co-perpetrators so that investigators could find and arrest them. (26RT: 4573-4574.) The court sustained appellant's objection but refused to let him approach to make a speaking objection. (26RT: 4574.) The prosecutor continued this theme later when cross-examining Arturo Talamante, one of appellant's religious witnesses, asking "[a]nd did defendant tell you why he has done nothing to help the authorities to bring his other accomplices to justice?" (26RT: 4631.) Again, the court sustained the objection but did not permit appellant to approach.

The prosecutor persisted in questioning appellant about the involvement of others. (See 26RT: 4576 ["didn't you split the money evenly with the other people who participated in the robberies?"; 4586 ["Isn't that one of your partners in crime, Carlos Umana?"].) The court sustained the objections, (26RT: 4576 and see 4586-4588), and sustained co-defendant objections to improper questions implicating them (26RT: 4565, 4598), but refused appellant's request under the Eighth Amendment to cite the prosecutor for misconduct, find him in contempt and sanction him by stopping the cross-examination at that point. (26RT: 4577, 4586-4588.)

The prosecutor's questions were improper because they violated the court's order and because evidence of the actions of the coperpetrators, which were irrelevant to any mitigating or aggravating factors, was inadmissible. "It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court

order." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) The prosecutor attacked the core of appellant's mitigation strategy, which was to explain his religious conversion, rejection of his former lifestyle and crimes and his future plans. The prosecution thus benefitted from questions associating appellant with crime partners and suggesting his reformation was false if he had not turned in any at-large suspects in the crimes at issue.

D. During a Break in Appellant's Cross-Examination the Prosecution Initiated an Improper Ex Parte Contact with the Court, Which Resulted in a Change in Interpreter Over Appellant's Objection

The prosecutors' confidence that they could act with impunity was demonstrated by prosecutor Grosbard's improper ex parte actions in approaching the interpreter and then the court when he was dissatisfied with the interpretation during his cross-examination of appellant. The record reflects that during the lunch break after the first portion of appellant's cross-examination, the prosecutor, without notice to the defense, approached the interpreter, expressed his displeasure with her interpretation and then spoke to the court. (26RT: 4567-4569.) After lunch, before the jurors entered the courtroom, the prosecutor announced "Your honor, we understand we are going to have a different interpreter this afternoon." (26RT: 4567.) A discussion regarding the matter ensued and when the defense complained that the prosecutor should have brought any problems to the court's attention, the court indicated that, "[i]t was brought to my attention and I agree." (26RT: 4568.)

Ex parte communications with a judge may constitute prosecutorial misconduct. (See *People v. Uribe* (2011) 199 Cal.App.4th 836, 878 [prosecutorial misconduct included improper attempts to initiate ex parte contact with judge]; *People v. Choi* (2000) 80 Cal.App.4th 476, 481-82 and

fn. 4 [stating district attorney's ex parte approach of court with a proposed letter to the editor following a gag order violated the Rules of Professional Conduct, Rule 5–300, prohibiting ex parte contact with a judge regarding a pending contested matter without the consent of all other counsel in the case]; *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1257 [noting that adversary proceedings are the rule and ex parte proceedings are disfavored].)

The competence of the interpreter is ordinarily for the trial court to determine. (*People v. Mendes* (1950) 35 Cal.2d 537, 543; see also California Standards of Judicial Administration, Standard 2.11, subd. (b)(2) [counsel who disagree with interpretation should ask to approach bench to discuss problem].) The prosecutor should have brought the matter to the court's attention in the presence of all counsel. The prosecutor's failure to do so constituted misconduct. (See *United States v. Anguloa* (1979) 598 F.2d 1182, 1184 [ex parte action of the prosecutor in replacing an interpreter was improper].)

Even though the information was subsequently relayed in open court, appellant's rights were prejudiced because by the time appellant was informed, the decision to replace the interpreter had been made. "The firmness of the court's belief may well have been due not only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship, innocent as it may have been thought to be, that permitted such disclosures." (*Haller v. Robbins* (1st Cir. 1969) 409 F.2d 857, 859-860.) The prosecutor's actions here interfered with appellant's right under the Sixth Amendment and Fourteenth Amendments to have his "counsel acting in the role of advocate" (*Anders v. California* (1967) 386 U.S. 738, 743), and his right to be present under the Confrontation Clause of the Sixth

Amendment and the Due Process Clause of the Fourteenth Amendment (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 106-107; *United States v. Gagnon* (1985) 470 US. 522, 526) and article I, section 15 of the California Constitution.

Although appellant did not ask for an assignment of misconduct as to this incident, any such request would have been futile, because the court saw nothing improper about the prosecutor's behavior, and indeed, decided the issue in the prosecution's favor during an ex parte contact. (See *People v. Hill, supra,* 17 Cal.4th at p. 820.)

E. Other Misconduct

The prosecutor's tone during his cross-examination of appellant was so extreme that early on, during a side bar, appellant asked the court to admonish the prosecutor for his sarcasm and theatrics, which were an attempt to testify about his disgust for appellant. (26RT: 4555-4556.) Instead, the court asked the prosecutor if he wanted to "calm down for a second," but the prosecutor refused, saying "I need this energy." (26RT: 4555-4556.) The court then merely told the prosecutor to "cut back on the editorializing. Just ask the questions and save it for argument." (26RT: 4555-4556.)

The defense again asked for an admonishment at the end of appellant's cross-examination. Because of the sarcastic way the prosecutor ended his cross-examination of Contreras's expert and appellant (26RT: 4618), Contreras also asked the court to admonish him to be professional.[65] Refusing to single out the prosecutor, the court instead "reminded" and

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[65] All defendants were deemed to join in all of each others motions/objections unless they excluded themselves. (See 8RT: 1036; 20 RT: 3504-05.)

"warned" Contreras along with the prosecutor that "we don't need any editorializing." (26RT: 4618.)

The prosecutor's continuous behavior was misconduct. A prosecutor may not by way of facial expressions, laughter or body language imply to the jury that the prosecutor does not believe the testimony of a defense witness. (See *People v. Tate* (2010) 49 Cal.4th 635, 693 [any undue prejudice ameliorated by court's two strongly-worded admonishments to jury to disregard the prosecutor's reactions, expressions and gestures]; *United States v. Peters* (8th Cir. 1995) 59 F.3d 732, 733-734 [single unintentional incident where prosecutor made facial gestures and sarcastic comments during cross-examination of defendant not reversible misconduct because trial court's stern rebuke was effective in preventing recurrence of misconduct].) Here, the court refused to rebuke the prosecutor and thus failed to ameliorate the prejudice. (See *People v. Tate, supra,* 49 Cal.4th at p. 693.)

F. The Prosecutor's Actions Were Prejudicial Misconduct and Reversal of the Death Judgments Is Required

All of the misconduct identified here either unfairly added to the reasons why a death sentence should be imposed or unfairly discredited the reasons why a life sentence should be imposed. As stated above, the prosecutor's actions violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments. Appellant's rights under the Due Process Clause of the Fourteenth Amendment were violated because the prosecutor's pervasive misconduct resulted in an unfair trial. (*People v. Hill, supra*, 17 Cal.4th at p. 819.) The individual and cumulative effect of the instances of misconduct described above distorted the record, injected improper considerations into the sentencing calculus and encouraged the jurors to make a decision based on emotion rather than reason. They therefore

violated appellant's Eighth Amendment right to a reliable, individualized and non-arbitrary sentencing determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.) Furthermore, to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury and a reliable death judgment were violated by the state arbitrarily withholding a non-constitutional right provided by its laws. (U.S. Const., 5th, 6th, 8th & 14th Amends. ; Cal. Const., art. 1, §§ 1, 7, 15, 16; see *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.)

Under California law, the test of prejudice in evaluating generic prosecutorial misconduct is the traditional harmless-error rule. (*People v. Green* (1980) 27 Cal.3d 1, 34-35.) Even if the error is assessed only under California law, there is a reasonable chance of a more favorable result absent the repeated misconduct. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) However, where, as here, the misconduct impacts upon a defendant's federal constitutional rights, "the burden shifts to the state to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Bolton, supra*, 23 Cal.3d at p. 214.)

In each instance above, application of the stricter federal standard of prejudice is required. This case, however, obviates the need for this Court to parse which of the state or federal standards should apply, to which error and to what end. Whether viewed singly or in combination, reversal of the death judgments is required under any standard of prejudice.

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XIX.

THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING THE PROSECUTOR TO COMMIT MISCONDUCT BY REPEATEDLY QUESTIONING APPELLANT ABOUT WHETHER HE HAD BEEN INVOLVED IN A SHOOTOUT

The court erroneously permitted the prosecution to suggest through repeated questions during appellant's cross-examination that appellant had been involved in a shoot-out during the same time period as the charged crimes. The cross-examination resulted in the introduction of highly inflammatory and prejudicial, irrelevant and nonstatutory aggravating evidence. Individually and collectively, the errors violated appellant's rights to be free from self-incrimination, to a fair trial and due process, effective representation of counsel and a reliable penalty determination, necessitating reversal under state law and the United States Constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. Factual Background

During his direct examination, appellant testified that Kim fired and hit him, after which appellant shot back. (26RT: 4538.) During his cross-examination of appellant, the prosecutor elicited his testimony that after being shot, he was treated at a hospital. (26RT: 4586.) The bullet was never removed and showed up in an x-ray taken a few days before appellant testified. (26RT: 4591.) The prosecution then asked:

Q: Are you sure you didn't get shot somewhere between the period between December 31, 1991 and April 18, 1992?

A: I am sure it wasn't then.

Q: Were you involved in a shoot-out at that time?

(26RT: 4592.) At that point appellant objected that the prosecution was bringing in other crimes evidence and lacked a good faith basis for the question. (26RT: 4592-4593.) The court ruled the question was permissible because it "didn't see how you can keep the people from suggesting that the bullet was acquired some other time." (26RT: 4593.) However, the court ruled the prosecutor could not bring in extrinsic evidence if appellant denied involvement. (26RT: 4594.) Apparently directing the prosecutor to move on, the court asked him what his next question was, and the prosecutor responded, "Casa Gamino." (26RT: 4594.)

When cross-examination resumed, though, the prosecutor continued, "Sir, were you involved in a shoot-out in February of 1992 in which you may very well have received that gunshot wound?" (26RT: 4595.) Appellant asked to approach, but the court instead sustained the objection. (*Ibid.*) The prosecutor asked for a read back of the question where the objection was not sustained, and then again asked:

Q: Were you involved in a shoot-out during the time period, between December 31, 1991 and April 18, 1992?

A: As far as I am able to remember, I don't believe so.

Q: You are just unclear about the time period?

A: From the 31st of 1992?

Q: Yes, sir?

A: No. That is, I was not involved in that.

Q: Not involved in what?

A: In the shoot-out, the one that he's talking about – I'm sorry, that you are talking about?

(26RT: 4595-4596.) The court denied appellant's request to approach and directed the prosecutor to ask his next question, which he did. (26RT: 4596.)

Appellant presented evidence that he had a bullet next to his femur, but the age of the wound could not be determined. (27RT: 4690-4692, 4694-4695.)

B. Applicable Legal Principles

The factors in aggravation on which a jury may rely in imposing a capital sentence are strictly limited to those contained in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Evidence of conduct that is not probative of any statutory factor would have no tendency to prove a fact of consequence to the action and is therefore irrelevant to aggravation. (*People v. Boyd, supra,* 38 Cal.3d at p. 774.) Evidence of other criminal activity is admissible under factor (b) only if it is substantial (*People v. Griffin, supra,* 33 Cal.4th at pp. 584-585), i.e., if it is reasonable, credible and of solid value. (*People v. Bassett* (1968) 69 Cal.2d 122, 138-139.) The Court reviews the trial court's ruling to admit factor (b) evidence for abuse of discretion. (*Ibid.*)

C. The Court Erred in Allowing Repeated Questions Suggesting Appellant Was Involved in a Shootout in February 1992

The court was correct that the prosecutor could cross-examine appellant so as to suggest that he was shot by someone other than Kim, because it was a matter appellant expressly testified about during the direct examination. (Evid. Code, § 773.) However, the court erred by allowing the prosecutor to go far beyond that, implying by his repeated questions that in February 1992 appellant committed another crime involving a shoot-out.

As the court noted, proper cross-examination would have suggested "that the bullet was acquired some other time." (26RT: 4593.) Such a question would have been a broad one, e.g., "were you shot at a time other than by Kim?" For this reason, even the prosecutor's initial question, directing the jurors to suspect that a particular event occurred between the Outrigger robberies on December 31, 1991 (12RT: 1902), and the Siete Mares robberies on April 18, 1992, was improper. (16RT: 2573.)

The prosecutor's second question, which brought in the word "shoot-out," further suggested that the event at issue was an illegal one. (26RT: 4592.) A "shoot-out" is a "battle fought with handguns or rifles." (<http://www.merriam-webster.com/dictionary/shoot-out> [as of Nov. 28, 2011].) In common understanding, the term connotes illegal activity. (See Wikipedia <http://en.wikipedia.org/wiki/Shootout >[as of Nov. 28, 2011], [describing a shootout as a gun battle between armed groups, often pitting law enforcement against criminal elements or involving groups such as rival gangs].) Given that appellant was on trial for a series of robberies, including two murders, the clear implication was that appellant committed another robbery or crime involving a shooting that the jury was not being told about.

After the trial court denied appellant's objection, the prosecutor went even further, suggesting in his question that appellant was wounded in a shoot-out in February 1992. (26RT: 4595.) The court finally sustained an objection to this question, though it denied appellant's request to approach. (26RT: 4595.) By then asking the court reporter to repeat his prior question, the prosecutor succeeded in exposing the jury to it another time, and then again when he asked a variation of the question for the fourth time. (26RT: 4595.) The prosecutor continued to question appellant so as to elicit specific denials and answers from which the jury could reasonably infer that

appellant knew of the shootout to which the prosecutor referred. (26RT: 4595-4596.) The court again refused appellant's request to approach, but finally specifically directed the prosecutor to move on. (26RT: 4595-4596.) Having succeeded in presenting the other crimes evidence through harmful insinuations and prejudicial testimony, the prosecutor finally moved on to questions about Casa Gamino. (26RT: 4596.)

In *People v. Bagwell* (1974) 38 Cal.App.3d 127, the defendant testified on her own behalf at her trial charging her with murdering her husband with a knife. Prior to her taking the stand, the court ruled that the prosecution could not present evidence of an earlier knife assault under Evidence Code section 1101 to prove intent. (*Id.* at p. 133.) Nevertheless, "with the court's sufferance" (*id.* at p. 140), the prosecutor asked the defendant a long series of questions about that assault over defense objections. (*Id.* at pp. 134-138.) The defendant was eventually forced to assert her rights under the Fifth Amendment, but not before she made substantial admissions. (*Id.* at pp. 138-140.) The appellate court reversed, stating that:

> We are advised of no theory, and we are aware of none, that permits cross-examination on such an unrelated offense not adverted to on direct examination, except the theory allowing proof of a similar offense to establish intent. (See Evid. Code § 1101.) But the trial court had expressly disallowed that approach, finding the prejudicial effect too great.

(*Id.* at p. 140.) The court found "gross prejudice" ensuing from the improper questions and the defendant's invocation of her rights and unguarded inculpatory answers and reversed. (*Id.* at p. 140.)

Similarly here, the questions and appellant's responses alluding to another alleged crime, i.e., a shootout, were not relevant to any properly

admissible theory of evidence. Because these insinuations and evidence were not probative of any statutory factor that had a tendency to prove a fact of consequence to the action, it was inadmissible aggravating evidence. (*People v. Boyd, supra*, 38 Cal.3d at p. 774.)

D. The Prosecution's Repeated Improper Questions and Insinuations Constituted Misconduct

The trial court erred by allowing the prosecutor to introduce this prejudicial and confusing evidence through his improper questioning. The court erred by failing to control the prosecutor, who in turn took advantage of the court's leniency by suggesting to the jury over and over that appellant was involved in illegal conduct that was not supported by admissible evidence, eventually eliciting a denial from appellant. (26RT: 4595-4596.) Questioning a defense witness about conduct by the defendant inconsistent with or outside the scope of the testimony provided requires a good faith belief that the acts actually took place. (*People v. Sandoval* (1992) 4 Cal.4th 155, 188-189; *People v Siripongs* (1988) 45 Cal.3d 548, 578; see generally *Michelson v. United States* (1948) 335 U.S. 469, 472-481; ABA Rules of Professional Conduct, Model Rule 3.4(e) ["[a] lawyer shall not . . . in trial, allude to any matter . . . that will not be supported by admissible evidence . . ."].) Under the good faith rule, a prosecutor cannot ask a criminal defendant questions that suggest the existence of harmful facts in the absence of a good faith belief that the question will be answered in the affirmative or that the facts are susceptible of proof should their existence be denied by the witness. (*People v. Chojnacky* (1973) 8 Cal.3d 759, 766.)

Prior to the start of the penalty phase, the prosecution asked to cross-examine defense witnesses using a Honduran newspaper article, apparently found in appellant's residence, describing a robbery in which two people

were shot, though not killed. (24RT: 4191-4193.) According to the prosecutor, the article mentioned the names Sanchez-Fuentes and El Morro. (24RT: 4192.) The prosecution had not talked to any witnesses to the events and the court denied the request because the prosecutor did not have a "good faith position as to the accuracy of the statements" in the newspaper article. (24RT: 4192-4193.)

Nevertheless, as described above, the prosecutor repeatedly asked improper questions so as to elicit damaging testimony and prolong the jury's exposure to the inadmissible and highly prejudicial accusations. The prosecutor here lacked a good faith basis for the cross-examination at issue because the court had previously prohibited him from questioning defense witnesses or appellant at the penalty phase using the article.

E. The Court's Rulings Were an Abuse of Discretion

As in *People v. Bagwell, supra,* 38 Cal.App.3d at p.140, the court expressly disallowed questioning about an alleged prior bad act, and then without reason, in effect reversed its ruling, allowing damaging cross-examination on the same point. Under the circumstances, the trial court's failure to abide by its prior ruling was an abuse of discretion. (See *ibid.* [because trial court had previously prohibited introduction of prior bad act under Evidence Code section 1100, allowance of cross-examination on it was error].)

Additionally, a "judge has no discretion to allow the defendant, over objection, to be cross-examined beyond the scope of matters to which he or she voluntarily testified on direct examination." (Witkin, California Evidence (4th ed. 2000) § 233; see also Evid. Code, §§ 772, subd. (d), 761, 773; *People v. O'Brien* (1885) 66 Cal. 602, 603; *People v. Fauber* (1992) 2 Cal.4th 792, 859 ["As defendant asserts, the breadth of the waiver of his

privilege is determined by the scope of the testimony he presents"].) As argued above, appellant testified only that Kim shot him and the proper scope of cross-examination allowed a broad question as to whether he was shot at some other time. It did not include questions lacking a good faith basis insinuating that appellant engaged in criminal activities, including a shoot-out, in February 1992.

F. The Actions of the Court and Prosecution Violated Appellant's Constitutional Rights

Aside from the limitations prescribed by section 190.3, the Eighth and Fourteenth Amendments limit the sentencing jury to considering factors that are "directly related to the personal culpability of the criminal defendant." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) The jury's consideration here of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885), undermined the heightened need for reliability in the determination that death was the appropriate penalty. (See *Johnson v. Mississippi* (1981) 486 U.S. 578, 585.)

The cross-examination forced appellant to be a witness against himself, in violation of his privilege against self-incrimination. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1424 [Fifth Amendment right against self-incrimination applies at penalty phase].) "Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' (citations omitted), it protects him as well from being made the 'deluded instrument' of his own execution." (*Estelle v. Smith* (1981) 451 U.S. 454, 462.) The cross-examination also penalized appellant's assertion of his right to "to take the witness stand to explain or contradict a particular aspect of the case against him" and thereby deterred

his assertions of this right. (*People v. Schader* (1969) 71 Cal.2d 761, 771.) This in turn interfered with his right to present a defense. (U.S. Const., 6th & 14th Amends.; Cal. Const. art. I, §§ 7, 14, 15.)

The introduction of nonstatutory aggravating evidence without proper notice or an opportunity to rebut such evidence violated appellant's statutory and constitutional right to notice of aggravation that would be admitted against him. (§ 190.3; *Cole v. Arkansas* (1948) 333 U.S. 196.) It also violated his due process liberty interest in having his sentence determined on the basis of properly noticed statutory factors, as well as his right to be heard, to present a defense and to confront the witnesses against him. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522.)

The prosecutor's conduct constituted a bad faith effort to introduce prejudicial and inflammatory information suggesting an uncharged crime which the jury would have considered as propensity evidence, resulting in a denial of appellant's right to a fair trial and due process. (U.S. Const., 14th Amend., Cal. Const. art. I, §§ 1, 15; see *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385 [propensity evidence, including prior possession of knives, deprived defendant of fair trial and violated his right to due process].)

G. The Errors Were Prejudicial and Reversal Is Required

This Court has long recognized the prejudicial effect inherent in evidence that the defendant has committed other crimes, commenting in *People v. Robertson* (1982) 33 Cal.3d 21, 54, that:

> Here, the potential for prejudice was particularly serious because the error in question significantly affected the jury's consideration of "other crimes" evidence, a type of evidence which this court long ago recognized "may have a particularly

damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* [1965] 63 Cal.2d [443,] 450.)

An exchange between the court and prosecutor below demonstrates that the court understood the extremely prejudicial impact of this other crimes evidence. After the court's denial of the prosecution's request to cross-examine defense witnesses regarding the Honduran newspaper article, the prosecution persisted, arguing that appellant could explain the circumstances in the article. The following exchange then occurred:

The Court:	Do you want to do this trial twice, Mr. Grosbard?
Mr. Grosbard:	No, not at all.
The Court:	I don't either. There's no way that is coming in unless you have something better than the fact that he collected articles.

(24RT: 4193.)

Thus, the court here recognized that allowing the prosecutor to cross-examine defense mitigation witnesses based upon insufficient and uncorroborated information from a Honduran newspaper article, which allegedly described a robbery in February 1992 that resulted in people being shot, was damaging enough to constitute reversible error. (See *People v. Hempstead* (1983) 148 Cal.App.3d 949, 953-954 [describing circumstances under which character witnesses can be asked whether they have heard of particular prior acts of misconduct by the defendant].) Although the prosecutor did not use the article, his questions to appellant contained key elements known only from the article and were therefore equally prejudicial. Appellant seemed to acknowledge that the event took place and denied participating in it. The resulting prejudice was therefore equal to or greater

than if the prosecution had been able to cross-examine appellant's mitigation witnesses using the article.

This is so especially when considered with the prosecution's misuse of the erroneously admitted statement that appellant killed eight or nine other people, as argued in Argument XV and his repeated improper questions of appellant's sister regarding what appellant was doing in Honduras in early 1992. (27RT: 4775-4882 and see Argument XVIII.) Appellant incorporates by reference here the prejudice discussions in those arguments.

That Kim shot first was the only evidence appellant introduced to mitigate the circumstances of either of the homicides. The evidence was overwhelming that Kim shot his 25-caliber gun. (18RT: 3080, 3098 [holes in Kim's shirt consistent with him firing]; 19RT: 3334 [Kim told employees he had a gun]; 17RT: 2891 [.25-caliber pistol among guns used at Woodley's]; see also 21RT: 3775 [prosecutor concedes Kim probably pulled out his gun].) There was other evidence suggesting that the Kim shooting was unexpected and the robbery as a whole botched. Despite the keys and money bag being in plain sight, Contreras was unable to open the cash box or otherwise find any money. (17RT: 2753-2754, 2761; 19RT: 3276-3277.) Appellant and the others fled immediately after the shooting stopped, apparently taking nothing but Kim's gun. (18RT: 2936-2937, 3093-3094; 19RT: 3359.) Had it not been presented with the prosecution's erroneous and improper attack on this aspect of the defense mitigation case through insinuations that appellant had previously been involved in a shoot-out, the jury could have fairly considered appellant's testimony that he shot Kim only after he himself was shot.

The death sentences must be reversed because the government cannot satisfy its heavy burden of proving -- beyond a reasonable doubt -- that the

trial court's errors did not contribute to the jury's verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24-25.) Reversal is also required under the state standard for error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), because there is a reasonable possibility that even a single juror might have reached a different decision absent the errors. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984.)

XX.

THE TRIAL COURT ERRONEOUSLY PERMITTED IMPROPER IMPEACHMENT OF APPELLANT'S RELIGIOUS MITIGATION WITNESS

Arturo Talamante, who had a prison ministry, was one of appellant's religious mitigation witnesses. Under the theory that the prosecution was entitled to impeach Talamante's assessment of appellant's sincerity, the court allowed extensive cross-examination regarding Talamante's opinion and knowledge of another inmate, Mr. Bedolla Duarte (Bedolla), to whom Talamante had also ministered. The jury then learned that appellant and Bedolla had a close relationship in jail and that after religious studies and earning a pastoral certificate, Bedolla was arrested and convicted of three first degree murders and numerous other crimes. The prosecutor also questioned Talamante repeatedly about whether someone who had found God could still commit "vicious" and "cold-blooded" murders. (26RT: 4637.)

The cross-examination was devastating to appellant's mitigation case, which focused on his religious conversion. It also improperly skewed the focus of the penalty phase from appellant, linking him to a multiple murderer who committed his crimes despite his religious studies. The court's ruling violated appellant's rights to due process, a fundamentally fair trial and to

reliable death verdicts. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. Factual Background

Appellant proposed offering into evidence a document he wrote in jail called "The Fundamental Truth of the Bible," (Ex. 505A; Ex.505 [English translation]), and then presenting two religious witnesses to inform the jury that he had a deep understanding of the Bible. (25RT: 4362-4364.) From this, it could be inferred that appellant had had a true religious conversion in both his heart and mind. (25RT: 4363-4364, 4370.) The jury needed this as a basis upon which to draw the conclusion that appellant's testimony that he was converted was truthful. (25RT: 4371.) All this would be a "lead-in" to appellant's other religious witnesses who would then testify anecdotally about their religious discussions with appellant. (25RT: 4364.)

The court ruled that this was an inappropriate "area for expertise that is therefore used to show the truthfulness of the defendant. That is a credibility question for the jury to decide by listening to the defendant himself and looking at his writings . . . ." (25RT: 4366.) The defense witnesses could describe their observations and discussions with appellant but counsel could not ask them whether it was their opinion "that you believe Mr. Sanchez is telling the truth" (25RT: 4369-4370), because that question was for the jury to decide. (25RT: 4373.)

On direct examination, Talamante testified to the love of God appellant demonstrated in his letters to Talamante and the learning he saw in two of appellant's Bible studies that Talamante read. (26RT: 4622-4624.) Arturo Talamante also commented that he had only seen one other person in his prison ministry work with the same level of spirituality as appellant's. (26RT: 4622.) During the cross-examination, over appellant's objections

that the matter was irrelevant and inadmissible under Evidence Code section 352, the prosecutor was permitted to elicit the name of this other person, i.e., Bedolla, that Talamante found him as believable and as devoted to God as appellant (26RT: 4635-4636), and that he had seen a close relationship develop between appellant and Bedolla in the time they had been incarcerated together. (26RT: 4637, 4639.) The court then ruled that the prosecutor could properly impeach Talamante's assessment of appellant's sincerity. (26RT: 4640, 4642.) The court also overruled appellant's objections on other grounds to questions about Bedolla. (See 26RT: 4637 [went to impermissible topic of further dangerousness], 4641 [speculation, collateral], 4643 [hearsay and lack of personal knowledge].)

Over appellant's objections, Talamante was asked whether people who have found God go out and commit murders. (26RT: 4637.) The prosecutor also was permitted to elicit Talamante's testimony that he knew that prior to his arrest, Bedolla had studied for two and a half years at a Bible institute and had a pastoral certificate. (26RT: 4642-4643.) Finally, he was permitted to ask whether Talamante knew that just the previous month, Bedolla had been convicted of three counts of first degree murder, five counts of attempted murder and 24 other counts of crimes including robberies, attempted robberies and assaults. (26RT: 4643.) During recross-examination, the prosecutor continued, asking Talamante if Bedolla was teaching the word of God before his arrest. (26RT: 4649.) Appropriately, Talamante wondered why they were talking about Bedolla, who was not there. (26RT: 4650.)

B. Talamante's Opinions About Bedolla Were Inadmissible and Irrelevant to the Issue of Talamante's Credibility

Evidence Code section 780 allows impeachment to determine the credibility of a witness with "any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . . ." However, this Court has recognized that a lay witness's opinion about the veracity of another person's statements is inadmissible and irrelevant on the issue of credibility. (*People v. Melton* (1988) 44 Cal.3d 713, 744.) Such opinion testimony invades the province of the jury as the ultimate fact finder, is not helpful to a clear understanding of the witness's testimony, is not "properly founded character or reputation evidence," and does not bear on "any of the other matters listed by statute as most commonly affecting credibility." (*Ibid.*) For these reasons, the *Melton* Court concluded, "such an opinion has no 'tendency in reason' to disprove the veracity of the statements." (*Ibid.*; Evid. Code, §§ 210, 350, 780 & 800.)

In *Melton*, a witness, Boyd, had told the defense investigator of the possibility of a third party's involvement in the murder at issue and had also testified about the information. (*People v. Melton, supra,* 44 Cal.3d at p. 742.) Over defense objection, the prosecutor was permitted to cross-examine the defense investigator about his failure to follow up on that information by looking for the alleged third party. (*Ibid.*) The defendant argued that by revealing the investigator's failure to pursue the information, the questions and answers disclosed the investigator's inadmissible opinion that Boyd's statements about the third party were not worthy of belief. (*Id.* at p. 743-744.) This Court found the court's ruling to be in error. The record did not establish that the investigator was an expert in judging credibility. (*Id.* at p. 744.) Rather, he could describe his interviews in detail

and leave the factfinders free to decide Boyd's credibility for itself, based on their own observations of Boyd's testimony and factors such as motive, demeanor and background. (*Id.* at pp. 744-745.)

Similarly, here, the prosecutor sought to show that Talamante's testimony regarding appellant's conversion was not worthy of belief because Talamante was a bad judge of the credibility of others, specifically Bedolla. However, as *Melton* demonstrates, Talamante's opinion about the believability of Bedolla "had no tendency in reason" to prove or disprove Talamante's statements about appellant. (See *People v. Melton, supra,* 44 Cal.3d at p. 744.) The jury had at its disposal legitimate bases upon which to judge Talamante's credibility, having watched his direct and cross-examination and taking into account his background and motives, which were also subjects of the cross-examination. (See, e.g., 26RT: 4624-4625 [reasons Talamante has his ministry and that fact that he only sees the good in people].)

For these reasons, the court abused its discretion in overruling appellant's objection to the cross-examination involving Bedolla.

C. The Bedolla Cross-Examination Should Have Been Excluded as Irrelevant, Collateral and Prejudicial Under Evidence Code 352

1. The Bedolla Evidence Constituted Impermissible Nonstatutory Aggravating Evidence

Bedolla's criminal history before or after his religious studies was completely irrelevant to any permissible statutory aggravating factor at appellant's trial. (See *People v. Boyd* (38 Cal.3d 762, 773-776.) Yet the prosecution used it as the basis to suggest to the jury via cross-examination that despite a religious conversion, appellant, like Bedolla, still could go out and commit "vicious acts of murder." (26RT: 4637.) The prosecution

hammered away at this theme by repeatedly questioning Talamante about the friendship between Bedolla and appellant, the possibility of them working together in the future if they were sent to the same prison and whether someone who has found God can still go out and commit "cold-blooded" and "vicious" murders. (26RT: 4637-4640.)

Future dangerousness is not a statutory aggravating factor (§ 190.3; *People v. Thomas* (2011) 52 Cal.4th 336, 334, citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1223), and is inadmissible in the prosecution's case-in-chief. (*People v. Mattson* (1990) 50 Cal.3d 826, 878.) The trial court recognized that appellant had not opened the door to future dangerousness rebuttal evidence (26 RT: 4640-4641), but nevertheless permitted the extensive and damaging cross-examination described herein. The prosecutor told the court that she was "done" with future dangerousness and would not "go any further into it." (26RT: 4640, 4641.) Immediately, however, in the guise of questioning Talamante, the prosecutor told the jury that Bedolla had just been convicted the prior month of three counts of first degree murder, five counts of attempted murder and multiple other crimes despite having studied for two and a half years at a Bible study and obtaining pastoral certificates before his arrest. (26RT: 4643.) This, and the entire line of cross-examination, constituted irrelevant nonstatutory aggravating evidence.

2. The Bedolla Cross-Examination Was Collateral to Talamante's Direct Examination Testimony Regarding Appellant's Religious Conversion

The trial court also abused its discretion in allowing the cross-examination on Bedolla because it was collateral to the direct examination testimony. Collateral matters include those that have "no relevancy to prove or disprove any issue in the action," but nevertheless may "be relevant to the credibility of a witness who presents evidence on an issue." (*People v.*

Rodriguez (1999) 20 Cal.4th 1, 9, citation omitted.) Under Evidence Code section 780, the existence or nonexistence of a witness's bias, interest, or other motive and the existence or nonexistence of any fact testified to by the witness are always relevant for impeachment purposes. (Evid. Code, § 780, subds. (f), (I); see *People v. Rodriguez, supra*, 20 Cal.4th at p. 9.)

However, "the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296, superseded by statute on other grounds, as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

As noted above, Talamante testified on direct examination appellant's love of God as demonstrated in appellant's letters to Talamante and the learning Talamante saw in two of appellant's Bible studies that Talamante had read. (26RT: 4622-4624.) These topics complied with the court's initial ruling on the limits of the testimony of the religious mitigation witnesses, which disallowed testimony on whether they believed appellant was truthful. (25RT: 4370, 4373.) Talamante's comment that "in these past 25 years, I've only found two people" demonstrating the same devotion to God as appellant demonstrated, was unsolicited. Talamante made the remark while responding to a request on direct examination to describe appellant's knowledge of the Bible. (26RT: 4622.) It took up less than two lines in a five-page direct examination. (See 26RT: 4619-4624.) The point was clearly collateral to the point of Talamante's testimony.

In *People v. Sanders* (1995) 11 Cal.4th 475, 512-514, a witness, Rogoway, testified for the prosecution and identified the defendant. The defense sought to impeach her by bringing in evidence of problems in her

identification of a co-defendant tried separately. (*Id.* at p. 513.) The trial court excluded the evidence under Evidence Code section 352, observing "I will not let you show she is a bad identifier by showing she may have been wrong about" identifying the co-defendant. (*Ibid.*) This court upheld that ruling, as Rogoway's identification of the co-defendant was a collateral issue and its value was far outweighed by the prejudice of undue consumption of time and potential confusion of the jury. (*Id.* at p. 514.)

The parallels to the instant case are clear: whether Talamante was a bad judge of Bedolla's character and sincerity was collateral to his testimony regarding appellant's religious work.

In *People v. Lavergne* (1971) 4 Cal.3d 735, a prosecution for robbery, an accomplice who had already pled guilty testified for the prosecution that he had driven other robbers to the store. (*Id.* at p. 739.) The defense asked whether the car was stolen and the witness replied it was not. (*Id.* at p. 741.) The defense then sought to impeach the witness's credibility by introducing testimony to show that the car was stolen. (*Ibid.*) The court sustained the prosecution's objection to this testimony under Evidence Code section 352. (*Ibid.*) The Court affirmed the trial court's exercise of discretion excluding the evidence, finding that "the fact that the car was stolen had nothing to do with the facts at issue in the trial." (*Id.* at p. 742.) The Court noted that "the collateral character of the evidence reduces its probative value and increases the possibility that it may prejudice or confuse the jury." (*Ibid.*)

Similarly, here, Talamante's experience with and view of Bedolla had "nothing to do with the facts at issue" (*People v. LaVergne, supra,* 4 Cal.3d at p. 742), at appellant's penalty trial. Those facts were appellant's post-crime conversion and discussions with Talamante regarding it.

Another factor in *Lavergne* that supported the exercise of the court's discretion excluding the evidence was the fact that it appeared that the cross-examiner purposely elicited the collateral testimony for the purpose of impeaching the witness. (*People v. LaVergne, supra,* 4 Cal.3d at p. 743.) Here, although the court permitted the cross-examination on the ground that the prosecution could impeach Talamante's assessment of appellant's sincerity, Talamante never testified to this during his direct examination. (See 26RT: 4619-4624.) It was the prosecutor, not appellant, who asked Talamante if he found appellant believable and credible, despite the court's earlier prohibition on such questioning. (26RT: 4631, 25RT: 4370.) For this reason, also, the court abused its discretion in allowing cross-examination regarding Bedolla.

Moreover, following a five-page direct examination, the cross-examination on Bedolla took up about six pages, (26RT: 4635-4646), of a total of 15 pages of cross-examination. (26RT: 4624-4646; page counts omit discussion of objections.) Because this cross-examination was collateral to the direct examination and linked only by the prosecutor's improper questions on cross-examination, the court should not have permitted it. The cross-examination clearly led to an undue consumption of time, which was likely to confuse the jury. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1090 [no abuse of discretion to exclude evidence of threat a prosecution witness had made against defendant where it could confuse the jury and lead to undue consumption of time]; *People v. Harris* (2008) 43 Cal.4th 1269, 1290-1292 [no abuse of discretion to exclude testimony of probation officer regarding prosecution witnesses' dishonesty and other probation failures where failures were numerous and could have led to "prolonged nitpicking"].)

3. The Bedolla Cross-Examination Improperly and Prejudicially Struck at the Heart of Appellant's Mitigation Case

"[E]vidence is unduly prejudicial under section 352 only if it 'uniquely tends to evoke an emotional bias against the defendant as an individual and . . . has very little effect on the issues' (citation), or if it invites the jury to prejudge 'a person or cause on the basis of extraneous factors.' (Citation omitted.)" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 534.) The prosecutor elicited Talamante's opinion that Bedolla was, in many respects, the same as appellant and that the two of them had a close relationship in jail. (26RT: 4637, 4639.) She solicited Talamante's view that because Bedolla and appellant had both found God, he would not expect them to go out and commit murders. (26RT: 4638-4639.) After this set- up, the prosecutor finished the cross-examination by asking if Talamante had heard that after receiving his religious training and pastoral certificate, Bedolla had been convicted of multiple crimes, including three murders. (26RT: 4642-4643.) This severely damaged the value of not just Talamante's testimony, but that of all the religious witnesses, by playing into one of the prosecution's main penalty phase themes: that appellant's conversion was false, as he was a heartless person incapable of reformation who presented the religious testimony only to manipulate the jury into giving him a life sentence. (See, e.g., 29RT: 5278; 30RT: 5315-5317, 5326-5328, 5379 [prosecution's closing argument].)

A court's task in balancing the dangers of prejudice, confusion and undue time consumption when considering collateral impeachment evidence "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne, supra,* 4 Cal.3d at p. 744.) Certainly the same should be true when what is at stake is a defendant's life.

Here, the trial court failed in its task when it allowed the lengthy and injurious cross-examination regarding Bedolla.

D. The Court's Rulings and Resulting Improper Impeachment Violated Appellant's Rights Under the Fifth, Eighth and Fourteenth Amendments

The improper attacks on appellant through the Bedolla cross-examination precluded the jury's proper consideration of appellant's mitigation evidence and violated appellant's rights under the Eighth and Fourteenth Amendments to present mitigating evidence. (See *Depew v. Anderson* (6th Cir. 2003) 311 F.3d 742, 748-750 [multiple instances of prosecutorial misconduct undermined mitigation case so as to prevent jury from properly considering it].)

The court's errors led to a diminishment of the heightened standards in capital proceedings "for reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, pp. 305 [plur. opn. of Stewart, Powell, and Stevens, JJ.]; U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17.)

The errors further violated appellant's federal constitutional rights under the Fifth, Eighth and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, irrelevant evidence. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, citing *Zant v. Stephens* (1983) 462 U.S. 862, 884-885, 887, fn. 24 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].)

E. The Errors Were Prejudicial and Reversal is Required

The court's errors in permitting this line of questioning caused egregious harm to appellant's mitigation case. The sincerity of appellant's

conversion was a key theme of the defense mitigation case. (See 26RT: 4502, 4503 ["that is my defense, [] the sincerity of [appellant's] conversion"].) Appellant presented that defense abiding by the court's guidelines, only to be undercut by the court's rulings described herein and the prosecution's cross-examination and subsequent argument.

The prosecutor told the jury that appellant "concocted the conversion defense" and "[t]here is no down side to Mr. Sanchez lying." (30RT: 5327.) She argued that the "parade of clergy . . . . had to do some intellectual gymnastics" to account for appellant's behaviors and then highlighted cross-examination testimony from witnesses Pacifico Diaz, Julio Ruiz and Luke Packel regarding whether appellant lied or was "faking" religion. (30RT: 5327-5328.)

The prosecutor then argued:

> Do you remember Mr. Talamante? He told you there's only been two people who have the type of spirituality that he has seen in his 25 years of practice. One of them was Mr. Sanchez and the other one was Mr. Bedolla.
>
> Well, Mr. Talamante knew about as much about Mr. Sanchez and the crimes he committed as he did about Mr. Bedolla, that he also was a mass killer and robber and was a certified minister and studied two and a half years in bible college before he committed these crimes.

(30RT: 5329.)

Thus, the prosecutor took full advantage of the court's errors to discredit the testimony of the religious witnesses and with it, appellant's mitigation case. Apellant incorporates by reference the prejudice discussions in Argument XVII., regarding the prosecutor's further argument that appellant "lied, he deceived and manipulated these men of God . . . . It's

immoral and it was despicable and it is an insult to all religious people everywhere . . . ." (30RT: 5332-5333.)

Whether the evidentiary errors are assessed individually or collectively, the death sentences must be reversed because the government cannot satisfy its heavy burden of proving -- beyond a reasonable doubt -- that the trial court's errors did not contribute to the jury's verdicts. (*Chapman v. California* (1967) 386 U.S. 18, 24-25.) Reversal is also required under the state standard for error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448), because there is a reasonable possibility that even a single juror might have reached a different decision absent the errors. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984.)

XXI.

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

During penalty phase argument, the prosecutor misstated the law, misled the jury, improperly attempted to minimize the jury's burden and violated prior court rulings. The cumulative effect of the misconduct was to violate appellant's rights to a fundamentally fair trial and due process of law, to confront the evidence and witnesses against him, to the effective assistance of counsel, to be free from outrageous governmental conduct and to a reliable and appropriate penalty determination, as guaranteed by the First, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. Appellant therefore should receive a new, misconduct-free penalty trial.

A. Applicable Legal Principles

Appellant incorporates by reference as though fully set forth herein the authorities cited in section A of Argument XVIII., *ante,* regarding prosecutorial misconduct.

B. Misstatements and Misrepresentation of the Law

"'[I]t is improper for the prosecutor to misstate the law generally.'" (*People v. Hill* (1998) 17 Cal.4th 800, 829, quoting *People v. Bell* (1989) 49 Cal.3d 502, 538.)

Appellant unsuccessfully requested instructions on premeditation and deliberation at the first phase of trial. (21RT: 3633.) The prosecutor opposed the request, (21RT: 3630), repeatedly questioning how, under the facts, the defense could "allege it as anything other than a felony murder?" (21RT: 3630; 3639 [the defendants presented no evidence of anything other than felony murder]; 3700 ["your honor, it's a straight robbery from beginning to end"].)

At the penalty phase closing argument, the prosecutor told the jury that it could find premeditation and deliberation, which "some of you indicated in your questionnaires" are more indicative of aggravated murder. (29RT: 5279.) The prosecutor went on to argue that while it was not "legally necessary" for the jurors to find premeditation and deliberation, a murder with premeditation and deliberation was more aggravating than an unintentional or accidental killing during the course of a robbery, which was itself a first degree special circumstance killing. (29RT: 5279.) The court overruled appellant's objection that the line of argument was beyond the scope of the instructions. (29RT: 5279.)

The prosecutor then offered the jurors "suggestions" for finding premeditation and deliberation. (29RT: 5280.) The prosecutor told the

jurors they could, first "look at the way the crimes are committed," and then provided a sweeping description of "the way the crimes are committed," including "the way [the defendants] increased the risk of resistance to indicate . . . an absolute guarantee" that someone would be killed, the defendants' aggravation and escalation of violence as shown by the number of crimes, the hours of the day the crimes took place, the time they took and "well over 100 victims," gratuitous violence and the use of torture. (29RT: 5280.)

"Number two" - the prosecutor's second suggestion to the jury as to how to find premeditation and deliberation - included the statements of pre-planning, planning for possible resistance including the bringing and use of stun guns; the photos of Contreras and Navarro with guns; the photo of the three defendants displaying their wealth in a jewelry store; and the jewelry and property found pursuant to search warrants. (29RT: 5280-5282.)

The prosecutor certainly could argue that there was evidence of planning as part of the circumstances of the crime. However, the prosecutor's argument used the legal terms premeditation and deliberation so as to mislead the jury as to their meanings. (Cf. CALJIC No. 8.20 (5th Ed.) [Deliberate and Premeditated Murder].) For instance, as just stated, the prosecutor argued that evidence of premeditation and deliberation included photos of the two co-defendants posing with guns and the three defendants together wearing jewelry in a jewelry shop. (29RT: 5281.) These photos do not support a finding of premeditation and deliberation on the part of appellant as to the two homicides at issue here. (See, e.g., *People v. Anderson* (1968) 70 Cal.3d 15, 26-27 [describing evidentiary framework to assist reviewing courts in assessing whether the evidence supports an

inference that the killing resulted from preexisting reflection and weighing of considerations].)

This improper argument was prejudicial as the jury was informed that virtually all the guilt phase evidence was transmogrified into a circumstance of the crime.

C. Improper Tactics Designed to Mislead the Jury

A prosecutor may not use arguments that are calculated to mislead the jury. (*People v. Love* (1961) 56 Cal.2d 720, 731, overruled on another point as recognized in *People v. Morse* (1964) 60 Cal.2d 631, 637-638.) With respect to capital cases, the United States Supreme Court has emphasized that the constitutional concern for reliability in capital sentences requires exacting scrutiny of prosecutor's arguments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-334, 340-342.) In exercising that scrutiny, courts must determine whether the prosecutor's comments conveyed inaccurate or misleading information to the jury in violation of the Eighth Amendment or were so inflammatory as to violate the Due Process Clause of the Fourteenth Amendment. (*Id.* at p. 340; *Darden v. Wainwright* (1986) 477 U.S. 168, 178-179.)

The prosecutor began her opening argument at the penalty phase by complimenting the jurors on their "decisive and intuitive verdicts" and then stated, "[n]ow, we cannot tell you everything about the defendants in this phase of the trial. We are limited by law as the judge was explaining to you" to the three factors in aggravation. (24RT: 4212.) The prosecutor returned to this theme as she began her penalty phase closing argument, "[w]e chose, Mr. Grosbard and I, to rely on the weight and gravity and the convincing force of the evidence that you heard during the guilt phase." (29RT: 5261.) The following day, before the argument resumed, appellant objected to the

implication that there was available aggravating evidence the prosecution chose not to use. (30RT: 5294.) The court faulted counsel for not objecting contemporaneously and instructed appellant to find the exact comments. (30RT: 5294–5295.) Appellant did not reraise the issue with the court.

The prosecutor's implication that she had special knowledge outside the record violated appellant's due process rights. (*Newlon v. Armontrout* (8th Cir. 1989) 885 F.2d 1328, 1336-1337; see also *People v. Gallaway* (1979)100 Cal.App.3d 551, 564 [improper to invite the jury to speculate about "evidence" never presented at trial]; *People v. Yeoman* (2003) 31 Cal.4th 93, 148 [a prosecutor should not invite the jury to speculate].) While imperfectly preserved, appellant urges the court to reach the issue, as any objection would have been futile because, as demonstrated in Argument XVIII, *ante*, the court consistently refused to rein in or admonish the prosecution. (See *People v. Hill, supra,* 17 Cal.4th at p. 820-821; see also *People v. Vance* (2010) 188 Cal.App.4th 1182, 1198 [excusing late objection where counsel might initially decide not to object in the tactical hope that an improper remark is isolated and therefore should not be emphasized to the jury with an objection].)

D. Improper Vengeance Argument

The prosecutor during the penalty phase closing argument predicted that the defense would say that the death penalty is pure revenge and countered that there were two types of revenge, just and unjust. (30RT: 5365.) The prosecutor then evoked the "Midrosh [*sic*]"[66] to urge the jury to give up their natural inclination to want to prolong life; Justice Potter

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[66] Midrash are a type of rabbinical commentary on Hebrew scripture. (See http://www.jewishencyclopedia.com/articles/10805- midrash.)

Stewart for the idea that it was necessary to give the death penalty to avoid anarchy; and the survivors of Kim and Hoglund as well as some of the robbery victims who needed the death penalty so they could have the vengeance they wanted because "they can't take the defendants out and shoot and torture and terrorize them or gun them down on 52nd Street." (30RT: 5366-5367.) Finally, the prosecutor told the jury that, "[w]e owe the victims in this case vengeance as part of our system of justice and as sanctioned by the laws of our state, and that you swore to uphold as jurors in this case in determining penalty." (30RT: 5367.) Counsel objected to the argument as informing the jury that they could use vengeance to give the death penalty. (30RT: 5367-5372.) The court overruled the objection, but nevertheless told the prosecution to "stay away from any further discussion of vengeance." (30RT: 5367, 5372.)

As counsel below recognized, this Court has found brief comments on vengeance not to be misconduct. (See 30RT: 5372 and *People v. Wash* (1993) 6 Cal.4th 215, 262 [isolated references to retribution or community vengeance do not constitute misconduct].) The Court has approved argument equating retribution, vengeance and punishment and arguing that the death penalty is proper when exacted by the state in lieu of personal retaliation. (See, e.g., *People v. Zambrano* (2007) 41 Cal.4th 1082, 1077, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421.) Recently, the Court has suggested that because retribution is currently an accepted objective of punishment, the reasoning behind its prior case law, which found prosecutorial comment on vengeance problematic, is suspect. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1178.) These changes in penal philosophy "ameliorate concerns about the inflammatory relevance" of prosecutorial argument urging vengeance. (*Ibid.*)

Appellant respectfully disagrees with this conclusion and reasoning. Under the death penalty jurisprudence of the United States Supreme Court, it is incorrect to conflate retribution with vengeance, or assume that there has been or is a uniform view on the role that retribution plays as a rationale for the death penalty. (See Siglar, *Contradiction, Coherence, and Guided Discretion in the Supreme Court Capital Sentencing Jurisprudence* (2003) 40 Am. Crim. L. Rev. 1151, 1178-1183 [explaining difference between revenge and retribution and critiquing confusion around the concepts of revenge, vengeance and retribution among members of the High Court]; Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment* (2009) 103 Nw. U. L. Rev. 1163, 1179-1182 [identifying theoretical strands underpinning discussions of retribution in U.S. Supreme Court death penalty cases].) Given this, appellant asks the Court to reconsider its approval of prosecutorial argument that the death penalty is a state-sanctioned form of vengeance. For the same reason, appellant submits that the prosecution's argument was improper: it is legally incorrect to boil down the complex jurisprudence behind the death penalty to the word vengeance.

Even if retribution and vengeance were synonymous and vengeance alone is an acceptable consideration for the death penalty under California or federal constitutional law, it was incorrect and improper for the prosecutor to exhort the jurors that they "owe[d]" the victims vengeance as part of a system of justice they "swore to uphold." (30RT: 5367.) Of course, the jurors swore nothing of the kind; rather, they said "I do" when asked if they would "well and truly" try the case and render a true verdict according "only to the evidence presented to you and to the instructions of this court." (8RT: 1140.) Nothing in the penalty phase jury instructions mentioned vengeance.

Moreover, there was no evidence presented that the families of Kim and Hoglund or the "Saavedras and Rodriguez and Urriettas and all of the sea of faces before you" wanted to go out and "probably" achieve vengeance. (30RT: 5367.) By so arguing, and by raising the specter of the victims wanting to "shoot, torture, terrorize" and "gun [the defendants] down on 52nd Street" (30RT: 5367), the prosecutor went beyond any permissible argument. Unlike the policy argument approved in *People v. Zambrano, supra,* 41 Cal.4th at pp. 1177-1178, the prosecutor here sought to "invoke untethered passion, [and] dissuade jurors from making individual decisions," which was improper. (See *People v. Zambrano, supra,* 41 Cal.4th at p. 1179.)

E. Improper Argument under *Caldwell v. Mississippi*

During penalty phase closing argument, the prosecutor told the jury that the defense may argue that to give the death penalty to killers is to stoop to their level, but there is a big difference because before the defendants are executed they will get "all the rights, privileges, and safeguards that our society would possibly provide, and that were meticulously provided by the police, the courts" and attorneys. (30RT: 5367-5368.) The court overruled the defense objection that the mention of safeguards was an attempt to relieve the jurors of a sense of individual responsibility. (30RT: 5370-5371.)

It is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329.) "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death rests with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." (*Id.* at p.

333; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 761-762; *Buttrum v. Black* (N.D., Ga.1989) 721 F.Supp. 1268, 1316-1317 [prosecutor's closing argument describing jury as merely "one cog in the criminal process" violated Eighth Amendment's requirement of heightened reliability in a capital case and warranted habeas corpus relief, in light of court's implicit approval of the comments through overruling defendant's objection].) The court therefore erred in overruling the defense objection, violating appellant's right to a reliable penalty determination under the Eighth Amendment.

F. Other Flagrant Misconduct

Deterrence. Based upon comments in the voir dire questionnaires, the court early on told the prospective jurors that policy issues of deterrence and cost could not be part of their determinations. (6RT: 619-620, 661, 7RT: 950-951.) At the end of the penalty phase, the jurors were instructed not to consider deterrence. (29RT: 5242.) After and despite all this, the prosecutor asked the jurors during the penalty phase closing argument, "[h]ow many people have to be terrorized, tortured and robbed before you say enough is enough . . . . The death penalty should also be the price they expect to pay in committing these types of crimes and the risks they took." (30RT: 5377.) Appellant's objection to the deterrence argument was overruled.

This Court has "repeatedly held deterrence arguments rest on unproven assumptions and place a foreign weight on the scale on which should instead be made an *individualized* determination as to penalty." (*People v. Marshall* (1996) 13 Cal.4th 799, 859, italics in original.) Moreover, the prosecutor knew that at least one sitting juror felt that the death penalty was needed as a deterrent. (See Vol.2, 2SCT: 553, 566 [juror R.H.]; see also Vol.5, 2SCT: 1407, 7RT: 874 [juror I.Z.] [death penalty is a

deterrent].) Here, the prosecutor's argument was flagrant misconduct given the court's admonitions and instructions.

Method of Execution. In discussing the upcoming penalty phase, the court outlined areas that defense expert witnesses were prohibited from talking about, i.e., "mode of execution . . . what life in prison is like." (23RT: 4162.) No such defense evidence was presented. Nevertheless, the prosecutor argued at the close of the penalty phase that the defense "may say that execution is horrible, but any means of execution in our state is done with great efforts and great attempts to make it as humane as possible." (30RT: 5368.) When the defense objected, the prosecutor argued that she was countering any upcoming defense argument on the horrors of execution. (30RT: 5369.) The court sustained the objection, (30RT: 5368, 5370), and admonished the jury that they were to not to consider the manner of execution. (30RT: 5370, 5375.)

However, when defense counsel pointed out that the prosecution knew the defense was precluded from going into the manner of execution, the court defended the prosecutor, remarking, "it saves rebuttal." (30RT: 5370.) It is therefore apparent that a further effort to perfect the record by requesting an assignment of misconduct and an admonishment would have been futile.

The prosecutor's argument was another attempt to minimize the burden on the jurors in sentencing someone to death and violated appellant's rights under the Eighth Amendment. (See *Antwine v. Delo* (8th Cir. 1995) 54 F3d 1357, 1362 [death sentence constitutionally invalid because prosecutor's argument that death by lethal gas was instantaneous invited jury to minimize burden in sentencing someone to death by comforting them with the thought that death was painless].)

Inflammatory language during closing arguments at both the guilt and penalty phases. Appeals to the sympathy or passion of the jury are misconduct at the guilt phase of trial. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) At a break after the first portion of the prosecution's closing argument at the guilt phase, appellant objected to the prosecutor's argument that the defendants had engaged in "military planning," and to the repeated emphasis on torture and the pleasure the defendants took in inflicting pain as irrelevant to guilt phase issues. (21RT: 3796.) Appellant objected that this and the argument overall were improper attempts to inflame the jurors against appellant in order to secure a death sentence. (21RT: 3795-3796; see also prosecutor argument at 21 RT:3759 [defendants liked breaking ribs and putting guns to people's heads]; 21RT: 3762-3763 [analogizing robberies to military operations]; 3762 [arguing that defendants' modus operandi included torturing managers if needed]; 3779 [defendants started torturing people at Casa Gamino]; 3780 [Armando Lopez described being tortured]; 3779 [brutality and viciousness of defendants].) Appellant requested an assignment of error and admonition. (21RT: 3796.)

By repeated references to torture, by impugning sadistic motivations to appellant and by describing the robberies as military operations, the prosecutor was presenting "'irrelevant information or inflammatory rhetoric that divert[ed] the jury's attention from its proper role, or invite[d] an irrational, purely subjective response.' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742.) This improperly encouraged the jury to allow "emotion [to] reign over reason" (*id.*), when deliberating at the guilt phase. Moreover, as appellant argued below (21RT: 3796), the emotional argument improperly sought to turn the jurors against appellant for penalty phase purposes.

Defense counsel also objected to the prosecutor's characterization of appellant as a "little man." (21RT: 3795; see also 21RT: 3784 [prosecutor's argument].) The prosecutor responded to this objection and the court overruled it. (21RT: 3798-3799.) The prosecutor did not respond to appellant's other objections and the court never ruled on them. Appellant contends that despite his not requesting a specific ruling, the issue has not been waived. (See *People v. Heldenburg* (1990) 219 Cal.App.3d 468, 474-75 [where defense counsel did not press the trial court for an admonition to the jury the court had agreed to give, defense counsel waived the issue of prosecutorial misconduct].) As argued *ante*, the trial court consistently refused to find misconduct and/or admonish the prosecutor. (See 28RT: 4873-4874, 4877-4878 [improper cross-examination]; 30RT: 5370 [improper argument regarding method of execution]; 26RT: 4567-4568 [improper ex parte contact with interpreter].) Because pressing the court for a ruling and admonition would have been futile, appellant requests this Court to rule on this matter and find error. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [appellate court has discretion to consider an inadequately preserved misconduct issue].)

The court overruled appellant's objection during the penalty phase argument to the prosecutor's description of appellant and others as entering the Outrigger restaurant "like storm troopers," which was a reference to Nazis. (30RT: 5295; see 29RT: 5264.) "In general, prosecutors should refrain from comparing defendants to historic or fictional villains, especially where the comparisons are wholly inappropriate or unlinked to the evidence." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1213.) Here, the reference to storm troopers went completely outside the record and could only have been aimed at arousing the prejudice of the jury. Hence, it was

misconduct. (See *People v. Beyea* (1974) 38 Cal.App.3d 176, 196, disapproved on other grounds in *People v. Blacksher* (2011) 52 Cal.4th 769, 807 [prosecutor's comparison in guilt phase argument of defendants' actions to, among others, those of Hitler's Brown Shirts, overstepped permissible bounds of fair comment].)

G. The Prosecutor's Argument Was Cumulatively Prejudicial

"A prosecutor's closing argument is an especially critical period of trial. [Citation.] Since it comes from an official representative of the people, it carries great weight and must therefore be reasonably objective. [Citation.]" (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) The prosecutor here repeatedly sought to mislead the jury and introduced numerous improper and prejudicial factors that provided the jury with unlawful bases for returning a death verdict. The misconduct steered the jury away from a proper evaluation of the evidence admitted and its relationship to the statutory aggravating and mitigating factors and toward an improper evaluation of appellant's death-worthiness.

Empirical research has shown that jurors who are exposed to such improper influences are significantly more likely to impose a death sentence than those who are not. (Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Arguments in Capital Trials* (1999) 23 Law & Hum. Behav. 471, 483.) Moreover, the prejudicial effect of the improper comments by the prosecutor, described above in each section, was exacerbated by the trial court's passive or non-response to them. (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1201.)

The misconduct violated appellant's rights under the Due Process Clause of the Fourteenth Amendment because the prosecutor's pervasive misconduct resulted in an unfair trial. (*People v. Hill, supra*, 17 Cal.4th at p.

819.) The individual and cumulative effect of the instances of misconduct described above distorted the record, injected improper considerations into the sentencing calculus and encouraged the jurors to make a decision based on emotion rather than reason. They therefore violated appellant's Eighth Amendment right to a reliable, individualized and non-arbitrary sentencing determination. (*Caldwell v. Mississippi, supra,* 472 U.S. 320, 329.) And to the extent that state law was violated, appellant's rights to due process, equal protection, a fair trial by an impartial jury and a reliable death judgment were violated by the state arbitrarily withholding a non-constitutional right provided by its laws. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 1, 7, 15, 16: *Ross v. Oklahoma* (1988) 487 U.S. 81, 88-89; see (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

This Court has previously recognized how hard it can be to conclude in a capital penalty phase that there is no reasonable possibility that a substantial error could not have affected the outcome of a capital trial:

> [T]he jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

(*People v. Hines* (1964) 61 Cal. 2d 164, 169, overruled on other grounds in *People v. Murtishaw* (1981) 29 Cal. 3d 733, 774, fn. 40.)

Even if this Court concludes that any single instance of misconduct standing alone might have been harmless, it must find that the cumulative impact of misconduct was prejudicial. (See *People v. Purvis* (1963) 60 Cal.2d 323, 348, 353 [combination of "relatively unimportant

misstatements" requires reversal]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1077 [cumulative effect of closing argument prejudicial].)

Under any of the possibly applicable standards of review, the penalty judgment must be reversed. There is a reasonable possibility under the state law standard (*People v. Brown* (1988) 46 Cal.3d 432, 446-448) that absent the prosecutor's improper plea to the passions and prejudices of the jury in her final remarks to them, the penalty verdict would have been different. Stated otherwise, the prosecution cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The death judgments must therefore be reversed.

XXII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY THAT MERCY COULD BE CONSIDERED AS A BASIS FOR RETURNING A VERDICT OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

The trial judge instructed the jury in the penalty phase that, "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial that it warrants death instead of life without parole." (12CT: 3505, 29RT: 5255, CALJIC No. 8.88.) Pursuant to CALJIC No. 8.85, the trial judge also described the factors in aggravation and mitigation that the jury should consider in its penalty determination. This instruction included a description of factor (k):

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that a defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(12CT: 3500; 29RT: 5240-5241; see § 190.3, factor (k).) The jury was also instructed pursuant to CALJIC No. 8.84.1 that "[i]n determining penalty, the jury may take into consideration pity or sympathy." (12CT: 3497; 29RT: 5235.)

Recognizing that these standard instructions cover sympathy but not the separate concept of mercy, defense counsel proposed an instruction about the place of mercy in the jury's deliberations at the penalty phase, which stated, in relevant part, that "[a] juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor." (X SCT: 346.) Appellant also joined Navarro's request for an instruction to explain the concept and applicability of mercy at the penalty phase. (29RT: 5063-5064; 1SCT: 37, Navarro No. 2, lines 8-11 ["the law permits you to be influenced by mercy, sympathy, compassion or pity for the defendant or his family in arriving at a proper penalty in this case"]; see also 1SCT: 49 and 57, Navarro Nos. 13 and 21, additional instructions on mercy.)

The trial court refused to instruct on mercy on the grounds that under this Court's cases it was inappropriate and because the words "sympathy" and "pity" adequately covered the area.[67] (29RT:5189-5190.) The trial court erred. The requested instructions sought to inform the jury that mercy could be considered in determining whether or not to impose the death penalty. It is well established that mercy is a proper consideration for the penalty determination in a capital case. This error by the trial judge violated appellant's rights to a fair jury trial, to present a defense, to a reliable penalty

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[67] The trial court cited *People v. McPeters* (1992) 2 Cal.4th 1148; *People v. Daniels* (1991) 52 Cal.3d 815; *People v. Wright* (1990) 52 Cal.3d 367; *People v. Wader* (1993) 5 Cal.4th 610; and *People v. Danielson* (1992) 3 Cal.4th 691.

determination and to due process as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15 and 17 of the California Constitution.

A. Appellant's Request for Instructions on Mercy Should Have Been Granted

1. Consideration of Mercy Is a Constitutionally Valid Response to Mitigating Evidence and a Guide for Juror Discretion In Determining Penalty

A defendant in a capital case is entitled to due process, a fair jury trial and procedural safeguards guiding the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S.153, 189.) The Eighth Amendment requires that capital sentencing "reflect a reasoned moral response to the defendant's background, character and crime." (*Roper v. Simmons* (2005) 543 U.S. 551, 603, citations omitted.)

> A process that accords no significance to relevant facets of the character and record of the individual offender . . . excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.

(*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

The U.S. Supreme Court's death penalty jurisprudence recognizes that guided discretion includes a determination of those cases fit for mercy.

> [T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

(*Gregg v. Georgia, supra*, 428 U.S. at p. 203.) The Eighth and Fourteenth Amendments to the United States Constitution mandate that a capital case jury "not be precluded from considering, as a mitigating factor, any aspect of

a defendant's character or record, and any of the circumstances of the offense that the defendant offers as a basis of a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma, supra,* 455 U.S. at p.110.) These cases guarantee the right of a capital defendant to offer any mitigating evidence and require appropriate instructions to the jury that "give effect to the mitigating evidence." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, 323; *Brewer v. Quarterman* (2007) 550 U.S. 286, 289, 294-295.) The unfettered mitigation inquiry preserves the defendant's right, and the jury's prerogative, to mercy.

This Court has also acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Haskett* (1982) 30 Cal. 3d. 841, 864.) This statement recognizes that although mercy is not itself a listed, statutory factor in mitigation, and is not an aspect of the defendant's character, it is a critical and legitimate "reasoned moral response" to mitigating evidence permitting imposition of a penalty less than death. (See *Penry v. Lynaugh, supra,* 492 U.S. at p. 328; *Gregg v. Georgia, supra*, 428 U.S. at p. 222 (conc. opn., White, J.); *Zant v. Stephens* (1983) 462 U.S. 862, 875-876, fn. 13.)

In this sense, mercy is an evidence-based consideration that jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty despite the defendant's culpability in the commission of the murder. (See *People v. Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea of "mercy" and "compassion" relevant to whether death was an appropriate

penalty for the defendant notwithstanding his culpability in the commission of the murder].) Without adequate instructional guidance, however, there is a substantial likelihood that a jury may exclude any consideration of mercy, or believe that it is out of their reach, even though the concept is implicated by the evidence as well as the arguments of counsel. (See *Brewer v. Quarterman, supra*, 550 U.S. 286, 294-296; *California v. Brown* (1987) 479 U.S. 538, 546 (conc. opn. of O'Connor, J.).)

Mercy also offers a means for the jury to deliver a just verdict even if it fails to find any mitigating factors as defined by the legislature and presented by the defendant. Indeed, this Court has consistently recognized that a jury may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances. (See, e.g., *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192 [jury may decide that aggravating evidence not comparatively substantial enough to warrant death].)

2. Mercy Is a Concept Separate and Distinct from Sympathy, and Because Standard Penalty Phase Instructions Fail to Guide Juror Discretion to Consider Mercy, Special Instructions Such As Those Proposed by Appellant Are Necessary

As appellant argued below, mercy and sympathy are not the same. (29RT: 5065.) Mercy can be defined as "compassion or forbearance shown especially to an offender," whereas sympathy as "an inclination to think or feel alike" and "the act or capacity of entering into or sharing the feelings or interests of another." (Merriam-Webster Dictionary, <http://www. merriam-webster.com> [as of October 1, 2011].) In addition, mercy is "a virtue that tempers or 'seasons' justice – something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of

tempering seriously, to make it stronger." (Murphy & Hampton, Mercy and Legal Justice in Forgiveness and Mercy (1988) p. 166.)

Without an instruction about the relationship of mercy to the jury's sentencing decision, there is a substantial likelihood the jury believed they were precluded from considering constitutionally relevant evidence, especially if it did not fit neatly into any statutory mitigating factor, including factor (k). (See § 190.3, factors (d)-(k).)

In a capital case, penalty phase instructions must be examined as a whole to determine whether the jury was adequately informed. (*People v. Melton* (1988) 44 Cal. 3d 713, 759.) In *People v. Melton,* although the jury received an instruction in the literal terms of factor (k), they also heard that mitigating circumstances may be considered in "fairness and mercy." (*Id.* at p. 760.) In contrast, the jurors in this case were not adequately informed of their ability to dispense mercy. They were instructed only pursuant to the literal and general terms of statutory mitigating factors pursuant to pattern instructions.

Because mercy is an acknowledged part of the jury's capital sentencing determination (see *People v. Haskett, supra*, 30 Cal. 3d. at p. 864; *Gregg v. Georgia, supra,* 428 U.S. at p. 203), it is constitutionally unacceptable for jurors to be uninformed of their right to exercise mercy in response to any mitigating evidence. Accordingly, instructions regarding the jury's ability to dispense mercy were constitutionally mandated.

3. Appellant Requests This Court to Reconsider Its Prior Decisions Holding That Defendants Are Not Entitled to a "Mercy" Instruction

This Court has repeatedly held that it is not error to deny a request for a "mercy" instruction. (See, e.g., *People v. Gonzales* (2011) 52 Cal.4th 254, 326; *People v. Ervine* (2009) 47 Cal.4th 745, 801-803; *People v. Lewis*

(2001) 26 Cal.4th 334, 393.) The Court has reasoned that "the unadorned use of the word 'mercy' implies an arbitrary and capricious exercise of power rather than a reasoned discretion based on particular facts and circumstances." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1195.) This, however, is contrary to the pronouncement in *Gregg v. Georgia,* above, that a jury's decision "to afford mercy does not render unconstitutional death sentences imposed" under a system with safeguards against arbitrariness. (*Gregg v. Georgia, supra,* 428 U.S. 153, 203.) And because mercy is one of the ways by which jurors can give effect to mitigating evidence, a proper mercy instruction such as that proposed by appellant would not be "understood by the jurors as permitting them to indulge in sympathy unrelated to any of the evidence adduced at trial." (*People v. Williams* (1988) 45 Cal.3d 1268, 1322.) Finally, as explained above, mercy is distinct from sympathy, so the standard penalty phase instructions on sympathy do not "duplicate[] those that were actually given." (*People v. Danielson* (1992) 3 Cal.4th 691, 717.) For these reasons and others argued herein, appellant requests the Court to reconsider its prior decisions finding no error in refusal to instruct on mercy.

B. The Trial Court's Refusal to Instruct the Jury With Appellant's Proposed Instructions on the Role Of Mercy in Determining the Appropriate Penalty Precluded Consideration of Mitigating Evidence Intended to Inspire the Jury to Be Merciful

When requesting instructions on mercy, appellant stressed their importance given the theme of his penalty phase, "the St. Paul's portion of the New Testament with the majority being that of mercy." (29RT: 5064; see also 26RT: 4498 [mitigation theme of appellant helping others in the future based upon his grasp of the Bible].) Appellant testified about his

religious conversion, Bible studies and desire to bring others to God. (26RT: 4520-4521, 4534-4535, 4540-4541.) Four religious witnesses testified regarding appellant's dedication to his religious principles and study of the Bible. (25RT: 4468-4489; 26RT: 4619-4663; 27RT: 4671-4689, 4698-4757.) Appellant's family members either requested or suggested that appellant's life be spared and appellant's mother and brother Francisco specifically mentioned mercy. (25RT: 4407, 4464; 27RT: 4772-4773.) Appellant also presented mitigating evidence regarding the positive relationships he had with his mother and siblings and some evidence about childhood difficulties. (25RT: 4398-4458, 27RT: 4767-4772.)

In response, the prosecutor argued, "[r]emorse is the one thing moral and reasonable people look to in assessing the extent to which a crime is truly deserving of mercy." (29RT: 5287.) The prosecutor told the jury that "under factor (k), you can glean enough mercy and sympathy for the defendants from what was presented here" and use the mitigation to overcome the aggravation, but "that every minute that you spend contemplating and considering the fate of these defendants is one second and one minute more than they spent considering the fate of their victims." (30RT: 5365.) If the jurors got past the prosecutor's proposition that only unreasonable and immoral people would contemplate mercy for an insufficiently remorseful defendant, the prosecutor's argument would lead the jury to consider mercy as synonymous with sympathy, rather than understand that mercy was a separate basis upon which to impose a life sentence. (See *Brewer v. Quarterman, supra*, 550 U.S. 286, 293-294 [likelihood jurors accepted prosecutor's argument which necessarily disregarded any independent concern that defendant may not deserve death sentence due to his troubled background].)

In arguing on how to use mercy when determining appellant's sentence, his counsel clearly felt constrained by the court's disallowance of a mercy instruction. Appellant's counsel begged the jury for "mercy" and "to recognize the sympathy the law allows" (30RT: 5476), and told the jury that it could consider sympathy and pity "and I hope mercy . . . in deciding the factor (k) information." (30RT: 5494.) Thus, counsel's argument also failed to clarify the independent role that mercy could play in the jury's deliberations.

In any case, the arguments of counsel cannot substitute for proper jury instructions. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489.)

> Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for [a] proposition than the prosecutor will be . . . . It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably.

(*Id.* at p. 489.)

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue or pinpoint the crux of his defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Sears* (1990) 2 Cal.3d 180, 190.) The penalty phase instructions must eliminate any ambiguity concerning the factors actually considered by the sentencing body in imposing a judgment of death. (*People v. Easley* (1983) 34 Cal.3d 858, 879.) Because the majority of appellant's mitigating evidence was designed to elicit mercy as a "reasoned moral response" from the jury, he was entitled to an instruction explaining the role mercy could play in the sentencing decision.

The absence of the proposed instructions combined with the prosecutor's argument would have reasonably led the jury to believe that mercy was an improper consideration, which would have created a false limitation on their right and ability to consider and exercise mercy. As a result, the prosecutor was able to secure a death sentence, based in part on the argument that compassion and mercy were disproportionate responses, that appellant was not remorseful, and/or the jurors' misunderstanding that the facts of the crime prohibited consideration of mercy for appellant. Appellant's proposed instructions, explaining the role of mercy apart from the statutorily enumerated mitigators, would have removed any such false restriction on the jury's consideration of mercy as a reason to find for life over death in spite of the balance of mitigating and aggravating factors. Had the trial court provided the jury with the clarifying instructions on mercy, the jury may have reasonably decided to dispense mercy on appellant and sentence him to life imprisonment.

C. Reversal Of The Penalty Judgment Is Required

The trial judge's refusal to give appellant's requested instructions violated his right to present a defense (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294), his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In addition, the errors violated appellant's right to trial by a properly instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const. art. 1, § 16; *Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145) and violated federal due process by arbitrarily

depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

Appellant introduced relevant evidence in mitigation that was intended to inspire mercy in the jurors. Because the trial court's charge to the jury omitted appellant's requested instructions on the role of mercy in determining the appropriate sentence, "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." (*Penry v. Lynaugh, supra*, 492 U.S. at p. 328.) The standard pattern jury instructions provided no means to give effect to evidence not necessarily displaying "sympathetic" aspects of appellant's background and character, but nevertheless warranting the jurors' merciful response. Hence, the jury was unconstitutionally precluded "from giving effect to any relevant mitigating evidence." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276, citations omitted; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*) Accordingly, the death judgments must be reversed.

XXIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MODIFICATION OF THE DEATH VERDICT

Subsequent to the jury's return of a death verdict, appellant filed a motion to modify that verdict (12CT: 3572-3593), which the court denied. (31RT: 5600-5612.) The trial court's rejection of appellant's motion to modify the verdict was erroneous.

Penal Code section 190.4, subdivision (e), provides:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for the modification of such verdict or finding . . . . In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

(Pen. Code, § 190.4, subd. (e).) The statute contemplates that "[i]n ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the evidence supports the death verdict." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267.) On appeal, this Court independently reviews the trial court's ruling after reviewing the record, but does not determine the penalty de novo. (*Ibid.*)

Here, the trial court in exercising this judgment misconstrued the applicable law and facts. Because of these errors, the trial court failed to fulfill its statutory obligation to consider the evidence fairly and to reweigh

the aggravating and mitigating circumstances independently. (*People v. Steele, supra*, 27 Cal.4th at p. 1267.)

With regard to the Casa Gamino crimes, the court stated that appellant had sexually assaulted Maricella Mendoza, the hostess of the restaurant. (31RT: 5606.) There was no such evidence. Armando Lopez testified that appellant was still with him when Mendoza was screaming near the ice machine where the assault took place. (14RT: 2237.) Mendoza could not identify the man who took her from the office to the area near the ice machine, where he hit and threatened her and tried to kiss her and remove her clothing. (14RT: 2289-2290, 2292.) However, Mendoza testified that the assault ended when another man came and said Morro was coming. (14RT: 2290-2292.) Because appellant was Morro (26RT: 4614), he obviously was not the assailant. Even the prosecutor argued only that "they" assaulted her. (See 22RT: 3960 [guilt phase argument], 29RT: 5268 [penalty phase argument].)

The court stated that appellant had "tortured" Lopez and Mendoza. (31RT: 5606.) However, the prosecution never charged appellant with the crime of torture under section 206 because it was unable to prove all the elements. (7CT: 1932–1933.) It was therefore improper for the court to ascribe this crime to appellant.

With regard to appellant's mitigation case, the court found "that the evidence relating to Mr. Sanchez-Fuentes' upbringing and religious conversion does not serve as a *moral justification* or extenuation for his conduct and further [found] that such mitigation is not sufficient to serve as a basis for a sentence less than death." (31RT: 5610-5611, italics added.) Appellant was not required to show, under factor (k) or otherwise, that his mitigating evidence served as a moral justification for his conduct. (See, e.g,

Lockett v. Ohio (1978) 438 U.S. 586, 604 [sentencer should not "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"].)

The court referenced a letter that appellant sent the court after the trial ended, which in the court's view "call[ed] into question the sincerity of appellant's conversion and its meaning." (31RT: 5611.) The court noted that the letter had no impact on the court's evaluation under section 190.4, but then contradicted itself by stating "but to have an impact to find that the conversion is sincere, the court is not able to make that finding." (31RT: 5611.)

In deciding the modification motion, the court may consider only evidence that was properly before the jury. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1381.) It appears from the record that despite saying that it did not consider appellant's letter, the court may have done so. Moreover, the fact that the court commented on the letter while explaining the 190.4, subdivision (e), ruling strongly suggests that it considered it.

The failure of the appellate record to demonstrate that the trial court correctly reweighed the aggravating and mitigating circumstances requires this Court to vacate the judgment of death and to remand the case for a new modification hearing. Because the court found an aggravating factor of an uncharged crime that was not supported by the evidence, weighed the mitigating evidence under an improperly high standard, and appears to have considered posttrial evidence when making its ruling, there is a reasonable possibility that the trial court would have granted the modification motion had it considered only the facts before the jury and reweighed the mitigating evidence under the correct standard. (See *People v. Kaurish* (1990) 52

Cal.3d 648, 718 [adopting reasonable possibility test in reviewing motion for modification].)

As with the jury's original penalty decision, the motion for modification requires the trial court to make a normative decision based upon its review of the aggravating and mitigating circumstances. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 794.) The court's failure to do so constituted an arbitrary deprivation of appellant's state created rights under section 190.4, subdivision (e) in violation of due process and eliminated a key safeguard in ensuring the reliability of appellant's death sentence in violation of the Eighth and Fourteenth Amendments. (U.S. Const., 8th & 14th Amends.; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Thus, any substantial error renders the entire decision in doubt. Such error "must be deemed to have been prejudicial." (*People v. Robertson* (1982) 33 Cal.3d 21, 54; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 [concluding if error vitiates findings, reviewing court cannot speculate on what hypothetical sentencer might have done]; *People v. Karis* (1988) 46 Cal.3d 612, 652 [reversal unless error had "no impact" on trial court's decision to deny].) Here, there was a reasonable possibility that a full and fair consideration of appellant's modification motion would have resulted in the trial court concluding that the aggravating factors did not outweigh the mitigating factors and granting the motion to modify the death verdicts. As a result, this Court should remand for a new hearing pursuant to Penal Code section 190.4, subdivision (e).

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XXIV.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3 (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 12CT: 3499; 29RT: 5238-4241.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide, i.e., facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing and the location of the killing. In this case, for instance, the

prosecutor argued that the murders were especially aggravated because of the method, motive and time of day. (See, e.g., 29RT: 5271-5277.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 980, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

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C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 12CT: 3504-3505; 29RT: 5252-5255.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that

each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely* and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring* and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors and the appropriateness of the death penalty and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (12CT: 3499-3500, 3504-3505; 29RT: 5238-5241, 5252-5255.), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it was permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

D. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

1. Aggravating Factors

It violates the Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

2. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed

that unanimity was not required. (CALJIC No. 8.87; 12CT: 3502; 29RT: 5246.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant, i.e., the Rod's Coffee Shop evidence, and argued that such activity supported a sentence of death (See, e.g., 29RT: 5291).

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. 296; *Ring v. Arizona*, *supra*, 536 U.S. 584; and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

3. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (29RT: 5255.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

4. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299,

307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

5. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 as given to appellant's jury did not address this proposition. (12CT: 3504-3505, 29RT: 5253-5255.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that because the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan*

(1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOPP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a reasonable likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation. The failure to provide the jury with appropriate guidance was prejudicial and

requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the federal Constitution.

7. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.)

However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

F. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial," (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 12CT: 3499-3500; 29RT: 5238-5241), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486

U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85 (e) [victim participation], (f) [moral justification], (g) [duress or domination], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions, (12CT: 3499-3500; 29RT: 5238-5241), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (12CT: 3499-3500; 29RT: 5238-5241.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h) and (j) – were relevant solely as possible

mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) The court below gave a special instruction numbered 8.854 that told the jury that, "The factors in the above list [CALJIC No. 8.85] which you determine to be aggravating circumstances are the only ones which the law permits you to consider as aggravation. . . . Factor (a) . . . may be considered as aggravating or mitigation." (12CT: 3500; 29RT: 5241.) This instruction, however, did not solve the problem, as appellant's jury still was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

G. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable

manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

H. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, and aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.420(b) (1995 ed.).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

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I. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

XXV.

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

It is well settled that "the aggregate prejudicial effect of" a series of errors may be "greater than the sum of the prejudice of each error standing alone." (*People v. Hill, supra,* 17 Cal.4th 800, 845, and authorities cited therein.) It is an equally well settled point of state and federal constitutional law that the cumulative effect of a series of errors may so infect a trial with unfairness as to make the resulting conviction a denial of due process.

(*Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Hill*, supra at pp. 844-847; *Parles v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928, and authorities cited therein.) Here, assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the convictions and sentences of death.

The trial court's denial of appellant's *Wheeler-Batson* motions, the failure to sever appellant's trial from that of his co-defendants, the improper admission of uncharged robberies via out-of-court hearsay statements from a co-defendant and the Rod's Coffee Shop incident evidence, the conviction of a robbery and attempted murder count despite insufficient evidence and instructional and other errors all combined to infect appellant's trial with unfairness and make the resulting convictions a denial of due process. (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643.) Appellant's convictions, therefore, must be reversed. (See *People v. Hill, supra*, 17 Cal.4th at pp. 844-846 [reversal based on prosecutorial misconduct and other cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton*, (1963), 60 Cal.2d 105, 136-137.) The death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See

People v. Hayes (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This is especially so because under California law, the penalty determination takes into account all evidence presented in the guilt phase of a capital trial and all of the "circumstances of the crimes" (Pen. Code, § 190.3, subd. (a)), as the jurors in this case were explicitly instructed. (12CT: 3499; 29RT: 5240-5241 [jurors in this case instructed with CALJIC No. 8.85 to consider guilt phase evidence in determining appropriate penalty].)

The errors committed at the penalty phase of appellant's trial included the removal of appellant's interpreter at the prosecutor's behest, admission via preliminary hearing testimony from an unreliable witness of a highly inflammatory statement that appellant allegedly said he had killed eight or nine people previously, and numerous instances of prosecutorial misconduct that went to the heart of appellant's mitigation case and instructional error. The cumulative effect of the errors was prejudicial, violated appellant's state and federal constitutional rights to a fair penalty trial and reliable penalty verdicts and requires reversal of the death sentences. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244 [cumulative effect of penalty phase errors prejudicial under state or federal constitutional standards]; *Mak v. Blodgett* (1992) 970 F.2d 614, 622-625 [cumulative effect of penalty phase violated federal due process].)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

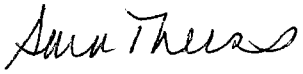
CONCLUSION

For all of the reasons stated above, both the convictions and sentences of death in this case must be reversed.

DATED: February 15, 2012

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



SARA THEISS
Deputy State Public Defender
Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, EDGARDO SANCHEZ-FUENTES, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 97,413 words in length.

Dated: February 15, 2012.

Sara Theiss

Sara Theiss

DECLARATION OF SERVICE

Re: *People v. Edgardo Sanchez Fuentes* California Supreme Court No. S045423
L.A. Superior Court No. LA011426

I, JULIE FRASIER, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main St., 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Office of the Attorney General
Attn: Corey Robins, D.A.G.
300 S. Spring Street, Ste, 500
Los Angeles, CA 90013-1232

Christina Borde, Esq.
Habeas Corpus Resource Center
303 2nd Street
San Francisco, CA 94107-1328

EDGARDO SANCHEZ FUENTES
(Appellant)
(To be hand delivered on 2/16/12)

Honorable Jacqueline Connor
Los Angeles County Superior Court
1725 Main Street
Santa Monica, CA 90401-3297

Ms. Addie Lovelace
Capital Appeals Coordinator
Los Angeles County Superior Court
210 W. Temple Street, Room M-3
Los Angeles, CA 90012

Office of the District Attorney
Attn: Michael J. Grosbard, D.D.A.
210 W. Temple St., 18th Floor
Los Angeles, CA 90401-3297

Each said envelope was then, on February 15, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Signed on February 15, 2012, at San Francisco, California.

DECLARANT