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No. S045423

SUPREME COURT COPY

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)

SUPREME COURT
FILED

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Deputy

APPELLANT'S REPLY 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

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Appellant does not reply to arguments that are adequately addressed in his opening brief. In particular, appellant does not present a reply to Arguments II, IX, XI, XXII, XXIV and XXV. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments and subsections in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief, except for Argument I.D., where additional subsection headings have been added.[1]

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[1] All statutory references are to the Penal Code unless stated otherwise. The following abbreviations are used herein: "AOB" refers to appellant's opening brief; "RB" refers to respondent's brief. As in the opening brief, citations to the record are abbreviated as follows: "CT" is used to refer to the clerk's transcript on appeal, "SCT" is used to refer to the augmented clerk's transcript and "RT" is used to refer to the reporter's transcript. "Ex." is used to refer to exhibits introduced at trial. For each citation, the volume number precedes, and the page number follows, the transcript designation, e.g. 1CT: 1-3, is the first volume to the clerk's transcript at pages 1-3.

ARGUMENT

I.

THE TRIAL COURT'S DENIAL OF APPELLANT'S *WHEELER-BATSON*[2] MOTION VIOLATED STATE LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DEMANDS REVERSAL

Based upon the prosecution's disproportionate striking of panel members who shared appellant's Hispanic ethnicity and its preference for Caucasian jurors; the interracial/ethnic nature of the homicides; the fact that peremptory challenges constitute a jury selection process highly subject to manipulation for discriminatory purposes; and the totality of the relevant circumstances, appellant argued that the trial court erred by denying his *Wheeler/Batson* motion.

Respondent contends that the Court should affirm the rulings below because: appellant's sample size is too small for meaningful analysis and this Court has rejected similar showings in prior cases; race neutral reasons explain the strikes; the ethnicity of all the victims was too varied to suggest a discriminatory motive; the prosecution repeatedly accepted the jury with Hispanics on it; and the fact that one Hispanic served in the final jury. Respondent is incorrect on all points.

D. The Trial Court Erroneously Failed To Find a Prima Facie Case Of Discrimination Based On The Pattern Of Strikes

Without addressing the controlling authority or any of the other reasoned federal cases cited by appellant in his opening brief, or parsing the

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[2] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

numbers and patterns identified by appellant, respondent contends that the sample size is too small for meaningful analysis. Specifically, respondent argues that the "statistics here are merely *suggestive* of an imbalance implicated by a small sample size rather than being *definitive* of a prima facie case . . . ." (RB 135-136, italics added.) Respondent's misunderstanding of the applicable law is demonstrated by this statement.

As appellant argued in the opening brief (AOB 44), a defendant's burden at *Batson's* step one is light; a defendant must only raise "suspicions and inferences that discrimination may have infected the jury selection process." (*Johnson v. California* (2005) 545 U.S. 162, 172 (*Johnson*); see also *United States v. Collins* (9th Cir. 2009) 551 F.3d 914, 920 [burden is "small"]; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 512 [prima facie case established by circumstances raising a suspicion that discrimination occurred].) Contrary to respondent's assertion, appellant's burden of production is not to demonstrate a "definitive" prima facie case. In fact, the numerical "imbalance" appellant showed in the opening brief is a sufficient and relevant circumstance, when added to the other two set forth in *Batson*, to satisfy the standard for producing a prima facie case. (See *Batson, supra,* 476 U.S. at p. 96.)

Respondent cites several of this Court's cases to urge it to conclude that the numbers involved herein render any attempt at statistical analysis meaningless. (RB 132-136, citing *People v. Garcia* (2011) 52 Cal.4th 706, 744, 747 (*Garcia*); *People v. Bonilla* (2007) 41 Cal.4th 313, 342-343 (*Bonilla*); *People v. Bell* (2007) 40 Cal.4th 582, 597-598 (*Bell*); *People v. Clark* (2011) 52 Cal.4th 856.) Specifically, respondent argues that: (1) appellant's sample size is too small; (2) race neutral factors justify the

prosecutor's strikes; and (3) appellant's statistical showing fails in light of this Court's case law. However, none of these reasons withstand scrutiny.

1. The Issue Is Relevancy Rather Than Sample Size

The issue is not sample size, bur rather relevancy, i.e., whether a circumstance has the capacity to enhance or diminish an inference that race/ethnicity was a motivating factor in one or more prosecutorial strikes against the cognizable group venire members. (*Batson, supra,* 476 U.S. at p. 96.) Various factors will affect whether the numbers being considered in a case are more or less legally relevant.

When the exclusion rate[3] is high, even a small number of strikes can satisfy the prima facie burden, at least where the defendant and the jurors are of the same race. (See *Johnson, supra,* 545 U.S. at pp. 164, 172 [finding prima facie case where prosecutor used three of his 12 peremptory challenges to remove the three black prospective jurors among the 43 eligible jurors]; *Jones v. West* (2d Cir. 2009) 555 F.3d 90, 98 [collecting cases showing that high exclusion rates alone may be sufficient to establish a prima facie case].) This means that where the number of cognizable group members on the panel is low, it is easier to establish a prima facie case on the basis of one or two strikes alone. (*People v. Harris* (2013) 57 Cal.4th 804, 882-883 (conc. opn. of Liu, J.) [collecting cases]; *United States v. Clemons* (1988) 843 F.2d 741, 748.)

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[3] The exclusion rate is determined by comparing the proportion of a party's peremptory challenges used against a cognizable group to that group's proportion in the larger panel of jurors subject to challenge. (AOB 48-49.)

Appellant's numbers are a case in point as to why numbers that this Court may consider too small should not defeat a prima facie case.[4] Appellant bases his analyses on the jurors in the box at the time of each *Wheeler/Batson* motion, which is the most relevant time to freeze-frame the numbers. (See *People v. Lenix* (2008) 44 Cal.4th 602, 624 [trial court's finding is reviewed on record as it stands at time of *Wheeler/Batson* ruling].) Appellant offered three methods of analysis, each of which is a relevant circumstance to show a prima facie case. (See AOB 47-56 and cases cited therein.)

First, the prosecutor struck four of six (67 percent) Hispanics by the time of the second *Wheeler/Batson* motion.[5] (AOB 48.)

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[4] There are differences between the numerical descriptions in respondent's and appellant's briefs. Appellant's analysis excludes jurors excused for cause or by stipulation. (AOB 51-52.) As explained, *post*, these are irrelevant for the purposes of a *Wheeler/Batson* analysis. Respondent, on the other hand, counts T.J. as one of the Hispanic jurors when determining the percentage of Hispanic jurors the prosecution had struck at various points. (RB 107, 109, 111.) However, the parties stipulated to excuse T.J. before anyone could question her (7RT: 840-841), so she is not included in appellant's analysis. In addition, respondent compared the prosecutor's strikes against Hispanics with the total number of prospective jurors at the end of each round (RB 106, 107, 109, 111), rather then total number subject to peremptory challenge at the point of appellant's two motions, as appellant did. (AOB 39-41.)

[5] Respondent does not concede that R.F. or T.M. is Hispanic. (RB 104, fn. 54 & 55; 109, fn. 60.) As indicated in the opening brief, though, Spanish surnames identify Hispanics, a cognizable class. (AOB 40, fn. 19; see also see also *Castaneda v. Partita* (1977) 430 U.S. 482, 486–487 ["Spanish-surnamed" and "Mexican-American" used as synonyms for census category "persons of Spanish language or Spanish surname" in case alleging discrimination against Mexican-Americans in selection of grand jury terms].)

Second, the prosecutor's exclusion rate for Hispanics was disproportionate to their presence in the panel of jurors available to strike, i.e., though Hispanics made up only 19 percent of the 32 jurors available to strike, the prosecutor struck four of six (67 percent). (AOB 50.) The disproportionate striking of minority jurors such as this is "plainly relevant [where] there are confluent race related patterns in both the absolute number of strikes used," and the percentage of strikes against a cognizable group as compared to their representation overall. (*Coulter v. Gilmore* (7th Cir. 1998) 155 F.3d 912, 919.)

Third, appellant's proportionality analysis comparing all cognizable groups further supports the inference that the disproportionate striking of Hispanics was not random. Hispanics were struck at a disproportionately high rate and Caucasians at a disproportionately low rate.[6] (AOB 51-54.) Each of these three levels of analyses increasingly enhances an inference that the prosecutor's strikes against Hispanics were not random, but stemmed from an impermissible motivation and therefore is sufficient to show a prima facie case. (See AOB 47-54 and cases cited therein.)

In addition, the ethnic/racial composition of the entire panel of 141 people was proportionally similar to the panel members in the box at the time the jury was sworn.[7] (AOB 53-55.) Evaluating the panel as a whole

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[6] At pages 51 and 52 of the opening brief, appellant mistakenly indicated that 11 Caucasians were subject to strike by the time of appellant's second *Wheeler/Batson* motion. The correct number is 10, as indicated by the 10 names listed in footnote 24 on page 51. By the time of the final jury was selected, 11 Caucasians were subject to strike.

[7] Respondent indicates that there are 130 filled out juror questionnaires, not 141 as appellant stated. (RB 105 & fn. 56.)

(continued...)

here measures the overall impact of stipulations, cause challenges and all parties' use of peremptory challenges on the jury finally seated, while a *Batson* analysis focuses on one party's use of strikes. Thus, where the defense brings the motion, defense strikes are not relevant to a *Batson* analysis.[8] (*Miller El v. Dretke* (2005) 545 U.S. 231, 255, fn. 14 (*Miller-El II*) [a defendant's methods in jury selection are "flatly irrelevant" to the question whether the prosecutor's practices revealed a desire to discriminate]; *People v. Snow* (1987) 44 Cal.3d 216, 225 [propriety of prosecutor's peremptory challenges must be determined without regard to validity of defendant's challenges]; *Wheeler, supra*, 22 Cal.3d at 283, fn. 30 [party does not sustain his burden of justification by attempting to cast different burden on opponent]; *Brinson v. Vaughn* (3d Cir. 2005) 398 F.3d 225, 234 [legitimate or illegitimate defense strike does not open door to illegitimate prosecution strike]; *Holloway v. Horn* (3d Cir. 2004) 355 F.3d 707, 729 ["while *Batson* permits a trial judge to focus at the prima facie stage upon 'all *relevant* circumstances,' the nature of a defendant's strikes fails the test for relevancy," original italics].) Nevertheless, taking defense strikes into account here indicates that they did not effectively alter the original composition of the venire.

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[7](...continued)
Respondent's copy of the record contains duplicate questionnaires in CT volumes 13 and 14. (*Ibid.*) Appellant informed respondent that these volumes in fact contain different questionnaires.

[8] There were two panel members with the initials M.M. Appellant struck Mary M., who was Hispanic, during round 3. (Vol. 5, 2SCT: 1368; 7RT 1029.) Codefendant Navarro struck Michael M, who was Caucasian, during round two. (Vol. 4, 2SCT: 1052; 7RT: 946.)

Despite the force of appellant's statistical showing, respondent reflexively echoes this Court's statement in *Garcia, supra,* 52 Cal.4th at p. 747, that it is "impossible, as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused, and no indelible pattern of discrimination appears." (RB 133; see also *Bell, supra,* 40 Cal.4th at p. 598, fn. 3 [noting that in an "ordinary case" it is very difficult to make a prima facie case after the excusal of only one or two members of a group].) This blanket statement appears difficult to reconcile with the high court's holding in *Johnson, supra,* 545 U.S. at pp. 164, 172, where three out of 12 peremptories exercised against African-Americans was held to satisfy the prima facie case as a matter of law where the three constituted only seven percent (three of 43) of eligible jurors. If applied to cases where jury panels have few Hispanics, this Court's rule in *Bell* will have the "particularly pernicious" effect of stripping Hispanic defendants of their rights under *Batson* merely because of "the statistical likelihood that their jury venires will [] overwhelmingly" be non-Hispanic. (*United States v. Clemons, supra,* 843 F.2d at p. 748, fn. 6.)

a. The inference of improper motive remains even if juror R.R. is removed from the statistical analysis.

Respondent contends that the prosecutor's strike of Hispanic juror R.F. was proper in part because the defense unsuccessfully tried to excuse him for cause, and the court stated it hoped someone should excuse him. (RB 123, 126-127.) As argued above, defense strikes are irrelevant in a *Wheeler/Batson* analysis. And because the court never explained why it felt R.F. should be excused, it is impossible to know whether and how its remark would undermine an inference of improper motive as to the striking of R.F.

Yet even if R.F. is removed from the statistical analysis, a similar pattern of discriminatory strikes remain. The prosecutor would have eliminated three of six (50 percent) of the Hispanic jurors at the time of the second peremptory challenge, which is sufficient to infer a prima facie case. (AOB 48, citing cases.) The prosecutor would have used a disproportionate number of his total strikes, three of ten (30 percent), against Hispanics, who were 19% of the potential jurors available to strike. (AOB 50-51.) And the prosecutor's preference for Caucasian jurors would have remained unchanged, i.e., the prosecutor only struck one of the 10 available Caucasian jurors by the time of the second *Wheeler/Batson*, i.e., 10 percent. (See fn. 6, *ante*.)

b. "Chance" is an erroneous alternate explanation at step one, an invalid one in appellant's case, and the Court's reliance on it would increase unconstitutionally appellant's burden beyond what *Batson* requires.

When a party strikes most or all members of a small cognizable group, this Court has posited that the law of probabilities, as an alternate, nonracial explanation for the strikes, weakens the force of any corresponding inference of discrimination. (See, e.g., *Bonilla, supra*, 41 Cal.4th at p. 344 [where small subcategories and numbers involved, it is more likely that majority or all group members were struck due to law of probabilities rather than discrimination].) Appellant respectfully suggests that this approach does not accord with *Batson* jurisprudence and even if it were not improper, it is an inappropriate generalization in light of the variance in data and circumstances from case to case.

The high court has never required a defendant to disprove rival hypotheses, such as chance or the impact of racially neutral factors, at step

one. It acknowledges the "inherent uncertainty present in inquiries of discriminatory purpose" but resolves the problem by moving on to steps two and three. (*Johnson, supra,* 545 U.S. at pp. 171-172; see also *Batson, supra,* 476 U.S. at p. 95 [noting that "the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse"].) A case in point is *Johnson,* where the high court rejected this Court's "strong likelihood" standard for step one. (*Johnson, supra,* 545 U.S. at p. 173.) The court disapproved, as inconsistent with *Batson*, California's rule that a step one showing establishes a legally mandatory, rebuttable presumption. (*Id.* at pp. 166-168.) Rather, the court found that the trial court's comment that "we are very close," and this Court's acknowledgment that "it certainly looks suspicious that all three African-American prospective jurors were removed from the jury," were both sufficient inferences that discrimination may have occurred to establish a prima facie case. (*Johnson, supra,* 545 U.S. at p. 173.) This constituted a rejection of this Court's rationale that three of prosecutor's 12 peremptory strikes used against African–Americans were "perhaps more explainable by happenstance." (*People v. Johnson* (2003) 30 Cal.4th 1302, 1327-1328, revd. *sub nom. Johnson, supra,* 545 U.S. 162.)

For these reasons, rejecting appellant's statistical proffer on the grounds that the sample size is too small would unconstitutionally increase appellant's first step burden beyond what the high court requires. (See *Johnson, supra,* 545 U.S. at p. 170 ["We did not intend the first step to be so onerous that a defendant would have to persuade the judge-on the basis of all the facts, some of which are impossible for the defendant to know with certainty-that the challenge was more likely than not the product of purposeful discrimination"].)

The United States Supreme Court does not even require proof of a pattern or practice because "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' [Citation]." (*Batson*, *supra*, 476 U.S. at p. 95.) When the high court has looked at patterns, it has relied on numerical or statistical analyses without requiring them to meet a certain threshold. (See, e.g., *Johnson, supra,* 545 U.S. at pp. 164, 172.) In *Johnson*, for example, the court observed only that the prosecutor used three of his 12 peremptory challenges to remove the only three black prospective jurors in the 43-person panel. (*Id.* at p. 164.) It did not go on to discuss the relevant proportionality data, described *ante.* In the third step case of *Snyder v. Louisiana* (2008) 552 U.S. 472, the court similarly recited the raw numbers without further elaboration, and then went on to analyze only one of the two strikes that the petitioner had alleged were discriminatory. (*Id.* at pp. 474, 475, 477-478.)

Appellant's case shows why using chance as an alternate explanation at step one is numerically, as well as legally, flawed. As stated above, by the time of appellant's second *Wheeler/Batson* motion, 67 percent of Hispanics were challenged, four of six Hispanics, while just 10 percent of Caucasians were challenged, one of 10. Therefore, the strike rate was over six and one-half times higher for Hispanics (.67 divided by .10) than for Caucasians. (See Baldus et al, *Statistical Proof of Racial Discrimination in the Use of Peremptory Challenges: the Impact and Promise of the Miller-el Line of Cases as Reflected in the Experience of One Philadelphia Capital Case* (2012) 97 Iowa L. Rev. 1425, 1442-1443 (hereafter Baldus).) These same challenge or strike rates show that the average Hispanic eligible to be struck had a 57 percent higher chance of being struck than the average

Caucasian (.67 minus .10).[9] (*Ibid.*) For this reason, these numbers are not "merely a statistical aberration" of the type inevitable with small samples. (*People v. Johnson, supra*, 30 Cal.4th at pp. 1326-1327.)

Finally, as argued in the opening brief (AOB 51-53), the fact that the prosecution struck such a disproportionately low number of Caucasian jurors is another relevant circumstance supporting a prima facie case. (*United States v. Stephens* (2005) 421 U.S. 503, 513-514.) It is difficult to see how such numbers can be dismissed on the theory that they are likely a product of chance.[10] (See *Miller El v. Cockrell* (2003) 537 U.S. 322, 342 (*Miller-El* I) ["[h]appenstance is unlikely to produce this disparity"].)

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[9] Even if Hispanic juror R.F. is removed from these calculations, similar patterns remain. If 50% of the Hispanic jurors were challenged (three rather than four), the strike rate against Hispanics would be five times higher (.50 divided by .10) than that of Caucasians. Hispanics still would have a 40% higher chance of being struck than Caucasians (.50 minus .10).

[10] Of course, a defendant is not required to make a record identifying the race of all the eligible jurors struck by the prosecution and defense or the racial composition of the final jury. (*Holloway v. Horn, supra,* 355 F.3d at pp. 726-28 [requiring such a showing in order to move beyond the first step places an undue burden on defendant].) Requirements such as these are inconsistent with the three-prong *Batson* standard for assessing a prima facie case, i.e., that a defendant must show that the prosecutor struck potential jurors in the same cognizable class as the defendant; that the defense can rely on the fact that the perempty challenge jury selection process is subject to manipulation for improper motives; and that these and any other relevant circumstances give rise to an inference that the prosecutor has struck jurors on account of their race. (*Id.* at pp. 727-28, citing *Batson, supra*, 476 U.S. pp. 96-97.)

2. The Existence Of Race-Neutral Factors Does Not Defeat Appellant's Statistical Showing at Step One.

The fact that race-neutral factors exist that may or may not explain a prosecutor's decision to strike certain jurors also is of no import at *Batson's* first step. *Batson* and its progeny do not require that statistical evidence offered by a defendant in support of a prima facie case must be adjusted for race-neutral factors. (See *Holloway v. Horn, supra,* 355 F.3d at p. 728; *Harris,* 57 Cal.4th at p. 872 (Liu, J., concurring) [because it is "all too easy to comb the record and find some legitimate reason the prosecution could have had for striking a minority juror," negating a prima facie case requires more than this].) This is the purpose of the third step, where the prosecutor's reasons are evaluated. (See, e.g., *Miller El I, supra,* 537 U.S. at p. 343 [three of state's proffered race-neutral rationales for striking African-American jurors pertained equally to some white jurors not challenged who served in jury].)

There are some cases where federal courts have found that the record so clearly points to a reason for a peremptory challenge that a prima facie case of discrimination cannot be established. (See *United States v. Stinson* (9th Cir. 2011) 647 F.3d 1196, 1207 [struck juror twice stated that she did not want to serve]; *United States v. Stephens, supra,* 421 F.3d at p. 516 [citing cases].) Circuit courts have emphasized that "[a]fter *Johnson* and *Miller-El II*, however, it is clear that this is a very narrow review." (*United States v. Stephens, supra,* 421 F.3d at p. 516.) The strikes must be "readily discernible" and "so clearly attributable" to the apparent, nondiscriminatory reason that "there is no longer any suspicion, or inference, of discrimination in those strikes." (*Id.*)

Codefendant Navarro's unsuccessful *Wheeler* motion as to Caucasian juror R.R., the "only admittedly gay prospective juror" on the panel, is a case in point. (8RT: 1035.) R.R. was under psychiatric care and was concerned about missing appointments; was symptomatic despite taking medication; had concerns about being drowsy during trial because his medications made him sleepy; and probably had an outstanding warrant in another state. (6RT: 681, 684-687].) Grouped together, these are the type of very obvious disqualifying factors that can undermine an inference of discrimination at step one. Ordinarily, however, and in the circumstances of appellant's *Wheeler/Batson* claim, the prosecution's stated reasons, or reasons a trial or reviewing court might speculate about, must wait for step three, where the credibility of the prosecutor is measured (*Snyder v. Louisiana, supra*, 552 U.S. at p. 477), in the context of comparative juror analysis.

Respondent argues that the juror questionnaires and oral voir dire of the four Hispanic jurors in question demonstrate non-discriminatory reasons for "any prosecutor" to peremptorily discharge them. (RB 118-130.) But as just explained, although respondent's detailed recitation of multiple factors and explanation of how those might be weighed for each juror may be appropriate for the later steps of a *Batson* analysis, this Court should not enmesh itself in examining them at step one. (*United States v. Stephens, supra,* 421 F.3d at pp. 517-518.)

3. The Statistical Analyses In This Court's Prior Cases Do Not Defeat Appellant's Statistical Showing.

Respondent contends that even if statistics demonstrate some support in general for an inference of discriminatory motive, that argument is not reasonable here. First, respondent compares appellant's numbers with those

in *Bonilla, supra,* 41 Cal.4th 313, 342-343, to no avail. (RB 134.) The *Bonilla* prosecution used 10 percent of its strikes to strike a proportionate number of Hispanics, who made up 10 percent of the pool. (*Id.* at p. 344.) Not surprisingly, the Court found that this exclusion rate provided no basis to infer discrimination. (*Ibid.*) While acknowledging that the strike rate of 40 percent in appellant's case was "a point of distinction" from the numbers in *Bonilla,* respondent nevertheless argues that "the *Bonilla* prosecutors used three times as many peremptory challenges," without explaining how this is relevant. (RB 134.)

In *Garcia, supra*, 52 Cal.4th at pp. 744-748, the defendant argued that the striking of three women early on constituted a prima facie case. (*Id.* at p. 745.) The Court rejected this claim on the ground that the absolute size of the sample undergoing scrutiny was too small, i.e., it refused to draw the requisite inference because only a few members of the cognizable class were excused and "no indelible pattern of discrimination appear[ed]." (*Id.* at p. 747.) Respondent argues that the same principle should apply here. (RB 133.) However, appellant never relied on one raw number, but started his analysis with the high elimination rate – the majority, or 67 percent, of prospective Hispanic panel members were struck by the time of appellant's second *Wheeler/Batson* motion. (AOB 47-48.)

Moreover, the Court's "broader statistical view" in *Garcia*, as opposed to respondent's selective recitation of the facts (RB 133), supports appellant's statistical approach and conclusions. (*Garcia, supra,* 52 Cal.4th at p. 747.) In *Garcia*, there were more women than men in the jury pool and the box, yet the prosecutor used only 50 percent of his challenges against women. (*Id.* at p. 748.) In contrast, as noted above and in the opening brief, the percentage of prosecutorial strikes against prospective

Hispanic jurors below exceeded the percentage of Hispanics eligible to be struck and constituted a disproportionate number of the total number of challenges the prosecutor used. (AOB 52.)

People v. Bell, supra, 40 Cal.4th at pp. 594-599, is also distinguishable. Unlike appellant, the *Bell* defendant did not proffer any pattern evidence other than the fact that the prosecutor challenged two of three African-American women. Finding that the absolute sample size was too small, and because of the dearth of other facts that might give rise to an inference of discrimination, the Court affirmed the trial court's ruling that there was no prima facie case. (*Id.* at pp. 598-599.)

Finally, respondent cites *People v. Clark, supra,* 52 Cal.4th at pp. 905-906, where this Court rejected a prima facie case after the prosecutor used 20 percent of his total peremptory challenges (four of 20) to excuse 80 percent of African-Americans (four of five), even though African-Americans comprised only 5 percent of the jury panelists not excused for cause. (RB 135.) For the reasons argued above and in his opening brief (AOB 48-50), appellant questions the Court's conclusion that standing alone, these statistics did not raise an inference of discrimination. The Court also found it notable that African-Americans constituted 5 percent of the eligible jurors but were almost 10 percent of the selected jury. (*People v. Clark, supra,* 52 Cal.4th at p. 905.) In contrast, appellant's comparable numbers favor an inference of a discriminatory purpose: Hispanics were 19 percent of jurors eligible to be struck but only 8 percent of the final jury. (AOB 52, 55.)

Because the prosecutor's strikes against prospective Hispanic jurors at appellant's trial constituted an "indelible pattern of discrimination," the

trial court erred in finding no prima facie case. (See *People v. Garcia, supra,* 52 Cal.4th 706, 747.)

E. The Trial Court Erroneously Failed To Find a Prima Facie Case Of Discrimination Based On Other Factors

Respondent argues that the varied ethnicity of the noncapital victims, the number of times the prosecutor accepted the jury with Hispanics on it, and the fact that one Hispanic served on the jury all undermine an inference of discriminatory purpose here. (RB 131-132.) Respondent is wrong.

Race of Defendant, Victims and Jurors

Respondent argues that "even if one assumes" that Hoglund was Caucasian and Kim was Asian,[11] no meaningful motive of discrimination can be inferred from the race of the victims because of the varied ethnicity of all the victims. (RB 132.) Respondent ignores the fact that the relevant racial dynamic is between the defendant and the murder victim. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 291-292; Adams, *Death by Discretion: Who Decides Who Lives and Dies in the United States of America?* (2005) 32 Am. J. Crim. L. 381, 388-389 & fn. 43 [citing studies].)

Moreover, even if the ethnicity of the robbery victims was relevant (see *Hernandez v. New York* (1991) 500 U.S. 352, 369-370), reliance on the shared race of the victim, witnesses and defendant is "a serious legal blunder" in that it does not take into account that *Batson* "is designed to protect the interests of potential jurors and of the public at large, not just the litigants." (*Hooper v. Ryan* (7th Cir. 2013) 729 F.3d 782, 786; see also

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[11] Despite respondent's comment, the evidence demonstrated that Hoglund was Caucasian and Kim was Asian. (AOB 56; Ex. 12, p. 2.)

Harris, supra, 57 Cal.4th at p. 865, citing *Batson, supra,* 476 U.S. at p. 99, and collecting cases (conc. opn. of Liu, J.) [recognizing that purposes of *Batson* and its progeny include protecting venire members belonging to cognizable groups from discrimination and inspiring confidence in the justice system and rule of law]; *Eagle v. Linahan* (11th Cir. 2001) 279 F.3d 926, 942 [equal protection challenges allow court to vindicate rights of excluded jurors].)

As appellant argued, the race of the jurors and defendant are also relevant in the context of the strikes as a whole. (AOB 56-57.) The penalty phase depended in large part upon appellant's credibility before a jury stripped of all but one member of his ethnicity. (See Arguments XVII, XIX, XXI.) This factor also supports an inference of discrimination. (*United States v. Stephens, supra,* 421 F.3d at p. 515; *Holloway v. Horn, supra,* 355 F.3d at p. 723.)

Backstrikes

Respondent argues that the prosecutor's acceptance of a panel with Hispanics on it multiple times is evidence that the prosecutor's subsequent exercise of peremptory strikes against Hispanic jurors was not based upon improper considerations. (RB 131, citing *People v. Clark, supra,* 52 Cal.4th at p. 906 and *People v. Cornwell* (2005) 37 Cal.4th 50, 69-70; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1294-1295 [finding multiple acceptances of panel with women who were later struck "patently inconsistent" with an inference of discrimination].) This reasoning ignores the reality of how and why attorneys use peremptory strikes, the record below, and the fact that backstrikes can be used to obscure discriminatory intent and that appellant can rely on the fact that backstrikes, as part of the

jury selection process, permit "those to discriminate who are of a mind to discriminate." (*Batson, supra*, 476 U.S. at p. 96.)

One of the lessons of the *Miller-El* decisions is that an authorized procedure, such as the jury shuffle in Miller-El's case, which both sides used, can be used by a prosecutor for discriminatory purposes. (*Miller-El II, supra,* 545 U.S. at pp. 253-255, 265; *Miller-El I*, 537 U.S. at p. 346.) Even explanations that are objectively reasonable can be "severely undercut" by surrounding circumstances. (*Miller-El II, supra,* 545 U.S. at pp. 248, 250 [recognizing that prosecutors may accept a black juror to "obscure the otherwise consistent pattern of opposition to seating one"].) Ultimately, the high court in *Miller-El II* rejected the state's contention that accepting an African- American juror was anything but a tactical ploy. (*Id.* at p. 250.)

In *People v. Motton* (1985) 39 Cal.3d 596, 602-603 (*Motton*), the defense made *Wheeler* objections to the prosecutor's peremptory challenges against African-American women. On appeal, the Attorney General argued that a prima facie case of discriminatory intent had not been established because the prosecutor had accepted the juror panel with African-Americans a number of times, and one African-American juror ultimately served. (*Id.* at p. 607.) This Court rejected that argument, quoting at length from the dissent in the decision below:

> [T]he offending counsel who is familiar with basic selection and challenge techniques could easily accept a jury panel knowing that his or her opponent will exercise a challenge against a highly undesirable juror. If, for instance, three people on the panel exhibit a proprosecution bias, then the prosecutor could pass the jury with at least three members of the group which he ultimately wishes to exclude still remaining on the jury – knowing that he will have a later

> opportunity to strike them. By insisting that the presence of one or two black jurors on the panel is proof of an absence of intent to systematically exclude the several blacks that were excluded, the People exalt form over substance.

(*Id.* at pp. 607-608.)

Two years later, in *People v. Snow*, *supra,* 44 Cal.3d 216, 225, the Court cited *Motton* with approval and found *Wheeler* error. At the same time, the Court added that although not conclusive, the passing of certain jurors may indicate the prosecutor's good faith in exercising peremptory challenges and may be a factor for a trial judge to consider, for purposes of ruling on whether a prima facie case has been shown. (*Id.* at p. 225) In spite of the nominal affirmation of *Motton* in *Snow*, though, this Court repeatedly has relied on the prosecution's passing while jurors it later strikes remain on the panel, as part of its reasons for rejecting a first step *Batson* claim. (See, e.g., *People v. Williams* (2013) 56 Cal.4th 630, 659; *People v. Carasi, supra,* 44 Cal.4th at pp. 1294-1295.)

Backstrikes, however, are part of an attorney's toolbox during voir dire, and like peremptory challenges in general, they are tools that "permits those to discriminate who are of a mind to discriminate." (See *Batson, supra*, 476 U.S. at p. 96.) This Court, on the other hand, presumes prosecutors use their peremptory challenges in a constitutional manner. (*People v. Salcido* (2008) 44 Cal.4th 93, 136-137.) Appellant respectfully argues that this presumption is contrary to *Batson* jurisprudence. The reality is that "there is a very real temptation" for attorneys to exercise peremptory challenges on the basis of race/ethnicity. (*Briggs v. Grounds* (9th Cir. 2012) 682 F.3d 1165, 1189 (dis. opn of Berzon, J.).) This is not because an attorney is racist. Rather, it is because prosecutors,

> may believe—rightly or wrongly—that race is as good (or bad) a predictor of a juror's likely vote as other demographic factors such as age or education or any of the other arbitrary bases upon which prosecutors decide whether to excuse a juror. Still, our law proscribes the use of race, but not the use of these other factors, as a basis for prosecutorial hunches.

(*Ibid.*)

The *Batson* line of cases allows for this human tendency to embrace stereotypical thinking with a three-step test that at step one errs on the side of protecting the equal protection rights of the defendant and venire members. Built into this very test is appellant's entitlement to rely on the fact that the peremptory challenge system is subject to manipulation for improper reasons. (*Batson, supra*, 476 U.S. at p. 96.) For this reason, appellant respectfully argues that this Court's treatment of the backstrike phenomena is contrary to this basic premise of the *Batson* three-part requirement for a prima facie case. (*Ibid.*)

Even if the prosecutor's acceptance of a panel with Hispanics was relevant, it would not be relevant here. It was only *after* appellant's first *Wheeler/ Batson* motion, which put the prosecutor on notice about the issue, that the prosecutor passed, which was after he had struck two of the three Hispanic jurors then available to strike. (7RT: 944-946.) Also, the small number of Hispanics in the venire below distinguishes this case from *People v. Carasi, supra,* 44 Cal.4th at pp. 1294-1295. There, this Court found no obvious pattern of discriminatory strikes where the prosecution accepted the jury several times with more women than men, or an equal number, and excused men when women were in the majority on the panel. (*Ibid.*) In contrast, the number and proportion of Hispanics on appellant's panels were small and remained so throughout jury selection.

Furthermore, passing on a panel and then later striking cognizable group members in that panel is especially subject to manipulation in a multidefendant murder case like the instant case, where most defense attorneys will exercise a number of challenges. (*Reynoso v. Hall* (9th Cir. 2010) 395 Fed.Appx. 344, 350.) It is then easy for a prosecutor to pass on a minority juror many times and try to insulate later challenges by arguing she passed on the juror several times. (*Ibid.*; see also *People v. Carasi, supra,* 44 Cal.4th at pp. 1320-1321 (conc. opn. of Kennard, J.) ["in light of tactical realities of jury selection in a multidefendant case" where prosecution struck 20 of 23 women, prosecutor's pattern of excusals and acceptances of panels could support a prima facie case].)

Here, for instance, the prosecution had 36 peremptory challenges (3RT: 358-359), and was never in any danger of running out of strikes to use. The prosecution could afford to accept the jury when it contained non-Hispanic prospective jurors that it knew the defense would want to strike, because, for example, the defense unsuccessfully had challenged them for cause. C.M. was such a person. She was Caucasian and indicated in her questionnaire that she belonged to a church that believed in the death penalty; was strongly pro-death penalty because of the biblical "eye-for-an-eye" rule; and would always vote for the death penalty for an intentional murder with a special. (Vol. 6, 2SCT: 1472-1491; 7RT: 947 [to box]; 7RT: 1016-1019 [appellant's cause challenge denied; 1028 [prosecution accepts panel, appellant strikes C.M.].)

Similarly, the prosecutor accepted the jury twice while D.C., an African-American, was still on it. D.C. indicated in her questionnaire that those who continued to kill, for whatever reason, should have their lives taken; someone who killed several people should not be fed in prison; and

that if you take someone's life, your life should be taken also. (Vol. 6, 2SCT: 1628-1647 [questionnaire]; 7RT: 947 [to box]; 1019-1021 [appellant's cause challenge denied]; 1028-1029 [prosecution accepts panel twice; appellant strikes D.C.].)

The prosecution also accepted a panel with L.S., a Filipina juror who, on her questionnaire, was very strongly pro-death penalty and would always vote for death for a robbery participant where an officer, owner, or multiple victims are killed. (Vol. 6, 2SCT: 1680-1699 [questionnaire]; 7RT: 948 [to box]; 1021-1022 [appellant's cause challenge denied]; 7RT: 1028, 1029, 1030-1031 [prosecution accepts panel three times; appellant strikes L.S.].) Based on facts like these, the prosecution's acceptance of panels below with Hispanics that it later struck does not negate the suspicion that discrimination may have infected the jury process. (See *Johnson, supra,* 545 U.S. at p. 172.)

Finally, a juror who ultimately sits for the trial and one who is struck represent fundamentally different circumstances, and it does not make sense to use one situation to prove the other. One is either deprived of the right to equal protection of the law or is not. The fact that a juror was close to sitting on the jury does not make a discriminatory peremptory strike against her any less of a constitutional deprivation. (*Brinson v. Vaughn*, *supra*, 398 F.3d at p. 233.) As just explained, the mere timing of a peremptory strike does not negate a discriminatory inference.

For all these reasons, appellant respectfully requests that this Court reexamine its prior reasoning that a prosecutor's acceptance of a panel, followed by a backstrike, is evidence of a lack of discriminatory intent. (See e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 576 [prosecutor's acceptance of the panel containing a protected class member "*strongly*

suggests that race was not a motive" in the challenge at issue], italics added); *see also People v. Carasi, supra,* 44 Cal.4th at pp. 1294-1295; *People v. Lenix, supra,* 44 Cal.4th at p. 629; *People v. Kelly* (2007) 42 Cal.4th 763, 780.) Rather, the Court should review the backstrikes below with a critical eye to ensure that appellant's right to equal protection is protected and hold that at least in appellant's case, the prosecution's passing on panels with Hispanics, some of whom it later struck, does not refute the inference that the challenges were racially motivated. (*Williams v. Runnels* (2006) 432 F.3d 1102, 1109.)

One Hispanic Juror Sat on the Final Jury

Respondent next argues that the fact that the jury included one Hispanic indicates the prosecutor's good faith and is an appropriate factor to consider in determining whether appellant showed a prima facie case. (RB 131, citing *People v. Garcia, supra,* 52 Cal.4th at pp. 747-748.) Appellant disagrees that this is a relevant circumstance at step one for the reasons explained in subsection D, *ante*: the final composition of the jury will reflect defense strikes and often other events irrelevant to the existence of a prima facie case. Thus, even if it is "true that the prosecution's use of peremptory strikes did not result in a racially unbalanced petit jury, that is not the test for deciding whether there has been an equal protection violation." (*Eagle v. Linahan, supra,* 279 F.3d at p. 942.)

Moreover, if the question is whether the proponent struck any juror who is a member of a cognizable group based on a discriminatory motive, the seating of other members of the group on the jury also is irrelevant.

> [A] prosecutor's purposeful discrimination in excluding even a single juror on account of race cannot be tolerated as consistent with the guarantee of equal protection under the law. [Citations omitted.] '[W]e emphasize that under *Batson*,

> the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black jurors.' [Citation omitted.] Moreover, a prosecutor who intentionally discriminates against a prospective juror on the basis of race can find no refuge in having accepted others venire persons of that race for the jury.

(*Holloway v. Horn, supra*, 355 F.3d at p. 720; see also *Miller-El II, supra,* 545 U.S. at p. 250 [late-stage decision to accept a black panel member willing to impose a death sentence did not neutralize early-stage decision to challenge a comparable juror]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814, overruled on other grounds in *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 685; *Cochran v. Herring* (11th Cir. 1995) 43 F.3d 1404, 1412; *United States v. Omoruyi* (9th Cir. 1993) 7 F.3d 880, 882.)

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

Respondent contends that a prima facie case is defeated by locating reasons in the voir dire record that suggest "grounds upon which the prosecutor might reasonably have challenged the jurors in question." (RB 116, quoting *People v. Pearson* (2013) 56 Ca1.4th 393, 421.) As argued in the opening brief, this is contrary to the dictates of *Batson, Johnson* and other United States Supreme Court precedent. (AOB 59-62.) This approach fails to take into account that its application erroneously results in conflating all three steps of *Batson* into one-inclusive step and unjustifiably increases the defendant's burden at step one. The prosecutor's reasons and the validity of those reasons are not at issue until a prima facie case is established. "It is not until the *third* step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines

whether the opponent of the strike has carried his burden of proving purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 (*per curiam*) original italics.)

Under *Batson*, the prosecutor is required to state a race-neutral reason for the peremptory challenge at step two. (*Batson*, 476 U.S. at p. 97; *Miller-El I, supra,* 537 U.S. at p. 328.) Positing that the prosecutor's reason is a relevant circumstance at step one renders the second step irrelevant by merging it into the first step in contravention of the *Batson* framework itself. (*Purkett v. Elem, supra,* 514 U.S. at p. 768 [court errs by combining *Batson* steps]; *People v. Harris, supra,* 57 Cal.4th 804, 874 (conc. opn of Liu, J.) [warning of risks of "collapsing all three of *Batson*'s steps into the prima facie inquiry"].)

Ultimately, respondent expends a great deal of effort pointing to possible reasons reflected in questionnaires or voir dire, as well as those cited by the prosecutor, that would justify striking P.G., E.A., T.M. and R.F. (RB 117-132.) Respondent then concludes that the record contains "legitimate non-racial reasons unrelated to race that P.G., E.A., T.M. and R.F. were not suitable jurors from the prosecutors' perspective." (RB 130.) However, the consideration of these multiple factors as valid reasons to exercise a peremptory challenge "is not the type of *apparent* explanation that alters the inference of discrimination" at step one. (*United States v. Stephens, supra,* 421 F.3d at p. 517, italics added.) In addition, this argument is flawed because it depends on this Court determining that the prosecutor was credible. This is not the proper function of a reviewing court at *Batson*'s first step. (*Snyder v. Louisiana, supra,* 552 U.S. at p. 485; *Batson, supra,* 476 U.S. at p. 98.)

H. Under The "Totality Of Relevant Facts" Standard Of *Batson*, This Court Should Engage In Comparative Analysis

In the opening brief, appellant set forth reasons why the Court should engage in comparative analysis in appellant's case. (AOB 62-64; see also *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491 (conc. opn of Liu, J.) [prosecutor's statement of reasons for striking a juror moves *Batson* inquiry to third step, requiring evaluation of whether reasons were genuine or pretextual].) Respondent points out that this Court has repeatedly held that appellate courts need not employ comparative analysis on appeal in step one cases. (RB 136.) Appellant submits that should this Court search for, and rely upon, characteristics of the Hispanic jurors the prosecutor struck to justify any of the strikes appellant challenges, the Court must perform a comparative analysis and consider whether the characteristics apply to jurors not struck by the prosecutor. Otherwise, by looking only at the struck jurors, the court has not taken into account all relevant circumstances. (See *Harris, supra*, 57 Cal.4th at p. 872 (conc. opn of Liu, J.).)

J. The Judgment Must Be Reversed

Appellant recognizes that "[d]iscarding . . . convictions because jurors were ousted for racial reason is tough medicine." (*Briggs v. Grounds, supra,* 682 F.3d 1165, 1189 (dis. opn of Berzon, J.).) However, reversal is necessary if the justice system is to be "free of the taint of racial discrimination." (*Ibid.*) Stated another way, "[t]he remedy for [] an equal protection violation is reversal of the conviction without regard to whether we perceive the defendant to be actually innocent or guilty." (*Eagle v. Linaham, supra,* 279 F.3d at p. 943.)

For this and all the reasons argued above and in the opening brief, appellant's case must be reversed. (See *Snyder v. Louisiana, supra,* 552 U.S. at p. 486 [reversing where there was no "realistic possibility" that question of causation in third step case could be profitably explored further on remand more than a decade after the defendant's trial].)

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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 (11CT: 3296; 23RT: 4103), an employee at the Mercado Buenos Aires. (12RT: 1799.) Respondent does not dispute the lack of direct evidence that property was taken from Flores, arguing instead that the testimony of Manuel Rodriguez inferentially provided substantial circumstantial evidence that personal property was taken from Flores. (RB 144-146.) Rodriguez's testimony on the point, however, was pure speculation: he only *thought* that "others" had been robbed. (12RT: 1811.) Because there was neither direct nor circumstantial evidence that property was taken from Flores, Count 21 must be reversed. (AOB 99-101.)

Circumstantial evidence is "'that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred.' [Citation.]" (*People v. Smith* (2008) 168 Cal.App.4th 7, 14.)

> "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid.Code, § 600, subd. (b).) However, "[a] reasonable inference ... 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.' [Citations.]" [Citation.] Here, the evidence to support the critical inference was lacking.

(*People v. Davis* (2013) 57 Cal.4th 353, 360.) Respondent's argument fails; as in *Davis*, there was no evidence supporting the critical inference.

The prosecutor first questioned Manuel Rodriguez on direct examination about his movements during the robbery. Rodriguez was at the meat table when he first saw the robbers. (12RT: 1797.) He was moved to the kitchen along with "everyone" else, including Flores (12RT: 1799, 1802), then the office area (12:RT 1804), and finally the bathroom. (12RT: 1809.) The prosecutor next asked about whether the robbers took property from Rodriguez's person (12RT: 1810), and then continued:

> Q. Did you see any property being taken from any of your employees or customers?
>
> A. Wallets and watches.
>
> Q. *Did you actually see that, or did you just hear about it?*
>
> A: I saw them take out a wallet from one of my employees [Dario De Luro] in the bathroom and also his watch, *but for the others, I think they did it before.*

(12RT: 1811.)

Respondent thus appears to argue that because Rodriguez testified that at one point both he and Flores were in the kitchen (12RT: 1802), and he later saw property taken from De Luro in the bathroom (12RT: 1811), the jury could properly infer that property was taken from Flores on the basis of Rodriguez's "think[ing]" that "others" had been robbed earlier. (12 RT: 1811; see RB 146.) Rodriguez did not say who the "others" were and his thoughts on the matter were pure speculation.

In *People v. Rudolph* (1961) 197 Cal.App.2d 739, two restaurant employees testified that an armed man entered the restaurant and forced them at gun point to lie on the floor while he rummaged around the room. (*Id.* at pp. 740-741.) Both heard a sound like keys rattling, but neither saw the armed man take any keys, nor was there evidence that the keys were missing after the robbery. (*Id.* at pp. 743-744.) The court overturned the

defendant's robbery conviction for taking the keys. (*People v. Rudolph, supra,* 197 Cal.App.2d at p. 744.) The witnesses' assumption that the defendant took the keys was "merely a conclusion from the fact that they heard what they believed to be the rattling of keys." (*Ibid.*) The evidence was insufficient because "[h]owever strong the suspicion that the defendant carried away keys . . . the facts in evidence fall far short of proof that [the defendant] was guilt of robbery." (*Ibid.*)

The instant case lacks even the weak circumstantial evidence present in *People v. Rudolph, supra,* 197 Cal.App.2d 739, 744. Rodriguez's thinking that "others" were robbed earlier was at most a suspicion rather than the basis for a reasonable inference. Because the "facts in evidence fall far short of proof" (*ibid.*), that appellant was guilty of robbing Flores, appellant's conviction on Count 21 must be reversed.

C. Because There Was Insufficient Evidence To Support Count 21, Appellant's Rights Under Federal and State Law Were Violated, and Appellant's Conviction For The Robbery Of Arturo Flores Must Be Reversed

Appellant's conviction 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. I, §§ 7, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 & fn. 13.) Under the federal test for sufficiency of evidence, Count 21 must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [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].) Similarly, under California law, Count 21 must be reversed because a rational trier of fact could not have found guilt based on

the evidence and inferences drawn therefrom. (*People v. Lewis* (2006) 39 Cal.4th 970, 1044; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1131 [upholding sufficiency of rape special circumstances where jury could reasonably infer defendant's intent to rape, notwithstanding the absence of physical evidence]; *People v. Young* (2005) 34 Cal.4th 1149, 1180 [holding evidence sufficient because jury finding was reasonable].)

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IV.

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

Appellant argued that the trial court erred both when it denied his motion to strike key but speculative testimony relating to Count 5, the attempted murder charge, and when it denied his motion to dismiss Count 5 pursuant to section 1118.1. (AOB 102-113.) Respondent's arguments to the contrary are incorrect.

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

Respondent argues that the trial court did not abuse its discretion in denying appellant's motions to strike portions of Medina's testimony as speculative. (RB 151-153.) The disputed testimony was that appellant tried to change the clip on his gun because "it seems logical if . . . there is [sic] no bullets inside the gun," and appellant "made a gesture as if to remove the clip." (11RT: 1614-1615.) Respondent does not address appellant's argument (AOB 106, 112), that the court erred by refusing to strike speculative testimony under the premise that testimony through a translator is not "as precise as we could ever get it with English." (11RT: 1621.) The application of a less stringent standard to testimony given through a Spanish interpreter violated appellant's right to equal protection of the laws under the Fourteenth Amendment and California's Constitution. (U.S. Const., 14th Amend.; Cal. Const. art. I, § 7; *Hernandez v. Texas* (1954) 347 U.S. 475, 482 [barring discrimination based upon national origin or descent); *Hirabayashi v. United States* (1943) 320 U.S. 81, 100 [same based upon ancestry and race]; *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 369 [same

based upon race, color, or nationality].) The court's ruling also lightened the prosecution's burden to prove appellant's guilt beyond a reasonable doubt, violating appellants rights under the Due Process Clause of the Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 359, 364.)

D. There Was Insufficient Evidence That Appellant Had The Specific Intent To Kill Medina

Respondent does not reference or distinguish the cases appellant cited demonstrating that despite Medina's testimony that appellant kept trying to pull the trigger when he pointed the gun at Medina, the evidence was insufficient to show appellant had the specific intent to kill Medina. (AOB 103, 108-109.) Respondent instead cites cases where, with far more evidence of intent, including verbal threats and/or admissions, the court found the evidence sufficient to sustain an attempted murder conviction. (RB 150, citing *People v. Van Buskirk* (1952) 113 Cal.App.2d 789, and *People v. Lashley* (1991) 1 Cal.App.4th 938.)

In *People v. Van Buskirk, supra,* 113 Cal.App.2d 789, the defendant waited until his three intended victims arrived, threatened to kill all of them, fired a shot over the witness/victim's head, again threatened to kill them all, and then attempted to shoot but the gun failed to fire. (*Id.* at p. 791.) The defendant ran some distance away, reloaded and leveled the gun at the victim, who by then was hiding behind the car door. (*Id.*) After his arrest, the police found a note on the defendant he had written explaining why he had to kill the three people and himself. (*Id.* at p. 792.) Not surprisingly, the court found sufficient evidence of intent to kill. (*Id.* at pp. 792-793.) In *People v. Lashley* (1991)1 Cal.App.4th 938, the court similarly found sufficient evidence of intent to kill where, during a series of interactions with the victim as described by several witnesses, the defendant threatened

to do bodily harm to the victim, took aim before firing a .22 caliber rifle and shooting the victim, who suffered serious injuries. (*Id.* at pp. 944-946.) The facts of these two cases, including various movements, actions and direct threats by the defendants over a period of time, in no way resemble the very brief encounter between appellant and Medina as described by the latter's speculative testimony.

Respondent mischaracterizes appellant's argument as based on the impermissible theory of factual impossibility. (RB 150-152.) Appellant agrees that factual impossibility is not a defense; his argument relies on the lack of substantive evidence of specific intent necessary to sustain the attempted murder charge. (See AOB 109-110.) Moreover, respondent's cases on this point again are not helpful to its overall argument, as there is ample evidence of the requisite intent in both cases it cites. (See RB 150-151, citing *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, and *People v. Pham* (2011) 192 Cal.App.4th 552.)

In *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, the defendant argued that because the prosecution could not prove that his intended victims were under the age of 14, the evidence could not show, inter alia, that he had the specific intent to molest a child under that age. (*Id.* at pp. 185-186.) The court rejected this factual impossibility defense: the defendant was told that the intended victims were under age 14, expressed fear of the outcome if he was detected, but he nevertheless tried to convince the victims to engage in sexual conduct with him. (*Id.* at p. 187.) In *People v. Pham* (2011) 192 Cal.App.4th 552, the defendant expressly admitted that he shot into a group intending to kill two particular people, who, it turned out, were not present. (*Id.* at p. 555.) The defendant unsuccessfully argued that under the transferred intent doctrine, he lacked

the specific intent to kill. (*Id.* at pp. 554-555.) The court instead characterized the defense as one of factual impossibility. (*Ibid.*) Under that theory, the defendant's mistaken belief was irrelevant; the two crimes of attempted murder were committed when he fired shots into the group thinking his intended victims were there.[12] (*Id.* at pp. 560-561.) Thus, in both cases cited by respondent, there was ample evidence – including through the defendants' own words – of the intent necessary for the crimes at issue. This is in stark contrast to the instant case with testimony about a gesture and an empty gun.

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

Citing *People v. Watkins* (2012) 55 Cal.4th 999, 1023-1024, respondent states that "inferences offered against claims of insufficient evidence may not be based upon speculation." (RB 151.) In that case, the defendant testified that he had not planned to rob the particular victim and the gun had gone off accidentally. He then argued that the evidence was insufficient to convict him of attempted robbery, because it would have been based on speculative inferences. (*Ibid.*) This Court ruled otherwise: the evidence showed that the defendant had committed three armed robberies within a few hours of the charged attempted robbery using a similar method of parking a truck so as to attract potential victims, raising the hood to provide concealment, and displaying a gun. (*Ibid.*) The jury therefore could reasonably conclude that the defendant, using the same

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[12] The third case respondent cited regarding factual impossibility has been depublished. (See RB 151, citing *People v. Richardson* (2007) 151 Cal.App.4th 790; 60 Cal.Rptr. 458.)

modus operandi, intentionally shot the victim who had walked away from the truck. (*Ibid.*) Based on the evidence, which included eyewitness and forensic testimony regarding the gun's very heavy trigger pull, the court did not err in denying Watkin's motion for acquittal under section 1118.1. (*Id.* at p. 1025.) This evidence is in stark contrast to Medina's belated and vague testimony about gestures.

Respondent argues that appellant conceded during the guilt phase closing argument that the jury could reasonably conclude that appellant believed the gun had at least one bullet in it and tried to shoot and kill Medina. (RB 151.) However, that concession was made as part of a circumstantial evidence argument. Appellant told the jury that if appellant and his codefendantss were the experienced, military-precision gunmen that the prosecution described, they would know that when the slide is open it does no good to pull the trigger. (22RT: 3847.) Appellant then argued that there were two reasonable interpretations of the evidence: the perpetrator had the intent to kill both when he shot the officer and then swung the gun over to Medina, or that he pointed the gun at Medina to get him to "back off . . . [if] he doesn't get involved, [he] doesn't get shot." (22RT: 3848.) Under the circumstantial evidence instruction, the jury had to choose the reasonable conclusion about intent that favored appellant. (22RT: 3848-3849.)

This argument, made after the court ruled against appellant on the motion to strike portions of Medina's testimony and motion to dismiss Count 5, do not undermine his claims on appeal. Under the "defensive acts doctrine . . . a defendant should not lose his right to contest an erroneous ruling by the trial court merely because the defendant thereafter acts prudently to mitigate the adverse effects of that ruling." (*People v. Eilers*

(1991) 231 Cal.App.3d 288, 297.) Appellant's attempts to make the best of a bad situation cannot be used against him now. (See *People v. Scott* (1978) 21 Cal.3d 284, 291 [where prosecution chose to present test results that were negative, Court was "unable to find a waiver in defendant's spirited attempts to persuade the jury in closing argument that the test results tended to establish his innocence"]; see also *People v. Venegas* (1998) 18 Cal.4th 47, 94 [attempt to attack the merits of damaging testimony following unsuccessful objection is not a waiver but a necessary and proper trial tactic]; *People v. Turner* (1990) 50 Cal.3d 708, 744 and fn. 18 [no forfeiture where counsel elicited witness's prior convictions after unsuccessful motion to exclude them].)

F. Because The Evidence Was Insufficient, Appellant's Rights Under Federal and State Law Were Violated, and The Conviction For Attempted Murder Must Be Reversed

Under the federal test for sufficiency of evidence, Count 21 must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [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].) This is especially so in light of the circumstantial evidence and appellant's argument. If "the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." (*Cosby v. Jones* (11th Cir. 1982) 682 F.2d 1373, 1383; accord, *United States v. Harris* (7th Cir. 1991) 942 F.2d 1125, 1129-1130; *United States v. D'Amato* (2d Cir. 1994) 39 F.3d 1249, 1256; *United States*

v. Flores-Rivera (1st Cir. 1995) 56 F.3d 319, 323; *United States v. Santillana* (5th Cir. 2010) 604 F.3d 192, 195.)

Under California law, Count 21 must be reversed because a rational trier of fact could not have found guilt based on the evidence and inferences drawn therefrom. (*People v. Lewis* (2006) 39 Cal.4th 970, 1044; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1131 [upholding sufficiency of rape special circumstances where jury could reasonably infer defendant's intent to rape, notwithstanding the absence of physical evidence]; *People v. Young* (2005) 34 Cal.4th 1149, 1180 [holding evidence sufficient because jury finding was reasonable].)

Appellant's conviction on Count 5 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. I, §§ 7, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 & fn. 13.) For the reasons above and those set out in appellant's opening brief, appellant's conviction for attempted murder must be reversed.

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V.

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

Respondent claims that the trial court properly found Rosa Santana to be an unavailable witness and admitted her preliminary hearing at trial. (RB 154-171.) Respondent is incorrect. The prosecution did not meet its burden of showing that the facts demonstrated prosecutorial good faith and due diligence in attempting to secure Santana's testimony at trial (*People v. Herrera* (2010) 49 Cal.4th 613, 623), and the trial court's finding to the contrary was erroneous. The trial court's reasons for its due diligence finding were "what the People did and the way it ended up, resulting in the contact made in August, the fact she showed up on the warrant to attend the lineup, and her cooperativeness other than the apparent problems she had" with her parents. (19RT: 3170.) Both these reasons and those argued by respondent do not stand up when viewed in the context of the relevant portions of the record.

A. The Prosecution Failed To Establish Santana's Unavailability Under California Statute and the Sixth and Fourteenth Amendments and The Trial Court Erred In Finding That The Prosecution Exercised Good-Faith, Reasonable Diligence and In Admitting Santana's Preliminary Hearing Testimony

First, the trial court's reliance on "the way it ended up, resulting in the contact made in August" (19RT: 3170), cannot be credited because the only "contact" with Santana in August 1994 consisted of her surrendering in her own burglary case in Pomona; the prosecution in appellant's case had no contacts with Santana in August and did not renew their search for her until

August 31.[13] (19RT: 3153, 3159-3160.) Moreover, there is no evidence that Santana's decision to turn herself in for her own case in Pomona had any relation to the prosecution's efforts to find her. While the prosecution had urged Santana to turn herself in (19RT: 3158), there is no evidence in the record as to why Santana finally surrendered herself in August 1994 but not earlier. For example, she had promised the prosecutor in May and July of 1994 that she would do so, but did not. (19RT: 3157-3159.) Respondent also has not countered appellant's argument that Santana's appearances for other cases are irrelevant to a showing of due diligence in securing her presence at appellant's trial. (AOB 122, citing *In re Choung D* (2006) 135 Cal.App.4th 1301, 1313.) Thus there is no evidence that Santana's Pomona appearance in August in her own case was related in any way to the prosecution's diligence below.

Second, the trial court's reliance on "the fact she showed up on the warrant to attend the lineup [in May 1994]," again in a separate case (19RT: 3170, 3158), was legally irrelevant, as just stated, and also unreasonably ignores surrounding events. Santana was completely unstable, with at least three different addresses between May and July of 1994. (19RT: 3157-3159,

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[13] Although, as respondent notes, one of the prosecutors, when introducing the due diligence issue, stated that Santana had been served with a subpoena in August 1994 (RB 155, citing 19RT: 3141), it appears the prosecutor misspoke. As the record indicates and respondent states, the evidence at the due diligence hearing established that on May 4, 1994, the prosecution served Santana with two subpoenas: one to appear at a lineup on a related case on May 16, 1994, and another to appear on September 7, 1994, at appellant's trial, then scheduled to start in August. (RB 156-158, 166; 19RT: 3151-3152, 3157-3159.) When Santana appeared at the lineup in the other case in May, the prosecution served her with a second subpoena to appear at appellant's trial on September 7. (19RT: 3159.)

3146-3147 [East Olive St., Pomona [5/4/94]; Bandera St., Montclair [7/94]; 1328 S. San Antonio Ave., Pomona [had not lived there for 2 mos. as of 9/7/94].) There is no evidence that she ever voluntarily contacted the prosecution to report these address changes or stay in touch; rather, the prosecution had to relocate Santana each time they had contact with her other than at the May 1994 lineup. (*Ibid.*)

Also Santana, who was 16 years old at the time of trial, had been a consistent runaway for the prior two years. (19RT: 3156.) Nothing, including having a baby in January 1994, happened to change that, despite the prosecutor's wishful thinking to the contrary. (See 19RT: 3143 [prosecutor had believed Santana would be more stable given that she had a baby].) Given Santana's constant movement before and after the May 1994 lineup and failure to surrender for months in her own case, the trial court unreasonably concluded that her May 1994 lineup appearance demonstrated the prosecution's diligence.

Third, the court's conclusion that Santana was cooperative other than her problems with her parents (19RT: 3170) also is belied by the record. At the material witness hearing on March 24, 1993, during appellant's preliminary hearing, the court recognized that Santana had been evading and avoiding service. (3/24/93 RT: 18.) Two days later, the prosecution sought to deny Santana bail entirely, arguing, among other things, that Santana had indicated that she wanted to stay on the streets rather than appear in appellant's case. (Misc. Muni. RT: 252-253.) The prosecution's characterization of her as a hostile witness during the preliminary hearing was unrelated to parental problems. (2CT: 402.) Ironically, the only one of Santana's moves in 1994 that appears directly related to problems with her parents took place after the prosecution approved her release from custody in

August 1994, when she was released to her parents and promptly ran away. (19RT: 3142-3143.)

At the due diligence hearing, appellant informed the court of the prosecution's representations at the undertaking during the preliminary hearing (19RT: 3162-3166), and then argued that the prosecution's complete switch in positions did not show good faith. (19RT: 3166-3169.) The court rejected this argument as well as appellant's argument that rather than agree to her release[14] on August 19, 1994, the prosecutor should have asked the juvenile court to continue to keep Santana in custody to appear at appellant's trial then set for September 7, 1994. (19RT: 3158-3159, 3167; 9CT: 2632 [9/7/94 trial date set], 10CT: 2753 [on 8/24/94, trial date reset for 9/14/94], 2986 [trial starts on 9/14/94].) Given the record and the law, the trial court incorrectly found that the prosecution's decision to let her go was not unreasonable. (19RT: 3170.)

"[A] prosecutor's support for a decision to release a witness who poses a substantial flight risk is a *significant* factor to be considered in evaluating whether the prosecutor has exercised due diligence." (*People v. Bunyard* (2009) 45 Cal.4th 836, 854, italics added.) In addition to that general principle, the prosecution unreasonably assumed that Santana, although a juvenile with a baby, would not be released to her parents. (19RT: 3142, 3152.) Based upon this unreasonable assumption, the

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[14] In the opening brief, appellant at one point mistakenly indicated that the prosecution had agreed that the Pomona authorities could release Santana to her parents while she awaited disposition of her burglary case. (AOB 120.) However, the prosecution agreed to her release with electronic monitoring only on the assumption that she would not be released to her parents. (AOB 125; 19RT: 3142.)

prosecution agreed that just three weeks prior to Santana's September 7, 1994, subpoena date to appear at appellant's trial, the Pomona district attorney could release Santana as long as there was electric monitoring. (19RT: 3142, 3158-3159; 20RT: 3543; 9CT: 2632; 10CT: 2753.) Had the prosecution diligently questioned its counterpart in Pomona, it would have learned that Santana would be released on the condition that she went to her parents. (20RT: 3543.)

People v. Bunyard, supra, 45 Cal.4th 836 (*Bunyard*), supports appellant's position. The issue there was whether the prosecution had exercised due diligence after it had initiated a 1332 proceeding prior to a retrial when the witness failed to appear, but later supported the court's decision to release the witness. (*Id.* at pp. 846-847.) Following release, the witness appeared twice as ordered, but then disappeared. (*Id.* at pp. 847-848.) This Court's discussion of the factors relevant to whether the prosecution exercised reasonable diligence when it agreed with a trial court's erroneous decision to release a material witness from custody (*id.* at p. 849 & fn. 5), is germane. These factors include whether the witness had pending charges or was awaiting sentencing in a felony case, was an imminent flight risk, had previously appeared as promised in the same case, or made credible, in-court promises to appear. (*Id.* at pp. 853-854.) In *Bunyard*, this Court reviewed these factors and held that the trial court's decision to release the witness was reasonable in light of the fact that the witness had no pending charges, had promised orally and in writing to report regularly and had done so for two months, and had no incentive to flee. (*Id.* at pp. 851-855.) Moreover, in *Bunyard* the Court gave deference to the trial court's assessment of the witness's credibility (*id.* at p. 851), a factor not present here.

Here, all these factors work against a finding of reasonable diligence. By the time of trial, Santana was awaiting disposition on a felony (19RT: 3151); had not previously appeared in appellant's case other than under compulsion at the preliminary hearing; had not made credible in-court promises to appear at appellant's trial; and certainly was a flight risk (19RT: 3169 [prosecutor acknowledges she knew of Santana's propensity to disappear].) Additionally, Santana's two sporadic appearances May and August in other cases (19RT: 3157-3160), interspersed with her lack of fixed addresses as described above, are also distinguishable from the initial compliance of the witness in *Bunyard.* (See *id.* at pp. 851, 853-854.) Thus, the prosecution's agreement to release Santana, a vital witness, shortly before trial despite the substantial risk she would disappear, rather than take adequate preventive measures, demonstrates the prosecution's lack of good faith and diligence.

As respondent acknowledges, whether the prosecution sought to detain a witness prior to trial under section 1332 is relevant to a due diligence determination. (RB 165, citing *People v. Hovey* (1988) 44 Cal.3d 543, 564.) The prosecution's failure to do so here, especially in contrast to its position at the secret 1332 proceedings at the time of the preliminary hearing (3/24/93 RT: 3-4, 16-19; 2CT: 349-351, 368, 373), showed a distinct lack of good faith.

In finding reasonable the prosecutor's decision to allow Santana's August 1994 release after her Pomona petition was sustained, the court remarked, "I don't know what they could have done other than [defense counsel] saying she should have been kept in custody from August." (19RT: 3170.) The court's out-of-hand rejection of this point suggests it thought the very idea of detaining Santana was not reasonable. However, that

determination should have been made at a 1332 hearing, where the judge considers the tension between the state's right to compel a material witness to appear and testify, and a witness's right not to be unreasonably detained. (*In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1070 (*Francisco M.*) Thus, the court never adequately considered appellant's argument that to demonstrate good faith and diligence, the prosecutor should have requested a hearing under section 1332 in order to secure, or at least attempt to secure, Santana's testimony at appellant's trial. (*People v. Hovey, supra*, 44 Cal.3d 543, 564; *People v. Roldan* (2012) 205 Cal.App.4th 969, 981.)

Additionally, whether or not Santana was taking care of her baby was not discussed below nor was it a factor in the court's decision. Whether it would have been a factor in the court's determination at a 1332 hearing is unknown, and respondent, who has the burden of proof, cannot now benefit from suppositions in this regard. Significantly, the authorities in Pomona had no compunctions about keeping Santana in custody for a week in August 1994 after she finally turned herself in in her own felony case. (20RT 3543.) And if Santana made arrangements for childcare during her Pomona incarceration, she could have done so again.

In *Francisco M., supra,* 86 Cal.App.4th 1061, two juveniles, aged 17 and 15, had been detained to testify as material witnesses in a murder case for about ten and eight weeks, respectively, at the time the court of appeal considered their habeas petitions contesting their continued detentions. (*Id.* at p. 1065.) Their commitment orders had been reviewed periodically. (*Id.* at pp. 1067-1070.) Ultimately the court denied the juveniles' request for immediate release, despite the fact that the trial had been postponed. (*Id.* at p. 1079.) *Francisco M.* shows that a detention period sufficient for Santana to testify at appellant's trial might well have been reasonable.

In *People v. Roldan, supra,* 205 Cal.App.4th 969, the key witness identifying the defendant in an attempted murder charge was in federal custody on an immigration hold pending deportation, but was held for nine months in order to testify at the preliminary hearing, and then promptly deported. (*Id.* at pp. 975, 976.) The prosecutor had consulted with United States Immigration and Customs Enforcement officials in an unsuccessful attempt to have the witness held so as to testify at trial, but the witness was deported promptly. (*Id.* at pp. 976-978.) The preliminary hearing testimony was then admitted at trial over the defendant's objection. (*Ibid.*)

The *Roldan* court recognized that the prosecution's failure to pursue any judicial remedies is a factor in determining whether or not it has exercised due diligence in attempting to secure the witness's presence at trial. (*People v. Roldan, supra,* 205 Cal.App.4th at p. 981.) Although due process considerations prevent the years-long detention of an unimportant witness, courts have sanctioned the months-long detention of a material witness. (*Ibid.*, citing *Francisco M., supra,* 86 Cal.App.4th at p. 1061 and *United States v. Mercedes* (D. Puerto Rico 2001) 164 F.Supp.2d 248.) The court found that the prosecution's failure even to seek such an order under section 1332 or to formally evoke federal statutory procedures to bring the witness to state court to testify, demonstrated a lack of diligence. (*People v. Roldan, supra,* 205 Cal.App.4th at pp. 982-985.) Finally, "[a]t an absolute minimum," the prosecutor in *Roldan* should have notified defense counsel of the witness's impending deportation so he could take action to make the witness available at trial. (*Id.* at p. 985.)

Similarly, the prosecution here should have attempted to utilize judicial processes or notified defense counsel that it planned to allow Santana to be released three weeks before her scheduled appearance, so

defense counsel could take action to secure her testimony. Given that when released in August 1994, Santana was awaiting sentencing in her underlying burglary case (19RT: 3159-3160), her detention for a few weeks may have been appropriate. (See, e.g., *People v. Bunyard, supra,* 45 Cal.4th at p. 854 & fn. 6, discussing *Francisco M, supra,* 86 Cal.App.4th 1061.) The prosecution's failure to attempt to utilize judicial processes, or to notify defense counsel so he could do so, is a major factor showing the prosecutor's lack of good faith effort below.

Respondent recites record facts and general legal principles (RB 154-165), but the sum total of respondent's actual argument is in Respondent's Brief at page 166. However, contrary to respondent's assertion that Santana testified cooperatively at appellant's preliminary hearing (RB 166), Santana testified there only after the prosecution requested that she be held as a material witness under section 1332 due to its unsuccessful ten-month search for her and other factors. (3/24/93 RT: 3-4, 13-14; Misc. Muni RT: 252.) The court ordered sureties of $20,000 in addition to the $20,000 bail in Santana's Pomona case, and had to order her to testify under a partial grant of immunity. (3/24/93 RT: 3-5, 13, 18-21; 2RT: 368-369.) Even then, the prosecution asked that she be deemed a hostile witness at the preliminary hearing. (2CT: 402.) In addition, as shown above, respondent's reliance on the fact that the Santana honored the subpoena to attend the codefendant's lineup in May 1994 was not reasonable.

To support its argument, respondent cites only *People v. Watson* (1980) 213 Cal.App.3d 446 (*Watson*), but its reliance on this case again (19RT: 3152; RB 166) is in vain. There, the witness, a United States legal resident, testified at the preliminary hearing and was later served with

subpoena for trial. (*People v. Watson, supra*, 213 Cal.App.3d at pp. 450-451.) He informed the authorities that he was going home to Argentina for Christmas, but would appear at trial, and gave his contact information in Argentina. (*Ibid.*) Authorities reached him in Argentina after Christmas, two weeks before trial and again during the trial. After expressing increasing doubt about testifying, the witness refused to return to do so. (*Ibid.*) The prosecutor's office spoke with the United States Department of Justice and learned that there was no treaty with Argentina providing for extradition or compulsion of witnesses. (*Id.* at p. 451.)

The *Watson* court rejected the defendant's argument that the prosecution should have obtained a federal subpoena, finding that the sanction of arrest upon return to the United States for failure to respond to the state subpoena was at least as strong an incentive as the threat of a large fine from a federal subpoena, and both could result in the loss of resident status. (*Watson, supra*, 213 Cal.App.3d at pp. 453-454.) The serving of the state subpoena and the "additional efforts" were sufficient to meet the reasonable diligence standard. (*Id.* at pp. 454-455.) The additional efforts were the periodic telephone calls to a witness with a stable work history for most of his 14 years in the United States and stable contact information in Argentina, and contacting the federal authorities to explore additional options. (*Id.* at pp. 450-451, 454-455.)

Unlike *Watson*, Santana continued to be unstable and the prosecution was only intermittently able to contact her, and even then it was only after extensive searches. Santana's youth, constant instability, lack of work history and the prosecution's difficulty in contacting her are quite different from that of the witness in *Watson.*

Finally, the trial court also relied in general on "what the people did" as a basis for finding due diligence (19RT: 3170) and respondent cites to "the People's numerous efforts to locate Santana." (RB 166.) These conclusory statements do not support a finding that the prosecution made a good faith effort to find Santana prior to trial. The U.S. Supreme Court has noted that "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation." (*Ohio v. Roberts* (1980) 448 U.S. 56, 74-75, italics omitted, *abrogated by Crawford v. Washington* (2004) 541 U.S. 36.) The standard of "reasonableness" is a stringent one, as demonstrated by the example of when no effort would be required, i.e., in the case of the witness's intervening death. (*Ohio v. Roberts, supra,* 448 U.S. at p. 74.) For all the reasons argued above and in the opening brief, the prosecutor's showing below did not meet that heavy burden and the court's conclusion to the contrary was erroneous.

B. Appellant Was Prejudiced By The Trial Court's Erroneous Admission Of Santana's Preliminary Hearing Testimony

Rather than respond to appellant's specific prejudice argument regarding the peace officer special circumstance, the guilt phase counts that he did not concede at trial, and the impact of Santana's testimony at the penalty phase (AOB 128-131), respondent mechanically summarizes all the guilt phase trial testimony. (RB 167-170.) Appellant incorporates by reference the prejudice arguments in Arguments VI, XV, XIX, and XXI here and in the opening brief, and otherwise will not repeat his prejudice arguments. For all these reasons as well as those argued in the opening brief, counts 10 through 18, and 24 through 27, and the death sentences must be reversed.

VI.

EVEN IF ROSA SANTANA WAS A CONSTITUTIONALLY AVAILABLE WITNESS, THE TRIAL COURT ERRED BY ADMITTING HEARSAY STATEMENTS THROUGH HER IN VIOLATION OF THE *ARANDA/BRUTON*[15] RULE AND RESTRICTING APPELLANT'S CROSS-EXAMINATION OF HER IN VIOLATION OF THE SIXTH AMENDMENT

In his opening brief, appellant argued that the trial court erred in admitting a taped statement by Rosa Santana containing a codefendant's hearsay statements against appellant. Appellant wrote that in Santana's taped statement, she told the police that she learned from Navarro that he and appellant bought cars from the proceeds of another robbery three to four months earlier where they had each received $14,000. (AOB 132, citing Vol.2, 6SCT: 219-220.)[16] Respondent correctly points out that Santana recited this piece of information without directly attributing it to Navarro. (RB 173.) Nevertheless, the court at both the preliminary hearing and trial consistently recognized that the statement was hearsay as to appellant such that admission would have violated the *Aranda/Bruton* rule.

The portion of Santana's taped statement relevant here is:

Q: [Navarro] and [appellant] bought that, the red car together?

A: Yeah, each of them got their money, so each them got - bought their car.

Q: Where did they get the money?

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[15] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

[16] Exhibit 47 is the tape and Exhibit 48, located at Vol.2, 6SCT: 212-220, is the transcript of the tape. Santana's preliminary hearing testimony is at 2CT: 349, 367-523, 530-547. Detective Perales read her testimony at trial. (19RT: 3363-3370; 20RT: 3391 et seq.)

A: From another store robbery.

Q: How much did they have?

A: About $14,000 each.

Q: How long ago was that?

A: About three or four months.

(Ex. 48,Vol.2, 6SCT: 220.) When the preliminary hearing testimony was read at trial, the above reference to appellant was redacted and the jury instructed that the statement should be considered only as to Navarro. But the above-quoted portion of the transcript and tape were not redacted. Over appellant's objections, trial Exhibit 47, the tape, was admitted and played at the preliminary hearing and trial. (2RT: 426-428; 20RT: 3414-3415 [tape played]; 19RT: 3195 [renewing hearsay objection from the preliminary hearing transcript, pages 43 to 45 (2CT: 423-425)]; 19RT: 3196 [renewing *Aranda* objection to taped statement and arguing admonitions would not cure harm from jury hearing inadmissible hearsay as to appellant]; 3197 [noting ruling at preliminary hearing that statements on tape would be limited under *Aranda*; see 2CT: 427-428]; 19RT: 3374-3376 [hearsay objection to admission of Exhibit 47, the tape]; see also 19RT: 3222 [objecting to Santana's testimony at trial by renewing all preliminary hearing objections]; 20RT: 3504-3505 [renewing all objections from preliminary hearing and in limine motion to Santana's testimony].)

Appellant first objected at the preliminary hearing on hearsay grounds when the prosecutor asked Santana whether she was ever with Navarro when he discussed doing a prior robbery. (2CT: 411.) The court overruled the objection, with the caveat that statements would be limited to the defendant speaking, unless a codefendant was present. (2CT: 411-412.) The prosecutor then limited his question to Navarro and elicited Santana's

testimony that Navarro pointed out a little market they were passing, telling her he had robbed it and bought his car with the proceeds. (2CT: 412-414.)

Appellant next unsuccessfully objected to the playing of the tape at the preliminary hearing. (2CT: 423.) After the court heard it, appellant moved to strike it in its entirety, including Santana's recital of numbers and figures, on grounds of hearsay, lack of foundation and *Aranda.* (2CT: 426-427.) The court denied the motion on the ground that there were no *Aranda/ Bruton* problems as the statements would be limited to the speaker. (2CT: 427-428.)

Shortly thereafter, appellant objected to admission of Santana's taped statement because it violated his rights to confront and cross-examine witnesses, to due process and to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to United States Constitution and the provisions of California Constitution. (2CT: 433-436; see also 2CT: 481-482 [renewing confrontation and cross-examination objections].) Citing *Idaho v. Wright* and *Maryland v. Craig,*[17] the court overruled appellant's objections in large part on the ground that preliminary hearings are unknown to federal constitutional law and the confrontation right is not at issue at a preliminary hearing as it applies only to evidence admitted to convict a defendant at trial. (2CT: 434-435, 481-482.) The court granted appellant's request to make the objections continuing ones. (2CT: 436.)

Navarro then cross-examined Santana on whether Navarro and appellant had purchased a car together or separately.[18] (2CT: 512.) Santana

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[17] *Idaho v. Wright* (1990) 7 U.S. 805; *Maryland v. Craig* (1990) 497 U.S. 836.

[18] Santana's testimony that Navarro told her he had done a prior (continued...)

testified that they each bought different cars. (*Ibid.*) At trial, the court sustained defendant's objection on hearsay grounds to this question and response, recognizing that Santana's knowledge as to whether they purchased a car together would be hearsay and "if it's [Navarro] talking, how do we get it in as to Mr. Sanchez-Fuentes?" (19RT: 3233- 3234.)

During redirect examination at the preliminary hearing, the prosecutor tried to elicit testimony from Santana about appellant's presence at the prior robbery. Appellant's objections again were sustained:

> Q: Now, you testified that Hector told you about another robbery of a small market that he had done. He pointed it out to you as you drove around one day.
>
> A: Yeah.
>
> Q: Did he tell you who he did the robbery with?
>
> A: No. He told me that they had also done that store. He told me that.

(2CT: 519-520.) The prosecutor, *after noting that Santana's source of information was Navarro*, questioned Santana about who "they" were, but following defense objections, her responses that "they" must have been Contreras, appellant and the others, were stricken as speculative and hearsay, except as to Navarro. (2CT: 520-523.) At trial, over the prosecution's objection, the court ruled further that both the question "Did he tell you who he did the robbery with?" and Santana's answer, "No. He told me that they had also done that store," were inadmissible because of the impact of the testimony on the other defendants. (19RT: 3238-3235.)

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[18](...continued)
robbery and purchased his car with money from it was admitted at trial. (20RT: 3405-3406; 2CT: 412-413.)

By all these rulings, the preliminary hearing and trial court recognized that Navarro was Santana's source for her statement on the tape regarding the prior market robbery, that appellant was not present when Navarro made the statement to Santana about the prior market robbery, and that the statement was inadmissible hearsay as to appellant, and a violation of *Aranda* and appellant's confrontation rights.

For all these reasons, the court should have sustained appellant's objections to the admission of Exhibit 47 and 48 at trial with regard to the portion of the transcript excerpted above that told the jury that appellant and Navarro bought cars based on a prior robbery they had done. (Ex. 47, Vol.2, 6SCT 220.)

Admission of Santana's statement on the tape that appellant robbed another small market and bought a car with the proceeds violated appellant's Fifth, Sixth and Fourteenth Amendment rights under the United States Constitution and analogous provisions of the state constitution to confront and cross-examine witnesses and to due process and a fair trial. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15; *Bruton, supra,* 391 U.S. at pp. 126-128; *Aranda, supra,* 63 Cal.2d 518.

The errors further violated appellant's right to due process under the Fifth and Fourteenth Amendments, because confrontation and cross-examination ensure that evidence is reliable and "subject to the rigorous adversarial testing that is the norm . . . ." (*Maryland v. Craig, supra,* 497 U.S. at p. 847; *Michigan v. Bryant* (2011) 131 S.Ct. 1143, 1162.) "The right . . . to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; see also

Jackson v. Denno (1964) 378 U.S. 368, 381-383, 388-390 [New York procedure, wherein it was impossible to determine whether jury relied on unconstitutionally obtained confession to determine guilt, violated defendant's 14th Amendment due process rights]; *Aranda, supra,* 63 Cal.2d at pp. 528-529 [recognizing that it may be denial of due process to rely on jury's presumed inability to disregard codefendant's confession implicating another defendant for purposes of guilt/innocence determination]; *People v. Winson* (1981) 29 Cal.3d 711, 717 [recognizing that absence of proper confrontation calls into question ultimate integrity of fact-finding process].)

Respondent's remaining contentions with respect to the instant argument raise no significant issues beyond those addressed in appellant's opening brief, and therefore no further reply is required.

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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

Appellant argued that the court erred in admitting evidence of an incident at Rod's Coffee Shop ("Rod's") as prior crimes evidence. Respondent has not successfully rebutted appellant's arguments, which are based upon the case law interpreting Evidence Code section 1101, subdivision (b), and the logic behind its evidentiary theories and principles. (AOB 144-153.)

Respondent makes three arguments. First, respondent contends that the Rod's evidence was admissible as to appellant's identity at each of the charged robberies because the prosecution may not be compelled to accept a stipulation that would deprive its case of its persuasiveness and force. (RB 197.) However, under that theory, evidence still must be relevant and is subject to Evidence Code section 352. (*People v. Scheid* (1997) 16 Cal.4th 1, 16; see also *People v. Rogers* (2013) 57 Cal.4th 296, 331 [because other crimes evidence may be viewed as inherently prejudicial, it must have "substantial probative value" to be admissible].) Here, the probative value was negligible in terms of the uncontested robbery counts (AOB 144-148), and at the very least cumulative and far more prejudicial than probative as to the contested ones. (AOB 143-144.) Moreover, as explained below and in the opening brief, the Rod's evidence was irrelevant under the applicable evidentiary theories.

Second, respondent argues that because appellant "did not admit to torturing[19] Armando with a stun gun," the court properly admitted the Rod's evidence as relevant to prove that appellant used the stun gun, because the use of the stun gun during a takeover robbery is highly distinctive. (RB 197.) This generalization does not address the evidentiary theories under which the Rod's stun gun evidence was admitted and the jury instructed, nor appellant's arguments and authorities showing the broken links on the inferential chain of reasoning underlying the court's decision to admit the evidence. (See AOB 144-48 [common scheme or plan], 148-152 [knowledge or possession of means for the charged offenses].)

Also, as demonstrated in the opening brief, the trial court's view, based on lack of personal familiarity with cases where electrical devices were used, was simply not correct. (AOB 150-151.) Moreover, it was improper for the court to rely on personal experience when ruling on the admissibility of evidence. (*United States v. Lewis* (9th Cir. 1987) 833 F.2d 1380, 1385[improper for trial judge to rule, on the basis of his own personal experience and reaction to anesthetic in a prior surgery, that defendant's confession given after waking up from surgery was involuntary].)

In addition, as appellant argued, the stun gun was found under the passenger seat of the car appellant was driving; the evidence did not show that appellant ever possessed it. (16RT: 2566; 18RT: 3032-3033, 3035; 29RT: 5086.) The law "makes the matter of knowledge in relation to

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[19] 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.) Appellant was charged with two counts of assault with a stun gun under section 244.5, subdivision (b), counts 30 and 33. (7CT: 2009.)

defendant's awareness of the presence of the object a basic element of the offense of possession." (*People v. Gory* (1946) 28 Cal.2d 450, 454, original italics.) Thus, "proof of opportunity of access to a place where [contraband is] found, without more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285-286 [summarizing cases in which evidence of narcotics possession was insufficient because others besides defendant had access].) Proximity to a weapon, standing alone, is not sufficient evidence of possession. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417; see also *People v. Antista* (1954) 129 Cal.App.2d 47, 50; *People v. Bledsoe* (1946) 75 Cal.App.2d 862; *People v. Boddie* (1969) 274 Cal.App.2d 408, 411-412.)

These cases stand for the basic principle that when more than one person has access to a location, the mere fact that a weapon is found hidden somewhere in that location does not establish constructive possession, regardless of the defendant's relative proximity to the item's hiding place. Here, there were two other men in the car appellant was driving when it was stopped, including a front seat passenger, who fled. (18RT: 3030-3032.) For this reason, there was insufficient evidence to establish that appellant had possession of stun gun under the front passenger seat of the car, or even that he had known it was there.

Third, respondent argues that the Rod's evidence was relevant to prove appellant's identity for the robbery counts on a "common modus operandi theory," i.e., "a group of well-armed men would pretend to simply be customers, then take over the establishment in question and commit various violent crimes." (RB 197.) However, as appellant already demonstrated, evidence of a common scheme or plan is inadmissible to provide identity. (AOB 145, citing *People v. Ewoldt* (1994) 7 Cal.4th 380,

406.) Moreover, a group takeover robbery is not unusual or distinctive enough to be admissible to show identity. (AOB 152-153; *United States v. Luna* (9th Cir.1994) 21 F.3d 874, 881 [loud entry, profanity, use of guns and abuse of employees are generic features of a takeover robbery, by definition necessary to intimidate people] & *id.*, fn. 6 [by its very use of the label "takeover robbery," government concedes that this is a general type of crime].) The other aspect of the supposed modus operandi respondent describes is also not unusual: initially posing as a customer is so common that it is used in the classification of robbery types. (See Altizio, *Robbery of Convenience Stores* (April 2007) Problem-Oriented Guides for Police, Problem-Specific Guides Series, No. 49, p. 4. <www.cops.usdoj.gov/Publications/e0407972.pdf> [as of September 17, 2014].)

Moreover, even if respondent's characterization did comprise a modus operandi, most of the crimes at issue did not adhere to it. Only at El Siete Mares restaurant did a "group" enter the establishment and take seats as customers, as was done at Rod's. (16RT: 2573-2576.) In three other incidents, from one to three robbers made initial contact at a counter, followed immediately by demands and display of guns. (See 9RT: 1300-1301 [George's Market]; 12RT: 1866 [Mercado Buenos Aires]; 14RT: 2225-2226, 2284 [Casa Gamino][20].) The display of one or more weapons initiated

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[20] Armando and Mendoza both testified they were at the front greeting customers when three men entered and were asked how many were in their party. (14RT: 2225; 2284.) Armando testified that after responding, one of the men immediately pulled a gun on him. (14RT: 2225-2226.) In contrast, Maricella testified that following their response, the men went to the restrooms and returned about ten minutes later, when (continued...)

the remainder of the incidents. (See 13RT: 1969-1971, 1991-1992, 2078 [Outrigger]; 17RT: 2749-2750 [Woodley Market]; 15RT: 2392-2393 [Ofelia's Restaurant].)

F. The Admission Of The Rod's Incident Evidence Was Prejudicial Error

Respondent argues that even if the Rod's Coffee Shop evidence was improperly admitted, the error was harmless because of the overwhelming evidence at trial that appellant used the stun gun on Armando Lopez[21] and Maricella Mendoza. (RB 198-199.) On the contrary, appellant thoroughly impeached the witnesses who testified regarding appellant's role during the Casa Gamino crimes, i.e., Armando and his brothers Javier and Arturo Lopez. They were impeached with prior inconsistent identifications and the circumstances of the identifications, including the many chances for contamination of the memories of the three brothers.

Appellant impeached Armando significantly with his pre-trial descriptions of the stun gun assailant. On the night of the incident, Armando told Deputy Cabrera that Suspect 1 hit him with a gun, used the stun gun on him, led him to the cash register up front, took cash, and yelled, "Where's Morro, let's go." (20RT: 3583-3585.) Morro was appellant's nickname (19RT: 3178; 26RT: 4614), so logically, Suspect 1 was not appellant. Armando's initial description of Suspect 1 as of Mexican descent, while the other robbers were Central American (20RT: 3585), further confirmed that

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[20](...continued)
one of them placed a gun on her. (14RT: 2284.)

[21] As in the opening brief, appellant uses first names for members of the Lopez family who testified.

appellant was not Suspect 1. Appellant is from Honduras and was described elsewhere as having a Central American accent. (12RT: 1872; 25RT: 4446.)

About two weeks after the May 17, 1992, Casa Gamino crimes, at a June 4, 1992, photo lineup, Armando picked out two photos in a six pack, one of a nonsuspect and one of appellant, but was not sure about them and did not specify their roles. (14RT: 2224, 2249, 2251-2252, 2272-2273; Folder A, Ex. 16; Ex. 232.) He identified Navarro as the one who stayed with the hostess. (14RT: 2252; Folder C, Ex.18; Ex. 232.) In another six pack, Armando identified Contreras without reservation as the person who threatened to kill him, hit him in the head with a gun and shocked him with the stun gun. (14RT: 2250-2251, 2273-2274; Folder B, Ex. 17; Ex. 232.) On August 25, 1992, at a live lineup, Armando was unable to select anyone in lineup three; selected appellant and a nonsuspect in lineup four, again without certainty or any description of the role played at the robbery; and selected a nonsuspect in another lineup. (14RT: 2252-2254, 2274; Exs. 27, 233, 234.)

In contrast, over two years later at trial, Armando identified appellant with certainty as the person who used the stun gun on him, but not as the person who took him to the front of the store and took money from the cash register. (14RT: 2228-2232, 2237-2238, 2279.) He also testified that appellant had a Central American accent. (14RT: 2240.) When cross-examined about the discrepancies between his earlier identifications and descriptions versus those at trial, Armando denied them, characterized them as inaccurate, or claimed lack of memory. (14RT: 2260, 2265, 2270-2272.)

Armando's brothers Arturo and Javier testified similarly to Armando regarding appellant's role and their testimony was likewise heavily impeached. Javier testified that he saw appellant aim a gun at Armando and

take him to the office, and then could see through the office window that appellant used the electrical device on Armando. (15RT: 2403-2405, 2406-2407, 2414, 2428-2429.)

On June 4, 1992, Armando, Arturo, Javier and Javier's wife were all at the restaurant at the same time when they at looked at photos (14RT: 2325; 15RT: 2418-2420.) Javier selected Contreras from the photo lineups as the person who pointed a gun at him, and appellant as the person who took his bracelet and had two guns. (15RT: 2413, 2422; Exs. 16, 17 and 252.) He did *not* identify appellant as the stun gun assailant. Moreover, at trial, Javier insisted that he had identified appellant as the one with the gun who took Armando to the office, and that someone else took his bracelet. (15RT: 2423-2425; Ex. 16.) Javier initially denied that he and his brothers each knew whom the others had identified, though they did talk about the Casa Gamino robbery and which robbery participants each was able to identify. (15RT: 2420-2421.) Javier then admitted he told them which of the participants he had picked out. (15RT: 2421.)

Arturo testified that appellant aimed a gun at Armando, took him to the office and hit Armando with a gun. (14RT: 2301-2302.) Arturo did not see anyone use a device on either his brother or Mendoza. (14RT: 2305.) Despite the fact that Arturo was in the kitchen kneeling down, bent forward and looking downward as instructed by an armed robber, he insisted that through the small office window, he could see appellant's actions. (14RT: 2300-2302; 2313-2317.) In contrast, at the June 4, 1992, photo lineup, Arturo selected appellant as the suspect who had a gun and told people not to move. (14RT: 2307; Folder A, Ex. 16.) Notably, Armando had told Arturo what had happened to him during the robbery, and after the photo lineup,

they told each other whom they had each picked out. (14RT: 2325-2326.) This caused Arturo to be more certain of his identifications. (14RT: 2326.)

At jail lineups on August 25, 1992, and September 30, 1992, respectively, Arturo and Javier both identified appellant as a suspect but did not describe his role. (14RT: 2308-2309, Exs. 27, 243 [Arturo identifies appellant at position number one in line up four]; 15RT: 2416; Exs. 23, 254.) Arturo drove to the jail lineup with Armando and others from the robbery. (14RT: 2327.) Afterwards, Arturo and Armando shared with each other whom they had picked out, which again made Arturo feel more certain of his identification. (14RT: 2327-2328.)

Armando, Javier and Arturo all drove together to the preliminary hearing. (15RT: 2432.) Arturo, but not Javier, recalled that Armando told him whom he had picked out in court that day. (14RT: 2327-2329; 15RT: 2432.) Arturo and Armando also came to court together on the day they testified at trial. (14RT: 2329.)

Thus, appellant significantly impeached Javier's identification of appellant at trial as the stun gun assailant, and Arturo's identification of appellant at trial as the person who beat Armando with a gun. Appellant also argued that the testimony of Armando and his brothers in this regard was at odds with their prior inconsistent identifications, admissions that they had shared information prior to trial about whom they had identified, and the many chances there were to consciously or unconsciously contaminate each other's memories. (See 22RT: 3866-3877 [guilt phase defense closing argument].)

The impeachment of appellant's identity as the stun gun assailant carries over to Armando's testimony that appellant also used the stun gun on Maricella Mendoza, because Armando similarly did not identify appellant as

having used a stun gun on Mendoza at the phone or jail lineups.[22] Mendoza herself could not identify any of the suspects, except that Navarro might have been the person who aimed a gun at Armando in the office. (14RT: 2292-2296.)

The testimony of Armando Lopez and his brothers was the only evidence that appellant was the stun gun assailant and that he assaulted Armando and Mendoza with a gun. Although there were 15 employees present on the night of the robbery (14RT: 2224, 2242), the prosecution only presented Maricella Mendoza and the four members of the Lopez family, Armando, his brothers, and Javier's wife Lucia Lopez. In light of the brothers' heavily impeached testimony, and the fact that there were no other witnesses to the identity of the stun gun assailant, respondent's argument that the Rod's evidence was cumulative to the overwhelming evidence of guilt must be rejected. (RB 200.) Under these circumstances, admission of the Rod's evidence was prejudicial as to the disputed Casa Gamino counts 28 and 31 (assault with a deadly weapon) and 30 and 33 (assault with a stun gun) as to Armando and Mendoza, and the other disputed counts.

In addition to bolstering the weak evidence on the other disputed counts in the case (see AOB 156), the Rod's evidence was extremely prejudicial because it was the foundation for the prosecution's underlying theme throughout the trial of appellant-as-torturer. It began during voir dire,

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[22] In any case, Armando's testimony regarding the identity of the person who assaulted Mendoza with the stun gun is questionable. Armando testified "yes" when asked whether he ever saw "them" using the electrical device on Mendoza. (14RT: 2235.) Thereafter, the prosecutor's questions assumed it was appellant who used the stun gun on her, and Armando's answered the questions without using appellant's name. (See 14RT: 2236, lines 1-11.)

when the prosecutor elicited promises from jurors, including two on the final jury, to be open to circumstances of the crime evidence that might include torture. (RB 113 [members of jury]; 7RT: 929 [sitting jurors T.W. & J.R so agree].) The prosecutor repeated the torture theme during guilt phase opening statement (9RT: 1270, 1273, 1281, 1287) and closing argument (21RT: 3779, 3780; 22RT: 3824); during cross-examination of appellant and his mitigation witnesses at the penalty phase (26RT: 4598, 4629; 27RT: 4774); and closing argument at the penalty phase (29RT: 5264, 5280, 5291; 30RT: 5315, 5334, 5337, 5367, 5377, 5380, 5385). Because of the unique role that the stun gun evidence played in the prosecution's portrayal of appellant as a torturer at the penalty phase, the Court should reject respondent's argument that because there was overwhelming evidence of appellant's guilt as to all the counts of which he was convicted, the admission of the Rod's evidence during the guilt phase likely weakened its impact for the penalty phase. (RB 200.)

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

The improper admission of the Rod's evidence violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal constitution as well as analogous state provisions.[23] (AOB 138, 157-

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[23] Appellant's federal constitutional claims were preserved below. The court granted appellant's motion that California and federal constitutional arguments be deemed raised in defense trial objections. (9CT: 2686-2688; 10CT: 2753; 2RT: 309-310; see *People v. Vines* (2011) 51 Cal.4th 830, 865 & fn. 15 [stating that defendant had preserved issue, including due process aspect, for review, and noting that trial court granted appellant's request that "all defense counsel's objections at trial be deemed objections under the Constitutions of both the State of California and the

(continued...)

158; U. S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.)

Reversal of Casa Gamino counts 28, 31, 30 and 33 and the other disputed counts (5, 10 through 18, and 24 through 27) is required because respondent has not carried its burden of showing the erroneous admission of the Rod's evidence was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24), as well as under state law. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

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[23](...continued)
United States"].)

Moreover, his objections based on Evidence Code sections 352 and 1101 also preserved those claims. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1194-1195 & fn. 6 [defendant's trial objection under sections 352 and 1101 preserved both a due process claim and an Eighth Amendment reliability claim regarding the admission of evidence of prior cohabitant abuse]; *People v. Partida* (2005) 37 Cal.4th 428, 435-436 [defendant's trial objection under section 352 rendered cognizable on appeal his claim that admission of gang evidence violated his due process rights].)

VIII.

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

Appellant argued that assuming the Rod's Coffee Shop (Rod's) evidence was admissible, the trial court erred in (a) failing to limit the jury's consideration of it to the Casa Gamino crimes, and (b) instructing the jury such that the prosecution's burden of proof was lowered. (AOB 158-167.) Respondent contends that the claim has been forfeited and fails on its merits. (RB 203-207.) Respondent is incorrect.

The claim is not forfeited. Under similar circumstances, this Court has addressed the merits "because the asserted instructional errors are reviewable on appeal to the extent they affect [the defendant's] substantial rights." (*People v. Lindberg* (2008) 45 Cal.4th 1, 34, fn. 11; *People v. Foster* (2010) 50 Cal.4th 130, 1346, fn. 20 [same]; §§ 1259, 1469.) Should this Court nevertheless view the issue as one requiring defense counsel to request a limiting instruction (RB 203), the Court should apply the "narrow exception" to this principle that it has recognized. (*People v. Collie* (1981) 30 Cal.3d 43, 64.) Under the exception, because the past offense was "a dominant part of the evidence" against appellant as to the stun gun assault charges, and was "both highly prejudicial and minimally relevant to any legitimate purpose" (*ibid.*), the exception applies here, as shown in preceding Argument VII.

Respondent argues that the claim fails on its merits because all the crimes "involved similar takeover robberies." (RB 205.) As appellant argued, *ante,* in Argument VII, this generalization is not grounded in the record. Similarly, respondent's argument that *People v. Key* (1984) 153 Cal.App. 888, is not applicable fails because the Rod's evidence was

improperly admitted to prove appellant's identity as to the assaults and the stun gun assaults at Casa Gamino and the contested counts. (See RB 206-207; Argument VII, *ante*.)

Respondent notes, as did appellant, that the Court has continued to reject the argument that the interplay between CALJIC Nos. 2.50 and 2.51 results in an evisceration of the reasonable doubt standard. (RB 206, AOB 161-165; *People v. Rogers* (2013) 57 Cal.4th 296, 336-339, and cases cited therein; 345, fn. 8.) Appellant nevertheless again urges the Court to reconsider its view at least with regard to appellant's case. As argued in Argument VII, *ante*, and in the opening brief, the jury was permitted to consider the Rod's evidence to prove any of the 40 offenses charged against appellant. Because the Rod's evidence was not similar to the charged offenses – robberies committed under different circumstances, assaults, stun gun assaults, attempted murder and murder – the only way the jurors could have found the evidence relevant was under the prohibited theory of propensity. This is why *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 (*Gibson*), applies to appellant's case.[24] (See AOB 161-164.)

Gibson involved the introduction of a prior uncharged sexual offense under Evidence Code section 1108. (*Gibson v. Ortiz, supra*, 387 F.3d at p. 817.) The jurors were instructed with CALJIC No. 2.50.01, which told them

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[24]As noted in the AOB at page 162, footnote 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.

that if they found that the defendant committed the prior offense, "you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused." (*Gibson v. Ortiz, supra*, 387 F.3d at p. 817.) CALJIC No. 2.50.1 told the jurors that the prosecution had to prove the prior offense by a preponderance of evidence. (*Gibson v. Ortiz, supra*, 387 F.3d at p. 818.) This was reversible error despite other correct instructions on the burden of proof because "the interplay of the two instructions allowed the jury to find that Gibson 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." (*Id.* at p. 822.)

Appellant's jury was not told directly, as the *Gibson* jury was, that it could use the Rod's evidence to infer that appellant had a disposition to commit a prior crime, and if it did so, it then could infer that he committed the crime at issue. Under the facts below, however, the impact of the instruction was similar to that given in *Gibson*. The court never limited the crimes to which the Rod's evidence could be used. The court instructed appellant's jurors that the evidence could be used to show appellant's identity as the perpetrator of any of the charged crimes; as proof that any of the charged crimes were part of a larger continuing plan, scheme, or conspiracy, or as proof that appellant possessed the means for any of charged crimes. (18 RT 3011-3012; 21 RT: 3681-3682; 11CT: 3102-3103.) As demonstrated in Argument VII, *ante*, the jury had no way to make any logical, permissible inferences from the Rod's evidence to the robberies,

stun gun assaults or for completely dissimilar crimes such as the attempted murder charge in Count 5. Therefore, the *only* inference that could be drawn from the Rod's evidence and applied to appellant's role at the Casa Gamino and any of the other charged crimes was that of criminal propensity, which is prohibited under Evidence Code section 1101, subdivision (a). For this reason as well, contrary to respondent's argument (RB 205-206), and the circumstances in *People v. Lindberg* (2009) 45 Cal.4th 1, 35-36, neither CALJIC No. 2.50 nor the instructions as a whole cured the error in appellant's case.

E. The Failure Of The Instructions To Properly Limit The Jury's Consideration Of The Other Crimes Evidence Violated Appellant's Rights Under The Fifth, Sixth, Eighth and Fourteenth Amendments and Analogous Provisions Of The California Constitution, Prejudiced Appellant and Requires Reversal Of His Conviction

Here, there was at least a reasonable likelihood that the jury misunderstood and misapplied the instruction so as to violate appellant's constitutional rights as just stated. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) Because the misapprehension affected the disputed counts for which the evidence was weak or insufficient (Counts 5 [attempted murder of Medina], 10 through 18 [Outrigger counts], 21 [Flores robbery county], and 24 through 27 [El Siete Mares counts]) and the death verdicts, appellant's right to due process was violated. (*Estelle v. McGuire, supra,* 502 U.S. at pp. 72, 75, fn.5; U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, sections 7, 15 & 16.) In addition, the erroneous instruction violated appellant's Sixth Amendment right to trial by jury. (6th & 14th Amends.; Cal. Const., art. I, sections 7, 15 & 16; see *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.)

The admission of the Rod's evidence without limitation also violated appellant's right to reliable guilt and penalty determinations. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, section 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 & fn. 13.)

For the reasons argued above and in the opening brief, appellant's convictions for the Counts 5, 10 through 18, 21, and 24 through 27, must be reversed and his death sentences vacated.

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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

Appellant was convicted of 11 counts based entirely or primarily on eyewitness testimony given by just two witnesses, one present at the Outrigger crimes and the other at the El Siete crimes. Their selections of appellant as the perpetrator were weak and belated but expressed with certainty. The court then instructed the jury with a critically flawed portion of CALJIC No. 2.92:

> in determining the weight to be given to eyewitness identification, you should consider . . . factors which bear upon the accuracy of the witness' identification of the defendant, including . . .[¶] . . . [¶] [t]he extent to which the witness is either certain or uncertain of the identification.

(11CT: 3106-3107.) Appellant argued that this portion of CALJIC No. 2.92 is based on an erroneous interpretation of case law, lacks scientific support and is factually erroneous. (AOB 174-175.) Respondent counters that appellant forfeited the claim, which failed on its merits and was harmless. (RB 215-217.) Respondent is incorrect.

Respondent argues that appellant forfeited the claim because the instruction was correct in law, responsive to the evidence and appellant did not object or request a modification. (RB 215.) However, as appellant has pointed out, the reliability of an identification involves the constitutional rights of an accused. (AOB 174-175 & fn. 46, 180.) Thus, this Court may review an instructional error on appeal that affects a defendant's substantial rights. (*People v. Prieto* (2003) 30 Cal.4th 226, 247; §1259.)

Moreover, as appellant argued (AOB 176), the instruction is not correct insofar as it permits jurors to take into account a witness's certainty regarding the identification expressed at trial, rather than, as correctly stated in *Neil v. Biggers* (1972) 409 U.S. 188 (*Neil v. Biggers*), "the level of certainty demonstrated by the witness *at the confrontation*." (*Id.* at p. 199, italics added.) In *Neil v. Biggers*, the "central question, [was] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." (*Id.* at p. 199.) Specifically, the Court considered the admissibility of a witness's identification of the defendant at a showup held seven months after the crime at issue. (*Id.* at pp. 198, fn. 5; 200-201.) Thus, both the plain language and facts of *Neil v. Biggers* confirm that the relevant issue for the jury is the certitude expressed by a witness at the initial confrontation, rather than at subsequent identifications inside or outside the courtroom.

A. CALCIC No. 2.92 Incorrectly Expresses The "Certainty" Factor Derived From *Neil v. Biggers*

Respondent next argues that the claim fails on its merits, because this Court has previously rejected it. (RB 215-216.) Appellant acknowledged this in his opening brief (AOB 179-180, discussing *People v. Johnson* (1992) 3 Cal.4th 1183), and respondent does not address appellant's arguments on why the Court's prior case law is distinguishable and should be reconsidered.

Notably, respondent has not countered appellant's authorities and the mounting evidence and cases on the lack of correlation between witness confidence and accuracy of identification. (AOB 178-179.) Respondent instead claims that CALJIC No. 2.92 does not contradict any consensus of recent scientific evidence undermining the assumption that certainty of

identification is linked to a more accurate identification. (RB 116-117.) This argument ignores the weight of authority that appellant has cited. Moreover, case law and social science literature supporting this point continue to build. "Study after study demonstrates that . . . jurors routinely overestimate the accuracy of eyewitness identifications; [and] that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy." (*Perry v. New Hampshire* (2012) __ U.S. __ [132 S.Ct. 716, 739] (dis. opn. of Sotomayor, J.) [footnotes listing studies omitted].)

Lower courts also have increasingly rejected the link between eyewitness confidence expressed at trial and the accuracy of an identification. (See, e.g., *United States v. Greene* (4th Cir. 2013) 704 F.3d 298, 309, fn. 4 [noting that the *Neil/Manson*[25] witness certainty factor "has come under withering attack as not relevant to the reliability analysis . . . . [M]any courts question its usefulness in light of considerable research showing that an eyewitness's confidence and accuracy have little correlation"]; *State v. Lawson* (2012) 352 Or. 724 [291 P.3d 673, 777] [citing studies]; *State v. Guilbert* (2012) 306 Conn. 218 [49 A.3d 705, 721 & fn. 12, 725 & fn. 23 [collecting cases].)

Respondent also argues that the instruction states various factors in a neutral manner, leaving it to counsel to put on evidence and argue how the factors operate. (RB 216-217, citing *People v. Wright* (1988) 45 Cal.3d

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[25] *Neil v. Biggers, supra,* 409 U.S. 188, set forth a legal framework, formally adopted in *Manson v. Brathwaite* (1977) 432 U.S. 98, for adjudicating a due process challenge to the admissibility of eyewitness identification. California courts have followed this legal framework. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)

1126, 1143.) In *People v. Johnson, supra,* 3 Cal.4th 1183, this Court followed its prior ruling in *People v. Wright* (1988) 45 Cal.3d 1126, which approved of the use of eyewitness identification jury instructions that "focus the jury's attention on facts relevant to its determination" and disapproved instructions that explained the effects of the various factors, i.e., witness certainty. (*People v. Johnson, supra,* 3 Cal.4th at pp. 1230, 1231, citing *People v. Wright, supra,* 45 Cal.3d at pp. 1141-1142.) However, as argued above, because certainty is not a relevant factor, that is, it has been shown to have essentially no correlative relationship to the reliability of the identification, and in light of the *Neil v. Biggers* focus on certainty at the time of confrontation, this Court should reconsider its reasoning in *Johnson*.

Moreover, in appellant's case, there was nothing "neutral" about instructing the jurors that their evaluation of eyewitness testimony should be guided by the empirically unsupported notion that the confidence of the witness is correlated with the accuracy of the identification. (See *State v. Cabagbag* (2012) 127 Hawai'i 302, 311 [277 P.3d 1027, 1036] [citing studies].) Rather, the instructional error unfairly bolstered the government's case and undermined appellant's defense of mistaken identification.

For all these reasons, appellant asks this Court to reconsider its prior position, and join other states in holding that it is error to instruct a jury that it can consider witness confidence as a factor in assessing the accuracy of an identification. (See AOB 179-180, *State v. Mitchell* (2012) 294 Kan. 469, 479-481 [275 P.3d 905, 912-913] [error to instruct jury to consider certainty in its determination of the accuracy of the eyewitness identification]; *State v. Guilbert, supra,* 49 A.3d at p. 717, fn. 5, 734 [disapproving broad generalized instructions on eyewitness identification, including instruction permitting jury to consider, inter alia, "that the level of certainty indicated by

a person . . . may not always reflect a corresponding level of accuracy of [the] identification"]; *Brodes v. State* (2005) 279 Ga. 435, 440-441 [614 S.E.2nd 765, 770-771] ["in light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification," court holds that giving such an instruction was harmful error]; *Commonwealth v. Santoli* (1997) 424 Mass. 837, 845-846 [680 N.E.2d 1116] [due to significant doubt between witness confidence in, and accuracy of, an identification, juries should not longer be instructed that they may consider "the strength of the identification"].)

B. The Instructional Error, Which Violated Appellant's State and Federal Constitutional Rights, Was Prejudicial and Reversal On The Outrigger and El Siete Mares Counts, As Well As Casa Gamino Counts 28, 30, 31 and 33, Is Required

CALJIC No. 2.92 directed the jury to consider an irrelevant factor, as the certainty expressed by a witness at trial is not rationally related to the accuracy of the identification. Thus, it failed to be one of the necessary 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. 729; U.S. Const., 14th Amend; Cal.Const., art. I, §7, 15 & 16.)

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 1, section 15 of the California Constitution. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) Under the facts of this case, the instruction, which relied on an erroneous factor in its evaluation of the eyewitness testimony, allowed appellant to be convicted upon proof of less than beyond a reasonable doubt, and violated appellant's due process right for that reason as well.

Respondent argues that because the certainty factor was just one of many that the jury was told it could consider, appellant did not suffer prejudice. (RB 216-217.) However, the selections of appellant as the perpetrator of both Outrigger counts 10 through 18 and El Siete Mares counts 24 through 27, was based upon the belated confidence expressed by one out of 11 of the Outrigger witnesses and one of three El Siete Mare witnesses. (AOB 175, 180-184.) Under these circumstances, the state cannot show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Respondent also ignores the recognition that eyewitness confidence is *the most powerful single determinant* of whether or not jurors will believe that the eyewitness made an accurate identification. (AOB 178-179; *State v. Guilbert, supra,* 49 A.3d at p. 725; *State v. Lawson, supra,* 291 P.3d 673, 705, and studies cited therein].

In addition, jurors are often unaware of the weak or nonexistent relationship between confidence and accuracy and of how susceptible witness certainty is to manipulation by suggestive procedures or confirming feedback. (*State v. Lawson, supra,* 293 P.3d at pp. 777-778; see also *State v. Guilbert, supra,* 49 A.3d at pp. 720-721 [noting the "widespread judicial recognition," which tracks "a near perfect scientific consensus" that

eyewitness identifications are potentially unreliable in a variety of ways that are unknown to the average juror]; *United States v. Brownlee* (3d Cir. 2006) 454 F.3d 131, 142 ["jurors seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable"]; *State v. Outing* (2010) 298 Conn. 34, 108 [3 A.3d 1, 47] (Palmer, J., concurring) ["[M]ost people believe that the more confidence that an eyewitness demonstrates in his identification, the more likely it is that his identification is accurate," but this belief is not true].) As a result, jurors tend to overvalue the effect of the certainty variable in assessing eyewitness accuracy. (*State v. Lawson, supra,* 291 P.3d at p. 778.)

Respondent also argues that the incorrect instruction was harmless in light of appellant's cross-examination of witnesses on their identifications of appellant and argument that certain identifications were unreliable. (RB 216.) However, cross-examination is of limited usefulness in eyewitness cases for several reasons. (*State v. Guilbert, supra,* 49 A.3d at pp. 725-726.) First, the courts should not "rely on jurors to divine rules themselves or glean them from cross-examination or summation." (*State v. Henderson* (2011) 208 N.J. 208, 296 [27 A.3d 872] *modified on other grounds by State v. Chen* (2011) 208 N.J. 307, 327 [27 A.3d 930, 942-943].) Second, cross-examination is less likely to be effective in discrediting an eyewitness because jurors confound certainty and accuracy. (*Young v. Conway* (2d Cir. 2012) 698 F.3d 69, 88-89.) Third, eyewitnesses who "sincerely believe their testimony and are often unaware of the factors that may have contaminated their memories, [] are more likely to be certain about their testimony," which in turn can enhance their credibility. (*Id.* at p. 88; see also *Jones v. State of Wisconsin* (7th Cir. 1977) 562 F.2d 440, 444 [eyewitness's confidence is irrelevant as "the very harm of an irreparably suggestive confrontation is its

capacity to render the witness unable to separate initial recollections from those affected by prejudicial police actions"].) Fourth, at least one study showed that the study jurors were not sensitive to eyewitnesses who displayed confidence that inflated over time. (Douglass & Steblay, *Memory Distortion in Eyewitnesses: A Meta-Analysis of the Post-Identification Feedback Effect* (2006) 20 Appl. Cognit. Psychol. 859, 965.) Finally, cross-examination cannot effectively educate jurors about the significance of factors that undermine accuracy of an eyewitness identification. (*State v. Guilbert, supra,* 49 A.3d at pp. 725-726.)

Respondent similarly argues that any instructional error was harmless in light of appellant's argument attacking the eyewitness identifications. (RB 216.) This rationale also cannot stand because "the arguments of counsel cannot substitute for correct instructions from the court." (*People v. Rogers* (2006) 39 Cal.4th 826, 869-870, citing *Carter v. Kentucky* (1981) 450 U.S. 288, 304; see also *Boyde v. California* (1990) 494 U.S. 370, 384 [defense counsel's summation is "billed in advance to the jury as matters of argument, not evidence"] *Taylor v. Kentucky* (1978) 436 U.S. 478, 489 ["it was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably [via instructions]"].)

This is especially so in eyewitness identification cases. (See, e.g., *State v. Guilbert, supra,* 49 A.3d at p. 726 [in the absence of evidentiary support from an expert, defense closing argument that an identification is unreliable is likely to be viewed "as little more than partisan rhetoric"]; *State v. Cabagbag, supra,* 277 P.3d at p. 1038 [jurors may ignore counsel's arguments regarding factors that affect eyewitness reliability, but the law generally presumes that juries follow court instructions]; see also *Taylor v. Kentucky, supra,* 436 U.S. 478, 488-489 [defendant's right to have the jury

deliberate solely on basis of evidence cannot hinge upon hope that defense counsel will be a more effective advocate than the prosecutor will be].)

Respondent cites to the strength of evidence on counts other than the Outrigger counts 10 through 18 and El Siete Mares counts 24 through 27. (RB 216-217.) The evidence on the other counts, many of which appellant conceded, was of course completely irrelevant to the jury's determination of appellant's guilt as to the Outrigger and El Siete Mares counts, and are equally irrelevant to this Court's consideration of this issue on appeal.

Respondent did not include a record cite for the assertion that appellant's possession of stolen jewelry when arrested "clearly shows" his connection to the instant crimes. (RB 217.) Appellant's review of the record indicates that there was no such showing. The officer who arrested appellant removed a sock containing "a bunch of jewelry" from appellant's person. (13RT: 2180.) He did not catalogue the contents but nevertheless testified that the jewelry in Exhibit 136 (a bag of jewelry) appeared to be the same as that in the sock. (13RT: 2181; 12CT: 1826.) Marjorie Livesley, an Outrigger bar patron witness, testified that a small gold chain bracelet removed from Exhibit 136 looked like the type she was wearing that night, but it was just the same style, had no distinctive marks, and she was unable to say it was the same. (13RT: 2088-2089, 2091.) Her uncertainty in this regard did not "clearly show" that appellant was linked to the Outrigger, and she was the only one of the witnesses on the Outrigger and El Siete counts asked to identify jewelry from Exhibit 136.[26] (13RT: 2088-2089.)

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[26] The property taken from the others was not linked to appellant. (For witness testimony regarding property taken at the Outrigger, see 13RT: 2038, 2124 [John & Marjorie Tucker, counts 10, 18]; 13RT: 2059-2060 (continued...)

The prejudice extends to the convictions for the stun gun and gun assaults at the Casa Gamino, counts 28, 30, 31 and 33. After appellant impeached Armando and Arturo Lopez, the prosecutor elicited their testimony that they were "certain" of their identifications of appellant. (14RT: 2279, 2334.) Given appellant's significant impeachment of the identifications by Armando and/or his brothers of appellant as the person who assaulted both Armando and Mendoza with a gun and stun gun, respondent cannot show beyond a reasonable doubt the eyewitness certainty instruction was harmless.

At the guilt phase, appellant contested his identity as a perpetrator of Outrigger counts 10 through 18, El Siete Mares counts 24 through 27, and Casa Gamino counts 28, 30, 31 and 33. (See defense closing argument at 22RT: 3827, 3857-3865, 3884 [Outrigger]; 3881-3884 [El Siete Mares]; 3866-3877 [Casa Gamino].) The instruction given, however, was critically flawed in its emphasis on the eyewitness's certainty as an important factor in assessing the witness's accuracy. Scientific research has established that certainty has at most a weak correlation with accuracy; yet certainty is fixed in the minds of laypersons as the single factor most likely to influence the conclusion that the witness's identification was accurate. The combination of certainty's nonexistent correlation with accuracy coupled with the

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[26](...continued)
[Englesberger, Count 11]; 13RT: 2060-2061; 16RT: 2607 [Gallegos, Count 12]; 13RT: 2109 [LuettJohann, Count 13]; 13RT: 2076-2079, 2088-2089 [Lively & Skinner, Counts 14 & 15]; 13RT: 2013 [Lehman, Count 16]; 12RT: 1937-1939 [DeWitt, Count 17].) For property taken at El Siete Mares restaurant, see 16RT: 2668 [Count 24, Urietta]; 15RT: 2503-2504 [Nelson Hernandez, Count 25]; 16RT: 2578 [Aguilar, Count 27]; 2628 [Guizar, Count 26]. For witness/robbery victim names and corresponding counts, see 7CT: 2019-2025, 2029-2032.)

conventional wisdom misstating its importance renders its interjection into a misidentification case prejudicial error.

For all the reasons above and in appellant's opening brief, and whether viewed as state law or federal constitutional error, the erroneous instruction was prejudicial and requires reversal of counts 10 through 18, 24 through 27, 28, 30, 31 and 33.

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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. (19RT: 3256, 3259 et seq.) Prior to trial, the prosecution learned that Rivera was a Mexican National who had returned to live in Mexico. The prosecution successfully argued at a contested hearing 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. (19RT: 3132; 11CT: 3045.)

Appellant argued that under state law and the Sixth Amendment right to confront witnesses, the trial court erroneously concluded that Rivera was unavailable and allowed the prosecution to present Rivera's preliminary hearing testimony. (AOB 199-206.) Respondent's claims to the contrary must be rejected because they rely on a factually unsupported reading of the record, incorrect application of relevant case law and because the prosecution failed to meet its burden of proof below.

A. Respondent's Argument That The Prosecution Satisfied Its Good Faith Obligation To Attempt To Locate Rivera Is Legally and Factually Unsupported

Appellant argued that as in *People v. Sandoval* (2001) 87 Cal.App.4th 1425 (*Sandoval*), the prosecution had a duty to make a good faith effort to obtain Rivera's testimony even though the court could not compel his presence under the Treaty, including use of Articles 7 and 9 of the Treaty,

which provided for cooperative means of obtaining witness testimony either in Mexico or the United States. (AOB 201-202.) In an attempt to distinguish *Sandoval*, respondent argues that the Mexican witness in *Sandoval* had been located and was willing to testify, but here, the prosecution "could not locate" the witness, who had "indicated he would not testify." (RB 226-228.) The record does not support either contention.

Respondent repeatedly relies on the unsupported factual assertions that Rivera "had indicated he would not testify because the incident had so disturbed him" (RB 227-228), that "he did not want to testify" (RB 229), and that "he did not want to come back to Los Angeles." (RB 228.) However, the prosecution's actual proffer at the due diligence hearing was that Rivera told his former coworkers at the Market that (a) he had mental and psychiatric problems from witnessing the killing; and (b) that he was buying land in Mexico and did not plan to return. (19RT: 3127-3128.) Rivera's brother told the prosecution that Rivera had no "definite plans" to return. (19RT: 3129.)

Thus, there is no evidence that Rivera told anyone that he did not want to testify or would refuse to return to Los Angeles to do so or that he went to Mexico because of his mental problems. Nor are respondent's unsupported assertions even a likely or logical conclusion to draw from Rivera's statements. For example, Rivera may have wanted to testify in order to help to get convictions.

Ultimately, respondent argues that "at most" Rivera possibly could have been compelled to testify in Mexico or invited to testify in LA. (RB 228-229.) That is exactly the point – there were methods under the Treaty that the prosecution could have used to attempt to get Rivera's testimony at appellant's trial, but did not.

Respondent agrees with appellant that *Sandoval* required the prosecution to make reasonable, good faith efforts to obtain the witnesss presence at trial by utilizing the applicable treaty provisions. (RB 228; AOB 202.) However, despite the fact that the prosecution below did *not* utilize the applicable treaty provisions, respondent asserts that the prosecution made the required efforts. (RB 228.) This court should reject respondent's baseless assertion.

Moreover, there is no record support for what respondent asserts were the required efforts:

> Here, as the trial court found, the prosecution did make the required additional effort by repeatedly trying to contact [Rivera], even after learning that Rivera did not want to testify, that he was emotionally scarred by appellant's crimes, and that he did not want to come back to Los Angeles.

(RB 228.) As just described, there was *no* evidence that Rivera did not want to testify and would not come back to do so. And the trial court did not make factual findings, instead ruling simply that due diligence had been shown.[27] (19RT: 3136-3137.) Respondent's argument that its efforts to locate Rivera were sufficient, even though it did not use the cooperative means available through the Treaty, is based on these nonexistent facts. (See

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[27] In lieu of live testimony, the defense stipulated to the prosecution's offer of proof, and only a prosecution investigator testified at the due diligence hearing. (19RT: 3131.) "When, as here, the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially." (*People v. Smith* (2003) 30 Cal.4th 581, 610.)

RB 228.) For these reasons alone, respondent's counter-arguments must be rejected.[28]

Moreover, *Sandoval* did not turn just on the fact that the prosecution had located the witness, who appeared willing to testify if given assistance. (*People v. Sandoval, supra,* 87 Cal.App.4th at p. 144.) Rather, the court found that "the prosecution had several reasonable alternatives it could have pursued to obtain [the witness's] live testimony at trial." (*Id.* at p. 1443.) These included providing the assistance that the witness had requested as well as using the Treaty to enlist the aid of the Mexican authorities either to facilitate the witness's attendance at trial in California or to compel the witness to appear in Mexico to testify during trial. (*Id.* at pp. 1442-1443.) As the *Sandoval* court stated,

> Instead of making a good-faith effort to obtain *any* category of contemporary, live testimony, the prosecution threw up its hands and asserted Zavala was unavailable simply because he was a foreign citizen residing outside of the United States. The confrontation clause, which allows for some exceptions to the face-to-face confrontation requirement, calls for more.

(*People v. Sandoval, supra,* 87 Cal.App.4th at p. 1443, italics added.) Respondent's similar assertion here also failed under the confrontation clause.

In contrast to the prosecution's meager efforts below, *People v. Martinez* (2007) 154 Cal.App.4th 314, demonstrates the effort that is sufficient to satisfy the confrontation clause when a witness leaves the

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[28] Along the same lines, appellant did not argue, as respondent states, that the treaty provided a means for Mexican authorities to compel Rivera's attendance in Los Angeles. (RB 228, citing AOB 202.) Rather, appellant argued, and respondent appears to agree, that the Treaty provides cooperative means for obtaining witness testimony. (AOB 202, RB 227.)

United States. There, Singh, an important murder witness originally from India, went to Canada after testifying at the preliminary hearing. (*Id.* at pp. 324-325.) The prosecution made extensive efforts to obtain his presence at trial, working with the Department of Homeland Security, immigration authorities in both the United States and Canada, the FBI, the Canadian consulate and the Los Angeles Police Department. (*Id.* at pp. 325-326.) The prosecution also located and talked directly to the witness using an interpreter, and sent him a letter to make sure he understood that the prosecutor wanted him to return and testify and would pay for his travels. (*Id.* at pp. 326-327.) However, the witness had applied for asylum in Canada, would not be guaranteed re-entry if he left Canada, and had no passport. (*Id.* at p. 327.) Moreover, there were no special arrangements between the United States and Canadian governments that could be invoked. (*Id.* at p. 331.) Under these circumstances, the trial court properly found that witness Singh was unavailable and admitted his preliminary hearing testimony. (*Id.* at p. 332.)

In contrast, the prosecution below merely contacted Rivera's brother by telephone in San Francisco, "who made several attempts to call and left messages [at the village phone number] for [Rivera] to return the call," to no avail. (19RT: 3129-3130.) The prosecution's reliance on the brother's report, rather then at least having a Spanish-speaking investigator or detective call the village, explore the situation and attempt to contact Rivera itself, is the complete opposite of diligence, respondent's argument to the contrary (RB 228) notwithstanding. In fact, respondent's position reinforces appellant's argument that the prosecution could have used the cooperative means in the Treaty to attempt to obtain Rivera's testimony, because Rivera's location in Mexico was known. (Cf. *People v. Herrera* (2010) 49

Cal.4th 613, 631 [where there was no agreement providing for compelled return or voluntary cooperation, and El Salvadoran authorities, at prosecution's request, tried unsuccessfully to locate witness, speculative to argue that if prosecution had begun search earlier, witness would have been located].)

Further, the prosecution's serious search for Rivera began quite late. About eight or nine months prior to trial, i.e., in January 1994, Rivera told his former co-workers that he was returning to Mexico to buy a plot of land and did not plan to return. (19RT: 3127.) In April 1994 some detectives searched for Rivera but found "the same information," i.e., everyone told them that he had left and he was not at his former addresses or phone numbers. (19RT: 3128.) "Before the commencement of this trial," the prosecution's investigator again checked local addresses and did the "usual due diligence search" in the community. (19RT: 3128.) However, because searching for a witness within the state after he has left the jurisdiction is an idle act (*Herrera, supra,* 49 Cal.4th at pp. 630-631), the actual relevant efforts did not occur until the month before the October 13, 1994, due diligence hearing, when the prosecution confirmed through the INS that Rivera was in Mexico. (19RT: 3126A, 3128-3129.)

Respondent argues that "the fact that appellant now suggests other things the People could have done" does not mean their actual efforts were insufficient to satisfy the good-faith requirement needed for constitutional unavailability. (RB 229.) This point has no application here, because "the government cannot simply throw up its hands and do nothing when faced with the prospect of one of its witnesses being deported or leaving the country on his own accord. Instead, it must undertake reasonable efforts to preserve the defendant's constitutional right to be confronted with the

witnesses against him. [Citations.]" (*People v. Roldan* (2012) 205 Cal.App.4th 969, 980.)

The cases cited above and record below suggest numerous other things of the type that the prosecutor should have done to demonstrate reasonable good faith efforts given that Rivera's location was known. (Cf. *Herrera, supra,* 49 Cal.4th 613, 627, fn. 8.) For instance, the prosecution could have attempted on its own to contact Rivera, rather than relying on secondhand information from Rivera's brother obtained over the telephone; traveled to Mexico to talk to him, just as both parties had traveled to Central America in search of other evidence in the case (19RT: 3131-3132); offered to pay Rivera's expenses (*People v. Martinez, supra,* 154 Cal.App.4th 314, 326-327); worked with the Mexican Consulate in Los Angeles whether informally or through the applicable treaty provisions (*id.* at pp. 325-326); contacted immigration authorities in Mexico (*ibid.*); sent a letter to Rivera (*id.* at pp. 326-327); contacted police in the area where Rivera lived (*Herrera, supra,* 49 Cal.4th at pp. 620, 631); sought assistance from Los Angeles Police Department agents with contacts in Mexico; and of course utilized Articles 7 and 9 of the Treaty to facilitate Rivera's testimony at appellant's trial. (*People v. Sandoval, supra,* 8 Cal.App.4th at pp. 1442-1443.)

Because the prosecution did not exert reasonable efforts to locate Rivera, the trial court erred when it found he was unavailable and admitted his preliminary hearing testimony.

B. Appellant Did Not Forfeit This Argument

Respondent contends that trial counsel's failure to argue specifically that "there was a treaty mechanism by which Rivera's life testimony could be obtained," forfeits this argument. (RB 224.) Respondent is mistaken.

Appellant argued unsuccessfully that the prosecution's efforts to find Rivera were insufficient (19RT: 3131-3132), i.e., that it had not met its burden of showing due diligence. This was sufficient, because the prosecution bears to burden of showing that it "exercised reasonable diligence" (Evid.Code, § 240, subd. (a)(5)) and made sufficient "good faith effort[s]" (*Barber v. Page* (1968) 390 U.S. 719, 724-725), to satisfy state law and the Confrontation Clause of the Sixth Amendment.

Second, any such argument would have been futile. The prosecution below argued that under *People v. Denson* (1986) 178 Cal.App.3d 788, 790 (*Denson*) and *People v. Ware* (1978) 78 Cal.App.3d 822 (*Ware*), it did not have to show it used due diligence to secure Rivera's presence because the United States-Mexico Mutual Legal Assistance Cooperation Treaty lacked a provision to compel him to return from Mexico. (11CT: 3045; 19RT: 3132, 3136.) Appellant did not have any cases contrary to those cited by the prosecution[29] (19RT: 3132), and the court ruled in favor of the prosecution. (19RT: 3136.) It was not until after appellant's trial that an appellate court established a contrary interpretation of the cases relied upon by the court and prosecution below. (See *People v. Sandoval, supra,* 87 Cal.App.4th 1425, 1437-1440 [limiting *Denson* and *Ware* to their factual and legal contexts]; *Herrera, supra,* 49 Cal.4th at pp. 625, 626 & 628, fn. 10.) The trial court was therefore bound by the case law at the time of trial and any argument by appellant to the contrary would have been futile. (*People v. Sandoval, supra,* 87 Cal.App.4th at page 1433, fn. 1 [although defendant did not specifically argue in trial court that prosecution had to make good-faith

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[29] Appellant is also unable to locate any cases from prior to or at the time of trial that are contrary to those cited by the prosecution.

effort to obtain attendance at trial of foreign citizen residing in foreign country, argument would have been futile because trial court would have been bound by then-applicable case law].)

C. The Admission of Rivera's Preliminary Hearing Testimony Prejudiced Appellant, Requiring Reversal Of His Death Sentence

After arguing the importance of Rivera's testimony at trial (RT: 3132), respondent now argues that it was not important, i.e., any error was harmless because Rivera's preliminary hearing testimony was largely cumulative to the other evidence of appellant's guilt as to the Woodley Market crimes. (RB 230-232.) Appellant, however, conceded at both phases of trial that he shot and killed Kim during the Woodley Market robbery. (AOB 206.) Respondent does not address appellant's actual argument that the admission of Rivera's testimony was prejudicial because salient parts of it were not cumulative and formed the basis for irrelevant prosecution argument at both phases of the trial, made to appeal to the prejudice and passions of the jurors, which prejudiced appellant at the penalty phase. (AOB 206-207.)

Here, the historical facts emphatically do not demonstrate prosecutorial good faith and due diligence under the applicable objective, constitutionally based legal test this Court looks to when it applies a de novo standard of review. (*People v. Cromer* (2001) 24 Cal.4th 889, 900, 902-903.) And because the error cannot be deemed harmless, appellant's death sentences must be reversed.

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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 that its theory was that all three co-defendants were equally culpable (3RT: 423-425), 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, among others, that appellant moved for severance prior to trial and numerous times as the trial proceeded. The court denied these motions, as well as ones for separate juries and sequential penalty phase trials. 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. (AOB 208-209.)

Respondent argues that the defendants were properly joined for trial at both phases, that neither separate juries nor sequential penalty phase trials were needed, and that the joint trial did not violate appellant's rights under the Eighth Amendment or to due process. (RB 246-260.) Respondent's arguments are without merit and should be rejected.

Respondent argues that appellant waived the guilt phase severance claims. (RB 232, fn. 84; 249, citing 3RT: 424.) In the portion of the record respondent cites, appellant was responding to the prosecutor's argument against the severance motion emphasizing the guilt phase issues. Appellant pointed out, as he had at other times, that the case was likely to be a penalty

phase case. (3RT: 424; see also 3RT: 414.) Nevertheless, appellant had moved for separate trials or separate juries for both phases (10CT: 2924), focusing on the fact that the prosecution's case would be that appellant was the most culpable (10CT: 2925-2927, 2937-2938; 3RT: 414, 417-419), and the court ruled on that basis. (10CT: 2975; 3RT: 425-428.) There was no waiver.

Respondent argues that split sentencing verdicts such as those here demonstrate the jury's careful consideration and ability to separate out the defendants. (RB 259, citing *People v. Ervin* (2000) 22 Cal.4th 48, 96.) In fact, this Court has found that different or the same sentences for co-defendants, or difficulty reaching a verdict, *all* demonstrate that the jury independently assessed the respective culpability of each codefendant. (See, e.g., *People v. Ervin, supra*, 22 Cal.4th at pp. 67, 95-96 [death for defendant and one codefendant, life for another]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1173-1174 [death sentence for defendant, LWOPP sentence for codefendant]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1311 [death sentence for defendant, hung jury leading to LWOPP for co-defendant]; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 196-197 [initial difficulty reaching verdict as to one defendant and ultimate death sentence for both].) Taken together, this case law appears to negate a split verdict as a meaningful factor to be considered in determining prejudice.

Moreover, respondent has not addressed appellant's argument that in opposing appellant's severance motion, the prosecution argued that all three codefendants were equally culpable (3RT: 424), and the court agreed. (3RT: 425; AOB 215-216.) Yet, both the prosecution and court did a complete about-face, respectively arguing and finding that appellant's particular role and actions called for, and completely justified, his death sentence. (AOB

215-216, 219-220.) This is despite the fact that the court knew, when it denied appellant's motion for a separate penalty trial, that there was very little aggravating evidence against appellant other than the circumstances of the crime. (See 23RT: 3989.) This, along with the court's application of an erroneous understanding of the applicable law (AOB 212), demonstrates that its rulings denying the motions for separate trials, separate juries or sequential penalty phase trials, was an abuse of discretion.

Respondent argues that the trial court adequately instructed the jury that it must render individualized sentencing determinations to each defendant. (RB 254.) The Court has reasoned that jurors are presumed to follow instructions to ensure individualized sentencing at joint penalty trials. (See, e.g., *People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 196-197.) After summarizing more than two decades of research on whether jurors can follow instructions to ignore evidence, however, one commentator observed that the consistency of results makes it "safe to say that the research demonstrates that it is far more likely that admonitions are ineffective than that they work as the courts intend." (Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy* (1992) 60 U.M.K.C. L.Rev. 645, 653.) Judge Learned Hand recognized much earlier that an instruction to limit evidence to one defendant is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." [sic] (*Nash v. United States* (2d Cir. 1932) 54 F.2d 1006, 1007.)

In the context of the jurors' normative penalty phase decision, which is less susceptible to logic than that in the guilt phase decisions, it is much more difficult to separate out one defendant from another. This is why "the standards for severance are necessarily leavened by the fact this is a death

penalty case. The threshold for determining what constitutes prejudice and when the jury's ability to render a reliable verdict is compromised is necessarily lower than in the ordinary case." (*United States v. Green* (D. Mass. 2004) 324 F.Supp.2d 311, 320, citing *United States v. Perez* (D. Conn. 2004) 299 F.Supp.2d 38) [granting severance based on evidentiary concerns "given the heightened need for reliability in a death penalty trial"]; see also *United States v. Taylor* (N.D. Ind. 2003) 293 F.Supp.2d 884, 889 [recognizing that because a defendant's life hangs in the balance, the "court's discretion with respect to severance is constrained to some degree by the fact that this is a capital case [which] . . . has a heightened need for reliability"].) For this reason, appellant respectfully disagrees with the Court's view that properly instructed jurors, who are presumed to follow instructions, can perform their duty to render individualized sentencing decisions in multiple defendant cases. (See *United States v. Lecco* (S.D. W. Va. 2009) 2009 U.S. Dist. LEXIS 79799, at pp. 11-12 ["in assuring that only those most deserving of a capital sentence actually receive it, society benefits from allowing a defendant to make the best case in mitigation possible to a fact finder who has under consideration that defendant alone"].)

Respondent's remaining contentions with respect to the instant argument raise no significant issues beyond those addressed in appellant's opening brief, and therefore no further reply is required. The issues are fully joined.

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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

Appellant argued that the trial court prejudicially abused its discretion by removing the interpreter who was interpreting for appellant during his testimony at the penalty phase. (AOB 224-235.) Respondent rehashes the trial court's reasons for removing the interpreter, and then makes the conclusory assertion that the trial court properly exercised its discretion when it found no good cause to conduct a hearing. (RB 263-265.) Because respondent never addresses appellant's arguments and authorities, appellant will not repeat those arguments here, except to add further support for his argument regarding the critical importance of the jury hearing a witness's intonations during testimony.

In considering what deference is due to the trial court in evaluating a *Batson* claim, this Court discussed the limits of a cold record:

> Experienced trial lawyers recognize what has been borne out by common experience over the centuries. There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact. *"Even an inflection in the voice can make a difference in the meaning. The sentence, 'She never said she missed him,' is susceptible of six different meanings, depending on which word is emphasized."* (Citation, italics added.)

(*People v. Lenix* (2008) 44 Cal.4th 602, 622.) If inflection is important for jury selection, it cannot be any less so when a capital defendant testifies for his life at the penalty phase.

Respondent argues as a further justification that the trial court's ruling was proper because under section 1044[30] it had broad discretion to control the conduct of the proceedings. (RB 264.) The cases cited by respondent for this principle, *People v. Calderon* (1994) 9 Cal.4th 69, 79 (*Calderon*), and *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334 (*Cline*), both involved the application of section 1044's abuse of discretion standard to section 1025, which requires that a jury determine the truth of an alleged prior conviction. These citations are not helpful to respondent, however, because both cases emphasized section 1044's abuse of discretion standard to protect, rather than limit, a defendant's trial rights. For instance, *People v. Cline, supra,* 60 Cal.App.4th at p. 1334, stressed that in "exercising its discretion under section 1044, a trial court must be impartial and must assure that a defendant is afforded a fair trial. (Citation omitted.)"

In *Calderon, supra*, 9 Cal.4th at p. 74, this Court considered the authority of a trial court under section 1044 to bifurcate the truth of an alleged prior from the guilt determination. The Court recognized the serious danger that in a single proceeding, faced with other crimes evidence, a jury might conclude that a defendant has a criminal disposition and is thus guilty of the charged offense. (*Id.* at p. 75.) Despite the widely recognized value

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[30] Section 1044 states that "[i]t shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

of bifurcation (*id.* at pp. 75-77), the court found that the state's interest in conserving judicial resources was insufficient to deny a motion to bifurcate when having a jury concurrently determine the truth of a prior conviction and the defendant's guilt "would pose a substantial risk of undue prejudice to the defendant."[31] (*Id.* at p. 77.)

Thus, as in *Calderon* and *Cline*, the trial court should have exercised discretion to protect appellant's right to a fair trial and to avoid undue prejudice. (See *Calderon, supra,* 9 Cal.4th at pp. 75-77, 80 [court's error in denying defendant's motion to bifurcate may have been prejudicial because it apparently caused defendant to forego his right to a jury determination on the priors allegation.) Accordingly, this Court should reject respondent's argument that the trial court's broad power under section 1044 justified its refusal to hold a hearing on appellant's claim of juror misconduct. (RB 264.)

For all the reasons argued above and in the opening brief, 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 violation of the right to an interpreter under Article I, section 14, of the California Constitution, because this Court cannot say, based on the record, that the error was harmless beyond a reasonable doubt. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1012

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[31] The Court in *Calderon* remanded the matter to the trial court to reconsider defendant's motion for bifurcation in light of the principles set forth in that opinion. (*People v. Calderon, supra,* 9 Cal.4th at p. 82.)

[adopting "a *Chapman* approach" to violations of Art. I, sec. 14, because so many federal constitutional rights may be affected].)

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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

Appellant argued in the opening brief that the court erroneously admitted at the penalty phase 13-year-old Rosa Santana's unreliable, irrelevant and prejudicial statement that appellant said he had shot eight or nine people in his country. (AOB 235-245.) Respondent's argument to the contrary fails.

Respondent does not address the first part of appellant's argument, that Santana's statement was unreliable. (AOB 238-240.) Respondent also ignores the key factor distinguishing appellant's case from *People v. Michaels* (2002) 28 Cal.4th 486, 533-534 (*Michaels*), i.e., that the factor (a) evidence at issue in *Michaels*, which was the defendant bragging about 10 or 15 prior contract killings, was linked directly to the capital crime under the prosecution's motive theory. (See RB 270-271; AOB 241-242.) Also, unlike the prosecutor in *Michaels*, and contrary to respondent's argument (see RB 272-273), the prosecutor below misused Santana's statement, improperly cross-examining appellant about it so as to suggest there was a factual basis for the statement, and then arguing that appellant was a "mass killer." (AOB 242-243.) The limiting instruction was therefore ineffective. (AOB 242-243; see *People v. Michaels, supra,* 28 Cal.4th at p. 535.) Thus, *Michaels* does not control this case.

Respondent quotes this Court's language in *People v. Box* (2000) 23 Cal.4th 1153, 1201, to argue that the trial court retained only limited discretion to exclude inaccurate or unduly inflammatory circumstances-of-the-crime evidence at the penalty phase. (RB 272.) Respondent reads too

much in *People v. Box*, however. While discretion is more circumscribed because of the moral and subjective nature of the jury's task at the sentencing phase, the bottom line is that a trial court only lacks discretion to exclude *all* factor (a) evidence on the grounds that it is lacking in probative value, cumulative or inflammatory. (*Id.* at pp. 1200-1201.)

Moreover, the evidence at issue in *People v. Box* consisted of crime scene photos. (*Ibid.*; see also *People v. Davenport* (1995) 11 Cal.4th 1171, 1205-1206.) In contrast, the evidence here was a statement by appellant that was unrelated to Woodley Market crimes, and fell outside of the rationales approved by this Court in factor (a) cases in which a defendant's statements or actions are related to the capital crimes at issue. (See, e.g., *People v. Michaels, supra,* 28 Cal.4th 486, 533-535 [defendant's statement that he had committed prior contract murders related to motive for capital murder admissible under factor (a)]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1163-1164 [testimony of witness who overheard defendant admit to shooting victims and enjoying hearing them beg for their lives admissible under factor (a) as it reflected on defendant's state of mind contemporaneous with murder]; *People v. Ochoa* (2001) 26 Cal.4th 398, 448-449 [prosecutor's characterization of appellant's statement "hey I just shot the guy" as bragging that he had shot the victim, and factor (a) evidence was proper].)

Appellant urges the Court not to extend the reach of factor (a) evidence of a defendant's "state of mind" with regard to the capital crime to bad character evidence unrelated to the crimes at issue. To do so would go beyond the already overly broad application of factor (a) that the Court utilizes. (See AOB, Argument XXIV.B.; see also *People v. Foster* (2010) 50 Cal.4th 1301, 1362-1364 [rejecting argument that factor (a), as applied

over time, has become arbitrary and capricious because of the variety of circumstances it covers].)

Here, because the statement attributed to appellant did not reflect the crimes at issue in any way, the court's admission of it under factor (a) violated appellant's rights under Eighth and Fourteenth Amendments to penalty selection procedures that "minimize the risk of wholly arbitrary and capricious action." (*Tuilaepa v. California* (1994) 512 U.S. 967, 973.) The jury's consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 885), also undermined the heightened need for reliability in the determination that death is the appropriate penalty. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585.) The result was an unreliable, arbitrary, and non-individualized sentencing determination in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17.)

Respondent argues that in light of the overwhelming evidence against appellant, any error was harmless. (RB 273.) However, even for very gruesome crimes, the death penalty is not necessarily unavoidable. (*Douglas v. Woodford* (9th Cir. 2003) 316 F.3d 1079, 1091.) Prejudice may exist even when there is substantial evidence in aggravation or more than one murder involved. (See, e.g., *Porter v. McCollum* (2009) 558 U.S. 30 [counsel's failure to present mitigation evidence was prejudicial in case with two murders]; *Douglas v. Woodford, supra*, 316 F.3d at p. 1091 [mitigation evidence could have evoked sympathy from at least one juror where defendant murdered two teenage girls]; *Smith v. Stewart* (9th Cir. 1999) 189 F.3d 10094, 1013 [same]; *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044 [failure to present additional mitigation evidence in multiple

murder case prejudicial]; *People v. Gay* (2008) 42 Cal.4th 1195, 1227 [exclusion of lingering doubt evidence and erroneous instruction was prejudicial despite significant and unusually brutal aggravating evidence and scant mitigation]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1244, 1247 [judicial misconduct prejudicial where defendant murdered three of his friends, while they were bound and begging for mercy]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 962 [despite egregious nature of capital double murder, along with prior assaults on inmates, possession of assault weapon, and possession of shank in jail, "a death verdict was not a foregone conclusion"].)

Similarly, the nature of the peace officer murder special circumstance alone did not make a death verdict inevitable. (See, e.g., *People v. Gay, supra*, 42 Cal.4th at p. 1227 [death verdict was not a foregone conclusion despite aggravating evidence that defendant murdered peace officer in the performance of his duties and had committed prior violent crimes, which were "unusually – and unnecessarily – brutal and cruel," and scant evidence in mitigation]; *People v. Gonzalez* (2005) 34 Cal.4th 1111 [jury rejected death penalty in favor of life for defendant convicted of first degree murder of one peace officer with peace-officer murder special circumstance, as well as attempted premeditated murder of second peace officer]; *People v. Noble* (1981) 126 Cal.App.3d 1011, 1012-1013, 1015 [jury rejects death in favor of life for defendant convicted of murder of peace officer with special circumstance].)

The prosecution's case in aggravation consisted of the circumstances of the crime and evidence under factor (c) of a prior conviction, possession of cocaine base for sale. (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: 4213-4214.) Notably missing from the prosecution's case were some major aggravating factors, e.g., unlike many capital defendants, he did not have a long history of other violence. (*People v. Allen* (1986) 42 Cal.3d 1222, 1246 [defendant previously had committed multiple other violent crimes].)

In short, appellant's offense may have been heinous, but he was not one of the most heinous offenders, and a death sentence was not inevitable.

Because jurors in California will reject death in favor of life verdicts in cases with multiple murders, murder of police officers and strong aggravating evidence, the Court should reject respondent's talismanic reference to the "overwhelming" aggravating evidence at trial. Respondent still must prove beyond a reasonable doubt and based upon the entire record that the errors of the court and prosecutor in allowing and making improper arguments did not contribute to the death verdict under *Chapman v. California* (1967) 386 U.S. 18, 24, and, under *People v. Brown* (1988) 46 Cal.3d 432, 448, that there is a reasonable possibility that the erroneous exclusion of his statements affected the verdict. In light of appellant's mitigating evidence of his extremely impoverished upbringing in Honduras and religious conversion (see AOB 29-30, 32-33) and all the reasons above and in the opening brief, the trial court's error was prejudicial, and appellant's death sentences must be reversed.

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XVI.

THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF THE ROD'S COFFEE SHOP INCIDENT UNDER SECTION 190.3, FACTOR (b)

Appellant argued in the opening brief that the court committed prejudicial error when it admitted the Rod's Coffee Shop (Rod's) evidence as criminal activity involving violence within the meaning of section 190.3, factor (b), because it was insufficient to establish the elements of an attempted robbery or the possession of a stun gun indicating express or implied violence. (AOB 245-255; 24RT: 4180-4181 [court denies appellant's motion under section 1118.1].) Respondent's argument to the contrary is unsupported.

Respondent has not countered and does not even discuss appellant's arguments and authorities that 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. (AOB 247-250.) Respondent also ignores appellant's argument that the presence of a stun gun in the same car as appellant after he left Rod's Coffee Shop did not constitute an implied threat of violence. (AOB 250-252.) Respondent's prejudice argument is another broad generalization that fails to refer to or counter appellant's points. (See RB 280; AOB 253-255.)

Respondent cites two cases in which this Court found the possession of firearms constituted an implied threat of violence. (RB 279-280.) In *People v. Elliott* (2012) 53 Cal.4th 535, 586-587, evidence, which showed that the defendant reached toward his pocket containing a gun after a deputy told him to place his hands on a patrol car, was properly admitted as gun possession constituting an implied threat of violence. In *People v. Thomas* (2011) 52 Cal.4th 336, 362, the defendant went to the house of the intended

target, who was not home, and threatened to "get" him. Shortly after, the defendant fired his weapon, thus committing the crime of grossly negligent discharge of a firearm. (*Ibid.*) This Court found that the defendant intended his action to serve as an express or implied threat of violence. (*Ibid.*) These factual scenarios have nothing in common with the Rod's evidence, wherein the alleged weapon was a stun gun, and there was insufficient evidence that appellant possessed it or of an implied threat.

The stun gun, which was 4.1 inch long, was found under the passenger seat of the car that appellant was driving after he left Rod's. (18RT: 3032-3035, 3048-3049; Ex. 236A; Vol. 1, 4SCT: 186, 188 [xerox copy of Ex. 236A].) The evidence did not show that appellant even knew the stun gun was there. (29RT: 5086.) The law "makes the matter of knowledge in relation to *defendant's awareness of the presence* of the object a basic element of the offense of possession." (*People v. Gory* (1946) 28 Cal.2d 450, 454, original italics.) Thus, "proof of opportunity of access to a place where [contraband is] found, without more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285-286 [summarizing cases in which evidence of narcotics possession was insufficient because others besides defendant had access].) Proximity to a weapon, standing alone, is not sufficient evidence of possession. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417]; see also *People v. Antista* (1954) 129 Cal.App.2d 47, 50; *People v. Bledsoe* (1946) 75 Cal.App.2d 862; *People v. Boddie* (1969) 274 Cal.App.2d 408, 411-412.) These cases stand for the basic principle that when more than one person has access to a location, the mere fact that a weapon is found hidden somewhere in that location does not establish constructive possession, regardless of the defendant's relative proximity to the item's hiding place. For this reason,

there was insufficient evidence to establish that appellant possessed the stun gun found under the passenger seat of the car he drove after he left Rod's Coffee Shop.

Because of the requirement of reasonable-doubt instructions for proof of uncharged crimes at the penalty phase (*People v. Robertson* (1982) 33 Cal.3d 21, 53-55), the trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless 'a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, *quoting Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, and *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Because no rational trier of fact could find the essential elements of the alleged prior crimes proven beyond a reasonable doubt, the court's admission of the evidence violated appellant's rights to due process, a fair trial and reliable guilt and penalty determinations. (U.S. Const., Amends. 5th, 6th, 8th, & 14th; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia, supra*, 443 U.S. at p. 319.) The admission of the evidence violated the Eighth and Fourteenth Amendments by undermining the reliability of the jury's death verdicts and violating appellant's state law liberty interests. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, 590 [death sentence based upon "materially inaccurate" information may violate Eighth and Fourteenth Amendments]; *Robinson v. Schriro* (9th Cir. 2010) 595 F.3d 1086, 1103 [recognizing that in certain circumstances, insufficiency of evidence supporting aggravating factors can constitute independent due process or Eighth Amendment violations]); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [state trial court's misapplication of its capital sentencing statute implicates the Eighth

Amendments prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth Amendment].)

For the reasons argued above and in the opening brief, 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

In the opening brief, appellant argued that the court erred when it permitted the prosecutor to cross-examine appellant regarding the crimes in response to appellant's penalty phase testimony about his religious conversion in jail. Respondent contends that the prosecution "had the right to test appellant's claim of redemption by cross-examining appellant about the defense he was presenting." (RB 287.) Respondent's argument consists of this statement, preceded by various citation with general language. (RB 285-286.) Neither the facts below nor respondent's authorities support respondent's very broad conclusion.

C. The Impeachment Of Appellant With Questions About The Crimes Was Improper Rebuttal

Respondent states that a criminal defendant has no right to mislead the jury through one-sided character testimony at the penalty phase. (RB 286.) However, the cases respondent cites for this unremarkable proposition in fact support appellant's position that rebuttal must be specific. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 145-146 [where defendant, convicted of killing her four children, put on evidence she was a good mother, evidence of specific incident where she mistreated her nephew was within scope of rebuttal]; *People v. Payton* (1992) 3 Cal.4th 1050, 1064-1067 [mitigation witnesses who testified about defendant's religious faith in custody and good influence on other inmates properly impeached with questions about specific incidents of jail misconduct].)

Thus, even if the trial court was correct that "the whole impact of the document [appellant's religious writing] is he is now a good person as in contrast from before," its conclusion – that this permitted the prosecution to cross-examine appellant extensively regarding "what happened before," i.e., the circumstances of the crimes – was not. (26RT: 4500.) This is because the scope of rebuttal to general character evidence "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* (1986) 42 Cal.3d 730, 791-792 & fn. 24 [where defendant presented evidence through family members that he was gentle and avoided violent confrontations, prosecutor's reference to prior incident involving shotgun was proper rebuttal to this specific asserted aspect of defendant's personality].)

Respondent cites this Court's language *People v. Montiel* (1993) 5 Cal.4th 877, 934 (*Montiel*), that "[n]o constitutional principle precludes examination of a witness about the sincerity and depth of religious and remorseful feelings he himself has placed in issue." (RB 282, 286.) In *Montiel*, the defendant testified at the penalty phase on direct examination that he accepted Christianity, read the Bible, and felt remorse for the murder victim and his family. (*Montiel, supra,* 5 Cal.4th 877, 934.) *Montiel* is distinguishable; the language quoted above responded to that defendant's claim that the impeachment at issue, which involved a specific Bible verse, penalized his freedom of religious beliefs. (*Ibid.*)

In short, respondent has not specifically countered appellant's argument that the facts and holdings of *Montiel* and others discussed in appellant's opening brief demonstrate that because of the limits on rebuttal to, and impeachment of, a defendant's evidence or testimony regarding

postcrime religious conversion, the court erred in allowing the prosecutor to cross-examine appellant regarding the crimes. (AOB 258-260.)

Respondent states that rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence upon which the defendant has introduced evidence and the scope of cross-examination is a function of the "breadth and generality" of the direct testimony. (RB 285, citing *People v. Loker* (2008) 44 Cal.4th 691, 709.) Here, appellant proposed limiting the mitigation evidence in various ways (AOB 256-257), none of which included questioning the guilt phase verdicts. For instance, appellant proffered testimony about his jailhouse conversion, authorship of a religious writing, and his ability to help others in the future. (26RT: 4495-4496, 4501-4502.) Cross-examination about the crimes would not and did not disprove a fact of consequence as this proposed testimony.

Appellant further proposed not to discuss remorse or the sincerity of his conversion, but just about his ability to help others in the future, or even just to take the stand to authenticate the religious document he wrote. (26RT: 4495-4497, 4501-4502.) Nevertheless, the court erroneously and illogically ruled that appellant's current religious feelings were essentially telling the jury that he was remorseful, and that his conversion was sincere and the prosecution could therefore cross-examine him on the sincerity of his beliefs as well as on remorse by cross-examining him about the circumstances of the crimes.[32] (26RT: 4496, 4500-4504.) However, the

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[32] After the court overruled appellant's various attempts to exclude the topics of remorse, the crimes, and the sincerity of his conversion from cross-examination (24RT: 4200-4202; 26RT: 4496-4504), the court ruled that appellant's testimony on these various points did not waive his prior objections. (26RT: 4570-4571.) Appellant's claims have not been

(continued...)

premises underlying this ruling were incorrect and for this reason as well, cross-examination on the circumstances of the crime did not tend to disprove a fact of consequence stemming from appellant's testimony. (See *People v. Loker, supra,* 44 Cal.4th at p. 709.)

The court's first premise, that religious conversion is inevitably linked to remorse, was incorrect. The two concepts are not equivalent, nor is one a necessary or sufficient condition for the other. (Murphy, *Remorse, Apology, and Mercy* (2007) 4 Ohio St. J. Crim. L. 423, 432-433 (Murphy).) Take, for example, a person who has weak or no religious beliefs but who is against abortion. That person could shoot and kill an abortion provider. Unrepentant and in jail, the shooter could then have a religious conversion, and believe more strongly than ever that his acts were justified. Similarly, an atheist mercenary who joined the fight against Syria could commit war crimes before converting to the religious traditions of fellow soldiers and remain remorseless before and after his conversion.

Similarly, whether or not appellant's conversion was sincere did not hinge on whether he was remorseful. Sincerely religious people can be unrepentant, and some sincerely repentant people can be nonreligious or even antireligious. (Murphy, *supra,* 4 Ohio St. J. Crim. L. at pp. 432-433; Randall, The Psychology of Feeling Sorry: The Weight of the Soul (2013) p. 127.)

The court's second premise – that expressions of remorse open the door to cross-examination about the crimes – was also erroneous. By definition remorse is something that occurs after an offending behavior.

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[32](...continued)
forfeited. (*People v. Venegas* (1998) 18 Cal.4th 47, 94.)

Remorse is "a feeling of being sorry for doing something bad or wrong *in the past*: a feeling of guilt." (http://www.merriam-webster.com/dictionary/remorse [as of June 22, 2014] italics added.) Remorse, then, is a feeling that arises after some thought or reflection on the gravity of one's prior actions. (Ward, *Sentencing Without Remorse* (2006) 38 Loy. U. Chic. L.J. 131, 150 (Ward).) The prosecutor, on the other hand, asked appellant argumentative questions about whether he felt remorse *during* or immediately after the crimes (26RT: 4552-4554, 4574-4575, 4579-4581), and then argued that appellant's actions during the crimes demonstrated his lack of remorse. (29RT: 5288-5289.) This meant that the very fact that the crimes were committed indicated a lack of remorse. (Ward, *supra,* 38 Loy. U. Chic. L.J. at p. 150.) This renders the concept of remorse for actions in the past meaningless. (*Ibid.*) Because remorse "by definition can only be experienced after a crime's commission" (*Brown v. Payton* (2005) 544 U.S. 133, 142-143), such logic unconstitutionally removes remorse from the jury's consideration in violation of the Eighth Amendment. (See *id.* at p. 150, citing *Skipper v. South Carolina* (1986) 476 U.S. 1, 4-5 [mitigation includes evidence of defendant's behavior after offense].)

For the same reasons, the court's rationale that the prosecution had the right to test the sincerity of appellant's conversion by asking about the crimes was erroneous.

Respondent cites *People v. Farnam* (2002) 28 Cal.4th 107, 197 (*Farnam*) for the proposition that at the penalty phase, a prosecutor is entitled to inquire about the circumstances of the underlying crimes, but does not otherwise discuss the case or any possible application here. (RB 286.) In *Farnam*, the defendant was convicted of first degree murder, rape and sodomy and the jury found true five special circumstances. (*Id.* at pp. 125-

126.) At the penalty phase, the defendant testified on his own behalf regarding his upbringing; admitted killing the victim and several of the special circumstances; denied the sodomy or that he had premeditated the killing; and said he was sorry that the victim was dead. (*Id.* at p. 131.) The defendant argued that certain of the prosecutor's questions were misconduct, e.g., whether defendant enjoyed raping the victim. (*Id.* at p. 197.) The Court noted there was no objection and found the questions proper because the prosecutor was entitled, under factor (a), to cross-examine on the circumstances of the crime. (*Ibid.*)

In contrast, appellant did not open the door to cross-examination regarding the crimes. As a result of the court's ruling that *any* evidence of appellant's postcrime jailhouse conversion opened the door to a wide-ranging cross-examination regarding the circumstances of the crimes, appellant testified briefly on direct examination that he shot Hoglund to get away; shot and killed Kim; and knew the crimes were wrong and did them anyway. (26RT: 4538-4540.) The court ruled that appellant's testimony did not waive his prior objections. (AOB 257.) Thus, appellant's testimony did not open the door to cross-examination on the crimes or the evidence underlying the guilt phase verdicts as it appears was the case in *Farnam.* (See *People v. Venegas, supra,* 18 Cal.4th at p. 94.)

The trial court's view of the connections between religious conversion, remorse and sincerity was problematic for other reasons. The concept of remorse is subject to varying interpretations depending upon how it is understood by both a defendant and the sentencer, and the cultural and religious values of each. (Ward, *supra,* 38 Loy. U. Chic. L.J. at pp. 133-136.) For this reason, the jurors' consideration of appellant's remorse was a

very subjective one and introduced an arbitrary element into sentencing. (See *id.* at pp. 133-136, 142-143.)

Thus, the court erred when it reasoned that appellant's testimony regarding his conversion presented to the jury that he was reformed, and the people had a right to cross-examine him on his life before to test the sincerity of what he is doing now. (26RT: 4496.)

E. The Error Was Prejudicial and Reversal Is Required

Respondent argues that even if there was error, there was no prejudice because the prosecution could still have argued against appellant's "religious defense" based upon the guilt phase evidence. (RB 287.) This argument strains credulity. As described in the opening brief, the prosecutor conducted a lengthy and extremely damaging cross-examination of appellant regarding the charged crimes and whether he was remorseful; used appellant's testimony to impeach the defense mitigation witnesses; and elicited denials when appellant maintained his innocence in response to the prosecutor's questions and characterizations of the evidence. (AOB 260-262.) In fact, with the exception of three pages of questions about the Bible study appellant wrote (26RT: 4609-4612), and brief questioning about appellant's lack of contact with his family (26RT: 4612-4613), virtually the entire cross-examination consisted of questions related to the crimes.

The prosecution then made extensive use of the cross-examination during closing argument to excoriate appellant, accuse him of repeatedly lying under oath, deceiving and manipulating his religious mitigation witnesses and failing to admit the crimes or to express remorse. (AOB 260-262.) These arguments, which appealed to the passions and prejudices of the jury by again and again accusing appellant of lying, including to God, contrast sharply with the relatively tame argument that the prosecutor could

have made without the ammunition gained during the cross-examination on the crimes.

A major theme of the prosecutor's argument was appellant's lack of remorse. (See, e.g., 29RT: 5287 [asking jury to consider remorse in determining penalty]; 5287-5289 [describing certain actions after the murders and arguing that "the best measure of remorse" is appellant's actions during and after the crime]; 30RT: 5335-5336 [no remorse expressed in appellant's Bible study].) She posted a chart with excerpts of appellant's testimony, and used it to argue repeatedly that appellant lied and lacked remorse. (30RT: 5311-5327.)

The prosecutor also told the jurors that while they could not count appellant's lies as aggravation, they could consider them "as lack of remorse and facts and circumstances of the crime as indicated in his character." (30RT: 5326; 29RT: 5287 [same].) Thus, she argued that appellant's lies showed lack of remorse, which was factor (a) evidence, and that appellant's character was also factor (a) evidence on the facts and circumstances of the crime. This is another way that the prosecutor prejudicially misused her cross-examination of appellant regarding the crimes: the jury was given backwards and erroneous guidance, i.e., that appellant's trial testimony demonstrated his lack of remorse and character, and both were a fact and circumstance of the crime. This is not the law. (See, e.g, *People v. Farnam* (2002) 28 Cal.4th 107, 198-199 [prosecutor may comment on lack of remorse as long as she does not suggest it should be considered a factor in aggravation]; *People v. Avena* (1996) 13 Cal.4th 394, 439 ["after [*People v.*] *Boyd* [(1985) 38 Cal.3d 762], the People may not present aggravating evidence showing the defendant's bad character unless the evidence is admissible under one of the listed factors or as rebuttal"].)

The prejudice from the court's decision allowing the prosecutor to cross-examine appellant in detail about the crimes cannot be understated with regard to the remorse issue. Remorse, despite the arbitrary use to which it is put, is a significant factor for jurors in penalty phase decisions. (Eisenberg et. al., *But Was He Sorry? The Role of Remorse in Capital Sentencing* (1998) 83 Cornell L. Rev. 1599, 1632-33 [finding, in a multivariate empirical study of South Carolina capital jurors, that "[t]he difference . . . between jurors' beliefs about the defendant's remorse in life cases and in death cases is highly significant" and that "if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death"]; Sundby, *The Capital Jury and Absolution: the Intersection of Trial Strategy, Remorse, and the Death Penalty* (1998) 83 Cornell L. Rev 1557, 1558, fn. 2 [citing studies].)

In a study of a representative sample of 37 death California penalty trials tried between 1988 and 1992, a perceived lack of remorse was one of the most compelling reasons that a majority of capital jurors voted in favor of death. (Sundby, *The Capital Jury and Absolution: the Intersection of Trial Strategy, Remorse, and the Death Penalty, supra,* 83 Cornell L. Rev. at pp. 1559-1560 & fn. 6 [jurors from death cases interviewed in 1991 and 1992].) A defendant who presented a complete innocence/lack of responsibility defense was most likely to be deemed remorseless, whereas those accepting responsibility found more favor with juries. (*Id.* at pp. 1574-1577, 1584.) Given that the guilt phase defense included admitting the vast majority of the crimes, the prosecutor would have understood that this was a strong factor in appellant's favor at the penalty phase. For these reasons, the prosecutor's cross-examination of appellant linking the crimes to lack of remorse was devastating.

For the reasons above as well as those set out in Argument XV, *ante*, and in the opening brief, the death judgments must be vacated.

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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

Appellant argued that the prosecutor improperly insinuated through cross-examination that appellant had committed other murders; repeatedly violated court rulings limiting cross-examination to appellant's own actions during the crimes; erroneously caused replacement of appellant's interpreter; and improperly used sarcasm and theatrics to communicate his belief that appellant was not credible. Respondent incorrectly argues that the claims are forfeited, lack merit, or are not reflected in the record.

B. The Prosecutor Improperly Insinuated That Appellant Had Committed Prior Murders

Appellant argued that the prosecutor committed error when he asked appellant "Did you feel especially in a humorous mood as you recalled killing those eight or nine other people that you killed?" (AOB 267; 26RT: 4609.) Respondent argues that this claim was forfeited because appellant did not object on the basis of prosecutorial error in a timely way. (RB 291-292.) As argued in the opening brief, the court refused appellant's request to instruct the jury that the prosecutor had no evidence to back up his assertions. (AOB 267.) Given this, it is highly unlikely that the court would have assigned the error as misconduct and any such request would have been futile. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Futility may arise when the trial judge errs by overruling proper objections (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237) and when the prosecutor's acts of misconduct were not deterred even when the trial court attempted to prevent them. (*People v. Hill, supra,* 17 Cal.4th at p. 821.)

As argued here and in Arguments XVII, *ante*, XIX and XXI, *post*, the court overruled most of appellant's objections regarding the prosecution's improper cross-examination questions and argument. Appellant will not repeat each of those examples here, but will highlight some aspects of the court's responses to appellant's objections to illustrate the futility of perfecting the record with regard to prosecutorial error at appellant's penalty phase trial. For instance, the court refused to sustain appellant's objections, but nevertheless made suggestions to the prosecutor about permissible areas, which the prosecutor largely ignored. (See, e.g., 26RT: 4576-4579, 4586-4588.) In other instances, the court sustained appellant's objections, but the prosecutor ignored the court with impunity. (AOB 276-277 & 26RT: 4594-4595; AOB 270 & 26RT: 4571, 4573-4574, 4586-4588, 4631; see also 23RT: 4162; 30RT: 5368-5370 [prosecutor knowingly argued a prohibited topic].)

Thus, the record amply demonstrates that the court overwhelming rejected appellant's attempts to object to misconduct and/or cite the prosecutor for misconduct. For this reason, a request for an assignment of misconduct here would have been futile.

Respondent's argument that at most, the question was assailable due to ambiguity (RB 294), is incorrect as the trial court recognized that the question was inappropriate, and asked with the force and effect as if the prosecutor knew it to be the truth. (27RT: 4742-4743.) The trial court next ruled, incorrectly, that the prosecutor's follow-up question, after appellant asked "which eight or nine other people," was appropriate, and on that ground denied appellant's request to instruct the jury that the prosecution did not have evidence to support the truthfulness of the charge implied by its question. (AOB 267; 27RT: 4743.) Respondent argues that in context, it

was clear that the prosecutor's questioning went to appellant's state of mind, a permissible area of inquiry. (RB 293-294.)

Nothing, however, cancelled out the insinuation from the first ostensible question, where the prosecutor stated that appellant recalled killing, and had killed, eight or nine people. (AOB 267-268; 26RT: 4609.) The prosecutor's response to appellant's initial request for clarification ("what eight or nine people?") introduced a tertiary premise about the appellant's behavior in a conversation, i.e., "the ones that you talked about when you were giggling and laughing over killing the officer." (26RT: 4609.) Neither that, nor appellant's response – "I never did say that" – responded to or undercut the underlying premises of the prosecutor's first question, i.e., that appellant recalled killing, and had killed, eight or nine other people. Moreover, the prosecutor's initial question embedded within it a polar question (one that requires either a yes or no answer), i.e., "did you feel in an especially humorous mood as you recalled . . . ." This is an example of the classic loaded question, e.g., "just answer yes or no, have you stopped beating your wife?," in which the question contains a supposition and entraps the person who answers it in a yes-or-no format.

The prosecutor's improper cross-examination here was just the first arrow in his quiver: the prosecutor persisted in suggesting to the jury through cross-examination that appellant was involved in criminal activity involving a shooting in Honduras during the further cross-examination of appellant as well as that of his sister Argentina. (AOB 268-269; Argument XIX.)

Respondent asserts that any claim of prosecutorial error as to Argentina's cross-examination was forfeited and that appellant's futility argument should be rejected because of the many favorable rulings the court made for the defense. (RB 295-296.) Respondent does not list these rulings,

but the rulings sustaining appellant's objections to improper cross-examination of Argentina are irrelevant to the forfeiture issue as the court consistently refused to admonish the prosecutor for misconduct. (See 26RT: 4555-4557, 4577, 4586-4587; see also 4618 [asked to admonish prosecutor for unprofessional behavior, court warns *both* prosecutor and codefendant's counsel not to editorialize, despite any indication that the latter acted improperly].)

Given these circumstances and the pattern of misconduct described herein and in Arguments XVII, *ante*, and XIX through XXI, *post*, this Court should excuse any failure to object to every instance of misconduct or to request an admonishment. (*People v. Hill*, *supra,* 17 Cal.4th at p. 820 [defendant excused from necessity of either timely objection and/or request for admonition if either would be futile]; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100 [where misconduct is part of pattern and multiple objections made, court may consider all cited examples in evaluating pattern of impropriety]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [admonitions will not generally cure harmful effect of misconduct interspersed throughout trial].) Should the Court disagree, appellant urges it to reach the issue despite the lack of a request to admonish the prosecutor for misconduct. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

On the merits, and contrary to respondent's argument (RB 296), the prosecutor repeatedly violated the court's ruling on the permissible scope of cross-examination of Argentina. On direct examination, she testified about certain aspects of appellant's upbringing and asked the jury for compassion and a life sentence so that appellant could dedicate his life to God. (27RT: 4764-4772.) During cross-examination, the court overruled appellant's

objection to the questions of when and where she last saw appellant.[33] (27RT: 4775, 4779.) After she testified that she last saw him in Honduras at their mother's house (27RT: 4775), the court sustained appellant's objections on the grounds of irrelevancy and as beyond the scope of direct to six improperly suggestive questions regarding appellant's presence in Honduras in 1992. (27RT: 4775-4781.)

These improper questions did not test the quality of Argentina's relationship with appellant, nor did they respond to her direct testimony. Rather, as appellant predicted, they had a more particular purpose. (27RT: 4776) The trial court had earlier ruled that the prosecutor could not question witnesses about whether appellant was involved in a shoot-out in Honduras in February 1992. (24RT: 4191-4193.) By questioning Argentina as he did, the prosecutor repeatedly emphasized to the jury that appellant was in Honduras during this time period.

The questions further invited the jury to speculate regarding inadmissible and irrelevant matters, such as illegal activities by appellant during this time period. (27RT: 4779 ["What month of the year did you see him in Honduras in 1992?" and "Did he tell you why he was back in Honduras in early 1992?"]; 4780 ["Did your brother tell you why he was leaving you to return to the United States . . . ?"]; 4781 ["Do you know what your brother was doing to earn a living in the United States?"].) The jury may well have thought that by objecting, appellant was trying to keep

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[33] The prosecution had argued that because Argentina testified that appellant was like a son to her, and made an appeal for his life, it was entitled to ask about how much and what type of contact they had. (27RT: 4775-4776, 4779.)

evidence from it. (See *United States v. Coveney* (5th Cir. 1993) 995 F.2d 578, 586 [government put on defendants' former lawyers in tax fraud case; no prejudicial error where court gave limiting instructions that invocation of privilege should not be perceived as effort to hide evidence].) The questions were also improper because the prosecutor unduly emphasized the matter by repeating and enlarging on the erroneous question. (*People v. Grimes* (1959) 173 Cal.App.2d 248, 253-254.)

Moreover, in light of the prosecutor's various attempts to get before the jury information and insinuations that appellant committed other murders and/or was involved in a shootout, "[i]t would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions were improper, wholly unjustifiable, and peculiarly calculated to prejudice the substantial rights of the defendant." (*People v. Lynch* (1943) 60 Cal.App.2d 133, 143; *People v. Ford* (1948) 89 Cal.App.2d 467, 470 ["We would be accusing the deputy district attorney of crass ignorance or deplorable inexperience, or both, were we to assume that he did not know the wholly improper and inexcusable nature of his remarks"].)

Respondent argues that the court's weak admonition in response to appellant's objection to the prosecutor's improper questions, which merely reminded the jury that the statement about appellant having killed eight or nine people had been offered not for its truth, but as to appellant's state of mind, along with generic instructions, would have cured any harm. (RB 297-300.) However, particularly in a trial for murder, hearing accusations that the accused had previously killed is precisely the sort of bell that cannot be unrung. (See *People v. Johnson* (1981) 121 Cal.App.3d 94, 103-104.) For this reason, the prosecutor's questions would hardly pass without impact to the jury.

Moreover, this Court has also recognized that in some situations an admonition will actually exacerbate the prejudice to the defendant. (*People v. Bolton* (1979) 23 Cal.3d 208, 215-216, fn. 5; see also *People v. Pitts*, *supra*, 223 Cal.App.3d at p. 692.) Evidence of other crimes has been regarded as evidence of this type. The prejudice inherent in such evidence led one court to observe:

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. Of what value are the declarations of legal principles with respect to the admissibility of other-crimes evidence . . . if we permit the violation of such principles in their practical application? We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.)

In any case, despite the court's admonition, the insinuation remained that the prosecutor knew something outside of the evidence. (*People v. Wells* (1893) 100 Cal. 459, 460-461, 465 [reversing even though objections to content-laden improper questions were sustained]; *People v. Holt* (1984) 37 Cal.3d 436, 457-458 [instruction at end of guilt phase that punishment was not to be discussed or affect verdict did not negate prosecutor's improper reference to the effect that jury's adoption of the defense theory could lead to parole date].)

In addition, the mere fact that the improper statements and evidence came from the prosecution gives them added impact. The courts have long recognized the special regard jurors have for the prosecutor and the likelihood that jurors will give undue weight to statements made by the

prosecutor. (*People v. Bolton, supra*, 23 Cal.3d at p. 213.) For these reasons, the court's admonition to the jury did not cure the damaging impact of the prosecutor's continued questions implying appellant had murdered others in Honduras.

Moreover, contrary to respondent's argument (RB 299), the prosecutor improperly argued that appellant was responsible for other killings, i.e., he told the jury that appellant was a "mass killer." (30RT: 5311.) If the jury believed that appellant was or may have been involved in other murders, or a shootout, it would have considered him more culpable and more of a threat to society, and the prosecutor's "mass killer" description would have appeared even more compelling.

C. The Prosecutor Repeatedly Violated The Court's Ruling Limiting Cross-Examination To Appellant's Own Actions and Role In The Instant Crimes

Appellant argued that the prosecutor erred when he persistently violated the court's ruling that the prosecutor could not cross-examine appellant about the activities of coperpetrators. (AOB 270.) Respondent argues that the issue was forfeited, the prosecutor did not violate any rulings and if it did, it was because they were ambiguous. (RB 305.)

The ruling that appellant cited was not ambiguous. Appellant explained prior to cross-examination that he would not answer questions about others involved in the robberies. (26RT: 4511.) The prosecution argued that asking appellant whether he had turned in others was relevant to test the sincerity of his religious beliefs. (26RT: 4511.) The court prohibited the prosecutor from asking appellant about the two codefendants, but initially did not limit questions about "the unnamed six or seven people" who also participated in various robberies. (26RT: 4511-4513.)

After the lunch break, the prosecutor told the court he planned to ask appellant with whom he did the robberies other than the codefendants. (26RT: 4571.) The court responded "no," explaining that although the original ruling excluded only questions about the codefendants, the court now realized that asking about anyone else was irrelevant to appellant's remorse and "as I think about it, the whole point of the penalty phase is to determine [appellant's] culpability." (26RT: 4571.) The court instructed the prosecutor to "[j] leave it alone" and even asked the prosecutor if he wanted to "go to the side" because the jury was coming in, but the prosecutor declined. (26RT: 4571.)

Almost immediately after this discussion, the court sustained appellant's objections to three questions implicating others and denied his requests to approach, but instructed the jury that the cross-examination was limited to appellant. (AOB 270; 26RT: 4573-4574, 4576.) The court permitted counsel to approach after a fourth objection, but denied his request to hold the prosecutor in contempt or cite him for misconduct for violating the court's clear ruling. (26RT: 4577.) After a fifth improper question, appellant unsuccessfully renewed his request to find the prosecutor in contempt and further asked that the court stop appellant's cross-examination. (26RT: 4586.) The court merely told the prosecutor that he was risked eliciting inadmissible testimony about others, and should "leave it alone." (26RT: 4587.) Appellant's comment during this discussion that he did not remember the court changing its rulings did not reflect confusion as respondent states (RB 305), but was a reminder to the prosecutor and court of its earlier rulings, which the court then repeated. (26RT: 4588.)

Under these circumstances, and contrary to respondent's argument (RB 303, 305, 307, 309), the court's rulings were not ambiguous, and appellant did not forfeit the issue.

Respondent attempts to get around the record by arguing that questions that the prosecutor asked about appellant's conduct were only "inartful." (RB 303-304, 305, 307, 311-313.) The trial court ruled otherwise when it sustained appellant's objections to questions implicating others. (26RT: 4574, 4576, 4598, 4631; see also 4565 [without directly responding to appellant's objection, court instructs prosecutor to limit his questions to appellant].) Moreover, contrary to respondent's argument (RB 307), that the prosecutor finally asked a permissible question does not negate the earlier ones that the court recognized were improper. (See *People v. Wells, supra,* 100 Cal.459, 461-462.)

Respondent argues that any possible prejudice stemming from cross-examination implicating the codefendants was harmless because it would have worked against his codefendants, rather than appellant. The record belies this claim. As explained above, despite the ruling that the prosecutor could not ask appellant questions about the involvement of either the codefendants or other coperpetrators (26RT: 4512-4513, 4571), the prosecutor continued to ask such questions, and appellant's objections were sustained. The prosecution then improperly argued that appellant's conversion was false and he lacked remorse because he did not turn in others. (30RT: 5316-5317.)

Respondent also claims that the court's instruction to the jury cured any possible prejudice. (RB 314, citing 26RT: 4565-4566; see also 26RT: 4576.) This is not so, given the prosecution's repeated defiance of the court's orders and the court's later refusal to instruct the jury that the

prosecution lacked evidence to support the facts implied in its questions. (28RT: 4873-4874.) (See *People v. Kirkes* (1952) 39 Cal.2d 719, 726 [objections and requests for admonishment would not have cured error where repeated objections to improper assertions and comments throughout a trial may serve to impress on jury the damaging force of the misconduct]; *People v. Pigage* (2003), 112 Cal.App.4th 1359, 1374 [defiance of court rulings brings disorder to court process and causes an unfair trial].)

D. During a Break In Appellant's Cross-Examination the Prosecutor Initiated an Improper Ex-Parte Contact With The Court, Which Resulted In a Change Of Interpreter Over Appellant's Objection

Appellant argued that the prosecutor committed error because during a break, he aggressively criticized appellant's interpreter and then approached the court ex parte regarding the matter. (AOB 271-273; 26RT: 4567-4569.) Respondent argues forfeiture and that there is no indication of an ex parte contact. (RB 314-315.) Appellant disagrees.

The rule that a defendant must object and request an admonition at trial in order to preserve the issue for appeal "applies only if a timely objection or request for admonition would have cured the harm." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn.27.) Here, as argued in the opening brief, by the time the matter was discussed on the record, the decision to switch the interpreter had been made and the court rejected the defense objections to the prosecutor's actions. (AOB 272-273.) Thus, a request for an assignment of misconduct and request for admonition would have been futile.

The proceeding began with the prosecutor announcing the court's ruling, prior to any discussion.

Court:	Everyone is here, do we have the hookups? Mr. Leonard? Are we set up?
Mr. Grosbard:	Your honor, we understand we were going to have a different interpreter this afternoon.
Mr. Richard Leonard:	Your honor, I was approached by the interpreter during the lunch break and she informed me that Mr. Grosbard verbally attacked her in the way that she was conducting the interpretation. He did not like the way she was interpreting for Mr. Sanchez Fuentes and he threatened her in terms of taking her off the case, or something to that effect. ¶ . . . If he has any problems . . . he should bring it to your attention.
The Court:	It was brought to my attention and I agree.

(26RT: 4567-4568.)

This interchange demonstrates that at the start of the proceeding, the prosecutor and court knew things that the defense did not, i.e., that the matter had already been brought to the court's attention, that the court agreed with the prosecutor's position, and that the interpreter would be switched. Respondent argues that court staff could have told the court about the matter or the parties could have already discussed the matter on a break. (RB 315.) These explanations are belied by the actual record showing pre-existing knowledge on the part of the prosecutor and court, and the absence of a reference to a prior discussion among the court and parties regarding the matter.

In any case, respondent does not address appellant's argument that the prosecutor's initial approach and castigation of the interpreter, rather than

bringing his complaints to the attention of the court and all parties, was improper. (See RB 313-315.) Thus, no further reply is required.

E. Other Misconduct

Appellant argued that the prosecutor committed error when it used theatrics and sarcasm while cross-examining appellant, in an attempt to testify about his disgust with appellant. (AOB 273-274 & fn. 65; 26RT: 4555-4556.) Respondent argues that there was no misconduct because sarcasm and "other rhetorical devices" during cross-examination of a defendant properly may highlight for the jury the improbability of a defendant's testimony. (RB 318.) The cases it cites for this proposition are inapposite. In *People v. Guerra* (2006) 37 Cal.4th 1067, 1127, this Court rejected the defendant's argument that a specific question was argumentative because the question highlighted the improbability of specific testimony the defendant has just given. In *People v. Bemore* (2000) 22 Cal.4th 809, 845-847, the Court found that given the evidence and defense argument, the prosecutor's arguments referring to counsel in the first person and alluding to the lack of evidentiary support for the defenses, were rhetorical devices properly used to focus the jury's attention on strong evidence of guilt and the weak defense case. Neither case counters the principle that a prosecutor may not, by way of facial expression, laughter or body language imply to the jury that the prosecutor does not believe the testimony of a defense witness. (*People v. Tate* (2010) 49 Cal.4th 635, 693; *People v. Hill, supra,* 17 Cal.4th at p. 834 [criticizing prosecutor for laughing during defense examination of witnesses].)

Respondent argues there could be no prejudice because it was clear to the jury that the prosecutor did not believe that appellant's life should be spared. (RB 318-319.) The Court should reject this argument as it ignores

the whole point of recognizing and curbing prosecutorial error, i.e., to obtain convictions by legitimate and fair means rather than by arousing the passion and prejudice of the jury. (*Viereck v. Unites States* (1943) 318 U.S. 236, 247; *Berger v. United States* (1935) 295 U.S. 78, 88.)

In addition, the prosecutor's repeated failure to abide by court rulings, as argued in Arguments XVII through XXI, demonstrated an overall pattern of misconduct that separately and additionally constitutes prosecutorial error. (See *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782 [failure of counsel to abide by court ruling "inexcusable"]; *People v. Pigage, supra* ,112 Cal.App.4th at p. 1374 [regardless of whether a ruling is right or wrong, an attorney must follow it]; *People v. Davis* (1984) 160 Cal.App.3d 970, 984 [counsel have duty to submit to court rulings and accept them].)

F. The Prosecutor's Actions Were Prejudicial Misconduct and Reversal Of The Death Judgments Is Required

In addition to the combined prejudice described in each of the above subsections, the errors were prejudicial because a prosecutor has a special status with the jury, which stems from the average juror's confidence that the prosecutor's obligations of fairness "will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States* (1935) 295 U.S. 78, 88; *People v. Hill, supra,* 17 Cal.4th 800, 828 [prosecutor's statement of supposed fact not in evidence worthless as a matter of law, but can effectively circumvent rules of evidence due special regard jury has for prosecutor].)

Respondent argues that even if the prosecutor committed error, the court's instructions and admonitions to the jury cured the harm. (RB 297-

299.) Appellant has argued above why this is not so. Furthermore, the prosecutor's errors were prejudicial because they forced appellant to risk that the jury would view the defense as obstructionist or forfeit a misconduct claim. (*United States v. Grayson* (2d Cir. 1948) 166 F.2d 863, 871 (Frank, J., conc.) [prosecutor should not deliberately and repeatedly put defendant's lawyer in dilemma where client will suffer if lawyer objects or he does not]; see also *United States v. Coveney, supra,* 995 F.2d at p. 586.) Thus, when appellant objected, the jury could very well have felt that he was trying to hide damaging information about a shoot-out and other murders that the prosecutor sought to put before them.

A jury's "verdict must be based upon the evidence developed at the trial. [Citation omitted.] This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (*Irvin v. Dowd* (1961) 366 U.S. 717, 722.) Here, in contrast, the prosecutor repeatedly and erroneously invited the jury to come to conclusions not based on the evidence, but on his own personal speculations. For this reason, as well as the others argued above, in Argument XV, *ante,* and in the opening brief, appellant's death judgments must be vacated.

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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 IN HONDURAS

Appellant argued that the court abused its discretion by permitting the prosecutor to cross-examine appellant on whether he was wounded during a shoot-out in Honduras, rather than by Kim during the Woodley Market crimes. As a result, the jury heard inadmissible, inflammatory and prejudicial nonstatutory aggravating evidence. Respondent's argument that the claims are forfeited and lack merit is incorrect.

The claims are not forfeited. Appellant objected on the grounds that the prosecutor lacked a good faith basis for his questions and was attempting to present other crimes evidence. (26RT: 4592-4594.) This complied with the general rule that to establish misconduct, the defense must object at trial on the grounds that the prosecutor lacked a good faith belief that the suggested facts exist, and that the prosecutor did not have evidence to prove those facts. (*People v. Bolden* (2002) 29 Cal.4th 515, 563-564; see also *People v. Pearson* (2013) 56 Cal.4th 393, 434 [objection to admissibility of evidence for impeachment purposes preserved misconduct issue for appeal].)

Additionally, contrary to respondent's argument, in context, both the prosecutor and the court would have understood that appellant's objection to "other crimes evidence" referred to aggravating evidence of prior criminal activity admissible under factor (b).[34] (See, e.g., 24RT: 4213 [prosecutor

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[34] Factor (b) of section 190.3 permits the introduction of evidence of the presence or absence of criminal activity by the defendant that involved (continued...)

describes forthcoming "prior criminal activity" evidence under factor (b)] during penalty phase opening statement]; see also *People v. Partida* (2005) 37 Cal.4th 428, 434-435 [to further purposes of requirement of a specific objection, the requirement must be interpreted reasonably, not formalistically; objection must fairly inform court and opposing party reasons for it].)

Finally, any possible forfeiture should be excused for the reasons stated *ante,* in Argument XVIII. For these reasons, the court should reach the merits of appellant's claims.

C. The Court Erred In Allowing Repeated Questions Suggesting Appellant Was Involved In a Shootout In Honduras In February 1992

Appellant testified at the penalty phase that Kim fired his gun, whereupon appellant shot back and, he believed, killed Kim. (RT: 24RT: 4191; 26RT: 4538.) In response, the prosecutor cross-examined appellant with a series of questions based upon information from an inadmissible Honduran newspaper article. (AOB 276-277; 26RT: 4592-4596.)

Respondent cites *People v. Harris* (1981) 28 Cal.3d 935, 953 (*Harris*), for the proposition that "evidence of 'an unrelated offense' may be introduced through cross-examination if it refutes a defendant's statement made on direct examination" (RB 324), but *Harris* is not applicable. There, the defendant volunteered information – that he was on parole – in response to cross-examination on a different topic at the guilt phase. (*People v. Harris, supra,* 28 Cal.3d at pp. 952-953.) The *Harris* court found the

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[34](...continued)
the express or implied use or attempted use of force or violence. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.)

question proper; the prosecutor had not intended to elicit the information and the scope of cross-examination is wide when a defendant makes a general denial of the crime, as Harris had. (*Id.* at p. 953.) Here, there was no general denial; in fact, appellant conceded his culpability for shooting Kim during his guilt phase opening statement (9RT: 1292-1293), told the jury at the guilt phase closing argument that it was "abundantly clear" that appellant shot Kim, and testified to this at the penalty phase. (22RT: 3885; 26RT: 4538.) Also unlike *Harris*, the prosecutor here pressed appellant until he elicited the inadmissible evidence. (AOB 281-282.)

Respondent nevertheless argues that the court properly permitted the prosecutor to ask about the three-month gap between the Outrigger crimes on December 31, 1991, and the El Siete Mares Restaurant crimes on April 18, 1992, because this gap, "rendered it more likely that appellant received his wounds in January or February 1992" than during the Woodley Market crimes. (RB 327.) The Court should reject this relevancy argument because it is illogical and lacks evidentiary support. Respondent does not explain why one should infer that appellant was shot during the first three months of 1992 rather than any other time period predating the Woodley crimes. Thus, even under the court's theory that the prosecution was entitled to suggest the bullet was acquired some other time (26RT: 4593), the proper question would only have been whether appellant got shot at a time other than by Kim. (AOB 278-281.) The cross-examination at issue shows that the prosecutor had a different interest, i.e., telling the jury that the prosecution had information that appellant was involved in "the shoot-out" that took place in Honduras in early 1992. (26RT: 4595.)

D. The Prosecution's Repeated Improper Questions And Insinuations Constituted Misconduct

Contrary to respondent's argument (RB 325-327), the prosecutor did not have a good faith basis for cross-examining appellant based on information in a Honduran newspaper article (AOB 285, 24RT: 4192-4193), and the court abused its discretion by letting him do so. As respondent notes, without a good faith basis that other, uncharged crimes occurred, a prosecutor cannot cross-examine a defendant about them for the purpose of placing "damaging insinuations before the jury." (RB 323-324, quoting *People v. Mickle* (1991) 54 Cal.3d 140, 191.)

Respondent cites no authority for the argument that the unsubstantiated contents of a Honduran newspaper article provided a good faith belief in the facts underlying the cross-examination. Indeed, much more is required under this Court's cases, e.g., some types of institutional and criminal justice records may suffice. (See e.g., *People v. Pearson, supra,* 56 Cal.4th at p. 434 [prosecutor read from complaint charging witness with fraud]; *People v. Friend* (2009) 47 Cal.4th 1, 80-81 [records]; *People v. Hughes* (2002) 27 Cal.4th 287, 386-388 [police records]; *People v. Mickle, supra,* 54 Cal.3d 140, 190-191 [Napa Hospital records]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1181 [statement given to prosecutor's investigator].)

The prosecutor's failure to follow the court's ruling regarding the Honduran newspaper article further demonstrates the prosecutor's lack of good faith. When the prosecutor first brought up the possibility of impeaching defense mitigation witnesses using the article, the court observed that it was a "pretty broad leap" from "just the fact that [appellant] had an article there and there's a reference to El Morro" to questioning appellant's witnesses about it. (19RT: 3244-3245.) At the prosecution's

request, the court reserved ruling on the matter, but instructed the prosecutor to come to the side before asking a question about it. (19RT: 3245.)

At the start of the penalty phase, the court asked the prosecutor if he had talked to any witnesses to the alleged robbery/shooting in Honduras so that he had "some good faith position as to the accuracy of those statements" in the article.[35] (24RT: 4192.) Because the prosecution had not, the court prohibited the prosecutor from questioning defense mitigation witnesses using the article. (24RT: 4191-4194.) The court granted the prosecutor's request to renew the motion depending upon the testimony of defendant and his witnesses. (24RT: 4193-4194.) However, the prosecutor never renewed the motion, or approached the bench before questioning appellant about events apparently described in the article, i.e., a shootout early in 1992. (26RT: 4595-4596.) This alone demonstrates the prosecutor's lack of good faith. (See *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782 [failure of counsel to abide by court ruling "inexcusable"];
Thomas v. Hubbard (9th Cir. 2001) 273 F.3d 1164, 1175-1177, overruled on other grounds by *Payton v. Woodford* (9th Cir. 2002) 299 F.3d 815, 829, fn. 11 [intentional misconduct where, after court excluded evidence that defendant used a gun in prior robbery, prosecutor cross-examined defendant on whether he robbed someone with, and plead guilty to robbery with, firearm].)

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[35] The prosecutor initially described the article as indicating that a suspect named "El Morro" was involved in a Honduran bank robbery in which six or seven bank tellers were killed. (19RT: 3244).) The prosecutor later stated that there were six articles, and two people were shot but not killed. (24RT: 4191-4193.)

Respondent argues good faith was supplied by appellant's response to the prosecutor's question implicitly acknowledging that a shootout had taken place when he denied involvement. (RB 325, 327.) Appellant disagrees. First, as the court recognized, at most this might show that appellant may have "collected articles." (24RT: 4193.) Second, a prosecutor may attempt to establish the foundation for relevance of other evidence through questioning a defendant, but only if he has a good faith belief that such facts exist. (*People v. Lucas* (1995) 12 Cal.4th 415, 467.) As explained above, both the nature of the evidence, a newspaper article from Honduras, the court's ruling that the prosecutor could not question witnesses based on it, and the prosecutor's failure to renew his motion to use the newspaper article (24RT: 4191-4194), all establish that the prosecution did not have a good faith basis. The fact remains that the article and its contents were *inadmissible* evidence, and a "prosecutor commits misconduct by intentionally eliciting inadmissible evidence." (*People v. Hajek* (2014) 58 Cal.4th 1144, 1210, original italics; AOB 279-282; see also *People v. Wells* (1893) 100 Cal. 459, 462 [even where prosecutor has reason to believe the matter insinuated in his question, asking question is error where prosecutor knows jury should not consider the evidence].)

Respondent argues that because the prosecution did not present evidence of other crimes related to the newspaper article, there was no misconduct. (RB 327.) However, the fact that the prosecution did not further violate the court's order is irrelevant, not least because this Court long ago recognized the importance of questions over answers, even when a witness answers in the negative:

> It is quite evident that the *questions*, and not the answers, were what the prosecution thought important. The purpose of the

> questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense.

(*People v. Wells*, *supra,* 100 Cal. at p. 464, quoting *People v. Mullings* (1890) 83 Cal. 138.)

As a fallback, respondent contends that even if the prosecutor framed one question in an objectionable matter, he reframed it, complying with the court's rulings. (RB 327.) This Court has previously rejected this type of argument and should reject it here. In *People v. Wells, supra,* 100 Cal. at pp. 461-462, the prosecutor asked three questions while cross-examining the defendant, then asked whether he had previously admitted to a forgery. (*Ibid.*) The Court recognized the significance of proper questions that set up an improper one. (*Ibid.*) The court in *People v. Grimes* (1959) 173 Cal.App.2d 248, 253-254, also recognized the "vice" of a line of questioning such as that here whereby the prosecutor unduly emphasizes a matter by repeating or enlarging on a question even after getting a negative answer from a witness.

Finally, respondent justifies the cross-examination on the ground that the prosecution needed to refute appellant's weak and "apparently false" evidence that he was shot at Woodley Market. (RB 325-327.) If there is supporting authority for a logical relationship between the strength or weakness of evidence and the scope of cross-examination, respondent does not supply it. Respondent is also wrong on the facts. There was substantial evidence that Kim shot his gun at Woodley Market (AOB 286), and that appellant was shot then. According to the prosecution's guilt phase

evidence, appellant and Kim were together in the close confines of the freezer when the shooting started, and although witnesses heard the first shot, no one saw who fired it. (17RT: 2804-2807 [Galvez testimony]; 19RT: 3285-3288 [Rivera testimony].) Similarly, respondent argues that appellant's testimony was improbable because his blood was not found at the crime scene, and he was able to participate in the Case Gamino crimes two weeks later. (RB 325.) However, the record does not support these inferences as it indicates only that a wound such as appellant received "may" bleed. (27RT: 4694-4695.) In any case, the matter is irrelevant to the issue at hand, i.e., the proper scope of cross-examination and prosecutorial error.

G. The Errors Were Prejudicial and Reversal Is Required

Respondent argues there could be no prejudice because the jury was instructed that the only other crimes evidence it could consider was appellant's conviction of possession for sale, and crimes associated with Rod's Coffee Shop, and that given all the aggravating evidence, the "brief mention of a shootout" could not have tipped the scales in favor of a death verdict." (RB 328.) Appellant suggests this argument is disingenuous, considering the prosecutor's repeated efforts to get before the jury suggestions, insinuations and inadmissible, unreliable evidence that appellant engaged in a shoot-out in Honduras in which he might have been shot, and might have killed people, as described above and in Arguments XV and XVIII.B, *ante*. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 818 ["A statement of supposed fact not in evidence is a highly prejudicial form of misconduct. As such, it is a frequent basis for reversal"]; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1099 [once improper suggestion made, any question or remark related to earlier one, whether or not admissible, again raises the offensive suggestion].) This is especially so, considering the

prosecutor's penalty phase argument 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.) (See *State v. Hinds* (App.Div.1994) 278 N.J.Super. 1, 17–19 [650 A.2d 350], revd. on other grounds (1996) 143 N.J. 540 [674 A.2d 161] [prosecutor's improper questions of witness regarding stolen items in her home, and reference in argument to his longstanding position as prosecutor, may have conveyed to jury that prosecutor knew of bad acts not in evidence; thus comments were highly prejudicial and deprived defendant of fair trial].)

In addition, the denial of involvement that the prosecution elicited from appellant (26RT: 4595-4596), fit right in with its penalty phase theme that appellant lied under oath and deceived and manipulated his religious mitigation witnesses. (See AOB 260-262.)

The fact that the court sustained some of appellant's objections did not mitigate the harm:

> [W]here the prosecuting attorney asks a defendant questions . . . where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict.

(*People v. Wells, supra,* 100 Cal. at p. 463.)

As argued above, in Argument XV and XVIII, *ante*, and in the opening brief, the prosecution cannot show that the errors did not influence the penalty phase verdicts, and appellant's death judgments must be set aside.

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XX.

THE TRIAL COURT ERRONEOUSLY PERMITTED IMPROPER IMPEACHMENT OF APPELLANT'S RELIGIOUS MITIGATION WITNESS

The trial court prohibited appellant from asking his religious mitigation witnesses whether they believed he was telling the truth about his religious conversion, because that was a question for the jury. Prison minister Arturo Talamante volunteered on direct examination that he had seen only two other inmates with appellant's level of spirituality. Over defense objection, the court then ruled that the prosecutor could impeach Talamante's purported assessment of appellant's sincerity through extensive cross-examination about one of those inmates, Bedolla Duarte (Bedolla). Despite the irrelevant, collateral, and improperly prejudicial evidence elicited during the cross-examination regarding Bedolla, respondent disagrees that the court's ruling was an abuse of discretion.

Respondent states that appellant called Talamante and others to testify about the sincerity of appellant's conversion, which was appellant's penalty phase defense. (RB 340, 342.) This misapprehends the record. [36]

Appellant initially proposed to present two religious witnesses as experts to talk about the quality of the content of Exhibit 505,[37] a Bible study

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[36] Respondent's factual discussion for this argument covers preliminary discussions among the parties and court about various aspects of the proposed religious mitigation evidence (see RB 329-333), but does not appear to reference the initial discussion and ruling relevant here, i.e., that religious witnesses could not be asked their opinions whether appellant was telling the truth regarding his conversion. (25RT: 4363-4373.)

[37] Exhibit 505A is the original Spanish version of appellant's Bible study, and Exhibit 505 an English translation; only the latter was admitted (continued...)

that appellant wrote in jail called "The Fundamental Truth of the Bible." (25RT: 4362-4363.) They would testify that appellant accurately understood the theology of the Bible, allowing the inference that he had converted in both mind and heart. (25RT: 4362-4365.) Other religious witnesses would then testify regarding religious discussions with appellant. (25RT: 4364.) Appellant's theory was that a converted person who devoted himself to studying the Bible, and then truly understood it, could reflect the truthfulness of his conversion. (25RT: 4364-4365.)

The court denied appellant's request on the grounds that testimony that appellant correctly interpreted the Bible constituted expert testimony on an inappropriate subject for expertise, was irrelevant, and would create confusion under Evidence Code 352.[38] (25RT: 4366-4369.) The religious witnesses could testify about their discussions with appellant, but not that they believed appellant had found God or ask the ultimate question, i.e., whether appellant was truthful, as the latter was for the jury to decide. (25RT: 4369-4371, 4373.) Appellant could also elicit testimony that he had a deep understanding of the Bible and the ability to help other inmates accept religion, which was a benefit to society and a reason to keep him alive. (25RT: 4371-4373.)

As argued in the opening brief, appellant abided by the court's ruling. (AOB 293, 295.) Thus, to the extent respondent suggests that appellant asked Talamante on direct examination to testify about the sincerity of appellant's conversion (RB 340, 342), respondent is incorrect.

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[37](...continued)
into evidence. (27RT: 4791.)

[38] Respondent therefore incorrectly describes Talamante as "a religious expert." (RB 342.)

Consistent with the court's ruling, defense counsel asked Talamante on direct examination to describe appellant's knowledge of the Bible. (26RT: 4622.) Talamante responded that in "the past 25 years, I've only found two people who have the spirituality that [appellant] has had. In every one of his letters, he has demonstrated a love, a desire to give himself over to the Lord . . . . I saw so much learning and so much spirituality within" a Bible study appellant sent that Talamante typed it up. (26RT: 4622.) Respondent argues that based on the testimony about only finding two people with appellant's level of spirituality, the court properly ruled that the prosecutor could impeach Talamante on his belief in Bedolla's sincerity. (RB 340, 342; 26RT: 4641.) However, the court's ruling was incorrect because, inter alia, it falsely equated testimony on appellant's level of spirituality with inadmissible opinion testimony about the sincerity of appellant's religious beliefs.

Spirituality is defined as "[o]f, relating to, or affecting the human spirit or soul as opposed to material or physical things" and "[o]f or relating to religion or religious belief." (<http://www.oxforddictionaries.com/us/definition/american_english/spiritual> [as of June 27, 2014].) Asked to describe appellant's knowledge of the Bible, Talamante responded directly to the question by testifying about the level of appellant's learning as reflected in his Bible study. (26RT: 4622.) This matched the definition of "spirituality" above, as did his testimony that in every letter appellant wrote to Talamante, appellant demonstrated his desire to give himself over to God. (26RT: 4622.)

Respondent nevertheless argues that the prosecution was entitled to question Talamante's testimony favorably comparing appellant and others in terms of religious knowledge and spirituality. (RB 342.) But respondent

never explains the leap of logic from that testimony to the issue of sincerity, arguing only that without the cross-examination on the comparison, the jury would have been left with a false or incomplete factual basis upon which to evaluate Talamante's testimony. (RB 340, 342.) Thus, contrary to court's ruling and respondent's argument, Talamante's testimony above was not a comment on the sincerity of appellant or Bedolla.

The court also never explained why it was "appropriate" to cross-examine Talamante on his "belief in the sincerity of [Bedolla] and test his belief also of [appellant]." (26RT: 4640.) Similarly, when appellant objected to questions about Bedolla's criminal conduct as impeachment on a collateral matter, the court repeated, but again did not explain, the logic of its earlier ruling: "I'm allowing it. . . . [H]e indicated of his 25 years there's only been two people of the level of spirituality he has ever experienced," and the prosecutor had a right to explore that. (26RT: 4641.) In fact, the prosecutor's questions about whether those who had a true conversion would go out and commit vicious acts of murder, followed by questions revealing Bedolla's post-conversion criminality (26RT: 4637-4643) were completely collateral and even more removed from the proper scope of cross-examination. (AOB 292-295.)

Respondent addresses only one of the cases appellant discussed in his opening brief, *People v. Melton* (1988) 44 Cal.3d 713, 742-744 (*Melton*). (AOB 290-291.) Respondent argues that *Melton* is inapposite because once Talamante testified about appellant's "purported religious knowledge and depth of spirituality . . . . he was subject to cross-examination on his opinion to test the sincerity of appellant's beliefs." (RB 342.) As argued above, this conclusion does not stand up to logical analysis, and under the reasoning and holding of *Melton, supra,* 44 Cal.3d at pp. 743-745, Talamante's opinion

about Bedolla's believability had no "tendency in reason" to prove or disprove Talamante's testimony regarding appellant. (*Id.* at p. 744.)

Respondent also argues that the Court's analysis in *People v. Melton, supra,* 44 Cal.3d at pp. 743-744, is inapplicable to the circumstances of appellant's penalty phase, where the jury's task was to make an individualized, normative decision regarding punishment. (RB 342-343.) Respondent does not otherwise explain or provide authority for this argument. In *Melton, supra,* 44 Cal.3d 713, 744, the Court relied upon Evidence Code section 780,[39] and has applied section 780 to penalty phase issues as well. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 85-86; *People v. Bennett* (2009) 45 Cal.4th 577, 603-604; *People v. Carpenter* (1997) 15 Cal.4th 312, 408; *People v. Mickle* (1991) 54 Cal.3d 140, 196-197 [all analyzing propriety of penalty phase cross-examination using Evidence Code section 780].)

As respondent pointed out, the jury's role at the penalty phase is "to render an individualized, *normative* determination about the penalty appropriate for the particular defendant." (RB 342, quoting *People v. Brown* (1988) 46 Cal.3d 432, 448, italics in original.) This in turn requires "reliability in the determination that death is the appropriate punishment in a specific case." (*Id.*, quoting *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Here, the proceeding was manifestly unreliable because the prosecutor was able to twice establish that appellant and Bedolla had developed a "close relationship" in jail (26RT: 4637, 4639), and then, over

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[39] Evidence Code section 780 provides that a "court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to" certain listed factors.

defense objection, ask a series of questions about whether "someone like Mr. Bedolla or [appellant]" who had found God could nevertheless go out and commit murder (26RT: 4637), and then further tie appellant to Bedolla by twice asking whether Talamante expected that the two would work together if sentenced to same prison. (26RT: 4639-4640.)

All this suggested guilt by association because the prosecutor testified, through her question, that Bedolla had just been convicted of three counts of first degree murder, five counts of attempted murder, 12 robbery related counts and 12 counts of assault with a firearm. (26RT: 4643.) The prosecutor again brought the two together when she argued, "[w]ell, 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" who found religion before he committed his crimes. (30RT: 5329.)

The court's rulings regarding the Bedolla cross-examination introduced unreliable, irrelevant and inflammatory evidence lacking in probative value and combined with the prosecutor's argument, suggested guilt by association. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 131-132, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2 [irrelevant penalty phase evidence that drug addicts entered defendant's residence appeared to be effort to prove "guilt by association"].)

In short, nothing that appellant asked or that Talamante said during his direct examination raised the issue of Talamante's ability to judge the sincerity of those whom he ministered in jail.

E. The Errors Were Prejudicial and Reversal Is Required

Respondent argues that there could be no prejudice because appellant was "an uneducated thug . . . closely associating with Bedolla Duarte," which contradicted Talamante's testimony about the level of appellant's Bible study. (RB 343.) For this reason, appellant's defense was "patently unbelievable," and gave "the lie to appellant's gallows conversion." (RB 343.) This prejudice analysis must be rejected because it assumes the very evidence appellant is challenging, rather than assessing the possible impact of the error on the trial. (See *Chapman v. California*, *supra,* 386 U.S. at p. 24; *People v. Watson*, *supra,* 46 Cal.2d at p. 837.)

Appellant attempted to rehabilitate Talamante on redirect examination by eliciting testimony that despite the charges against Bedolla, he had provided religious help to many inmates in jail (26RT: 4647), but the damage was done. As argued in the prejudice discussion in the opening brief, the prosecutor exploited the extensive cross-examination involving Bedolla during closing argument, and separately as well as together with the improper impeachment of appellant argued in Argument XVII, *ante*, this had a devastating impact on appellant's mitigation case. (AOB 260-264, 297-299.) For this reason, the Court should find prejudicial error. (See, e.g., *People v. Cruz* (1964) 61 Cal.2d 861, 868 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it"].)

In addition, the error, and the prosecutor's exploitation of it, distracted the jurors from the true question before them and played to their potential biases. (See *Brown v. Payton* (2005) 544 U.S. 133, 157 (dis. opn. of Souter, J.) [noting skepticism of jurors toward postcrime religious conversion evidence].) This in turn improperly undermined their

impartiality. (See *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [finding constitutional error where prosecutor, despite a strong case, needlessly coupled it with even stronger appeal to passion and prejudice].)

The jury instructions did not act as an effective counter. The jurors were instructed at the guilt phase that they were the sole judges of the believability of a witness (11CT: 3101; 21RT: 3677) and at the penalty phase that they were to be guided by the earlier instructions that were "pertinent and applicable to the determination of penalty." (12CT: 3497; 29RT: 5235.) However, given the extensive, inflammatory nature of the cross-examination and the prosecution's argument on it, it was too late to unring the bell. (See *People v. Hill* (1998) 17 Cal.4th 800, 845–846.)

Respondent argues that the persuasive value of appellant's penalty phase defense was so minimal that there could be no prejudice. (RB 344.) However, appellant had only to persuade a single juror to prevent the death sentences from being imposed. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; 12CT: 3505; 29RT: 5255.) And this Court has recognized that evidence from religious witnesses about the ability of life-sentenced individuals to change can alter the outcome at the penalty phase and that mitigation evidence that is not "very compelling" may make the difference between a life or death verdict even in an egregious case. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 953-954, 962.) Here, appellant presenting a mitigating life history, had no prior violent criminal history, took responsibility for the two murders and most of the other counts, and presented strong evidence regarding his religious conversion and desire to help others have better lives through spiritual renewal. (See AOB 30-33.) Given this, respondent has not shown, beyond a reasonable doubt, that no juror would have struck a different balance had she been able consider appellant's mitigation case

without the inadmissible, irrelevant, collateral and extremely prejudicial nonstatutory aggravating evidenced adduced during cross-examination of Talamante regarding Bedolla. (*Chapman, supra*, 386 U.S. 18, 24-25.)

For all the reasons above, in Argument XVII, *ante*, and in the opening brief, appellant's death judgments must be vacated.

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XXI.

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

Appellant argued that the prosecutor erred multiple times during closing argument at the penalty phase and the Court therefore must grant appellant a new penalty phase trial. Respondent argues that some of appellant's contentions are waived and none are meritorious. Appellant addresses only those contentions requiring a response and does not waive other portions of his argument.

B. Misstatements And Misrepresentations Of The Law

Respondent claims that evidence of premeditation was highly relevant to the jury's penalty determination because it showed that appellant's conduct amounted to far more than the "typical" felony murder. (RB 351-352.) There are several problems with this contention.

First, what the prosecutor actually argued – that a murder with premeditation and deliberation "certainly" was more aggravating than an unintentional or accidental killing during the court of a robbery – was a misstatement of the law.[40] (29RT: 5279.) This Court rejected a proposed jury instruction to this effect in *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455, abrogated on another point as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

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[40] The prosecutor argued: "Certainly premeditation and deliberation is certainly more aggravating than an unintentional killing or accidental killing during the course of a robbery, which would also be a first degree special circumstance killing. But this makes it even more aggravated. It's not legally necessary for you to find premeditation or deliberation, but it's helpful to your determination in assessing the weight to give to this crime." (29RT: 5279)

The proposed *Ochoa* instruction would have told the jury that, "[t]he circumstances of the crimes can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal ranging, for example, from the most intentional of willful, deliberate, and premeditated murder to the most accidental of felony murders." (*People v. Ochoa, supra,* 26 Cal.4th at p. 454.) This Court noted that under California law, both premeditated and felony murders qualify as murder in the first degree, and California deems both to be among the most serious kinds of murder. (*Id.* at p. 455.) California has further categorized murder in the commission of an enumerated felony as a special circumstance, which supports a sentence of death or life imprisonment without possibility of parole. (*Ibid.*, citing § 190.2, subd. (a)(17).) The Court held that the proposed instruction would have incorrectly informed jurors that felony murders are less serious for the purpose of punishment than premeditated and deliberate murders. (*People v. Ochoa, supra,* 26 Cal.4th at p. 455.) The proposed instruction was also improper because there was no evidence that the murder at issue was accidental. (*Ibid.*)

Here, the prosecutor argued exactly the same hierarchy of blameworthiness that this Court rejected in *Ochoa*, starting with an unintentional killing during a felony and ending with deliberate and premeditated murder. (29RT: 5279.) For this reason, the trial court incorrectly overruled appellant's objection that the line of argument went beyond the scope of the instructions. (29RT: 5279.)

The court, in overruling appellant's objection, characterized the prosecution's argument as "what the common person would understand as premeditation – or intentional as opposed to the technical elements we refer to." (30RT: 5299.) The prosecutor's language, however, strongly implied

that she was using a "technical" term, as in the very next sentence, she linked premeditation to what was and was not "legally necessary" for the jury to find. (29RT: 5279.) Moreover, the prosecutor could easily have made these points without using these particular technical, legal terms, which are highly salient in the context of a murder trial. (See *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1257 [rejecting government's contention that improper argument was a fair comment on defense argument where "the prosecutor could easily have made these points without" the improper implication]; *State v. Akins* (2014) 298 Kan. 592, 604-605 [315 P.3d 868, 878] [where no expert testimony on grooming introduced, court found misconduct, rejecting State's argument that prosecutor was merely using word "grooming" as commonly understood, as jury could reasonably infer it referred to defendant's "grooming" of sexual assault complainants, which has specific meaning in context of sexual abuse].)

Instead, the prosecutor presented the argument in a manner such that it is reasonably likely that the jury was misled into thinking that evidence of premeditation did, by law, make the crime more aggravating. Telling the jury that it was not necessary to make such a finding for a death sentence did not nothing to reduce the misleading nature of the argument, especially as there were no instructions to the contrary either before or after the argument.

Moreover, the prosecutor's argument to the jury that finding premeditation and deliberation would be "helpful to your determination in assessing the weight to give to this crime," and reminder that some of the jurors had indicated on their questionnaires that a premeditated murder was more aggravating (29RT: 5279), demonstrates that her use of the language

was not casual, but directed toward improperly bolstering factor (a) evidence by tying it to inapplicable legal concepts.[41]

Second, as appellant argued below, the prosecution insisted on proceeding only on a felony murder theory at the guilt phase, eliminating any chance that the jury might return a verdict of second degree murder. (AOB 300; 30RT: 5297; see also 21RT: 3697-3708 [discussion of guilt phase instructions].) The prosecution had charged appellant in Count 5 with the attempted willful, deliberate, premeditated murder of Medina. (7CT: 2015.) Recognizing the possible conflict between a felony-murder theory as to Hoglund, and a premeditated theory as to the attempted murder of Medina very shortly afterwards, which might benefit the defense, and after the court noted that it would "eliminate an issue on appeal," the prosecutor decided to withdraw premeditation instructions as to Count 5. (21RT: 3708.)

Plainly put, the prosecution should not be permitted to have gained the benefit of not having to prove premeditation and deliberation beyond a reasonable doubt at the guilt phase under jury instructions that correctly stated the law, and which the defense could have argued, and then have been permitted to use these terms loosely to unfairly bolster the prosecution's factor (a) evidence when the jury would decide appellant's fate.

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[41] Sitting jurors V.L., S.B. and E.S., all indicated on page 16 of their questionnaires that they "strongly agree[d]" that anyone who intentionally kills any other person should always get the death penalty. (2SCT, Vol. 6 at 1747, Vol. 5 at 1435 and Vol. 3 at 621.) (Juror R.H. strongly agreed as well, but appellant has not counted this response because he also strongly agreed that such a person should never get the death penalty. 2SCT, Vol. 1 at 568.) All but one of the rest of the sitting jurors agreed somewhat with the statement. (2 SCT, Vol. 4 at 963, 989, 1148; Vol. 5 at 1409; Vol. 6 at 1669; Vol. 7 at 1903, 1825, 1877.)

"California public policy 'will not permit a litigant "to blow hot and cold"' by taking the benefits of a doctrine 'when it suits his purpose' and then repudiating the same facts 'when it is no longer profitable or to his advantage to do so' [Citations]." (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 525 [agency may not rely on statutory provision to overcome a conflict of interest and simultaneously deny the existence of the conflict of interest].) Basic notions of equity prohibit such gamesmanship, which is particularly unseemly in a capital trial where the defendant's life is at stake. As this Court stated in granting a new penalty retrial because the prosecutor used inconsistent theories of culpability without a good faith justification, "'[t]he criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth.'" (*In re Sakarias* (2005) 35 Cal.4th 140, 159-160, quoting *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.)

People v. Williams (2006) 40 Cal.4th 287 (not cited by respondent), does not defeat appellant's claim. There, the defendant was asked to, and did, plead guilty to premeditated and deliberate malice murder, with his attorney noting that he did so only under a felony murder theory, which is what the evidence would have supported. (*Id.* at p. 305.) The prosecutor then argued at the penalty phase that the defendant committed the murder with premeditation and deliberation. (*Ibid.*)

On appeal, the defendant contended that the prosecutor thereby affirmatively misled him regarding the evidence to be presented in violation of due process as well as the notice requirement of section 190.3. (*People v. Williams, supra,* 40 Cal.4th at pp. 304-305.) The Court rejected both arguments. There was no unfair surprise because nothing in the plea colloquy suggested that the prosecution had agreed not to present evidence

or argue during the penalty phase that the murder was premeditated. (*Id.* at p. 305.) The prosecution did not violate the statutory notice requirement because section 190.3 authorizes a prosecutor to present evidence of the circumstances of the crime in aggravation. (*Ibid.*)

Here, in contrast, appellant was not charged with premeditated murders (7CT: 2011, 2015), and the prosecutor specifically chose to proceed only on a felony murder theory at the guilt phase, as noted above.

Respondent argues that even without the prosecutor's remarks, the actions of appellant were such that the jurors would have "noticed" that his actions demonstrated premeditation and deliberation. (RB 352.) However, the jury never received instructions on premeditation and deliberation, so had no way to assess the prosecutor's use of these terms. And, although the prosecutor told the court and counsel that "[o]bviously, we are way beyond" the issue of a first degree murder conviction on a premeditation and deliberation theory (30RT: 5298), she did not tell the jury this. (Cf. *Kaiser v. New York* (1969) 394 U.S. 280, 281, fn. 5 [although prosecutor mischaracterized recorded conversation as confession, no prejudice because jury knew prosecutor was referring to recording and there was no representation about evidence which jury was not itself in a position to evaluate].)

Thus, the jury would have understood that under the law, premeditated and deliberate murder is more aggravated than felony murder, and was present in appellant's case as demonstrated by the evidence described by the prosecutor. This improperly bolstered the circumstances of the crime evidence, such that the jury would have felt that evidence was even more aggravated than it otherwise would be.

The jurors were a receptive audience for the prosecutor's misleading and erroneous statements, because, as noted *ante*, all the sitting juries agreed or agreed strongly that an intentional killing should get the death penalty. This comports with the result of studies showing that many jurors believe – despite a judge's instructions – that they must impose the death penalty if the crime was premeditated or intentional. (Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation* (2008) 36 Hofstra L. Rev. 1035, 1037.)

Respondent argues that there can be no prejudice because the jurors, who are presumed to follow instructions, were given the applicable factors and instructed that their decision must be based on the law and evidence and that the instructions trumped attorney argument if there was a conflict. (RB 357.) However, neither the instruction on factor (a), circumstances of the crime (12CT: 3499; 29RT: 5238-5239), or any other penalty phase instruction, alluded to premeditation and aggravation. (12CT: 3495-3505; 29RT: 5233-5256; 30RT: 5498-5499.) Thus, the instructions, which were given before closing arguments, did nothing to dispel the deceptive way that the prosecutor described premeditated murder as more aggravating, and then pointed the jurors to various bits of evidence through which the jury could find premeditation and deliberation. (29RT: 5279-5282.) This including the overall number of crimes; the "well over 100 victims;" photos of the codefendants, but not appellant, with guns; photos of appellant and his codefendants wearing jewelry; and jewelry and property found in the defendants' possession through search warrants. (29RT: 5279-5282.) Accordingly, the instructions did nothing to counter the prosecution's legally erroneous argument and inflation of the circumstances of the crime evidence. (AOB 300-302.)

For all these reasons, it is reasonably likely that the jury misconstrued or misapplied the prosecutor's improper argument that they should find and use premeditation and deliberation as factor (a) evidence against appellant. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

C. Improper Tactics Designed To Mislead The Jury

Appellant recognized in the opening brief that the issue of the prosecutor's improper argument alluding to evidence outside the record was imperfectly preserved. (AOB 303.) For the reasons stated there, as well as in Argument XVIII, *ante,* the Court should review this claim.

Respondent argues that the prosecutor's comments during opening statement merely informed the jury that it must focus its attention on the statutory factors in aggravation, and during closing argument, that the prosecution would focus on factor (a) evidence. (RB 356.) Were that the case, the prosecutor could have used straight forward language to that effect. Instead, she told the jury the prosecution "chose" to rely on the guilt phase evidence at the penalty phase. (29RT: 5261.) To "choose" is not to "focus." Choosing means to "decide on a course of action, typically after rejecting alternatives" and to "pick out or select (someone or something) as being the best or most appropriate of two or more alternatives." (Oxford English Dictionary <http://www.oxforddictionaries.com/us/definition/american_english/choose?q=choose> [as of July 7, 2014].) By using the language she did, the prosecutor invited the jury to speculate on the evidence the prosecution "chose" not to select. This dovetails with the prosecutor's similar remark during the penalty phase opening statement that they were not permitted to tell the jury everything about the defendants. (AOB 302-303.)

It is improper for the prosecution to hint that but for certain rules, it would have presented other evidence to the jury. (See *People v. Bolton* (1979) 23 Cal.3d 208, 212 & fn. 1 [where defendant had impeached prosecution witness with prior felonies, improper for prosecutor to argue that but for certain rules of evidence he could show that defendant was "just as bad a guy"]; *Kitchell v. United States* (1st Cir. 1966) 354 F.2d 715, 719 [improper to refer jury to "certain rules of evidence" that the judge would instruct on, regarding limits on prosecution evidence]; *People v. Castricone* (N.Y. App. Div. 1993) 604 N.Y.S.2d 365, 366 [198 A.D.2d 765, 766] [improper for prosecutor to insinuate during summation that due to a "rule of law," she was not allowed to present to jury other information to support defendant's conviction].)

Respondent argues that there can be no prejudice because the jury was instructed that its decision had to be based on the law and evidence, and that the court's instructions trumped attorney argument on the law. (RB 357.) However, the remarks were not made in isolation. Petitioner incorporates by reference herein Arguments XV, XVIII, XIX, and XX, *ante*, and in the opening brief. In light of the prosecution's numerous efforts, described in these arguments, to lead the jury to speculate that appellant had previously killed people in his own country, it is reasonably likely that the jurors misconstrued or misapplied these improper remarks despite any general instruction.

D. Improper Vengeance Argument

Respondent incorrectly argues that this claim has been forfeited because appellant merely commented upon codefendant Navarro's objection, rather than objecting and requesting an admonition. (RB 358-359.) As stated in appellant's opening brief, however, all defendants were deemed to

join in all of each others motions/objections unless they specifically excluded themselves. (AOB 273, fn. 65.)

Here, the court overruled the first defense objection to the vengeance argument without allowing counsel to approach. (30RT: 5367.) When defense counsel were permitted to argue the matter, the court defended the prosecutor, incorrectly characterizing her argument as merely saying that the jurors swore to uphold the law. (30RT: 5371.) After defense argument, the court again overruled the objection, but told the prosecutor to "stay away from any further discussion of vengeance." (30RT: 5372.) Under these circumstances, and as demonstrated *ante*, in Argument XVIII, any further requests would have been futile.

Moreover, even if appellant simply had commented on Navarro's objection, as respondent maintains, his objection would be preserved. (See *People v. Chism* (2014) 58 Cal.4th 1266, 1291 [on appeal, defendant may raise a claim his codefendant made at trial even though defendant did not join in the objection, where defendant reasonably believed doing so would be futile].)

Respondent argues that the prosecutor's vengeance arguments were made to counter possible defense arguments that sympathy and mercy should mitigate the aggravating factors. (RB 359.) The record shows, however, that the prosecutor introduced the topic to counter possible defense arguments that the death penalty is "pure revenge." (30RT: 5365.) Of course, the defense had not yet argued, and in any case, would not have opened the door to the prosecutor's misconduct. (See *People v. Pic'l* (1981) 114 Cal.App.3d 824, 871, (disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 496–498 ["two wrongs do not make a right";

defense counsel's misconduct does not justify tit-for-tat answering misconduct by prosecutor].)

Respondent argues that the prosecutor's statement that "[w]e owe the victims in this case vengeance as part of our system of justice and as sanctioned by the laws of this state, and that you swore to uphold as jurors in this case in determining penalty" (30RT: 5367), reasonably related to the jurors' oath to follow instructions, and thus to California's laws. (RB 360.) It appears that the trial court overruled the defense objection on the same theory, as it remarked that the prosecutor had "refined [her argument]. They swore to uphold the law, not to impose death, is what she argued." (30RT: 5371.) This interpretation of the prosecutor's remarks is specious for several reasons.

First, even though vengeance may be a penological justification for the death penalty, it is not part of the law that the jurors swore to uphold. (AOB 304-305.) For this reason, vengeance was not "owed" to the victims as a result of the jurors' oaths. Rather, the jury's duty is to weigh the aggravating and mitigating factors and decide whether death or life without the possibility of parole is more appropriate. (*People v. Boyde* (1988) 46 Cal.3d 212, 253-254.) Thus, the prosecutor improperly described the jury's role, and in that regard misstated the law. This in turn diverted the jurors' attention from being able to consider and give effect to all relevant mitigating evidence as required by the Eighth and Fourteenth Amendments. (*Boyde v. California* (1990) 494 U.S. 370, 377-378; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-113.)

Moreover, the prosecutor's suggestion to the jury that it "owed" something to the victims was not an argument about the evidence presented during trial. Rather, it was an appeal to the jurors' self-interest and

suggested that they had a personal stake in a certain outcome. An attorney's appeal in closing argument to the jurors' self-interest is improper because such arguments tend to undermine the jury's impartiality. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 796; *People ex rel. Dept. of Public Works v. Graziadio* (1964) 231 Cal.App.2d 525, 533–534 [the "vice" of appealing to jurors' self interest violates the fundamental concept of an objective trial by an impartial jury]; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 695-696 [prosecutor's argument that "if we fail to persuade all 12 of you . . . it wipes out six months" improperly exerted pressure on jurors and appealed to their self-interest to take up a personal point of view].)

Second, by using "we," the prosecutor improperly teamed up with the jurors to the exclusion of the defense. "'The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him.'" (*People v. Eubanks* (1996) 14 Cal.4th 580, 589-590, quoting Corrigan, *On Prosecutorial Ethics* (1986) 13 Hastings Const. L.Q. 537, 538–539.) The phrasing linked back to the start of prosecutor Speer's closing penalty phase argument where (without objection), she thanked the jury "[f]rom the five police agencies, the 10 investigating officers, Deputy Perales, the surviving victims, and the families of the non-surviving victims, Mr. Grosbard, and myself" for their time and consideration. (29RT: 5260-5261.) Although appellant did not object to this, the vengeance argument should be viewed in this context.

The prosecutor's vengeance argument was not, as respondent maintains a "brief, isolated reference" that passes muster under *People v. Zambrano* (2007) 41 Cal.4th 1082, 1178. (RB 359-360; AOB 304-306.)

Rather, over the course of three pages (30RT: 5365-5367), the prosecutor built up to her exhortation that the jury "owed" the victims vengeance, because the survivors of Kim and Hoglund, the robbery victims, witnesses "and all the sea of faces[42] before you," "would like to go out and probably achieve some type of vengeance" because they could not personally "take the defendants out and shoot and torture and terrorize them or gun them down on 52nd Street." (30RT: 5367.)

This aspect of the argument was improper as there was no basis in evidence for what the victims wanted to do; it was irrelevant; it went beyond any permissible policy argument; it could only appeal to the passions and prejudice of the jury; and was impermissibly based on victim impact evidence, i.e., the supposed wishes of the victims and their families. (AOB 306; see *United States v. Lighty* (4th Cir. 2010) 616 F.3d 321, 360-361 [holding that both subtle and direct argument that victim's family was asking jury to impose death penalty was improper and violated Eighth Amendment as it lacked factual support and was based on victim impact evidence].)

According to the prosecutor's argument, appellant's jurors were not acting "alone" but instead were acting as the representatives of the People of the State of California with a license – indeed, a powerful revenge-motivated obligation – to kill. The court's earlier advisement to the jurors that if anything a lawyer said conflicted with the court's instructions, they should follow the latter (12CT: 3497; 29RT: 5234), was "not equivalent to advising it to consider only the facts of the immediate case, rather than the possible

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[42] During the prosecution penalty phase closing argument, the prosecution displayed posters with photos of victim-witnesses. (29RT: 5262.)

societal consequences of its ruling." (*United States v. Sanchez, supra,* 659 F.3d at p. 1258.)

For these reasons as well as those argued in the opening brief, it is reasonably likely that the jury interpreted and took to heart the argument as an exhortation to vote for death penalty to avenge the victims, rather than properly basing its decision on the aggravating and mitigating factors, and making an individualized determination of appellant's death-worthiness. (*Boyde v. California, supra,* 494 U.S. at pp. 377-378; *Eddings v. Oklahoma, supra,* 455 U.S. 104, 110-113.)

E. Improper Argument Under *Caldwell v. Mississippi*

Respondent first argues that *Caldwell v. Mississippi* (1985) 472 U.S. 320, is inapplicable because the prosecutor merely compared the appellant's crimes with the safeguards built into our justice system that protect people, like appellant, who are charged with crimes. (RB 361-363.) However, the suggestion that appellant is more death worthy because he did not accord the victims due process of law is contrary to the Eighth Amendment because in no homicide case, capital or non-capital, will the defendant be able to make such a showing. (See *Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1016 [state's contention that it is unfair for defendant to live since victim is dead created "super-aggravator" applicable in every death case and which no amount of mitigating evidence can counter, and if jury agrees they may not even consider mitigating evidence].) This proffered basis for the imposition of a death sentence does nothing to channel the juror's discretion, and it operates to preclude consideration of those factors relevant to the determination of a sentence in a capital case. (See *Lockett v. Ohio* (1978) 438 U.S. 586; *Eddings v. Oklahoma, supra,* 455 U.S 104.)

Next, citing *Romano v. Oklahoma* (1994) 512 U.S. 1, 9, and this Court's cases subsequent to that opinion, respondent argues that there was no error because appellant's jury was not affirmatively misled about their role in choosing the appropriate sentence. (RB 362-363.) However, as this Court has noted, "*Caldwell's* prohibition against misleading the jury as to the importance of their role 'is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" (*People v. Harris* (2005) 37 Cal.4th 310, 356, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 184, fn. 15.) As appellant argued in the opening brief, the prosecutor's argument here did just that. (AOB 306-307.)

In any case, even if the prosecutor's argument did not violate the *Caldwell* prohibition, it was still misconduct. *Caldwell* recognized that a certain kind of prosecutorial argument, if not corrected by a judge, was so damaging that it is likely to lead to reversal and established a particular standard of review for the error. (*Caldwell, supra,* 472 U.S. at pp. 340-341.) *Caldwell* does not stand for the proposition that any lesser attempts to mislead the jurors so as to diminish their sense of responsibility are acceptable and nonharmful.

Respondent argues that various instructions would have cured any prejudice. (RB 363.) For the reasons argued *post*, in subsection G., appellant disagrees.

F. Other Flagrant Misconduct

Respondent argues that the prosecutor's deterrence argument was at most "ephemeral" (RB 365) and that her comment on method of execution was a "passing reference" and "minor comment" and that the prosecutor

"may have misspoken" in seeking to counter a possible defense argument on method of execution. (RB 367-368.) In fact, the prosecutor knew the court the court had ruled that the topics were not permissible areas of argument, yet nevertheless argued them. (AOB 307-308.) Moreover, the court's rulings in this regard followed long-established California law. (*People v. Collins* (2010) 49 Cal.4th 175, 233, citing *People v. Whitt* (1990) 51 Cal.3d 620, 644; *People v. Thompson* (1988) 45 Cal.3d 86, 138; *People v. Harris* (1981) 28 Cal.3d 935, 962 [neither party may offer evidence on the manner in which executions are carried out]; see also *People v. Love* (1961) 56 Cal.2d 720, 731 [misconduct to argue general deterrent effect of capital punishment]; *People v. Harris* (2005) 37 Cal.4th 310, 356 [Court has "long held that the jury should not concern itself with protecting society"].) For this reason alone, the prosecutor's deterrence and execution method arguments were error.

Respondent argues that because the court instructed the jury that it could not consider deterrence, there was no prejudice as the jury is presumed to follow the law. (RB 365.) Appellant disputes that contention. The instructions here, given before the prosecutor's argument, "did not neutralize the harm of the improper statements because '[t]hey did not mention the specific statements of the prosecutor and were not given immediately after the damage was done.'" (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1151, quoting *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1054; see also *United States v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1172 [curative instructions inadequate where they were delayed over a period that spanned 50 pages of transcript; failed to tie in the prosecutor's misconduct; and never told the jury that the prosecutor's statement was improper].)

Method of Execution

As argued in the preceding subsection, the prosecutor erred when she discussed method of execution because under California law and the trial court's ruling, it was a prohibited topic. Citing *Antwine v. Delo* (8th Cir. 1995) 54 F.3d 1357, appellant also argued that the prosecutor's argument was another attempt to minimize the burden on the jurors in sentencing someone to death. (AOB 308.) Respondent argues that the prosecutor below did not make statements similar to those of the *Antwine* prosecutor. (RB 368.) This is a distinction without a difference. (Compare *Antwine v. Delo, supra,* 54 F.3d at p. 1361 [with gas chamber execution, defendant will "be put to death instantaneously"] and 30RT: 5368 ["any means of execution in our state . . . is done . . . with great attempts to make it as humane as possible"].)

Moreover, the prosecutor argued facts not in evidence when she told the jury that executions in California are done as humanely as possible. As the prosecutor undoubtedly knew, at the time of her argument on November 15 and 16, 1994 (29RT: 5062; 30RT: 5294), a federal court had recently ruled that execution by lethal gas constituted cruel and unusual punishment. Contrary to the argument of the *Antwine* prosecution, the district court found that given evidence of intense physical pain during the condemned inmate's period of consciousness, as well as the overwhelming evidence of societal rejection of lethal gas as method of execution, execution by lethal gas violated the Eighth Amendment. (*Fierro v. Gomez* (N.D. Cal.1994) 865 F.Supp. 1387, 1415, affd. (9th Cir. 1996) 77 F.3d 301, cert. granted,

judgment vacated (1996) 519 U.S. 918, and vacated *sub nom. Fierro v. Terhune* (9th Cir. 1998) 147 F.3d 1158.)[43]

Because of the recent publicity, the prosecutor here was faced with the real possibility that jurors were aware that execution by lethal gas, the then current method of execution in California, had just been found to be cruel and unusual punishment. (See, e.g., Morain, *Judge Bars Use of Gas Chamber in Executions*, Los Angeles Times (Oct. 5, 1994), Part A, p. 1; *Why Fight for a Cruel Method? California Shouldn't Appeal Court Ruling that Shut the Gas Chamber Door*, Los Angeles Times (Oct. 6, 1994), Part B, p. 6; Gladstone, *Gas Chamber Issue Enters Campaign*, Los Angeles Times (Oct. 6, 1994) Part A, p. 3; *Gas Chamber Barred*, (October 13, 1994), Part B, Letters.) Indeed, her reference to "any means of execution in our state" (30RT: 5368), suggests that this was the case. The prosecutor could have asked the court for an instruction that execution method could not be taken into account in sentencing. This would have dealt with any problem in a neutral and appropriate way. Instead, the prosecutor chose to testify to inadmissible and unsubstantiated information about how executions are carried out in California.

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[43] The United States Supreme Court vacated the Ninth Circuit's decision affirming the district court's decision and remanded the case for further decision in light of section 3604, which had recently been amended to make lethal injection the fallback method of execution if a prisoner did not elect between lethal gas and lethal injection. (*Fierro v. Terhune*, *supra*, 147 F.3d at pp. 1159-1160.) On remand, the Ninth Circuit instructed the district court to vacate its previous judgement, subject to reinstatement on the motion of from a death row inmate with standing to present a ripe claim. (*Id.* at p. 1160.) Thus, the district court's original finding that the lethal gas execution violated the Eighth Amendment were not questioned.

The prosecutor also improperly vouched for the constitutional sufficiency of executions in California when she told the jury in California, they are done "with great attempts to make it as humane as possible." (30RT: 5368.) Of course the prosecutor had no idea what execution method might be used in the future, and should not have speculated "as to what future officials in another branch of government will or will not do." (*People v. Thompson* (1988) 45 Cal.3d 86, 139.)

Moreover, in light of the difficulty that California has had coming up with constitutionally sufficient regulations for conducting executions as well as recent evidence of "botched" executions elsewhere using lethal injection cocktails, factual support for the prosecutor's prognostication is utterly lacking. (See *Morales v. Tilton* (N.D. Cal. 2006) 465 F.Supp.2d 972, 975 [citing evidence suggesting that six of the 11 California inmates executed by lethal injection may have been conscious when injected with second and third drugs in cocktail, which would cause an unconstitutional level of pain if injected in a conscious person]; *Sims v. Dep't of Corr. & Rehab.* (2013) 216 Cal. App. 4th 1059, 1075 [affirming portion of judgment that invalidated California's execution protocol for substantial failure to comply with Administrative Procedures Act]; <http://www.cnn.com/2014 /04/30/us/oklahoma-botched-execution> (as of September 23, 2014) [discussing problems in 2014 with executions in Ohio and Oklahoma].)

As respondent points out, this Court has rejected similar claims. (RB 367-368, discussing *People v. Collins, supra*, 49 Cal.4th at pp. 231-234.) In particular, the Court questioned the rationale of the *Antwine v. Delo* court, finding no relationship between a juror's relief over not condoning gratuitous suffering and their decision of whether or not to vote for a death

sentence. (*Id.* at p. 233.) Appellant respectfully disagrees with this reasoning.

This Court rejects method of execution evidence and argument because "evidence on how the death penalty would be carried out" is "more an attempt to appeal to the passions of the jurors" (*People v. Thompson* (1988) 45 Cal.3d 86, 139); because "a vivid account of an execution" has no place at the penalty phase and is unrelated to the individualized sentencing task before the jury (*People v. Grant* (1988) 45 Cal.3d 829, 850); and because "'f]urther dramatization . . . [about execution] distract[s] the jury's attention from the task at hand.'" (*People v. Pride* (1992) 3 Cal.4th 195, 260-261, quoting *People v. Morris* (1991) 53 Cal.3d 152, 218.) The Court thus acknowledges the possible impact this irrelevant testimony might have on a jury. This is consistent with evidence suggesting that the public in general prefers more humane execution methods. (Radelet, *The Changing Nature of Death Penalty Debates* (2000) 26 Annu. Rev. Social. 43, 54-55 [citing studies, including one in 1991].) There is no reason to think that appellant's jury was different.

The prosecutor inserted completely unsupported evidence outside the record into the deliberations. The prosecutor then argued it was relevant and took unethical advantage of defense counsel's inability to answer the false evidence either with contrary evidence or argument. Because respondent inserted the issue into deliberations, and in such an unreliable and improper way, respondent cannot carry its burden of proving that any error was harmless. (*Chapman, supra*, 386 U.S. at p. 24.)

The court instructed the jury after a recess that it was not to consider method of execution. (30RT: 5375.) However, the court did not inform the jury that the argument was in anyway improper and indeed, asked the

prosecutor if she could give the admonition and then apologized to the prosecutor for interrupting her to give it. (30RT: 5374.) Considering the salience of the issue for the jury and the manner in which the admonishment was given, it is reasonably likely that it did not dissipate the effect of the improper argument.

G. The Prosecutor's Argument Was Cumulatively Prejudicial

Respondent argues that even if there was prosecutorial error, there was no prejudice based on several factors. (RB 378-379.) First, respondent contends there is no prejudice because the aggravating evidence was overwhelming. (RB 379.) As argued *ante*, in Argument XV, the Court should reject this contention.

Second, respondent argues that the jury's failure to return death verdicts against appellant's two codefendants demonstrates there was no prejudice. (RB 379.) This is sheer speculation about what would have made a difference to appellant's jury. The argument is also flawed because ascribing to it would indemnify prosecutors in all codefendant cases with split penalty phase verdicts, such as occurred here.

Third, respondent argues that the jury was able to compare the evidence with the prosecutor's remarks because none of the prosecutor's argument referred to facts outside the scope of evidence. (RB 379.) As argued above and in the opening brief, appellant strongly disagrees with this contention.

Fourth, respondent argues that none of the prosecutor's comments in themselves were so egregious as to have prejudiced appellant. (RB 379.) This does not respond to appellant's argument that the prosecutor's errors were cumulatively prejudicial.

Fifth, a prosecutor's argument at the penalty phase carries great weight with the jury because of special regard jurors hold for prosecutors. (*Berger v. United States, supra,* 295 U.S. at p. 88; *People v. Hill, supra,* 17 Cal.4th 800, 828.) In addition, because the jury has accepted the prosecutor's position at the guilt phase, the jury may view her as more credible than the defense and be predisposed to accept her view concerning the criteria to use in making the penalty decision. (White, *Curbing Prosecutorial Misconduct in Capital Cases: Imposing Prohibitions on Improper Penalty Trial Arguments* (2002) 39 Am. Crim. L. Rev. 1147, 1150 [White].)

Finally, respondent contends that unspecified instructions given by the court would have remedied any possible error, and that counsel's arguments carry less weight than instructions. (RB 379.) This ignores several aspects of the issue. To begin with, improper argument is more likely to be prejudicial where trial court overrules a defendant's objection to remarks, as consistently occurred here. (*People v. Hall* (2000) 82 Cal.App. 4th 813, 817-818.)

Next, with the exception of the court's instruction not to consider deterrence and admonishment regarding method of execution (29RT: 5242; 30RT: 5375), there were no curative instructions to mitigate the impact of the prosecutor's remarks and the court never told the jury that any of the prosecutor's remarks were improper. (See *Donnelly v. De Christoforo* (1974) 416 U.S. 637, 644 [finding that court's instruction to jurors that prosecutor's comment was unsupported and they should disregard it was sufficient to cure any prejudice].)

Furthermore, as argued above, failure to correct the improper statements at the time they were made cannot be salvaged by the later

generalized jury instruction reminding jurors that a lawyer's statements during closing argument do not constitute evidence. (*United States v. Weatherspoon, supra,* 410 F.3d at p. 1151; *United States v. Perlaza, supra,* 439 F.3d at p. 1172.) For this reason, the court's later, generalized instructions did not dissipate either the individual or cumu lative impact of the prosecutor's errors during argument.

Last, even when the jury receives proper instructions from the judge, empirical evidence indicates that the jury is likely to be confused as to the criteria it should employ in making its life-or-death sentencing decision. (White, *supra*, 39 Am. Crim. L. Rev. at pp. 1149-1150.) Here, the prosecutor's arguments misinformed the jury about the proper sentencing criteria, introduced extraneous and irrelevant factors into the jury's deliberations, communicated misinformation, and deflected the jury from its task of evaluating the mitigating and aggravating evidence to make an individualized sentencing decision. It is reasonably likely therefore that under all these circumstances, the general penalty phase instructions did not cure the harm from the prosecutor's numerous improper arguments.

The prosecutor's argument was prejudicial, and as argued in the opening brief, under any standard of review, appellant's death sentences must be reversed. (AOB 313.)

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XXIII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MODIFICATION OF THE DEATH VERDICT

In the opening brief, appellant established that the court erred in denying his motion to modify the verdict of death by relying upon evidence not in the record, including the uncharged crime of sexual assault; rejecting appellant's mitigating evidence on the ground that it did not serve as a moral justification for his conduct; and apparently considering a posttrial letter appellant sent to the court. (AOB 324-326.) Respondent claims that (1) appellant has forfeited this claim by failing to object to the trial court's reasons for denying the motion; and (2) the court properly fulfilled its obligations under Penal Code section 190.4, subdivision (e), and the federal Constitution. (RB 384-393.) Appellant disagrees with both points and addresses the forfeiture issue and the court's improper application of law; respondent's remaining contentions with respect to the instant argument raise no significant issues beyond those addressed in appellant's opening brief, and therefore no further reply is required.

The notion that appellate review of errors in the ruling on an automatic motion to modify may be waived or forfeited by failure to object appears to derive from an unexplained reference in *People v. Hill* (1992) 3 Cal.4th 959, overruled on another point by *Price v. Superior Court* (2001) 25 Cal.4th 1046, where the defendant argued that the trial court erred when it stated at the beginning of the hearing on the automatic application under section 190.4, subdivision (e), that it had read and considered the probation officer's report. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1220; *People v. Hill, supra,* 3 Cal.4th at pp. 1012-1013.) This Court rejected Hill's claim on the merits but also stated: "As respondent points out, however, defendant's

assertion of error fails at the threshold because he failed to object at the hearing except to challenge one specific portion of the report." (*People v. Hill, supra*, at p. 1013.) The Court has since held that failure to make a specific objection to the court's ruling at the modification hearing forfeits the claim. (*People v. Riel, supra,* 22 Cal.4th at p. 1220.)

However, in *People v. Ochoa* (1998) 19 Cal.4th 353, the Court reviewed the trial court's ruling on a motion to modify the death verdict despite the fact that the defendant did not file papers or even argue the motion. (*Id.* at pp. 469-470.) Relying upon its own reading of the record, the Court concluded that it could not say "that there was much to add to what counsel had already presented, given the trial court's degree of conscientious engagement." (*Id.* at p. 470.) Thus, where trial counsel made no arguments at all, the Court took upon itself a review of the record to determine whether error occurred, but when defendants point out specific factual and legal errors readily apparent from the record, as appellant has, the Court finds they are waived.

These two approaches are inconsistent. The Court's former approach is consistent the constitutional significance of the automatic nature of the motion to modify. Both "this court and the United States Supreme Court have cited the provisions of section 190.4, subdivision (e), as an additional safeguard against arbitrary and capricious imposition of the death penalty in California." (*People v. Lewis* (2004) 33 Cal.4th 214, 226; see also *Pulley v. Harris* (1984) 465 U.S 37, 51-53 [holding that review under § 190.4(e) is one of four statutory safeguards in California's capital sentencing scheme that make comparative proportionality review unnecessary under the Eighth Amendment].) Because the trial court's independent review of the sentencing verdict provides a critical safety valve to ensure reliability and

fairness of the ultimate sentence, this Court should review the trial court's independent weighing of the aggravation and mitigation circumstances below without regard to preservation of specific factual or legal arguments.

Failure to address the merits of appellant's claim is also inconsistent with another line of authority from this Court. In *People v. Stanworth* (1969) 71 Cal.2d 820, 833 *(Stanworth)*, this Court said that in every capital case "subdivision (b) of section 1239 imposes a duty upon this Court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.'" Carrying out that duty, the Court in *People v. Easley* (1983) 34 Cal.3d 858, 863-864, reversed a judgment of death upon grounds raised for the first time in an amicus curiae brief in support of a petition for rehearing following the filing of an opinion by this Court.

Similar reasoning indicates that errors in the consideration of the automatic motion to modify cannot be forfeited by failure to object in the trial court. The judge has an obligation to rule, and rule correctly, on the automatic motion to modify regardless of what arguments, if any, the defendant's counsel makes in connection with the motion. *Stanworth* is plainly based on the same concern about the public interest in the reliability of judgments of death that motivates the United States Supreme Court's Eighth Amendment jurisprudence.

Finally, of course, this court has inherent authority to review this claim in order to prevent the injustice of a sentence imposed through an unconstitutional review. (*People v. Williams, supra,* 17 Cal.4th at p. 161, fn. 6.) It should reject respondent's invitation to refuse consideration and instead review whether the death penalty was properly evaluated at trial to prevent the ultimate injustice of a flawed capital sentence.

This is especially so given that the trial court assessed appellant's mitigation evidence under an unconstitutional standard (AOB 325-326), in contravention of its statutory duty to "make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and the *applicable law*." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 793, italics added.) A "litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts," "especially when the enforcement of a penal statute is involved." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Hines* (1997) 15 Cal.4th 997, 1061 [considering constitutionality of statute though issue not raised below].) Here, the record of the court's ruling on the automatic modification present undisputed facts, appellant raises a pure question of law, and the penal statute at issue is central to maintaining the constitutionality of California's statutory death penalty scheme. (*Pulley v. Harris, supra,* 465 U.S at pp. 51-53.)

Appellant argued that the trial court erred when it found "that the evidence relating to Mr. Sanchez-Fuentes's upbringing and religious conversion does not serve as a moral justification or extenuation for his conduct." (AOB 325-326; 30RT: 5610.) Respondent counters that the court's reference to "moral justification or extenuation" tracked the language in the jury instruction on factor (f) and was consistent with the factor (k) instruction. (RB 391-392.)

The jury was instructed under factor (f) that it could consider whether the offense "was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct." (29RT: 5239-5240.) Factor (f) thus addresses a defendant's beliefs and actions at the time of the crime. Factor (k) of section 190.3

allows the sentencer to consider any circumstances that may extenuate the gravity of the crime. (29RT: 5240.)

In contrast, the court's statement, made after it described the specific evidence it considered as mitigating (31RT: 5608-5609), demonstrates that it at least discounted appellant's mitigating evidence of his upbringing and conversion because it did not somehow morally justify or extenuate his criminal conduct. This is contrary to the Eighth Amendment because a defendant need not establish a nexus between his mitigation evidence and the crime. (*Tennard v. Dretke* (2004) 542 U.S. 274, 288–289 (*Tennard*) [holding that state's test requiring a "nexus" between petitioner's evidence of impaired intellectual functioning and the crime was incorrect under Eighth Amendment law]; *Smith v. Texas* (2004) 543 U.S. 37 ["unequivocally reject[ing]" any test requiring a causal nexus between mitigating evidence and the crime]; see also *Brewer v. Quaterman* (2007) 550 U.S. 286, 295-296 [standard that jury need only give "sufficient mitigating effect" to defendant's mitigating evidence has "no foundation in the decisions of this Court"].)

Further, after discounting the relevance of all of appellant's life history and religious conversion evidence because it did not directly mitigate appellant's crimes, the court went on to reject "such mitigation" as insufficient to serve as a basis for a sentence less than death. (31RT: 5610-5611.) Thus, the court was under a grievous misunderstanding of the applicable law when it considered the significance of appellant's mitigation evidence in light of the aggravating evidence.

Appellant's mitigation evidence was plainly relevant for mitigation purposes under the high court's precedents, even those predating *Tennard*. (See *Smith v. Texas* (2004) 543 U.S. 37, 45, citing, e.g., *Payne v. Tennessee*

(1991) 501 U.S. 808, 822; *Boyde v. California* (1990) 494 U.S. 370, 377-378; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.) The trial court, however, weighed the mitigating evidence under an unconstitutionally high standard. Because the trial court "assessed [appellant's] claim under an improper legal standard," (*Tennard, supra,* 542 U.S. at p. 287), and "at no point . . . manifest[ed] an intent to apply any other standard" this Court cannot say the court correctly applied the law or that the error had no impact on the court's decision to deny the motion. (*People v. Burgener* (2003) 29 Cal.4th 833, 891-892.)

Because the trial court's error was contrary to the dictates of the Eighth and Fourteenth Amendments, the standard of *Chapman v. California, supra,* 386 U.S. at p. 24, applies. (*People v. Jackson* (2014) 58 Cal.4th 724, 771.) Here, given the trial court's clear pronouncement, the prosecution cannot show, beyond a reasonable doubt, that the error did not contribute to the court's denial of appellant's motion to modify the death verdict. For the same reason, there is no reasonably possibility that the error did not affect its ruling. (*Id.*) Accordingly, this Court must vacate the death judgments and remand for a new hearing pursuant to section 190.4, subdivision (e). (*People v. Burgener, supra,* 29 Cal.4th 833 at p. 893.)

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CONCLUSION

For all the reasons above and in the opening brief, the convictions on counts 5, 10 through 18, 21, 24 through 27, 28, 30, 31 and 33 and the death sentences must be reversed.

DATED: September 30, 2014

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Sara Theiss, am the Deputy State Public Defender assigned to represent appellant, Edgardo Sanchez-Fuentes, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 49,331 words in length excluding tables and certificates.

Dated: September 30, 2014

Sara Theiss

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DECLARATION OF SERVICE BY MAIL

People v. Edgardo Sanchez-Fuentes Los Angeles County Sup. Ct. No. BA261252-01
Cal. Supreme Ct. No. S150524

I, the undersigned, declare as follows:

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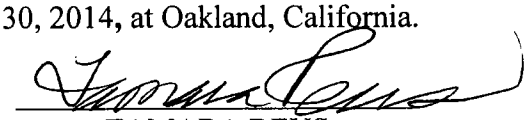
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on September 30, 2014, at Oakland, California.



TAMARA REUS