IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	**Supreme Court**
Plaintiff and Respondent,	)	**Crim. S120583**
	)	
v.	)	**Riverside County**
	)	**Superior Court No.**
MICKY RAY CAGE,	)	**RIF 083394**
	)	
Defendant and Appellant.	)	

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE

APPELLANT'S OPENING BRIEF

On Automatic Appeal From a Judgment of Death

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Micky Ray Cage

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INTRODUCTION

Appellant, Micky Cage, was convicted and sentenced to death for the murders of his mother-in-law, Brunilda Montanez, and her 16-year-old son, David Montanez, in November of 1998. The physical evidence and several items of circumstantial evidence connected appellant to the homicides. Jurors could, therefore, conclude that appellant shot the victims. The evidence did not, however, establish that these had been premeditated and deliberate first degree murders.

Appellant's first degree murder convictions and sentence of death had more to do with the testimony about his life history and general character than the evidence about his actions on November 9, 1998. In the guilt phase of trial, the prosecution was allowed to introduce detailed testimony about 14 other (for the most part unadjudicated) crimes and misdeeds. Appellant's wife, Clari, and his daughter, Vallerie, recounted the numerous beatings and humiliations appellant had inflicted on them over the course of 14 years prior to the homicides. The ostensible purpose was to establish intent, identity and a motive for the capital crimes. In reality the testimony was not relevant for any of these reasons. It was, rather, classic propensity evidence having little or no bearing on any of the prosecution's stated purposes. (See Argument I.) The abundance of propensity evidence

persuaded jurors to overlook the logical gaps in the state's case for first degree murder (see Argument II), as well as the insufficiency of the evidence supporting the lying-in-wait special circumstance. (See Argument III.)

The evidence of appellant's prior crimes and unadjudicated criminal conduct was unduly inflammatory for several reasons and its inclusion in the guilt phase of a capital trial was wholly inappropriate. Domestic violence is an emotional topic, and a young woman and a child subjected to years of abuse were sure to viewed sympathetically by the jury. As jurors were aware, Clari and Vallerie were not only the direct victims of appellant's past crimes but also the survivors of the murder victims. Through their guilt phase testimony the jury received what was essentially "victim impact" evidence. Clari related how she learned of her mother's and brother's murders, describing not only her intense grief and shock but the like responses of the extended family. (See Argument V.) An excessive number of gruesome photographs of the crime scene and autopsies further inflamed the situation, adding horrific visual images to an already emotional case. (See Argument VI.) The confusing and inadequate jury instructions pertaining to first degree murder, and the Penal Code section 190.2, subsection (a)(15) special circumstance, failed to clarify the jurors' tasks

under the law. (See Arguments IV and X.) Finally, several of the guilt phase instructions lightened the prosecution's burden of proof and undermined the constitutional requirement that criminal convictions be based on proof beyond a reasonable doubt. (See Argument IX.)

Having found appellant guilty of first degree murder based on the evidence of his unsavory history with the victims' family, the jury was virtually certain to recommend death as the appropriate sentence. Any doubt in this regard was eliminated after the jury heard additional, improper victim impact testimony in the penalty phase. (See Argument XI.) The trial court's refusal to make defense counsel's requested modifications to the penalty phase instructions, and the multiple flaws in the instructions given, made this outcome a near certainty. (See Arguments XII through XV.) For all of the reasons discussed herein, appellant's convictions and sentence of death must be reversed.

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APPELLANT'S OPENING BRIEF
(Death Penalty Case)

STATEMENT OF APPEALABILITY

This is an appeal from a judgment of death entered by the Riverside County Superior Court on November 14, 2003. (13 CT 3676-3678.) Appeal is automatic pursuant to Penal Code section 1239. [1]

STATEMENT OF THE CASE

On November 12, 1998, a felony complaint was filed charging appellant Micky Ray Cage with two counts of murder in violation of Penal Code section 187, in the intentional killings of victims Brunilda Montanez

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[1] All statutory references are to the California Penal Code unless otherwise noted.

and David Burgos. (1 CT 1.) Three special circumstances were alleged in connection with the two murder counts. With respect to Counts I and II, the complaint alleged that appellant killed the victims while lying in wait within the meaning of Section 190.2(a)(15). Count II (pertaining to victim David Burgos) further alleged a "multiple murder" special circumstance within the meaning of Section 190.2(a)(3). (1 CT 2.) Personal firearm use and weapon use allegations pursuant to Sections 12022.5(a) and 1192.7(c)(8) were alleged in connection with Counts I and II. (1 CT 2.) Count III charged appellant with a violation of Section 12021(a)(1) (felon in possession of a firearm) within the meaning of Penal Code Section 12001.6. (*Id.*)

Appellant was arraigned on November 16, 1998. (1 CT 4.) The Conflicts Defense Panel ("CDP") was appointed to represent appellant after the Riverside County Public Defender's Office declared a conflict of interest. (1 CT 5.) CDP attorney Peter Scalisi was subsequently assigned to the case. (See 1 CT 5.)

On March 23, 1999, the People filed a Notice of Intention to Seek Capital Punishment. (1 CT 12-13.)

Appellant was held to answer for the charges following a preliminary hearing held on July 7, 1999. (1 CT 44; 51-152.) The same charges were filed in an information on July 19, 1999. (1 CT 46-48.) Appellant was arraigned on the information on July 20, 1999, and entered pleas of not

guilty to all charges and denied all enhancement allegations. (*Id.*)

On September 1, 2000, the court granted appellant's request to substitute retained attorney Gary Olive in place of his two appointed lawyers, Exum and Scalisi. (1 CT 197.)

On September 1, 2000, the People filed a Notice of Evidence to be Introduced in Aggravation During Penalty Phase Pursuant to Section 190.3 listing a total of four items of evidence in aggravation: three previous incidents and the facts and circumstances of the instant offenses. (1 CT 195-196.) On September 22, 2000, the People filed an Amended Notice adding three additional unadjudicated incidents. (1 CT 200.) On August 13, 2001, the People filed an another "Amended Notice of Evidence to be Introduced in Aggravation." [2] (2 CT 299.) The Amended Notice filed on August 13, 2001, incorporated the incidents listed in the previous filings, as well as new items in aggravation, for a total of eleven. (2 CT 299.)

On July 31, 2003, a jury trial began before the Honorable Dennis Mc Conaghy. (2 CT 550.) Jury selection concluded on August 18, 2003. (13 CT 3447.) On August 19, 2003, the prosecution began presenting evidence

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[2] This is the second document titled "Amended Notice of Evidence in Aggravation." It includes additional incidents not listed in the previously filed "Amended Notice of Evidence in Aggravation." (Compare 1 CT 200 with 2 CT 299.)

in the guilt phase of trial. (13 CT 3452.) The presentation of evidence and the arguments of counsel concluded on September 3, 2003, and the jury began deliberations that afternoon. (13 CT 3520.) On September 4, 2003, the jury found appellant guilty of first degree murder as charged in the information. (13 CT 3522.) The jury found true the three alleged special circumstances, and further found true the personal use of a firearm and felon in possession enhancements. (*Id.*)

The penalty phase began on September 11, 2003. (13 CT 3578.) The presentation of evidence and the arguments of counsel concluded on September 22, 2003. (13 CT 3594.) The jury retired to begin deliberations at 1:50 p.m. on September 22, 2003. (*Id.*) The jury announced that they had reached a verdict just before adjourning for the evening at approximately 3:50 p.m. (13 CT 3620.) The court ordered the verdict sealed and retained in the custody of the clerk. (13 CT 3620.)

On September 23, 2003, the jury returned to the courtroom and the verdict of death was announced. (13 CT 3620.) The jury was polled and affirmed the verdict. (13 CT 3620.)

On September 23, 2003, the trial court denied appellant's motion for new trial, and also denied the automatic request to modify the verdict of death pursuant to Penal Code §190.4(e). (13 CT 3650.) The trial court

imposed the death penalty for the first degree murder charged in Count I of the information. The court also imposed the death penalty for the first degree murder charged in Count II of the information, stating that the sentence in Count II was to run concurrent. (13 CT 3686.) Sentence on Count III was stayed. (13 CT 3684, 3686.)

STATEMENT OF THE FACTS

The Guilt Phase Evidence and Testimony.

A. Appellant's History with the Victims and Their Family.

In November of 1998, Brunilda ("Bruni") Montanez lived in a single family home located at 9897 Deercreek Road in Moreno Valley, California. (6 RT 776.) Two of Bruni's three children lived with her. Her son Richard ("Richie") Burgos was approximately 28 years-old, but lived with Bruni because he was mildly mentally retarded and incapable of caring for himself. (6 RT 845.) Bruni's youngest child, 16 year-old David Montanez, also lived in the home. (6 RT 922.) Bruni's eldest child was a daughter, Claribel ("Clari") Burgos, who was around a year older than Richie. (See 6 RT 846; 14 RT 1927.) In November 1998, Clari was married to appellant, Micky Cage. (6 RT 789.) Clari and appellant lived near Bruni in an apartment they shared with their two children: their daughter, 11 year old Vallerie Cage; and, a son, Micky Jr., who was nearly three. (See 6 RT 791;

798-799; 807.) Over the course of trial, the jury heard extensive testimony covering the history of appellant's relationship with the Burgos family.

Appellant and Clari were 14 ½ years old when they met in Long Beach, California in 1984. (6 RT 789-790.) Appellant had been having problems at home, and a couple months after he met Clari he moved into Bruni's house. (6 RT 791.) In December of 1985, Clari and appellant had a daughter, Vallerie Cage. (*Id.*) The couple married in 1989, and their son, Micky Jr., was born in December of 1994. (6 RT 798-799.)

While appellant and Clari were together for the better part of fourteen years, their relationship was volatile. Over defense objection, the prosecution introduced a quantity of testimony recounting events which occurred between 1991 to 1998. (6 RT 789-816; 854-860. See Argument I.) Most of these were unadjudicated incidents of appellant's abusive and violent treatment of Clari and Vallerie. [3]

B. Clari's Decision to Leave Appellant.

By October of 1998, Clari was secretly planning to leave. Appellant had become increasingly unstable and suspicious. (6 RT 811.) He refused

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[3] Pursuant to a stipulation between the parties, the jury was told that appellant was convicted of a felony prior to November 9, 1998. (11 RT 1547-1548.) The jury was not specifically told the underlying facts of the offense. However, following Clari's testimony, jurors may have surmised the conviction involved a domestic assault. (See Argument I, C (3)(g).)

to leave Clari alone with the children, and accompanied her to and from work each day. Appellant often kept Clari awake all night arguing. (6 RT 812.) He made threats about what he would do if she ever left him, and repeatedly told her he would kill her entire family.

Early on the morning of Thursday, October 15, 1998, Clari was driving on the freeway on her way to work. Appellant accompanied her as usual, sleeping off and on in the backseat while she drove. (6 RT 813.) When appellant asked Clari for gas money, she replied that she had no cash. Appellant appeared to go back to sleep briefly. All of a sudden appellant said, "I know you have money." He reached over from the back seat, grabbed Clari's purse and threw it out of the car window. (6 RT 815-816.) Clari stopped to retrieve the purse, and set out again. Appellant grabbed the purse and threw it out onto the freeway a second time. (*Id.*) This time Clari did not go back to get the purse. She drove to work, went inside, and waited until appellant left the parking lot. Then she called Bruni and asked for her help. (6 RT 816.) Bruni picked up Clari and the children. (6 RT 817.) She found them a temporary place to stay where appellant would not think to look for them. A few days later, on Sunday, October 18, 1998, Bruni sent her daughter and two grandchildren to live with her relatives in Puerto Rico. (6 RT 823; 827.)

In October and November of 1998, Kevin Neal and Jason Tipton lived in apartment 269 at the El Dorado Point apartment complex on Calle Sombra. Appellant lived directly upstairs in apartment 270. The three men often spent weekends together having barbeque, drinking, smoking, and playing dominoes. (7 RT 959-960; 978.) Jason Tipton testified that appellant was upset after his wife left with the children. (7 RT 965-966.) [4] Appellant was particularly anxious to find his son. According to Tipton, appellant said he'd like to put a gun to his mother-in-law's head to make her tell him where Clari and the kids were. (*Id.*) Tipton also heard appellant say about his mother-in-law, "I should bust a cap in her ass, and she's going to call the cops anyway." (7 RT 965-966.) About one week before November 10, 1998, appellant talked about how he wanted to go to his wife's mother and get her to tell him where they were. Appellant said he would put a gun to her head. Tipton stated that he had been sitting in the Dodge Dart and listening to music with appellant on the Saturday or Sunday before the crimes when appellant said, "I feel like doing something to Clari's mom to

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Tipton testified at the preliminary hearing in July of 1999. (See 1 CT 93-128.) He died in an accident before appellant's trial began. (See 2 RT 333; Court's Exh. 1.) The court found that Tipton was an unavailable witness and, over defense objection, permitted his preliminary hearing testimony to be read to the jury. (See 7 RT 959-994.)

get my son back." (7 RT 965-966.) [5]

C. Events Preceding the Crimes on November 9, 1998.

Bruni's sister-in-law Carmen Burgos, and Carmen's husband Alfredo, often spent time at Bruni's home. The couple stayed at the house with Bruni and her family on the weekend of November 7th and 8th. They helped Bruni with household chores and some home repairs. (6 RT 872-873.) Because Bruni had the day off on Monday, November 9, 1998, Carmen and Alfredo spent the day with her and stayed for dinner on Monday evening. (6 RT 875-876.) After dinner, David Burgos went upstairs to his room to study and listen to music. (6 RT 877.) At approximately 7:30 p.m., Richie left the house with his friend and next-door neighbor, Steve Phipps. (*Id.*) Steve and Richie went to play pool and watch a football game at a local bar, Bahama Mama's. (6 RT 863.) Carmen and Alfredo watched television and chatted with Bruni for a while, and left at approximately 9:00 p.m. (6 RT 877.)

Appellant spent the evening of November 9th (from around 5:00 p.m.) playing dominoes, drinking, and smoking dope with downstairs

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In the penalty phase, appellant's mother, Emly Farmer, testified about going to visit him after Clari and the children left. Appellant was dirty and disheveled. He seemed disoriented, and told her that he had not been taking his medication. (15 RT 2130-2131.)

neighbors Jason Tipton and Kevin Neal. (7 RT 970-971; 1001-1002.) Tipton remembered seeing appellant drinking a 40 ounce can of malt liquor. In addition, all the men drank tall glasses of vodka mixed with Sprite or orange juice. (7 RT 972.)

Around three days earlier Neal had seen a "shorter than normal" black shotgun in appellant's apartment. (7 RT 1007-1008.) He identified People's Exhibit 1 as the gun. (7 RT 1009.) On the evening of November 9th, appellant showed them the gun, and "cocked" it to demonstrate its action. (*Id.*) Appellant also had a bunch of red shotgun shells with brass ends just like the shells in People's Exhibit No. 6. (7 RT 1010-1011.)

James ("J.D.") Sovel drove to appellant's apartment on the evening of November 9th. (1 CT 57-58.) He arrived at approximately 8:40 p.m., but waited a long time, about ten minutes, before appellant appeared and opened the door. (1 CT 63.) Appellant had a beer in his hand and continued drinking throughout the evening. Sovel saw appellant drink two tall glasses of vodka mixed with Squirt soda. According to Sovel, appellant had quite a lot of vodka that evening. (1 CT 65.) [6] Sovel played dominoes with

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Kevin Neal testified that he himself had been intoxicated to the point of black out on other occasions, but had not been intoxicated to that degree on the evening of November 9th. Neal believed that they also smoked a joint laced with cocaine that night. He did not, however, recall anyone being "totally wasted." (7 RT 1022-1023.)

appellant, Tipton and Neal. (1 CT 59, 64;7 RT 974, 1001.) After the domino game, appellant said he wanted to go visit his wife at his mother-in-law's home. (1 CT 60.) Sovel lived in an apartment 3 or 4 blocks away from Bruni's house and agreed to give him a ride. (1 CT 57.) [7]

Tipton testified that appellant left the apartment wearing a long black jacket. The coat had a Raiders emblem on the back and came down past appellant's knees. (7 RT 975.) Sovel stated that appellant was wearing a black or dark blue nylon "police type" jacket. (1 CT 63.) Appellant brought with him a laundry basket filled with clothing as well as some other bags of clothes. (1 CT 60-61.) On the ride to Bruni's house Sovel noticed that appellant was wearing two pairs of pants; a pair of blue sweat pants with another pair of pants underneath. (1 CT 67.)

Sovel knew Bruni's family because he was friendly with their next-door neighbor, Steve Phipps. (1 CT 61.) He and appellant pulled into Bruni's driveway at approximately 10:40 p.m. (*Id.*) Both men got out of the car. Appellant wanted the car keys, but Sovel refused because appellant was

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Riverside County Sheriff's Department ("RCSD") Officer Jess Gutierrez interviewed Mr. Sovel on November 13, 1998. At trial, Officer Gutierrez testified that Sovel had died in a car accident in March of 1999. (8 RT 1091-1092.) The details of Officer Gutierrez's interview of Sovel were not before the jury. At trial, Gutierrez stated only that Sovel reported giving appellant a ride to Bruni's house on the evening of November 9, 1998. (See 8 RT 1091-1092.)

drunk. (1 CT 61, 66.) As Sovel prepared to leave he took one bag of clothing and threw it out of the car. (1 CT 61.) Appellant picked up the bag of clothes. He then walked around to the passenger side of the car, retrieved the laundry basket from the back seat, and walked to Bruni's front door. (1 CT 62.) As Sovel backed out of the driveway, he saw that Bruni had opened the door. Appellant was standing on the threshold. As he drove off, Sovel saw appellant go into the house carrying the laundry basket. (1 CT 62.) Sovel never saw appellant again after that night. (*Id.*) He had no knowledge of the gun being hidden in the laundry basket. He had not seen the gun earlier that evening. (*Ibid.*)

Steve's sister, Sarah Phipps, was at home in the house next door to Bruni's. Sometime between 10:30 and 10:45 p.m.,she heard Bruni's dog bark. (8 RT 1059-1060.) A few minutes later Sarah heard three loud bangs followed by one more loud bang approximately 90 seconds afterwards. (8 RT 1061, 1062-1063.) Sarah looked outside, but saw nothing unusual. (8 RT 1063.) Another neighbor, Adrian Valdez, also heard four loud bangs. (7 RT 934-935.) Mr. Valdez lived near Bruni, on Sycamore Canyon Road near the intersection of Deercreek and Sycamore. (7 RT 936-937.) When he heard the sounds, Mr. Valdez went outside to the front of his house to investigate. (*Id.*)

Mr. Valdez saw a male figure walk across Bruni's front yard. The man took a diagonal path, walking across the intersection and heading toward where Valdez was standing. (7 RT 936-937.) The man was heavily built and had short dark hair. He stood approximately 5' 6" or 5'7" tall, and was wearing a long dark trench coat. (7 RT 943.) It was dark outside, and the shadows prevented Mr. Valdez from getting a look at the man's face. (7 RT 942.) As the man walked past Mr. Valdez he raised his hand and said "Hi." (7 RT 940-941.)[8] Mr. Valdez returned the greeting, and the man mumbled something unintelligible and continued walking. (*Id.*) The man had gone only a little way when Valdez heard what sounded like an alarm going off at Bruni's house. (7 RT 947.) The man in the trench coat began to run. Mr. Valdez noticed that the man was carrying a stick-like object (possibly a rifle) underneath his coat. (7 RT 948.) Something in the man's pockets made a jingling sound as he ran. (7 RT 949.)

Richie called Bruni at around 10:30 p.m. (6 RT 864.) He and Steve needed a ride home, and wanted Bruni to come pick them up at Bahama Mama's. (6 RT 864; 7 RT 907.) Bruni said she would leave right away,

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Over defense objection, Mr. Valdez testified that the man's voice did not sound like a mature male voice, but was rather high-pitched. (7 RT 957.) The prosecution's lead investigator, Michelle Amicone, testified that appellant's voice was high-pitched and juvenile, and appellant sounded much younger than she had expected. (11 RT 1543.)

but she never came. (*Id.*) [9] Richie and Steve called the house at least ten times after Bruni failed to arrive. (7 RT 911.) Richie was worried, and neither he nor Steve had any money. (7 RT 911, 913.) An acquaintance, Curtis Wilhousen, stopped by Bahama Mama's at around 12:20 a.m. Wilhousen owned a small cab company, and he agreed to take Richie and Steve home. (7 RT 912-913.) Wilhousen pulled his cab into the driveway of Bruni's house and waited in the car while Steve and Richie went into their respective houses to get some money to pay the fare. (7 RT 913-914.)

As Richie approached his house he noticed that the front door was slightly ajar. He went inside and discovered the crime scene. (6 RT 865.) [10] Bruni's body was in the entryway. Blood, tissue, and brain matter were splattered everywhere, including all over the front stairs and the walls of the foyer. (See 9 RT 1240-1241.) Richie began screaming. He hugged his mom, but she was covered in blood and the blood got on him. (6 RT 870.) Richie ran upstairs and found his brother. David was also dead. Richie hugged David, and then ran to his own bedroom and made a frantic call to

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Richie testified that when he called the house again looking for Bruni, Micky Cage answered the phone. (6 RT 864.)

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At trial, Richie testified: "My mom was laying – laying there on the floor right by the stairs with her face blown off." (6 RT 865.)

911. (6 RT 865; 871; People's Exhs. 92 and 93.)

D. The Crime Scene Investigation.

RCSD (Riverside County Sheriff's Department) Deputy Ronald Heim was the first to arrive at 12:28 a.m. on November 10th, and other officers arrived within minutes. (9 RT 1231-1233.) Richie was standing in the front yard, screaming and crying hysterically. (9 RT 1233.) He was covered all over, including his face, with blood and what appeared to be fleshy matter. (9 RT 1234.) It was difficult for the officers to subdue Richie but they eventually managed to get him in the back of a squad car. (9 RT 1235.)

Several RCSD investigators processed the crime scene at Bruni's house and interviewed neighbors. (See 8 RT 1106.) Other law enforcement personnel searched the area in the direction reportedly taken by the suspect. (8 RT 1131-1132.) The street that is the first right turn from Sycamore Canyon is Whitewater Road. Whitewater ends in a cul-de-sac, and a short paved pathway on the right hand side of the cul-de-sac leads to a dirt bridle path. (See 8 RT 1132-1134; 1146-1147.) A Mossberg 12 gauge shotgun was found just off the bridle path, concealed under a dense bush approximately 150 feet from the cul-de-sac. (8 RT 1133-1134; People's Exh. Nos.115-117.) When investigators extricated the gun from the bush,

they noticed what looked like blood and tissue inside the barrel. (8 RT 1140-1142,1145.) One live round and one spent casing were found inside the gun. (8 RT 1142-1144.) More of the same type of shotgun shells were found at different points along the trail. (8 RT 1133-1134.)

Investigators photographed some shoe prints visible in the area where the gun was discovered. (8 RT 1139-40; 1151-1154.) Criminalist Paul Sham subsequently compared the shoe prints with some black boots taken from appellant's closet. Sham opined that the right boot "could" have made one of the impressions, and that the left boot "probably" made the other impression. (8 RT 1401.)

Firearms analyst Phillip Pelzel examined the Mossberg shotgun, as well as a number of expended shell components, shotgun shells, and slugs. (9 RT 1265; People's Exh. Nos. 26, 26a through f.) Pelzel performed test firings of the Mossberg shotgun and compared the results to the various materials. (9 RT 1271-1273.) He noted that this gun does not always leave a distinctive mark. (9 RT 1274.) Pelzel concluded, however, that the four shells found inside the house were definitely fired from this gun. (9 RT 1287-1288.) The two slugs (one lodged in the wall between Richie's and David's rooms and the other found on the floor in David's room) were "probably" fired from the Mossberg shotgun. (See 9 RT 1271-1276.)

E. Appellant's Arrest and the Evidence Obtained.

Based on the condition of the crime scene, Lead Investigator Michelle Amicone suspected that appellant might be violent and dangerous. (11 RT 1530-1532.) Amicone requested that the Emergency Services Team assist in the arrest. (11 RT 1530-1532.) On the morning of November 10, 1998, RCSD deputies arrested appellant without incident outside his apartment. Appellant consented to a search of the apartment. (11 RT 1532.)

Investigator David Fernandez searched appellant's apartment. He was specifically looking for dark clothing or pants and any weapons or ammunition. (8 RT 1178.) Fernandez found a black plastic rifle case in the hall closet. (8 RT 1179-1180.) In the master bedroom closet, he found a magazine clip for a handgun. (8 RT 1182.) In addition, he found and removed a pair of boots, a black jacket, and a large purple coat. (8 RT 1183-1185.) Fernandez also collected some warm ashes that had been spread out in a flower pot. (8 RT 1186.) The ashes tested negative for the presence of blood. (*Id.*)

Appellant was taken to the Riverside County Sheriff's Station. (9 RT 1192.) There, investigators collected his clothing as evidence. (See 9 RT 1193-1200; and 1204-1220.) Forensic nurse Dawn Cirrito collected

swabs from appellant and drew blood for comparison and analysis. (9 RT 1223-1229.) Four items of evidence screened positive for blood: the blue pants appellant was wearing when arrested; the black shorts appellant had worn underneath the pants; a swab taken from the Mossberg shotgun; and, a swab taken from appellant's left leg. (See 9 RT 1326-1337.) DNA analysis indicated that two stains on appellant's blue pants (one blood stain and one stain made by human tissue) matched Bruni Montanez. (10 RT 1429-1431.)

After all of the evidence had been collected, investigators sent for a tracking dog to try to determine the suspect's trail leading away from the house. (8 RT 1146.) Appellant's boxer shorts were used to give the dog the scent to follow. (9 RT 1215-1216.) The dog, Fidelity, picked up the scent in Bruni's front yard. She followed a path down Sycamore, across the path leading to the wash area, along the dirt trail, and to the bush where the gun was found. (8 RT 1146-1147.) Fidelity continued along the path, stopping occasionally to "alert" in areas where various items of evidence had been found. (*Id.*) Eventually she lost the scent at the point where the dirt trail ended in a cul de sac. (8 RT 1166.)

The Penalty Phase Evidence and Testimony

F. Appellant's post-arrest behavior.

Appellant was transported to the Riverside County Sheriff's Station

at approximately 10:30 a.m. on the morning of November 10, 1998. (12 RT 1656.) Lead Investigator Michelle Amicone had him brought to an interview room at around 5:20 p.m. (12 RT 1657.) When she and Detective Gutierrez entered the room, appellant began behaving strangely. (12 RT 1658.) [11] Appellant was bouncing up and down in his chair; shaking, shivering, and chattering his teeth. He had a blank stare on his face, which he alternated with "bugging his eyes out" at Amicone. (12 RT 1658.) When she asked a question, appellant would open his eyes very wide, raise his eyebrows, and tip his head forward in her direction. (*Id.*) Appellant had wrapped a blanket around himself. He was sweating, but was also shaking, shivering, chattering his teeth. Amicone asked appellant "You're sweating, but you are acting like you're cold. Do you know what's going on?" Appellant did not respond directly. Amicone recalled him saying was that he didn't like her, and for her to get out. (12 RT 1658.) Amicone and Gutierrez stayed in the interview room only a short time. (12 RT 1659-1660.) At some point appellant asked to make a phone call, stating that he wanted to call 1-800-lawyer. (12 RT 1661.) Amicone got a cell phone, and

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RCSD employee Cindy Rambo interacted with appellant throughout the day on November 10, 1998, as she was helping to collect the evidence. She described appellant as pleasant and cooperative with her. (13 RT 1858.)

she and Gutierrez left the room so appellant could make his call. Amicone observed him from outside the interview room. Appellant picked up the telephone, and turned it over in his hands looking at it as if he did not know what it was for. He eventually hit a few numbers on the key pad, sang to himself a little, and then put the phone down on the table and sat there. (12 RT 1662.) When she went in and asked appellant if he had made his call, he did not answer. (*Id.*)

Appellant had told Amicone and Gutierrez that he had diabetes. (13 RT 1851.) Gutierrez had a deputy drive appellant to the emergency room of Moreno Valley Medical Center while he followed in an unmarked car. Appellant reached the emergency room at 6:40 p.m. (13 RT 1851.) Gutierrez stayed with him for the two hours they spent at the hospital, and was present when the doctor examined appellant. (13 RT 1852.) At the hospital appellant did not shiver, shake or act as he had done at the station. He displayed no bizarre behavior, and was alert, attentive, and fully coherent. (13 RT 1853-1854.) Appellant repeatedly asked Gutierrez: "Are you going to take me back?", and, "Are you going to book me?" (13 RT 1852.) Amicone and Gutierrez tried to interview appellant again after returning from the hospital. (12 RT 1659-1660; 13 RT 853-1854.) Appellant began the shaking all over again. (13 RT 1853-1854.) Appellant

immediately invoked his *Miranda* [12] rights and they terminated the interview. (12 RT 1661.)

Dr. Steven Green examined appellant in the emergency room. (12 RT 1665.) Dr. Green had been advised that appellant had diabetes. (12 RT 1665.) He took several steps, including obtaining a medical history and testing appellant's glucose level. (12 RT 1665-1667.) Appellant's blood glucose level was 367 which is moderately elevated. (12 RT 1666-1667.) An elevated level suggests that the patient has not taken their insulin for a matter of days or weeks. (12 RT 1669-1670.) However, this was a fairly common presentation and was not dangerous or life threatening. (12 RT 1666-1667.) Dr. Green consulted with appellant, and determined that the appellant had been prescribed the correct amount of insulin. (*Id.*) Appellant was in the emergency room for over two hours that evening, during which time he was not shaking or chattering his teeth. (12 1669-1670.) Appellant appeared alert and coherent. (12 RT 1675.) Dr. Green testified that shivering, shaking, and chattering of teeth are symptoms accompanying low blood sugar and would not be experienced by a patient presenting with an elevated blood glucose level. (12 RT 1671; 1675.) Dr. Green knew of no medical condition to account for appellant's symptoms

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[12] *Miranda v. Arizona* (1966) 384 U.S. 436 [L.Ed.2d 694, 86 S.Ct. 1602].

based on his presentation and test results. (12 RT 1677.) [13] He also saw no evidence of psychosis or acute mental illness. (12 RT 1677-1680.)

G. The Expert Medical Testimony.

The prosecution and the defense each presented a medical expert in the area of diagnostic brain imaging. The focus of the testimony was the interpretation of a PET scan of appellant's brain taken in October of 2002.

1. Defense expert witness Dr. Chong-Sang "Joseph" Wu.

Chong-Sang or "Joseph" Wu, M.D., testified as an expert witness for the defense in the penalty phase. (12 RT 1684-1686.) Dr. Wu is an associate professor at the University of California, Irvine Medical School, and clinical director for UCI Brain Imaging Center. (12 RT 1684-1686.) In his testimony, he explained for the jury the basic principles of PET scan and its diagnostic benefits for assessing brain function in an individual as compared to MRI or CAT scan. (12 RT 1687-1690.) Dr. Wu also described how the procedure is performed. (12 RT 1693-1695.) In Dr. Wu's professional judgment, the PET scan is more sensitive than an MRI in detecting brain injury. (12 RT 1701.)

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13 In response to the prosecutor's questioning, Dr. Green testified that shaking, shivering, and/or teeth chattering, would be likely choices of symptoms for any diabetic wanting to fake a reaction. (12 RT 1672.)

The PET scan of appellant's brain was performed on October 3, 2002. (12 RT 1704.) As he would do in all cases, Dr. Wu recommended that appellant be taken off of all psychoactive medications for at least two weeks prior to the scan. (*Id.*) Dr. Wu opined that appellant's PET scan was consistent with his having suffered a brain injury. (13 RT 1791.) Dr. Wu did not diagnose brain injury solely on the basis of the PET scan. (13 RT 1791.) The diagnosis was confirmed by information from appellant's mother reporting that appellant had broken his jaw in a football game. Dr. Wu explained how an amount of force strong enough to break the jaw could easily have injured appellant's brain. (13 RT 1792-1793.)

Dr. Wu's evaluation was similar with respect to schizophrenia. While he was unable to make a firm diagnosis on the basis of the PET scan alone, Dr. Wu found the test results to be consistent with those seen in other schizophrenic brains. Specifically, he noted the decrease in the activity of the frontal lobe of appellant's brain. (13 RT 1791; 1802-1803.) Dr. Wu's conclusions were based on: the PET scan of appellant's brain; reports written by other physicians over a period of years; recent medication logs; and anecdotal evidence provided by defense counsel and appellant's mother. (*Id.*) Dr. Wu had no specific recollection of seeing reports from other jail or prison doctors diagnosing appellant with schizophrenia. He did

rely on a 1993 report prepared for Social Security disability benefits by a Dr. Scanlon. (*Ibid.*) The 1993 report stated that appellant had classic symptoms of schizophrenia including delusions and auditory hallucinations. (13 RT 1786.) Further, Dr. Wu had observed appellant's "flat affect," another indicator of mental illness or impairment. (13 RT 1802-1803.) Finally, it was particularly significant that appellant was taking large doses of the anti-psychotic drug Haldol. (*Id.*) This in itself was a very strong indication of schizophrenia. Dr. Wu found it highly unlikely that appellant could be malingering. (13 RT 1786-1787; 1806.) Referring to the medication prescribed for appellant's schizophrenia, Dr. Wu stated: "This is the kind of dosage that would knock most people out like a light." (13 RT 1802-1803.)

2. Prosecution expert witness Dr. Alan Waxman.

The prosecution presented the testimony of Dr. Alan Waxman, director of Nuclear Medicine Services at Cedars-Sinai Imaging Medical Group. (14 RT 1981.) Dr. Waxman testified regarding some different uses and medical applications for PET scans. (14 RT 1982-1983.) Dr. Waxman had reviewed the PET scans taken of appellant at the direction of Dr. Wu. (14 RT 1986.) Dr. Waxman reviewed what were, in his view, some of the weaknesses inherent in the PET scan as a diagnostic measure for brain

injury or abnormality. (See 14 RT 1986-1990.) He then testified about the problems with the imaging methods Dr. Wu used to evaluate appellant's brain. (See 14 RT 1990-1992.) Dr. Waxman found no abnormalities in appellant's brain. (14 RT 1993; 2002.) The "amateurish" program devised by Dr. Wu has produced inaccurate results in this and in many other cases. (14 RT 1992-1993.) Dr. Waxman summarized a number of ways in which Dr. Wu's methods were deficient and explained how those errors flawed the final analyses. (See 14 RT 1998-2000.) He has reviewed Dr. Wu's methods with Ph.D. statisticians, and they concur that Dr. Wu's protocol is flawed. (14 RT 2000.) Having examined Dr. Wu's methodology, and reviewed his testimony in a large number of other cases, Dr. Waxman concluded that Dr. Wu could find an abnormality in any brain. (14 RT 2000-2002.) Dr. Waxman testified that using a PET scan to find or confirm schizophrenia is an interesting investigatory method, but he could not say if it was useful or accurate. (14 RT 2015-2016.) The fact that appellant was prescribed Haldol and other antipsychotic medication did not alter his interpretation of the PET scan. (14 RT 2021-2024.) Other information such as medication logs or reports from family members could not affect his reading of the PET scan. (14 RT 2024.) Although more information may be helpful in diagnosing schizophrenia, he could not confirm that appellant

was schizophrenic based on the scan. Dr. Waxman's reading of the scan showed a normal brain. (14 RT 2025.)

H. The Prosecution's Evidence in Aggravation.

1. The nature and circumstances of the murders and the impact on the victims family, friends And community.

The prosecution presented the testimony of four witnesses to describe the impact of the victims deaths. Bruni's 83 year-old mother, Celena Rodriguez, came from Puerto Rico to testify. (14 RT 1926.) Mrs. Rodriguez described Bruni's early life in Puerto Rico, and the effect her death has had on their large and close-knit family. (See 14 RT 1827-1830.) Bruni's sister, Lupe Quiles gave a disturbing account of her shock and horror upon learning of the homicides. (14 RT 1938-1940.) She described in detail cleaning up the blood and bone fragments that were all that remained of her beloved sister, and revealed that she kept a bone fragment she believed had come from Bruni's face. (14 RT 1941-1942.) Vallerie and Clari also testified about Bruni and David, and the loss of these central figures in their family. (See 15 RT 2086-2091.) Mrs. Quiles and Clari each testified that they had remained extremely depressed since the deaths. (14 RT 1952-1953; 15 RT 2091-2092.)[14]

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14 The victim impact testimony is set forth in greater detail in the legal

2. Appellant's past crimes and misconduct.

a. July 12, 1986 - possession of a cane.

Officer Tyrone Hatfield testified about appellant's arrest on July 12, 1986. (13 RT 1836.) Officer Hatfield had been on patrol in a marked police car. He and his partner drove by a "problem location" on West Summit Street in Long Beach. Appellant and another male named Trevor Baldwin were standing out in front. (*Id.*) Appellant was holding a broken, wooden walking cane with the crook over his arm. Baldwin held a martial arts baton. (13 RT 1836-1837.) The officers knew appellant and Baldwin, and citizens had recently contacted police reporting that people in the area had been beaten up with sticks and similar weapons. (13 RT 1838.) The location was also known for high traffic in rock cocaine sales. (13 RT 1839.) When Officer Hatfield asked appellant why he had the cane, appellant said his mom was handicapped. The officers handcuffed appellant and Baldwin and took them in to the Station for possession of deadly/dangerous weapons. (*Id.*) Appellant waived his rights and agreed to talk to Officer Hatfield. (*Ibid.*) Appellant said that Baldwin was looking for a guy who owed him $50. Baldwin planned to beat the guy up if he found him and appellant had gone along to help if necessary. (13 RT 1840.)

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challenges to the admission of this evidence. (See Argument XI.)

b. January 1987 - possession of a firearm.

In 1987 Nancy Icenogle lived at her grandparents home on San Miguel Street in Paramount, around three blocks away from Bruni and her family. (13 RT 1879-1880.) Icenogle was around 19 years old at the time. (13 RT 1880.) She knew Clari and Richie best, and knew appellant through them. (13 RT 1880.)

Appellant and Richie Burgos had come to visit Icenogle during the daytime when her grandparents were not at home. (13 RT 1893.) Icenogle showed appellant and Richie a German Luger 9 mm gun her grandfather brought home as a souvenir from World War II. (13 RT 1892-1894.) Appellant liked the gun and admired it. (13 RT 1895.) Appellant had already told Icenogle that some people were after him. (13 RT 1893.) He said, "Nancy, is there any way you could get us a knife from the kitchen because I'm afraid to walk home." (13 RT 1897-1898.) Icenogle put the gun back in its leather case. She went to the kitchen, and when she came back out appellant, Richie, and the gun were gone. (13 RT 1898.) Icenogle called Bruni's house and spoke to Clari. (*Id.*) She was crying and telling Clari she had to get appellant to bring the gun back. When Icenogle saw appellant later that afternoon he said she was not getting the gun back. Appellant said it was his word against hers and she would have to prove it.

(13 RT 1898.) Icenogle's grandfather eventually discovered that the gun was missing. (13 RT 1899.) Her grandparents confronted her, and she later admitted what had happened to her grandmother. (*Id.*) At that time Icenogle's grandmother called the police. They never did get the gun back. (*Ibid.*)

c. April 1987 - threats and assaults against Nancy Icenogle and Willie Hinton.

Brandy Field and her younger brother William "Willie" Hinton lived in the neighborhood in Paramount, and they were friendly with Nancy Icenogle, Clari and appellant. (13 RT 1880-1881.) At the time, Willie was approximately 16 or 17 years old. (13 RT 1882.) On April 4, 1987, appellant approached Icenogle and told her that he wanted to talk to Willie. (13 RT 1883.) Appellant said Willie had taken some money from him and he wanted to work it out. (*Id.*) Icenogle took appellant to Downey, where Willie was staying, which was only around 10 or 15 minutes away by car. (13 RT 1883.) When they arrived at the house, the appellant yelled for Willie. (13 RT 1884.) Appellant got out of the car when Willie came outside. He hit Willie on the head, knocking him to the ground. (*Id.*) Appellant was big and muscular at the time. He was much bigger than Willie who was small and scrawny. (13 RT 1884.) Appellant put Willie in the car and drove back to Bruni's house in Paramount. (13 RT 1885.) He

took Willie inside the house. (*Id.*) Appellant and Richie started beating Willie up. (13 RT 1885-1886.) Appellant was using a piece of wood with a screw or nail sticking out of it. He was hitting Willie all over in the face and in the upper body. (*Id.*) Willie curled up in a fetal position and was yelling for them to stop. Appellant was yelling at Willie that he needed to die. (13 RT 1885-1886.) Appellant had to pull the nail out from where it punctured Willie. (13 RT 1887.) Richie had a doubled up chain and was using that to beat Willie. (*Id.*) Icenogle was screaming for them to stop. Appellant told her to shut up and she got hit too. (13 RT 1887.) The nail left a mark on her back but did not break the skin. (13 RT 1888.) Bruni came in and got Richie off; she then put herself in front of Willie. (13 RT 1889.) Bruni made appellant stop hitting Willie. (13 RT 1903.) There were puncture wounds on Willie's head, face, chest and arms. (13 RT 1900.) He had bruises all over his body. (*Id.*) Bruni helped Willie up, nearly carrying him. (13 RT 1889.) She took him to his grandparents' house. (13 RT 1889.) The police were called and Icenogle spoke to them, although she feared for her safety. (13 RT 1890.) Icenogle was threatened a couple days later. (*Id.*) The Orange Avenue Liquor Store was a central hangout in the neighborhood. (13 RT 1891.) While Icenogle was there on April 9th, appellant came in and asked her to come outside. She knew

appellant would hurt her so she said no. (13 RT 1891.) Appellant began yelling at her. (*Id.*) He said she was a liar; she'd ratted on him and he was going to have to f ---ing kill her. (13 RT 1890.) Icenogle asked the store owner to help her. (13 RT 1891-1892.) The owner got appellant to leave, and a few people in the store walked Icenogle home. (13 RT 1892.)

d. 1988 - assault and injury to David Burgos.

In the guilt phase of trial, Clari testified about several episodes of domestic violence by appellant. On one occasion, appellant allegedly beat and kicked the then six-year-old David Burgos. (See 6 RT 792-793.) Appellant kicked David in the head, causing permanent injury. David repeatedly had severe headaches. (15 RT 2071.) During some episodes, he would have excruciating pain; he would just hold his temples and scream for several minutes at a time. These headaches occurred around once every couple of weeks. (15 RT 2071.)

e. April 14, 1988 - felony conviction.

The parties stipulated that on April 14, 1988, appellant was convicted of a felony (cocaine sales) and on Nov 7, 1988, was sentenced to a three year prison term. (13 RT 1771.)

f. April 29, 1990 - beating of Mary Roosevelt.

Mary Denise Roosevelt is the mother of appellant's other daughter,

Felisha Cage, born November 24, 1986. (13 RT 1833-1834.) On April 29, 1990, appellant went to Roosevelt's house, grabbed her around the neck and choked her. (13 RT 1834.) He socked Roosevelt in the face and threw her to the floor where he kicked her in the face and the stomach. Appellant also slammed her head into a wall. (13 RT 1834.)

g. August 10, 1991 - beating of Clari Burgos and subsequent felony conviction.

Signal Hill Police Officer Steven Owens went to Clari's and appellant's apartment on August 22, 1991, to speak to Clari Burgos about a reported burglary. (13 RT 1842; 1844-1846.) Clari had red marks on her face and was visibly upset. She gave a lengthy statement about events occurring twelve days earlier on August 10, 1991. (13 RT 1843.) Clari gave the officer a kitchen knife with some blood on it, and the clothes she had been wearing on August 10th. (*Id.*) The clothing was very heavily stained with blood. Clari's cheeks were still quite swollen and lightly bruised. (13 RT 1844-1846.) Signal Hill Police Officer Gregory Lee Pepoy had accompanied Officer Owens on August 22, 1991, and described appellant's arrest that day. (13 RT 1848.) Appellant arrived riding a bicycle. He rode up to the officers with his hands on the handlebars. When police went to place appellant under arrest for domestic violence, he began struggling. At the time appellant was large and very muscular. It took three

policemen to get a hold of appellant. He was finally subdued when Officer Pepoy's sergeant stepped in and used the carotid hold. (13 RT 1848.) The parties stipulated that on September 4, 1991, appellant was convicted of a felony (spousal abuse) and was sentenced to a two year prison term. (13 RT 1771.)

h. December 8, 1992 - assault of Vallerie Cage.

Clari and Vallerie testified about an incident on December 8, 1992, they were living on Genuine Risk in Perris. Clari was washing dishes in the kitchen when she heard screaming. She walked into the family room and saw appellant hitting Vallerie with a belt. He was "holding her up " by one arm with her feet dangling off the ground. (14 RT 2084.) Clari tried to intercede, but appellant pushed her out of the way and went on. When the defendant finished, the witness confronted him and said she didn't agree with him hitting her like that. (14 RT 2085.) Appellant said "that's my child and I'll hit her any way I want." He said he'd use as much force as he wanted to. (14 RT 2086.)

Vallerie testified appellant had been beating her that day with a belt buckle. She was seven or eight years old the time, and she got the courage to call the police. (14 RT 2051.) She soon regretted calling the police, because she got in worse trouble and was sent to the closet for long periods

of time. (14 RT 2052.) Vallerie sometimes spent entire days in the closet, including once on her birthday. (14 RT 2053.)

i. 1994 - assault of Richard Burgos.

Vallerie described an incident when she and Richie had a disagreement over who could have the last of the juice. She told appellant, and he picked a fight with Richie and beat him badly. Appellant hit Richie, knocked him down and kicked him in the abdomen. (14 RT 2048-2049.) Richie had to go to hospital, and he came back heavily bandaged. He had lots of severe bruising around his abdomen and sides, covering his entire torso and ribs. (14 RT 2050.)

j. June 1994 incident with neighbors.

In June of 1994, David Olson was 15 years old. Olson and his family lived at 2746 Genuine Risk Street in Perris, California. (13 RT 1864.) Bruni, David, Richard and Clari were the Olson's neighbors. (13 RT 1865-1866.) David Olson also knew appellant, and had known the family for around four years before the incident. (*Id.*) One day David Olson went over to Bruni's house to have Clari tutor him in high school math. (13 RT 1867-1868.) David had asked if appellant was home before going over to Bruni's. (13 RT 1868-1869.) He knew appellant was angry at him because he had refused to loan appellant a set of free weights. (13 RT 1870.) David

Olson left soon after getting to Bruni's because appellant came home. (*Id.*) Appellant asked him "What are you doing here?" David was afraid of appellant, and began "walking backwards" out of the house. (13 RT 1870.) Appellant started toward David, and then said "I'm not even going to waste my time with you. I'm just going to pick you up and I'll just toss you." Appellant picked Olson up by the seat of his pants and the back of his shirt and threw him over/into a hedge. (13 RT 1871.)

David's mother, Irene Olson, testified that appellant told her if she called the police he would kill her and her son and burn their house down. (13 RT 1905-1906.) Appellant pulled his pants down and told her "This is what I care about you. Call the police." (13 RT 1906.) Appellant exposed himself front and back and said "Lick my nuts bitch." (*Id.*)

David and Irene Olson were inside their house when the police arrested appellant. The Olsons heard the sound of breaking glass. (13 RT 1873; 1906.) David looked out and saw appellant trying to get out of the window of the police car. (13 RT 1873.) It took several police officers to pin him down. Appellant was saying "This is the same shit that happened to Rodney King." (*Id.*) Appellant had broken through the right rear window of the patrol car, and crawled out of the window and down to the ground. (13 RT 1874.) Appellant was saying that he wanted water. (*Id.*) David

Olson thought the police had sprayed mace in appellant's face. One officer got a hose and was spraying water in appellant's face, in response to which appellant was saying "Thank you." (*Ibid.*)

David Olson later heard appellant say that if he ever saw Olson's dad he'd "kill his white ass." (13 RT 1875.) Appellant later said he'd "get 18th Street after him." (*Id.*) David Olson believed that 18th Street was an LA street gang. His whole family was scared, and they slept at a friend's house that night. (*Ibid.*)

k. January 1996 - assault of Clari Burgos.

Traci Thompson and appellant's younger brother, Richard Cage, have twin daughters born in 1990. (14 RT 1956; 1963.) Thompson went to Long Beach Memorial Hospital on January 27, 1995, to see Clari. (*Id.*) Clari's children were in the waiting room alone, and Thompson brought her sister along to help watch them. (14 RT 1956.) Clari had a big gash in her head. It was "just white meat, and no teeth." (14 RT 1957-1958.) Thompson didn't believe Clari's story about being assaulted at the market, and she told Clari repeatedly to tell the police the truth. (*Id.*) She argued with Clari a bit but Clari couldn't really talk. (14 RT 1957-1958.) Richard told her they should stay out of appellant's and Clari's business. (*Id.*) Thompson did not tell the police because she knew it would be useless if

Clari didn't back up her story. (*Ibid.*)

l. July 4, 1997 - assault of Vallerie Cage.

Traci Thompson also testified about an incident that occurred around July 4, 1997. Thompson, Richard Cage, and their children, had gone to visit Clari and appellant at their place in Perris. (14 RT 1958-1959.) At dinner, Vallerie hadn't wanted to eat her vegetables. (*Id.*) Appellant took Vallerie into her room to discipline her. Thompson followed and listened by the door. (14 RT 1959.) She heard the sounds of appellant hitting Vallerie. (14 RT 1960-1961.) There was a big "thump" as Vallerie was being slammed into the wall. (14 RT 1967-1968.) When Vallerie come out of her room she was crying and shaking, and her nose was bleeding. (14 RT 1961.) Thompson was very angry and upset. She told Richard they had to leave, but driving home she changed her mind. (14 RT 1960-1961.) Thompson was afraid for Vallerie and Clari, and thought they should go back to protect them from appellant. (*Id.*) When they returned Thompson spoke privately with Clari. Clari said she knew it was wrong what appellant had done. (14 RT 1961.)

I. The Defense Penalty Phase Case.

1. Dr. Boniface Dy.

The defense presented the testimony of another physician. Boniface

Dy, M.D., was a psychiatrist employed by Riverside County Detention, Jail Mental Health Services. (15 RT 2097.) Dr. Dy testified that he had been seeing appellant once every 25 to 30 days for medication review since June 14, 2000. (15 RT 2098; 2101.) Appellant was currently taking several psychoactive medications: Seroquel, 300 mg, two times daily; Zyprexa 10 mg in the a.m. and 20 mg in the p.m.; and Sinequan, 350 mg in the evening. (15 RT 2099.) [15]

2. Felisha Cage.

Appellant's other daughter, Felisha Cage, testified in the defense case. At the time of trial, Felisha was 16 years old. She never lived with her father, but he called her on occasion and she sometimes went to visit at his house. (15 RT 2105.) She recalled going to Magic Mountain, and spending the weekend at appellant's house when she was around seven years old. (15 RT 2106-2107.) Felisha could not recall last time she saw appellant outside of court. (15 RT 2107.) Felisha stated that appellant had never been violent toward her. (*Id.*)

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Dr. Dy was the second psychiatrist to see appellant. Prior to his handling the case, Dr. Chan Wells had prescribed for appellant: Sinequan, 100 mg in a.m. and p.m.; Haldol 10 mg, two times daily; Cogentin, 1 mg two times daily; insulin medication for diabetes; and, some cold tablets. (15 RT 2099.)

3. Emly Farmer.

Appellant's mother, Emly Farmer, was the final defense witness to testify. (15 RT 2112.) Ms. Farmer related how appellant had been diagnosed with diabetes at age nine. (15 RT 2114.) Appellant had a hard time accepting the limitations of his condition. (*Id.*) At that time, appellant's behavior was "fairly decent," the largest problem she had with him was getting him to take his medicine. Appellant was obedient at home but "was missing a lot of school because of the frequent hospitalizations." (15 RT 2115.) After the diagnosis of diabetes, appellant's temperament changed. He got upset quickly and cried easily. [16]

Appellant's grades were very poor by the time he was eleven or twelve years old. His grades had never been good, and she had worked hard with him just to help him pass his classes. (15 RT 2118.) Appellant had always seemed slower than his younger brother Richard, and after the diabetes diagnosis he was slower still. (*Id.*) Ms. Farmer related how, when the boys were around twelve, they had wanted to buy their own school clothes. Ms. Farmer worked extra hours and gave them money to go shop

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Ms. Farmer testified that the endocrinologist told her that studies show a majority of diabetics have major depression. The prosecutor objected on hearsay grounds. The court granted the motion to strike and admonished the jury to disregard the testimony. (15 RT 2115.)

for themselves. Appellant was not able to coordinate buying his own clothing and things. (15 RT 2118-2119.)

By the time appellant was fourteen years old his behavior was "terrible." (15 RT 2119.) That year he went to live with the Burgos family. Initially Ms. Farmer did not know where he was. (15 RT 2120.) Ms. Farmer had rules and discipline in her home. Appellant was defiant, and he would get very upset and angry when confronted. Ms. Farmer still wanted appellant at home and she did not approve of his living elsewhere. She tried to get him back home several times. She sought the help of church members who worked with Children's Services in Long Beach, and even the Long Beach Chief of Police who was also a member of her church. (15 RT 2120-2121.) Sometimes appellant was persuaded to come back home for brief periods of time, but he would then "return to the undisciplined environment" of the Burgos's house. (15 RT 2121.) Ms. Farmer did not know if appellant ever went to high school. She related how he once told her he just couldn't understand what went on in school. (15 RT 2122.) She tried getting help through a couple of school programs, but appellant never completed them. They went back to doctors who recommended "psychiatry at Harbor UCLA Hospital." (*Id.*)[17]

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17 Outside the presence and hearing of the jury, the prosecutor

Ms. Farmer went on a cruise in November of 1998. She last saw appellant on October 28 or 29, 1998. He was dirty and unkempt and seemed distant. (15 RT 2130-2131.) The next time Ms. Farmer saw appellant was around a week after the murders when she drove out to see him at the County Jail in Riverside. (15 RT 2131.) Appellant did not know her. He was trembling, his hands were shaking and his lips were quivering. Ms. Farmer kept saying "Micky, it's mom," and he just stared at her. (15 RT 2131-2132.) She stayed between 20 and 30 minutes and appellant never acknowledged her. (15 RT 2132.) Ms. Farmer saw appellant around a week later at the next visiting day. He was much the same. He moved his mouth a few times but there was no sound coming out. Ms. Farmer was very alarmed at appellant's condition. She knew something was wrong. (15 RT 2134.) Ms. Farmer testified: "The only time I've seen that type of behavior – – or that type of display was at Metropolitan State Hospital." (15 RT 2132.) When she came back the next time he spoke to her but it was not a complete thought process. (*Id.*) On the third visit, he still seemed not to

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complained that she had been given no discovery about Ms. Farmer seeking psychiatric care for appellant. (15 RT 2122-2123.) Defense counsel stated that he was surprised by this aspect of Ms. Farmer's testimony, and had not intended to elicit the information. (*Id.*) The court cautioned defense counsel not to explore this area further. (15 RT 2123-2124.)

recognize her but appeared to be shaking less. (15 RT 2133-2134.) Appellant did not recognize her for at least two weeks. (15 RT 2133.)

J. The Prosecution's Evidence in Rebuttal.

The prosecution recalled Vallerie and Clari to testify to as rebuttal witnesses following the testimony of defense witnesses suggesting that appellant was schizophrenic. (See 15 RT 2146.) Vallerie described accompanying appellant to the medical evaluations necessary to qualify him for Social Security disability benefits. (15 RT 2148-2150.) According to Vallerie, appellant had enlisted her participation to help him appear "crazy." In the office, appellant talked about seeing aliens, made strange faces and laughed out of context. (*Id.*) Appellant was in fact fully rational and knew what he was doing all of the time. (15 RT 2153.) Clari also testified that appellant faked his mental illness to collect monthly disability benefits. (15 RT 2165-2167.) She stated that appellant bragged about it, and only took the prescribed medications when his case was up for re-evaluation because he knew the doctors would check his blood. (15 RT 2169.) When taking those psychoactive medications, appellant slept all the time. (15 RT 2170.)

I.

THE TRIAL COURT'S ADMISSION OF IRRELEVANT, CUMULATIVE AND HIGHLY INFLAMMATORY PROPENSITY EVIDENCE DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS AND WAS ERROR UNDER CALIFORNIA LAW.

A. Introduction.

The prosecution had physical evidence and circumstantial evidence connecting appellant to the two homicides. However, to obtain a conviction for capital murder, the prosecution needed to convince the jurors not only that appellant killed the victims but that these were deliberate and premeditated first degree murders. There were no eye-witnesses to what occurred inside Bruni's house that evening, and the evidence did not clearly establish that premeditation and deliberation preceded the shootings. The state's response was to formulate a theory of the case under which evidence from *other* crimes and misconduct could be introduced to support an inference of intent in the killings of Bruni and David. [18]

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[18] The evidence included both adjudicated and unadjudicated incidents and conduct which, although perhaps morally offensive, arguably did not constitute a crime. In the interest of brevity, this entire body of evidence may be referred to herein as the "prior crimes" or "past crimes."

Appellant had a 14 year history of acting out violently when angry or frustrated. Sadly, his wife and daughter often bore the brunt of his irrational rages. According to the prosecution's theory the murders were inextricably linked to the domestic violence. The prosecution proposed that appellant's plan all along had been to dominate and control not just Clari and Vallerie but every member of the Burgos/Montanez family. The murders of Bruni and David were, as the prosecution contended, a direct outgrowth of appellant's larger scheme. Having thus connected the domestic abuse history to the murders, the prosecution argued that the past crimes were relevant and admissible under Evidence Code section 1101, subdivision (b) to show identity, intent, and/or motive with respect to the murders.

Over defense objection, the jury heard abundant and detailed testimony about appellant's other, dissimilar (and for the most part unadjudicated), crimes and misdeeds. For all of the reasons discussed below, this was classic propensity evidence and was not probative on any disputed issue. The prior crimes evidence had little if any bearing on any of the prosecution's stated purposes, *i.e.*, to establish intent, identity, or motive. In addition to its lack of relevance, this material was unduly prejudicial for several reasons. Admitting this evidence, particularly under

the case's unusual circumstances, was a clear abuse of the trial court's discretion under California law and deprived appellant of fundamental state and federal constitutional rights. Appellant's convictions and sentence of death must therefore be reversed.

B. Overview of Legal Claims.

The trial court abused its discretion under California law by admitting evidence with no relevance to disputed facts or material issues in the guilt phase. (Evid. Code §§ 210, 350; *People v. Alcala* (1984) 36 Cal.3d 604, 631-632; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905.) [19] Any marginal relevance this evidence had was vastly outweighed by the inflammatory effect it was certain to have on the jury. (Evid. Code §§352; 1101; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) The admission of this irrelevant, cumulative and highly prejudicial evidence deprived appellant of his constitutional rights to due process of law (*Hicks v. Oklahoma* (1980) 447 U.S. 343), to a fundamentally fair trial (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and a reliable determination of the penalty (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) (U.S. Const. Amends. V, VI, VIII and XVI;

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Full parallel citations for cases from all of the courts of California, and cases of United States Supreme Court, are set forth in the Table of Authorities rather than in the text so as not to distract from the legal discussion. Parallel citations are included in the text for the decisions of other jurisdictions.

Cal.Const., art I, sections 7, 15 and 17.) For the reasons discussed below, this Court must reverse appellant's conviction of first-degree murder, and overturn his sentence.

C. The Proceedings Below

1. The Prosecutor's Trial Brief, the Pretrial Hearing and the Court's Rulings on the Proffered Evidence.

The week before jury selection began, the prosecutor filed a 15 page "Trial Brief Regarding the Admissibility of Evidence." (2 CT 531.) [20] The Trial Brief had a dual purpose: first, to persuade the court to adopt the prosecution's theory of the case; and, second, to convince the judge that any evidence offered to bolster that theory was relevant and admissible. The Trial Brief begins with the "Anticipated Statement of Facts," which sets out a chronological account of appellant's relationship with Clari Burgos and her family from the time the couple met in 1983 when they were both only 14 years old. Within a few months of appellant's and Clari's meeting her mother, Bruni, invited appellant to move in with their family. According to the prosecutor, appellant spent the better part of the next 14 years abusing

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The Prosecution's Trial Brief Regarding the Admissibility of Evidence was filed on July 28, 2003. (2 CT 531.) On August 5, 2003, defense counsel filed a Motion in Limine to Exclude Other Crimes Evidence. (8 CT 2123.) The trial court heard and denied the defense Motion the same day. (8 CT 2126.)

and controlling Clari and all members of the household. Several especially egregious incidents are described, leading up to Clari's decision to leave appellant in October of 1998. The Trial Brief then reviews the evidence the prosecution expects to present regarding the capital crimes, and relates events surrounding appellant's arrest on November 10, 1998. (See 2 CT 531-536.)

In the next section of the Trial Brief, entitled "Proffered Prior Abuse Evidence," the prosecutor briefly describes 19 incidents of past misconduct by appellant. The incidents were organized according to primary victim, and dated from 1984 through 1998. Fourteen incidents, A through M, involve Clari. (See 2 RT 536-539.) David Burgos was a victim in one incident, and Vallerie Cage was the alleged victim on three occasions. It was also alleged that appellant beat up Richard Burgos "all the time." (2 RT 539.)

The state argued that all of these incidents were relevant and admissible under Evidence Code section 1101(b) to show motive, identity and intent. (2 CT 540-542.) The Trial Brief suggests that the state's case would be vulnerable without the prior conduct evidence:

> [T]he defendant's prior acts of abuse toward the Burgos/Montanez family explain several things. First of all, it shows the power and control that he exercised over all of them for so many years. It also shows an escalating pattern of

violence by the defendant when he does not get what he wants from the people involved in this case. It explains why Clari had to take her children and leave the country to feel safe.

Most importantly, it is the only logical and reasonable explanation for the killings. Without the motive evidence, the jury will simply be left with the fact that the defendant brutally murdered his mother-in-law and brother-in-law. The first question they will want answered is why. That is why the law allows motive evidence to be introduced.

(2 CT 540.)

At the hearing the court asked the prosecutor to elaborate and to explain why the prior acts evidence was relevant to motive, intent and identity under Section 1101(b). The prosecutor stated:

Number one, I think the most important reason, is the motive. Because without a motive, the murder makes no sense.

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[T]he defendant was angry at his wife for taking his children and fleeing, and him having no idea where they were. The defendant had a strong suspicion that his mother-in-law knew where his wife was. And so he wasn't able to get that information from his mother-in-law because obviously he never went and sought her out. He just complained about not being able to find his children, being upset about the fact that his son was gone.

So he went over to his mother-in-law's house, using the clothes as a ruse to get her to open the door. Because I think it's pretty obvious that this man has terrorized this family repeatedly over the years. And she probably wouldn't have willingly opened the door to him, but for the fact that

> he's using this pretense of returning clothes to Clari – or giving clothes to the mother to say "Give them to Clari."
>
> So because the defendant is angry with his mother-in-law for not telling him where his wife and children are he kills her.
>
> Also, in one of the many threats the defendant made to Clari in the course of the relationship, especially over the last couple of weeks before she actually left, he made threats to the effect of, "I'll kill your whole family," things like that.
>
> Well, sure enough, lo and behold, the defendant follows through on those threats that he made to Clari if she ever left him.

(3 RT 438-439.)

Relying on *People v. Harris* (1998) 60 Cal.App.4th 727, 733, and *People v. Escobar* (1996) 48 Cal.App.4th 999, 1023, the prosecutor argued that Evidence Code section 352 did not foreclose evidence of appellant's prior misconduct. The prosecutor opined that the prior misconduct evidence was no more inflammatory than the charged crime. As a result, the past conduct was admissible under *People v. Ewoldt, supra,* 7 Cal.4th at p. 405. (2 CT 542-543.)

Defense counsel objected on several grounds. First, counsel pointed out the lack of relevance to the charges. If believed, the proffered evidence established that appellant had been abusive to his wife and daughter (Clari and Vallerie). However, there was no evidence of appellant ever having

behaved in a violent or aggressive way toward his mother-in-law, Bruni. On the contrary, Bruni was the respected family matriarch and appellant had lived with her for years at a time. The violent incidents involving appellant and Clari thus did not establish a motive for appellant to kill Bruni. Counsel next commented that many of the incidents were so old that they were, at best, marginally relevant. The single alleged incident involving David Burgos occurred some ten or eleven years before the crimes. Counsel further noted this was classic propensity evidence and clearly inflammatory. Additionally, defense counsel maintained that the sheer number of incidents was unduly prejudicial under Evidence Code section 352. (See 3 RT 442-449.)

The trial court held that the prosecutor could introduce nearly all of the evidence discussed in the Trial Brief to show motive and identity under Section 1101(b). (3 RT 445-446.) [21] In connection with its rulings, the trial court stated:

> As far as Vallerie Cage, under "A" and "B," I would let those in because it helps explain why Mrs. Cage was hiding herself and the kids. And it is prior 1101(b), in the sense that it's just violent – random violence upon another

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The evidence of appellant's having constantly "beaten up" Richard Burgos was not allowed. The court found that this testimony would have been excessive under Section 352, and might also have been unduly time-consuming. (3 RT 446-447.)

member which helps show the overall picture which goes to the ID and motive.

(3 RT 446.)

2. The Prosecutor's Opening Statement.

The prosecutor's opening statement followed the narrative set out in the Trial Brief. It was immediately clear that the abuse history would be the predominant theme in the state's case for intentional murder. After proclaiming that this case was "tragic, senseless and absolutely gut wrenching," the prosecutor told jurors that the story had begun years earlier. (6 RT 772-773.) The entire first half of the prosecution's opening speech was a preview of the evidence and testimony detailing appellant's past misconduct. (6 RT 772-778.) The clear implication was that the crime could be understood and the full horror appreciated apart from the historical context. The guilt phase presentation of evidence was tailored accordingly, and basically followed a chronological approach leading up to the actual homicides.

3. Clari Burgos's guilt phase testimony.

Clari Burgos was the prosecution's first witness. She and appellant met in Long Beach in 1984 when they were both only 14 years old. (6 RT 789-791.) Clari lived with her mother, Bruni Montanez, her two brothers: Richie Burgos, then age 13, and her baby brother, six month old David

Montanez. Bruni invited appellant to move in to their family's home only a few months after he and Clari met. Appellant later moved with them to Paramount, and in December of 1985 Clari and appellant had a daughter, Vallerie Cage. The family subsequently moved to Bellflower, the location of the first incident Clari described. (6 RT 791-792.)

a. Appellant's choking of Clari in the late 1980s.

One night appellant woke Clari up and told her to get him a glass of water. When she refused he grabbed her by the hair, dragged her downstairs, and choked her until she blacked out. (6 RT 792.)

b. Beating David Montanez and choking Vallerie.

Clari testified about another incident in Bellflower. (6 RT 792-793.) When David Montanez was five or six years old he cried one day when Bruni left the house. Appellant got upset. He called David "momma's boy," and began to punch and kick him. At one point David was down on the floor and appellant "stomped on" his head. When Clari tried to pull appellant away from David he turned on Vallerie, "squishing" the baby by bending her legs back over her head until her face turned blue. (6 RT 793.)

c. Choking and beating Clari in January 1991.

In 1991 Clari, appellant and Vallerie were living in their own apartment in Signal Hill. (6 RT 793.) The couple argued one evening

because appellant wanted to go out with his cousins. He pushed Clari back into the bathroom where he choked her and smashed one of her teeth out against the bathtub. (6 RT 794-795.)

d. Beating Clari in August of 1991.

Clari described another incident in Signal Hill from August of 1991. (6 RT 795-796.) She and appellant had been arguing about money. Appellant started choking her. He pushed her face down on the couch and pulled pieces of her hair out. Appellant dragged Clari to the kitchen, pushed her onto the floor and held a knife to her throat. Clari tried to get the knife away from her neck but in the struggle her hand was cut. Appellant dragged her into the bedroom and spent the rest of the night beating and choking her. (6 RT 795-796.) Appellant told Clari that if she told the police he would kill Vallerie. (6 RT 797.)

e. Hitting Clari with a brick in January of 1995.

In 1994 Bruni moved to Riverside County, to a house on Genuine Risk Street in Perris. In December of 1994 Clari and appellant had a son, Micky Cage Jr. (6 RT 798.) Appellant was not living with the family at this time, and Clari, Vallerie, and the new baby moved in with Bruni, Richie and David. (6 RT 798-799.) Clari had a new car she had bought for the commute from Perris to her job in Carson. Appellant showed up at the

house one day in January of 1995. He wanted to use Clari's new car, and when she said no he began beating her up. (6 RT 799-800.)

Clari ran outside, slipped on grass, and fell. The next thing she knew appellant was on top of her and she saw a brick coming toward her mouth. Clari supposed that she must have blacked out. When she came to there was a lot of blood in her eyes. Appellant kept saying "I'm not going back to jail. I know you'll call the police on me." (6 RT 800.)

Appellant made her get in the car with Vallerie, David and the baby, Micky Jr. Clari remembered feeling dizzy, and thought that she must have been in shock. (6 RT 800-801.) She wanted to go to the hospital but appellant just kept driving all around for the rest of the day. They drove all around Lake Elsinore and appellant refused to stop anywhere. Clari looked in the rear view mirror and saw that her forehead was split open and the flesh looked like hamburger. She knew that she had to tell appellant that she was in a lot of pain and dizzy or he would not take her to the hospital. (6 RT 801.) Appellant eventually drove near Long Beach. He said that his mother was a nurse and she could look at it. (6 RT 801.)

The incident happened in the middle of the day, but it was night by the time they got to the hospital. (6 RT 800.) They stayed outside in the car for a long time while appellant coached her on what to say. He told her

that if she said anything to make him get arrested he would kill the children. (6 RT 801.) Clari told the hospital staff that she had slipped and fallen at the market. She was afraid for the children because appellant had them outside in the car. Appellant's mother worked at the hospital and she came down to see Clari, as did Appellant's brother Richard Cage and his girlfriend Tracy Thompson. (6 RT 802-803.) Clari was not admitted, but she had a CAT scan and waited there overnight to see the plastic surgeon in the morning. She did not recall the number of stitches needed to close the wound in her forehead. The hospital arranged for Clari to see an oral surgeon immediately because the front of her jaw was caved in. It was a weekend and the doctor opened up his office to see them. Clari described how the doctor braced his foot up against the chair to pull her jaw back into alignment. (6 RT 804.) Clari's jaw still does not close properly and her teeth do not align correctly. (6 RT 804.) She lost her front teeth and her lip was badly cut. She also has a "Y" shaped scar on her forehead. (6 RT 804-805.) [22]

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Over defense objection, the trial court admitted into evidence close-up photographs of Clari's scar taken by an identification technician in the initial days of the trial. (See 7 RT 891-892; People's Exh. Nos. 98 and 99.)

f. Hiding Clari's false teeth.

Approximately six months to a year later, Clari had dentures made because she lost her teeth and much of her gums. (6 RT 805.) Appellant would hide or throw away her dentures so she would have to go to work without teeth. He did that to humiliate her. Appellant did that many times, right up until the time when she left. Vallerie felt sorry for her and would go into the dumpster to look for Clari's teeth. (6 RT 805-806.)

g. Threatening Clari in 1998.

Clari tried to leave many times but appellant would do something and/or threaten to kill her, the kids or her family. One time he took Micky Jr. and would not give him back. After the brick incident Clari knew that she had to get away. She began giving her Aunt Lydia money to hold for her. (6 RT 808.) In the month before she left, Clari was secretly interviewing for new jobs. She went on job interviews on her lunch breaks or before work. Her interview clothes were hidden at Aunt Lydia's house so appellant would not get suspicious. If Clari dressed up at home before leaving appellant would accuse her of seeing another man. She tried hiding her interview clothes in the trunk of her car, but appellant then began driving her to work. In the last month or so before Clari left appellant had become increasingly suspicious and aggressive. (6 RT 811.) Appellant

would not leave Clari alone with the children. He would not let her sleep, and instead kept her up all night arguing and made constant threats about what he would do if she left him. Appellant repeatedly threatened to kill Clari, the kids, and her entire family. His behavior would cycle. He would be nice for a time, and would then grow increasingly nasty and aggressive. (6 RT 812.)

h. Sugar in the gas tank of Clari's car.

Clari testified about other incidents which were not mentioned in the prosecutor's Trial Brief. Appellant once put sugar in her gas tank. (6 RT 808.)[23] Another time when she was driving and he was sitting in the passenger's seat they argued and he put the car in park. He thought it was funny and did it more than once. The car would spin and go out of control, "it was a joke to him." (6 RT 809.) Appellant often threatened to kill Clari and her entire family. Sometimes he threatened to kill her and Vallerie, saying "then your mother will have to raise Mick." (6 RT 809.) Clari knew when the remarks were directed to her mom, her brothers and the extended family because when appellant threatened her or the kids he would use their

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Defense counsel objected on relevance and discovery grounds. The objections were overruled. (10 RT 1379-1380.) Forensic technician Barbara Maestas was allowed to testify that she had examined the car and found white residue around the gas tank, and a funnel and an empty box of C&H sugar in the trunk. (See 10 RT 1376-1381.)

names. (6 RT 809.)

In the eighteen months before the crimes Clari, appellant and the children lived in an apartment two or three miles away from Bruni's house. Clari worked in Carson, and her hours were 6:00 a.m. to 2:30 p.m. She typically left home around 4:30 a.m. to avoid the rush hour traffic. In the last month before she left appellant insisted on accompanying her to work. (6 RT 813, 847-848.) He usually slept in the back seat while Clari drove. (6 RT 813.) She kept only a quarter tank of gas in her car because if it was full appellant would drive around and use up all the gasoline. (6 RT 814.)

i. Tearing up Clari's money.

There was no money in the house in the last few weeks before Clari left. (6 RT 813.) The last time Clari brought a paycheck home appellant took it out of her purse, ripped it up and flushed it down the toilet. (6 RT 813.)

j. Throwing Clari's purse out of the window.

On the day she left, Clari had scheduled a job interview for later in the day. Appellant insisted on taking her to work. (6 RT 814.) The gas tank was less than half full that morning. Clari told appellant that he needed to go get some money from his mother or they would not have enough gasoline for another round trip between the apartment and her job.

(6 RT 815.) Appellant went to sleep in the back seat. When they were nearing her freeway exit he said "I know you have money," and grabbed her purse from the front passenger's seat. He looked through the purse, found nothing and threw it out of the window on to the freeway. Clari got off at the next exit and doubled back. She stopped the car in the emergency lane and got out to retrieve her purse. Appellant waited until they were moving again, grabbed the purse and threw it out the window a second time. (6 RT 815.) When he said, "Aren't you going back to get your purse?" Clari said "No, there was nothing irreplaceable in it," and kept on driving. Appellant dropped her off, saying he would be back to get her at 2:30 p.m. He watched her walk into the building before driving out of the parking lot. Clari decided this was it: she had to leave appellant. She called Bruni, asked her to get the kids and to bring them to pick her up at work. Next Clari called Vallerie. She told her to pack some things for each of them because they were leaving. (6 RT 816.)

4. Vallerie Cage's guilt phase testimony.

In her testimony, appellant's daughter Vallerie described several of the same incidents Clari had related in her testimony. Vallerie also testified about times when appellant had been violent or abusive toward her. (See 6 RT 853-862.)

a. Two Incidents in 1991 and 1994.

Vallerie described how when they were living in the apartment in Signal Hill her parents had an argument that got out of hand. Vallerie saw Appellant put a knife to Clari's wrist and drag her into the other room by her hair. Appellant told Vallerie to get to her room. (6 RT 854-855.) Vallerie heard screaming and yelling but did not recall any specific threats. In 1994 there were several incidents at her grandmother's (Bruni's) house on Genuine Risk in Perris. (6 RT 855.) The prosecutor asked Vallerie to testify about the brick incident.

b. The brick incident in January 1995.

Vallerie testified about her experience of the time when appellant hit Clari in the face with the brick. Vallerie was nine years old at the time. (6 RT 857.) She heard her parents arguing in the other room. Appellant went into the living room, telephoned his mom and told her he loved her and if he never saw her again he wanted her to know that. Clari was standing by the door, and she ran outside when appellant started toward her. Vallerie saw appellant chase Clari down. He picked up a loose brick from the front walkway and "smashed" it into Clari's face. (6 RT 858.) Appellant dragged Clari back inside the house, and continued punching her and hitting her in the face. Appellant finally stopped when Clari was screaming that

her teeth were coming out. (6 RT 855.)

After that they all got into the car. Appellant drove, Clari sat in the front passenger's seat, and the children, Vallerie, David, and the baby, Micky Jr., sat in back. (6 RT 856.) They were driving around for a long time. Clari would not turn around because she did not want the kids to see her face. Appellant drove around talking as if they were not going anywhere in particular. Clari was pleading with appellant to take her to the hospital. He refused, saying that he did not want to get into trouble for what he had done. (6 RT 856.)

Throughout the long drive Vallerie held the baby, Micky Jr., on her lap. She had only one diaper for him and it was soiled. At one point, Clari motioned for Vallerie to pass her the diaper because she needed something to mop up all the blood. (6 RT 856.) While they were driving around the diaper became fully saturated with blood and appellant threw it out the window. (6 RT 857.) For the rest of the drive Clari had to use her shirt. (6 RT 857.)

Vallerie never told the police what had happened. (6 RT 858.) Appellant had threatened all of them. He said he would hurt Vallerie and David if they told anyone. (6 RT 856.)

c. Appellant shaves Vallerie's hair.

The prosecutor had Vallerie testify regarding another incident. (6 RT 858.) School was dismissed early one day, and Vallerie came home to find appellant sitting on the couch with another woman. On previous occasions when appellant did not want Vallerie to know what he was doing he would say "go to your friend's house," or "here's a $20, go to the mall." This time he said, "I dare you to open your mouth." (6 RT 858.) On this occasion, Vallerie did tell Clari and when Clari confronted appellant it came out that Vallerie had been the source of the information. (6 RT 858-859.) Appellant broke off arguing with Clari. He grabbed Vallerie by her hair and dragged her into the bathroom. Appellant plugged in his clippers and shaved all her hair off. Vallerie was ten or eleven years old at the time, and her hair had been past shoulder length. (6 RT 859.) She felt humiliated, and did not want to go outside or to school. Her mom bought her a wig but appellant saw it and would not let her wear it. (6 RT 859-860.)

5. The closing argument and the jury instructions.

The prosecutor began by reminding jurors that she had warned them the case would be "gut wrenching." (11 RT 1572.) [24] She summarized the

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In closing argument the prosecutor contrasted the jury's experience with that of the family. The prosecutor here pointed out while the jury heard the evidence in a "sterile courtroom environment," the witnesses had

testimony pertaining to eight of the most egregious past crimes or incidents.

(11 RT 1584-1586.) In conclusion, the prosecutor stated:

> Why did you hear all of that evidence? Not so that you would think that the defendant is a bad guy or a person of bad character. You can't use it that way. You heard that evidence to help you understand the intent required in this case, to help you understand the premeditation and deliberation; to help you determine the motive for this crime. That's why you heard all of that evidence. That's how you use all of that evidence.

(11 RT 1586.)

The court instructed the jury with CALJIC 2.50, stating:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a predisposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:
>
> The existence of the intent which is a necessary element of the crime charged;
>
> The identity of the person who committed the crime, if any, of which the

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lived through these events. (11 RT 1572, 1576.) Whereas the jurors were told about appellant's violent behavior, the witnesses experienced all of it. (11 RT 1572-1576.) Specific violent incidents were mentioned, with added reminders of the impact on the victims such as "Vallerie saw that," or "Clari heard that." (11 RT 1572-1575.)

defendant is accused;

A motive for the commission of the crime charged;

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

(11 RT 1558; 13 CT 3555.) [25]

D. Standard of Review.

The trial court's evidentiary rulings are usually reviewed for abuse of discretion. (See *People v. Burgener* (1986) 41 Cal.3d 505; Evid. Code § 352.) However, heightened scrutiny is appropriate and necessary because this claim involves the fundamental constitutional rights of a capitally charged defendant. The United States Supreme Court has applied heightened scrutiny to procedures involved in capital cases based on its recognition that "death is [] different." (*Gardener v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio* (1978) 438 U.S. 586.) As observed by the Ninth Circuit Court of Appeal, the United States Supreme Court's decisions reflect particular sensitivity to ensuring the accuracy of the

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The trial court refused defense counsel's request to modify this instruction by inserting after the first sentence: "Before you may consider this evidence you must first determine that the prior offense occurred and that the defendant committed that offense." (13 CT 3513-3514.)

evidence and also the propriety of admitting evidence in capital cases. (*Lambright v. Stewart* (9th Cir. 1999) 167 F.3d 477, citing *Skipper v. South Carolina* (1986) 476 U.S. 1; *Booth v. Maryland* (1987) 482 U.S. 496.)

According to the reasoning of these cases, this Court should independently examine the record to determine whether the trial court's erroneous exclusion of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The constitutional standard of *Chapman v. California* is long settled. Independent review applies where a claim implicates a significant constitutional right. Where error is found, the burden shifts to the state to demonstrate, beyond a reasonable doubt, that the error did not contribute to the conviction. Reversal is required where "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Chapman v. California*, *supra*, 386 U.S. at p. 23, citing *Fahy v. State of Connecticut* (1963) 375 U.S. 85, 86-87.)

The United States Supreme Court's opinion in *Chapman v. California*, further explains the nature of independent review. Independent review requires a truly meaningful examination of the rights and interests at stake in which all doubts are resolved in the defendant's favor. It is not enough for the state court to simply invoke the rule and then hold the

standard is satisfied based on the court's views regarding the strength of the evidence. The United States Supreme Court specified that the standard must be rigorously applied and not "neutralized" by a reviewing court's "emphasis and perhaps overemphasis upon the court's view of 'overwhelming evidence.'" (*Chapman v. California*, *supra*, at p. 23.) Like the defendant in *Chapman v. California*, appellant was "entitled to a trial free from the pressure of unconstitutional inferences." (*Id* at p. 26.) For all of the reasons discussed below, this Court should independently review the record in this case and reverse the convictions and sentence.

E. The Prior Incidents of Domestic Violence Were Not Relevant to Any Disputed Facts or Material Issues, and there was no Reasoned Justification for Admitting this Testimony under Evidence Code section1101(b).

The policy objectives of Evidence Code section 1101 are well-settled. Evidence of a defendant's past crimes and bad acts is recognized as so prejudicial that, with few exceptions, it is excluded in a trial for a subsequent offense. (See Evid. Code §1101(a).) "Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition." (*People v. Foster* (2010) 50 Cal.4th 1301, 242 P.3d 105, 130-131; Evid. Code §1101.) Evidence Code section 1101,

subdivision (b), permits evidence of a defendant's uncharged crimes or other misdeeds for limited purposes and only when certain prerequisites are satisfied. (*People v. Ewoldt, supra,* 7 Cal.4th 380; *People v. Balcom* (1994) 7 Cal.4th 414.) "Evidence of uncharged crimes is admissible to prove "the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes." (*People v. Foster, supra,* 242 P.3d at pp. 130-131; Evid. Code §1101.) The charged and uncharged crimes must be "sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Foster, supra.*)

The trial court's role as gate keeper is particularly important in this context given the potential past crimes evidence has for causing substantial undue prejudice. (See, e.g., *People v. Thompson* (1980) 27 Cal.2d 303, 314.) Evidence of a defendant's past crimes or misdeeds is to "be received with 'extreme caution' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Alcala, supra,* 36 Cal.3d at p. 631 [citation omitted]; see *People v. Holt* (1984) 37 Cal.3d 436, 451; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1395.) A trial court should not admit evidence of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue

upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative. (*People v. Stanley* (1967) 67 Cal.2d 812, 818-819, quoted with approval in *People v. Harris*, *supra*, 60 Cal.App.4th at pp. 739-740.) In appellant's case the trial court was not appropriately vigilant with regard to the proffered evidence of prior crimes.

According to the prosecution's theory, appellant killed his mother-in-law and brother-in-law because he was angry that his wife had left him. Two categories of evidence were offered in support of this theory: 1) testimony about some 14 incidents when appellant abused his wife and daughter over a period of approximately 14 years; and, 2) Clari's testimony about appellant having threatened to kill her family if she ever left him. Clari's testimony relating specific threats allegedly made within a few weeks of the murders may have been relevant and admissible for this purpose. [26] The domestic abuse crimes, however, were not.

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Appellant does not concede the relevance of Clari's testimony on this point. However, this evidence alone was not unduly prejudicial. Although defense counsel did not object on this basis, Clari's testimony about threats to Bruni was mere conjecture and was unlikely to be very persuasive. Appellant supposedly made a habit of intimidating Clari, and often threatened to kill her and her entire family. Testifying at trial, Clari claimed she knew when the threats were directed to her mother, her brothers, or the extended family because when appellant threatened her or Vallerie he would use their names. (6 RT 809.) Because Clari did not report a direct and specific threat to Bruni, jurors could have easily concluded that her interpretation of appellant's statements had been

In order to connect appellant's past acts with the capital homicides it is necessary to collapse the concept of motive into propensity or character. When fully articulated, the prosecution's argument proceeds as follows: Appellant's past acts demonstrate that he is violent with his wife and daughter, and will use brutal force to dominate and control them. Therefore, it is reasonable to infer that when appellant's immediate family is gone he acts out violently against the next degree relatives. The trial court's comments at the motion hearing reveal that it followed this line of reasoning. Upon issuing the ruling, the judge stated:

> As far as Vallerie Cage, under "A" and "B," I would let those in because it helps explain why Mrs. Cage was hiding herself and the kids. ***And it is prior 1101(b), in the sense that it's just violent – random violence upon another member*** which helps show the overall picture which goes to the ***ID and motive***.

(3 RT 446 [emphasis added].)

The trial court allowed itself to be distracted from what should have been the focus of its analysis. Evidence of appellant's tendency to explode

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influenced by subsequent events. This was especially so because the nonspecific comments Clari relied on conflicted with her recollections of appellant's exact statements. According to Clari, when appellant threatened to kill her and Vallerie he would say "then your mother will have to raise Mick." (*Id.*) This evidence plainly indicates that appellant was *not* threatening Bruni's life.

in "random violence" directed at family members is evidence of disposition and character which the law does not allow. The question was ***not*** whether the evidence would be useful to explicate the state's theory, or to add context, persuasive appeal, or to increase the credibility of state's witnesses. The correct inquiry was whether the evidence of appellant's past crimes had ***substantial probative value for a disputed element of the charges*** to be proven. (*People v. Foster, supra,* 242 P.3d at p. 133; *People v. Thompson, supra*, 27 Cal.3d at p. 318.) As demonstrated below, the evidence of appellant's past domestic violence was not probative of identity, intent or motive with regard to the capital case.

1. <u>The past crimes and the murders did not share the common features which would make this evidence relevant for identity</u>.

To admit past acts to prove identity under Section 1101(b) requires the highest degree of similarity between the defendant's prior crimes or bad acts and the present offense. The conduct must "display a pattern and characteristics... so unusual and distinctive as to be like a signature." (*People v. Kipp* (1998) 18 Cal.4th 349, 370; see also, *People v. Harvey* (1984) 163 Cal.App.3d 90, 101.) The past crimes and the current offense must be virtually identical, or "mirror images." (*People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Balcom, supra,* 7 Cal.4th at p. 425 ["[t]he

highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"].) [27] As the California Supreme

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In applying the signature test, the court looks at the common marks of the offenses by examining: 1) the degree of distinctiveness of the individual shared marks; and 2) the number of minimally distinctive shared marks. (*People v. Thornton* (1974) 11 Cal.3d 738, 756; see, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 333 [the existence of stolen credit cards in Crown Royal bags in both the charged and uncharged offenses was sufficiently distinctive "signature" characteristic to support an inference that the same person committed both the charged and the uncharged acts]; *People v. Catlin* (2001) 26 Cal.4th 81, 120 ["the charged and uncharged crimes bore a number of highly distinctive common marks" - each victim was a close female relative of the defendant (wife or mother); the defendant stood to gain financially from each victim's death; and the victims had died from paraquat poisoning, which is "rare"]; *People v. Kipp, supra*, 18 Cal.4th at pp. 370-371 [the charged and uncharged offenses displayed common features that revealed a "highly distinctive" pattern: in *both* rape-murders, the perpetrator strangled a 19-year-old woman in one location, carried the victim's body to an enclosed area belonging to the victim, and covered the body with bedding; the bodies of both victims were found with a garment on the upper body, while the breasts and genital area were unclothed; in neither instance had the victim's clothing been torn, and the bodies of both victims had been bruised on the legs]; *People v. Medina* (1995) 11 Cal.4th 694, 748 [admission of uncharged murders was justified in murder prosecution; both charged and uncharged offenses involved robbery and murder of convenience store employee, each victim was shot in the head execution-style, and ballistics reports indicated use of the same handgun, later traced to the defendant]; *People v. Sully* (1991) 53 Cal.3d 1195,1223-1225 [illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and each crime occurred in defendant's warehouse, where he lived, worked, and controlled "what came in and out"].)

Court stated in *People v. Rivera* (1985) 41 Cal.3d 388, "[i]n order for evidence of a prior crime to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the two acts must have enough shared characteristics to raise a strong inference that they were committed by the same person. But it is not enough that the two acts contain common marks." (*People v. Rivera*, *supra*, 41 Cal.3d at p. 406, citing *People v. Haston* (1968) 69 Cal.2d 233, 246, accord, *People v. Thompson*, *supra*, 27 Cal.3d at p. 316.)

This Court recently considered the degree of similarity between past and present crimes needed to admit evidence of a capital defendant's past crimes to show identity and a common plan or design. In *People v. Foster, supra,* 242 P.3d 105, this Court determined that evidence of two prior crimes had been properly admitted under Section 1101(b). The facts and circumstances of *People v. Foster* were, however, markedly different and the case offers a useful contrast to appellant's. The defendant in *People v. Foster* was charged with first degree murder with burglary and robbery special circumstances. The defendant had visited a church a few days before the crimes. He targeted a woman who worked in the church's office, and surprised her there when she was alone on a weekday afternoon. The defendant stabbed the victim to death and stole her wallet. At trial, the

prosecution was allowed to present evidence of two previous crimes. In both of the previous cases, the defendant sexually assaulted and robbed women who he knew would be working alone in their offices. (*People v. Foster*, *supra*, at pp. 131-132.) This Court noted 12 very specific features common to both the capital case and the two prior crimes. [28] Given the significant number of identical circumstances, the Court found the two prior crimes to be relevant to prove identity irrespective of the fact that only the victim in the capital case had been killed. (*Id* at p. 132.)

In order to be properly admitted to prove identity under Section 1101(b), the past and present crimes must share specific identifying features. More is required than the prosecution's assertion that the defendant's past crimes demonstrate a pattern or practice of committing certain types of offenses, or even a preference for similar types of victims.

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In *People v. Foster*, this Court identified a dozen shared aspects of the prior crimes and the capital homicide: (1) the two prior incidents occurred within three-quarters of a mile of each other, in a relatively rural town area, (2) both occurred between noon and 1:30 p.m., (3) both occurred in an office, (4) both female victims were working alone, (5) defendant had visited each site before the crimes occurred, (6) during his earlier visits to both sites, defendant provided a false story with respect to the purpose of his visit, (7) the contents of both victims' purses were emptied onto the floor, (8) the victims' purses were placed on the floor, (9) the victims were moved to a back area, (10) Cindy M. was told to disrobe, and one of Gail Johnson's shoes was found on top of the desk, (11) both victims resisted and were stabbed, and (12) each attack occurred shortly after defendant was released on parole. (*People v. Foster*, *supra*, 242 P.3d at p. 130.)

The hypothetical below illustrates the distinction between evidence merely showing criminal propensity and a *legitimate* use of past acts to establish identity. As the author observes:

> [W]hile evidence of the defendant's prior burglaries is inadmissible to show propensity to burglarize, evidence linking the defendant to an uncharged burglary that involved disarming a sophisticated alarm system might logically tend to identify the defendant as the perpetrator of a charged burglary of a building with a similar system.

(M. Cammack, *Admissibility of Evidence to Prove Undisputed Facts: a Comparison of the California Evidence Code § 210 and Federal Rule of Evidence 401,* 36 Sw.U.L.Rev. 879, 899-900 (2008).) In appellant's case there were no precise identifying features common to the domestic violence crimes and the murders, and the evidence should not have been admitted.

2. The evidence was not relevant to establish motive.

In order to be relevant and admissible to establish motive, past crimes or bad acts must be ***specifically linked*** to the new offense. (See *People v. Daniels* (1991) 52 Cal.3d 815, 857 [prior bank robbery in which defendant exchanged gun fire with police and was rendered a paraplegic was admissible to prove motive in first degree murder of two police officers by use of firearm]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118-1119 [evidence of prior violent struggle between defendant and victim relevant

and admissible to show motive for first degree murder].) Appellant's case lacks this type of direct connection. The prior crimes established appellant's history of abusing his wife and daughter. However, during this same 15 years, there was no indication of appellant ***ever*** having acted out against Bruni. The prosecution's speculation (*i.e.*, that appellant carried his alleged threat to Clari where he said he would kill her whole family) was not a sufficient basis from which to infer a shared motive between different crimes committed against different victims. [29]

3. The past crimes were not probative of intent in the capital case.

The evidence of appellant's past crimes and misdeeds did not support an inference of intent with respect to the two homicides. The

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In all but one instance, the trial court did not address the specific items of proffered evidence to determine whether and to what extent each was relevant. Where the court did single out two of the past incidents, its remarks indicate its confusion regarding the relationship of the proffered evidence to contested facts and issues. The trial court allowed the prosecutor to introduce Items A and B pertaining to Vallerie Cage (see 2 CT 539-540) based, in part, on its finding that this evidence "helps explain why Mrs. Cage was hiding herself and the kids." (3 RT 446.) Setting aside the question of whether these incidents are even probative on that point, Clari's reasons for leaving appellant are not relevant. The prosecution's theory was that appellant was angry because his wife left him taking their two young children. There was no reason to suppose that Clari's motivations for leaving would have altered appellant's response to the loss of his wife and children.

Amended Information charged appellant with two counts of deliberate and premeditated first degree murder. (2 CT 473.) A specific intent to kill is a necessary element of both express malice and first degree murder based on a "willful, deliberate, and premeditated killing." (See *People v. Alvarado* (1991) 232 Cal.App. 3d 501, 505.) To establish specific intent, the evidence must show that the defendant killed "as a result of careful thought and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design." (*People v. Anderson* (1968) 70 Cal. 2d 15, 26.) [30] Appellant's past mistreatment of his wife and daughter was irrelevant on this point.[31] Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2, quoting 2 Wigmore (Chadbourn rev. ed. 1979) § 300, p. 238.)

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The jury was instructed with CALJIC 8.20 (13 CT 3559; 11 RT 1564-1565.) Specific legal claims regarding the sufficiency of the evidence for first degree murder, and the jury instructions regarding premeditation and deliberation, are discussed separately herein. (See Arguments II, IV.)

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Appellant contends that the totality of the state's evidence was insufficient to prove premeditation and deliberation either with or without the prior misconduct evidence. (See Argument II, section D.)

The incidents described in Clari's and Vallerie's guilt phase testimony stated facts sufficient to establish battery and/or spousal battery. (Pen. Code §§ 242; 273.5 (a).) These are general intent crimes, which require only the intent to commit the assaultive act. (*People v. Campbell* (1999) 76 Cal.App.4th 305, 308.) Assuming *arguendo* that all of the incidents related in Clari's and Vallerie's testimony were proven beyond a reasonable doubt, that evidence was not probative in determining whether appellant acted with the specific intent necessary to sustain a conviction for first degree, premeditated murder.

4. The evidence did not prove a common scheme or plan.

To the extent that the prosecutor contended that the evidence reflected the existence of a common scheme tying the domestic abuse to the homicides, this justification fails as well. The testimony from Clari and Vallerie demonstrated that appellant was quick to anger (often for irrational reasons) and acted out immediately. Appellant's behavior was brutal at times, but it was not planned or thought out in advance. In order to meet the standard for admissibility under the "common design or plan" exception provided in Section 1101(b), there must be common features that "indicate the existence of a plan rather than a series of similar spontaneous acts... to support the inference that the defendant employed the plan in committing

the charged offense." (*People v. Ewoldt, supra,* at pp. 402-403.) In other words, the similarities must show that the prior act and the charged offense were carried out for the same purpose.

There was no more than speculation and invention offered in support of a "common plan" linking appellant's past acts to the homicides. The prosecutor theorized that all of appellant's behavior was attributable to his plan to dominate and control the entire family. The trial court was apparently persuaded, and followed this invitation to infer a global plan from the historic acts. The court stated: "And it is prior 1101(b), in the sense that ***it's just violent – random violence upon another member which helps show the overall picture which goes to the ID and motive.***" (3 RT 446 [emphasis added].) The judge's remarks thus reveal that the court conflated the meanings of "plan" and a pattern of behavior or propensity - precisely the error Section 1101 was designed to avoid.

F. Appellant's past Crimes Were Not Similar to the Murders.

California law required that the trial court examine critically the charged acts and prior incidents, in light of all of the evidence, to determine whether there were similarities sufficient to indicate that all were carried out in furtherance of an overarching design. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003; *People v. Ewoldt, supra*, 7 Ca1.4th at pp. 402-403.) The

prior violence evidence in this case revealed no comprehensive plan as acknowledged by the trial judge's use of the word "random." The trial court did not push the prosecutor to explain the state's need for evidence of appellant's history of battery to establish the fact of his anger and frustration toward his mother-in-law. Nor did the judge insist upon specific connections between that evidence and the elements of the charged crimes. A more rigorous approach would have revealed the logical flaws in the state's contentions and might have prevented the erroneous admission of an abundance of irrelevant and inflammatory evidence.

The facts of the two homicides were markedly different from the facts and circumstances of the domestic abuse incidents. Appellant had, on various occasions over a period of fourteen years, choked and struck his wife and daughter and made verbal threats in an apparent effort to intimidate them. He did not, however, threaten either of them with a gun. In fact, Clari's testimony established that appellant had the opportunity to threaten her with a weapon and did not do so. When appellant brought a gun into the apartment (on two prior occasions according to Clari's testimony) she had been upset at the prospect of an accident with the children and asked him to take it away. Appellant did as she asked without argument. (See 6 RT 834-835 [testimony of Clari Burgos].)

Perhaps the most significant distinction between the past acts and the homicides was the difference in appellant's relationships with the victims. While the victims were from the same family their relationships were very different and their respective roles were not interchangeable. Clari was appellant's wife and Vallerie was his daughter. Bruni was the respected family matriarch, and the evidence showed that appellant's relationship with her was unique. Clari testified that her mother invited appellant to live with the family in 1985 when she and he were young teenagers. (See 6 RT 790, 846.) The couple lived with Bruni off and on for the next 14 years. Not only was Bruni not involved in the previous incidents, she was not present when they occurred. (See 6 RT 792-808; 846 [testimony of Clari Burgos].) Clari's and Vallerie's testimony recounted incidents of alleged violence and abuse over a period of fourteen years. Nothing in this abundance of testimony suggested that appellant had ever previously threatened Bruni or behaved in an aggressive manner toward her. (Compare *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 585-586 [in a wrongful death action resulting from the defendant's murder of his former wife, prior instances of defendant's abuse of the victim were allowed to show motive, intent and identity; no requirement of distinctive *modus operandi* where acts involved the *same victim and the same perpetrator*].)

On the contrary, testimony in the penalty phase revealed that Bruni was the sole respected adult figure in appellant's life.

Appellant's mother, Emly Farmer, testified that before appellant went to live with Bruni's family his behavior at home had been "terrible." (15 RT 2119.) Appellant continued living in Bruni's household despite the repeated efforts of his mother, social services people, and church members to persuade him to return home to live with his mother and younger brother. (15 RT 2119-2121.) In all of the evidence and testimony in this case, Bruni emerges as the *only* person capable of controlling him. Witnesses testified about two incidents where several police officers could not contain appellant when he was in a violent rage. Three police officers were unable to wrestle appellant off of a bicycle to arrest him for spousal abuse in 1991 until the sergeant stepped in and applied the carotid hold. (13 RT 1848.) Several years later, David Olson saw appellant, who had been arrested, handcuffed and placed in the rear of a patrol car, break through the rear window and wriggle to the ground. On that occasion the police had to use mace to subdue him. (13 RT 1873-1874.) Bruni, however, could manage appellant even in his worst states. When appellant was beating Willie Hinton it was Bruni who intervened to stop him. Nancy Icenogle had tried and appellant had attacked her. (See 13 RT 1887.) Clari also implored

appellant to stop but he persisted. (15 RT 2076-2078.) Fortunately for all concerned Bruni came home. Bruni interrupted appellant in the midst of a crazed frenzy of brutal violence, and simply told him to stop. (See 13 RT 1887-1889 [testimony of Nancy Icenogle]; 15 RT 2079 [testimony of Clari Burgos].) Clearly, appellant's relationship with Clari was entirely different. Appellant's feelings for Clari and his behavior toward her were unrelated to his treatment of Bruni. The past incidents between appellant and Clari were, therefore, not relevant and should not have been admitted.

G. The Probative Value of This Evidence Was Greatly Outweighed by its Unduly Prejudicial Effect.

For all of the reasons discussed above, the evidence of appellant's past misconduct was not relevant to any disputed issues in the capital case. Assuming, *arguendo*, that the evidence had some marginal relevance, its usefulness was overwhelmed its obvious tendency to create undue prejudice. Relevance is not the sole consideration, and the trial court's evidentiary ruling must reflect its balancing of the competing concerns of probative value and the "inherent danger in regard to use of other-crimes evidence" (*People v. Nottingham* (1985) 172 Cal.App.3d 484, 495.) Evidence of other crimes entails specific and extreme risks of undue prejudice. As the court of appeal remarked, the admission of other-crimes evidence:

> inevitably tempts the tribunal to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.

(*People v. Nottingham, supra,* 172 Cal.App.3d at p. 495, quoting and citing *People v. Alcala, supra,* 36 Cal.3d at p. 631; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) These dangers should be of particular concern in a capital case because the jurors are in a sense primed to make a moral assessment. Through the voir dire and juror selection processes capital jurors are aware that, in the event a penalty phase is held, they will be making the ultimate moral judgment about the defendant.

The only connection between appellant's past acts and the capital crimes was his propensity for irrational violence when angry or frustrated. This type of loose global connection is precisely what the rules of evidence are designed to prevent. As the California Supreme Court stated over 40 years ago, where evidence of other crimes is offered, "[it] should be scrutinized with great care, . . . in light of its inherently prejudicial effect, and should be received ***only*** where its connection with the charged crime is clearly perceived." (*People v. Durham* (1969) 70 Cal.2d 171, 186-187 [emphasis added], cert.denied, *Durham v. California* (1969) 395 U.S. 968.) Evidence of uncharged offenses "proves too much," creating a substantial

risk of "overpersuading" the jurors and diverting their attention from their duty to determine whether the defendant's guilt of the instant offense has been proven beyond a reasonable doubt. (*Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Alcala*, *supra*, 36 Cal.3d at p. 631.) The danger inherent in the evidence of a defendant's past crimes or misdeeds is that the jury may be prompted to convict the defendant for being a "bad" person, without regard to whether his guilt of the instant offense has been proven beyond a reasonable doubt. (*Spencer v. Texas* (1967) 385 U.S. 554, 575-576 [conc. and dis. opn. of Warren, C.J.]; *Michelson v. United States, supra,* 335 U.S. at pp. 475-476; *People v. Garceau* (1993) 6 Cal.4th 140, 186.) In appellant's case, it is nearly certain that the jurors were so offended by appellant's history that they convicted him of premeditated, first degree murder and found true the lying-in-wait special circumstance despite the lack of sufficient evidence.

The recognition that a defendant's history of domestic violence is especially prejudicial in this respect is reflected in other provisions of California law. California Evidence Code section 1109, subdivision (a), section (1) allows evidence of other instances of domestic violence under very limited circumstances. The evidence is inadmissible if its probative value is outweighed by the possibility it will consume an undue amount of

time or create a substantial risk of undue prejudice or of confusing or misleading the jury. (Evid. Code §§352; 1109; *People v. Falsetta* (1999) 21 Cal.4th 903, 918.) The factors applicable to determining whether to allow evidence of uncharged offenses pursuant to Section 1109 are useful in comparison to this case, and include:

> the nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from the main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission.

(*People v. Falsetta*, *supra*, 21 Cal.4th at p. 918.) When the factors recommended by the California Supreme Court in *Falsetta* are applied to appellant's case, the trial court's error is readily apparent.

1. <u>The domestic abuse was significantly different from the charged offenses, and many incidents were remote.</u>

As discussed above, the prior incidents constituted *different* crimes: domestic violence (without use of a weapon in all but one instance), as opposed to first degree premeditated murder with two special circumstances and the use of a gun. The past incidents were general intent crimes, requiring proof of a *different* and less culpable mental state. Additionally, the past domestic violence incidents involved not only other individuals but persons who occupied very different roles in appellant's life. Even in

People v. Linkenaugher (1995) 32 Cal.App.4th 1603, which the prosecutor relied on to argue for the admission of all of the past conduct evidence, there was a direct correlation between the past and present offenses. There the defendant's past domestic abuse of his wife was held admissible in his trial for *her* murder. Not only did *Linkenaugher* involve the same victim, the defendant's acts and methods were similar, and the prior incidents occurred within two years of the murder. The court of appeal noted: "the defendant tortured and strangled his wife to death after abusing her for two years." (*People v. Linkenaugher*, *supra*, 32 Cal.App.4th at p. 1615.)

At the very least, the trial court should have been more proactive with respect to this evidence. (Compare *People v. Jones* (2011) __ Cal.Rptr.3d ___ [2011 WL 285163] [noting with approval the trial court's attempts to avoid undue prejudice by narrowly tailoring the evidence to eliminate a potentially inflammatory feature of the past crime].) Some of these incidents might have been disallowed for remoteness and uncertainty. The guilt phase testimony was made up of unadjudicated incidents - the single exception being the 1991 incident with Clari which resulted in appellant's guilty plea to spousal abuse charges. (See 13 RT 1771.) Many were quite remote; six incidents occurred seven or more years before the crimes. (See 2 CT 531-546 [People's Trial Brief Regarding the

Admissibility of Evidence].)

2. The trial court should have limited the past crimes evidence given the availability of alternatives.

The prosecution had evidence to support its theory of the case which was less prejudicial and more directly relevant to the murders. Clari's testimony about the month or two leading up to her decision to leave in October of 1998 conveyed the essence of the prosecution's theory without the excessive and inflammatory details of the entire fourteen year history. Clari's testimony about appellant in the several weeks preceding her decision to leave was more than adequate to portray appellant as a stereotypical wife abuser. Appellant, viewed through Clari's account of the fall of 1998, was mean, controlling, jealous, and temperamental. She was afraid of him, and he had repeatedly threatened her, her children, and the rest of her family. Assuming for the moment that Clari's motivations were relevant, the jurors could certainly understand her reasons for fleeing to Puerto Rico and keeping her whereabouts a close secret. Appellant's predictable anger and upset were described in the testimony of his neighbor, Jason Tipton, who related appellant's threats to harm and/or intimidate Bruni in the days and weeks immediately before the crimes. (See 7 RT 965-966.) Given these circumstances, there was no legitimate reason for the prosecution to compound the prejudice with a glut of extensive and

inflammatory evidence.

H. Reversal Is Required under Either the State or Federal Standard.

"Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) The erroneous and improper admission of the abundant testimony concerning appellant's domestic abuse history was overwhelmingly prejudicial. The jury was encouraged to conclude that appellant justly deserved a death sentence, irrespective of his intent in the homicides, for the role he played in devastating this family. Courts and commentators had long recognized this effect:

> It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal – whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications.

(*People v. Baskett* (1965) 237 Cal.App.2d 712, 715 [quoting I Wigmore, Evidence (3d ed. 1940) §§ 193, 194 p. 642], disapproved on other grounds,

People v. Kelley (1967) 66 Cal.2d 232, 243, fn. 5.) Subjected to the plethora of past crimes evidence and the prosecutor's argument, the jurors were bound to disregard any doubts they may have harbored about appellant's identity, motive, or mental state. Such a risk is intolerable in a capital case. (See *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775-776 [convictions and sentence reversed based on introduction of other-crimes evidence and the prosecutor's reliance thereon in closing argument].)

Due process demands that a defendant may be punished with criminal sanctions only for specific criminal acts and not for general bad character. (*In re Winship* (1970) 397 U.S. 358, 364; *Spencer v. Texas, supra,* 335 U.S. at p. 575; *Michelson v. United States, supra*, at pp. 489-490 (dis. opn. of Rutledge, J.); *People v. Schader* (1969) 71 Cal.2d 761, 772.) Appellant contends that, because the error is of federal constitutional dimension, this Court should apply the standard of *Chapman v. California, supra,* at pp. 23-24. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [erroneous admission of bad character evidence constitutes federal constitutional error].) The standard of *Chapman* requires the state to prove, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at pp. 23-24.) However, reversal is required

even applying the less stringent state standard of *People v. Watson* (1956) 46 Cal.2d 818, because it is at least reasonably probable that a more favorable result would have been obtained absent the erroneous admission of the improper propensity evidence.

II.

APPELLANT'S CONVICTIONS AND SENTENCE WERE OBTAINED CONTRARY TO CALIFORNIA LAW AND IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION TO SUSTAIN THE FIRST DEGREE MURDER VERDICTS.

A. Introduction.

As discussed in Argument I, the prosecution persuaded the court to admit an abundance of testimony detailing appellant's past violent and criminal behavior; the asserted justification was its relevance to identity and motive pursuant to Evidence Code, section 1101, subdivision (b). The state used the past acts evidence for an additional purpose. This evidence was used to prove that appellant acted with the premeditation and deliberation needed to support the first degree murder convictions. According to the prosecutor, appellant's history of mistreating Clari and Vallerie was evidence of his longstanding plan to exploit the entire Burgos/Montanez family. The murder victims, Bruni and David, were family members and

the physical evidence pointed to appellant as the shooter. The killings were, therefore, consistent with appellant's supposed plan. The prosecutor relied on the existence of a plan, together with a few other circumstances, to argue that these were cold and calculated killings accomplished with premeditation and deliberation.

The state's first degree murder theory was not based on solid logic or firm evidence. Instead, it depended upon speculation and interpretations of circumstantial evidence which did not compel, and in some instances did not support, the inferences the prosecutor favored. Having been inundated with the highly emotional and inflammatory evidence of this family's sad history, the jury overlooked the flaws in the prosecution's reasoning and found appellant guilty on two counts of first degree murder. (13 CT 3524, 3525; 11 RT 1621, 1622.) For all of the reasons discussed below, the evidence was insufficient to elevate the intentional killing from second degree murder to first degree murder and reversal is required. [32]

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The jury was instructed on the elements of premeditation and deliberation, and the elements of first degree murder. (CALJIC 8.20; 13 CT 3559; 11 RT 1564-1565.) The court also gave an instruction on the elements of second degree murder. (CALJIC 8.30; 13 CT 3560; 11 RT 1565.) The jurors were further instructed that if they unanimously agreed that there was a reasonable doubt about whether the murder was of the second or first degree, they should return a verdict of second degree murder. (CALJIC 8.71; 13 CT 3561; 11 RT 1566.) Appellant raises several related

B. Overview of Legal Argument.

Appellant's first degree murder conviction lacked sufficient evidence under California law which requires "evidence which is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt." (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; see also *People v. Anderson, supra,* 70 Cal.2d 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 313-314.) The first degree murder verdicts must be reversed to protect appellant's fundamental state and federal constitutional right to due process of law (U.S. Const. Amends. V and XIV; Cal.Const., art. I, §§ 7, 15, and 16), because the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt." (*Jackson v. Virginia, supra,* 443 U.S. at pp. 313-314; *Mullvaney v. Wilbur* (1975) 421 U.S. 684.) Additionally, the improper conviction violated appellant's constitutional rights to present a defense (U.S. Const. Amends. V, VI, and XIV; Cal. Const., art. I, §§ 7, 15, and 16), because "[a] meaningful opportunity to defend, if not the right to a trial

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legal challenges to these and other jury instructions. (See Arguments IV; VII; VII; and, IX.)

itself, presumes as well that a total want of evidence to support a charge will conclude the case in the favor of the accused." (*Jackson v. Virginia, supra*, at p. 314.) Finally, because the improper conviction occurred in a capital case, appellant was deprived of his constitutional rights to fair and reliable guilt and penalty determinations. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17; *Beck v. Alabama, supra,* 447 U.S. at p. 638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

C. Standard of Review.

Appellate claims regarding the sufficiency of the evidence for first degree murder are reviewed *de novo*. A reviewing court examines the entire record, in the light most favorable to the verdict, "to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Marks* (2003) 31 Cal.4th 197, 230; *People v. Silva* (2001) 25 Cal.4th 345, 368.)

D. An Unlawful Killing Is Presumed to Be Second Degree Murder under California Law.

The unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson, supra,* 70 Cal.2d at p.

25.) To sustain a first degree murder conviction, the prosecution must prove beyond a reasonable doubt that the defendant premeditated and deliberated before acting. (*People v. Anderson, supra,* at p. 25. See also *In re Winship, supra,* 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a greater from a lesser crime].) A killing is the product of deliberation and premeditation *only* if the killer acted as a result of careful thought and weighing the considerations, as with a deliberate judgment or plan, carried on coolly and steadily according to a preconceived design. (*Id.* See also *People v. Thomas* (1945) 25 Cal.2d 880; *People v. Holt* (1944) 25 Cal.2d 59.)

While acknowledging the difficulty of distinguishing first degree murder from second degree murder in certain cases, the California Supreme Court has steadfastly maintained the distinction. (See *People v. Solomon* (2011) 49 Cal.4th 792, 812-813 [killing resulting from preexisting reflection is "readily distinguishable from a killing based on unconsidered or rash impulse"]. See also *People v. Thomas, supra,* 25 Cal.2nd at p. 900; *People v. Holt, supra,* 25 Cal.2d 59.) "This Court has repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as

requiring no more reflection than may be involved in the mere formation of a specific intent to kill." (*People v. Wolff* (1964) 61 Cal.2d 795, 821; *People v. Caldwell* (1965) 43 Cal.2d 864, 869; *People v. Thomas*, *supra,* 25 Cal.2d 795.)

In the absence of direct evidence of the defendant's state of mind, premeditation and deliberation may be inferred from circumstantial evidence. (*People v. Eggers* (1947) 30 Cal.2d 676, 686.) However, the evidence supporting the inference must be both credible and sufficient. (*People v. Anderson*, *supra*, 70 Cal.2d 15.) Three types of evidence are of particular interest in reviewing a jury's finding of premeditation and deliberation: (1) evidence of the defendant's planning activity prior to the homicide; (2) evidence of motive arising from a prior relationship and/or conduct with the victim; and, (3) the manner of the killing, from which it may be inferred that the defendant had a preconceived design to kill. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27; *People v. Wharton* (1991) 53 Cal.3d 522, 546.) [33] The *Anderson* factors are guidelines and not

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As the *Anderson* Court noted, discernible patterns appear in the California cases. "Analysis of the cases will show that [the United States Supreme Court] sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson, supra,* 70

rigid requirements. "*Anderson* was simply intended to guide an appellate court's assessment of whether the evidence supports an inference that the killing occurred as the result of pre-existing reflection rather than unconsidered or rash impulse." (*People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Solomon, supra,* 49 Cal.4th at p. 812.) The presence of all three factors is not a "*sine qua non*" to finding premeditation and deliberation, and the factors are not exclusive. (See *People v. Sanchez* (1995) 12 Cal.4th 1, 32; *People v. Davis* (1995) 10 Cal. 4th 463, 511 [*Anderson's* factors are descriptive, not normative]; *People v. Perez*, *supra,* 2 Cal.4th 117, 125 [*Anderson* analysis "was intended only as a framework to aid in appellate review."].) Premeditation and deliberation may be found where there is very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing. (*People v. Raley* (1992) 2 Cal.4th 870, 886. See also *People v. Mayfield* (1997) 14 Cal.4th 668.)

The California Supreme Court's flexible approach to the three part analysis of *People v. Anderson* does not alter the prosecution's burden of proof regarding premeditation and deliberation. The evidence still must be sufficient to prove first degree murder beyond a reasonable doubt. That

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Cal.2d at pp. 26-27.)

burden was not met in appellant's case. For all of the reasons discussed below, the prosecution failed to carry its burden of proving first degree murder beyond a reasonable doubt. This Court should, therefore, reverse appellant's first degree murder convictions and modify the judgment to reflect convictions for second degree murder. (See, e.g., *People v. Bender* (1945) 27 Cal.2d 164, 186; *People v. Holt, supra,* 25 Cal.2d 59; *People v. Mendes* (1950) 35 Cal.2d 537, 544.)

E. The Evidence in Appellant's Case Did Not Sustain an Inference of Premeditation and Deliberation.

The evidence in this case showed that appellant planned a threatening ***confrontation*** with his mother-in-law rather than a cold blooded killing. According to the testimony, appellant desperately wanted his son back. He believed Clari had both children, and that Bruni knew where to find them. (See 7 RT 965-966 [testimony of Jason Tipton].) As anyone sufficiently rational to premeditate a murder would realize, killing Bruni would not get appellant the information he wanted. The prosecutor relied a great deal on the threats appellant allegedly directed toward Bruni in the days and weeks leading up to the shootings. (See 11 RT 1579) These threats, however, do not fit the prosecution's first degree murder scenario. Appellant said things like, "I ought to put a gun to her head and make her

tell me where my son is." (7 RT 965-966.) To the extent that this statement reflects a "plan" as opposed to idle boasting or general complaining, the objective of the plan is a confrontation and not a murder. These statements, therefore, were not evidence of a premeditated intent to kill.

Other circumstances undermine the prosecution's case for premeditated murder and suggest another theory of the case. Appellant appeared to be disoriented and unstable after Clari left in mid-October. (See 15 RT 2130-2131 [testimony of Emly Farmer].) On the evening of November 9th he was drinking heavily and using drugs. (See 7 RT 970-971 [testimony of Jason Tipton]; 7 RT 1001-1002 [testimony of Kevin Neal].) While in that condition, appellant decided to go confront Bruni. As he had done on previous occasions, he tossed the gun into the laundry basket. (See 6 RT 834-835 [testimony of Clari Burgos].) Appellant then asked Sovel for a ride. These facts suggest that appellant intended to frighten Bruni in order to get what he wanted - information leading to the return of his son, Micky, Jr. The scenario described above at most indicates second degree murder rather than a premeditated and deliberate killing.

1. There was no evidence of extensive planning.

Evidence of extensive planning and preparation may be a sufficient

basis for a first degree murder conviction. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237-1238; *People v. Wharton, supra,* 53 Cal.3d at p. 548) The defendant's planning of the crime has often been viewed as "the most important prong" of the *Anderson* analysis. (*People v. Alcala, supra,* 36 Cal.3d at p. 627; *People v. Lucero* (1988) 44 Cal.3d 1006; 1018.) Planning is inherent in certain methods of killing such as poisoning, arson or use of a destructive device.[34] Premeditation may be inferred from circumstantial evidence indicating that the killing was contemplated in advance. (See, e.g., *People v. Hovey* (1988) 44 Cal.3d 543, 556 [inference of intent supported where defendant armed himself with a knife, kidnapped 12 year-old girl, tied and blind-folded her, and drove to remote location].) Planning may also be found from circumstantial evidence in cases where the defendant's actions are not easily explained *other* than as preparations for murder. (See, e.g., *People v. Eggers*, *supra*, 30 Cal.2d 676 [defendant sold wife's rings under an assumed name and forged her signature to certificate of ownership for car]; *People v. Cooper* (1960) 53 Cal.2d 755

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The relationship of planning and preparation to culpability is reflected in a variety of statutes, including Penal Code section189, which assigns a presumption of premeditation for certain specified crimes: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other willful, deliberate, and premeditated killing."

[premeditation and deliberation shown by defendant's descriptions of his time consuming, careful and surreptitious preparations to strangle victims]; *People v. Caritativo* (1956) 46 Cal.2d 68, 72 [defendant forged the will of the first victim to obtain her property and then forged a suicide note for her husband (the defendant's second victim) making it appear that the husband was in fact the killer].)

The prosecutor argued that planning was evident in appellant's bringing the shotgun to Bruni's house concealed in the laundry basket.[35] (11 RT 1579.) Clari testified that appellant had twice before placed a gun

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The prosecutor argued:

> What did he do? The steps he took to have to go over there? He got the shotgun. And we know that he took with him at least 10 rounds of ammunition, because there were four expended casings in the house, one expended casing in the gun, and there was one live round in the gun. The one live round, No. 2, that was found outside where the shotgun was. Three more live rounds on that trail by the lighter there.
>
> So what does that tell you? The defendant wanted to make sure that he took care of anyone who was in that house. He had 10 rounds at least with him.
>
> And then he conceals the weapon, putting it into the laundry basket, taking it over there to the house. The evidence of the premeditation and deliberation in this case is overwhelming.

(11 RT 1579.)

inside a laundry basket to carry it into the apartment. (6 RT 834-835.) Additionally, the prosecutor noted that appellant brought at least ten rounds of ammunition with him when he went to Bruni's house. (11 RT 1579.) These circumstances do not demonstrate the kind of detailed or carefully considered planning activity found in the California cases noted above. At most, appellant took advantage of Sovel's offer of a ride, picked up the shotgun, placed it in the laundry basket, and went to Bruni's. If this were adequate evidence of planning every gun killing in California would meet the requirements for premeditated and deliberate first degree murder.

2. The Manner of Killing in this Case Implies a *Lack* of Premeditation and Deliberation.

The prosecutor argued that premeditation and deliberation were implicit in the way in which the shootings occurred. (See 11 RT 1579, 1581, 1583-1584.) None of the circumstances the prosecutor noted were sufficient, considered either together or separately, to conclude that the killings were premeditated. It is inconsequential that four or more shots were fired. Death resulting from "indiscriminate multiple attacks of both severe and superficial wounds" does not establish premeditation and deliberation. (*People v. Anderson, supra,* 70 Cal.2d at p. 21.) Even shooting at close range does not necessarily demonstrate premeditated

intent to kill. (See *People v. Ratliff* (1986) 41 Cal.3d 675, 695-696; see also *Braxton v. United States* (1991) 500 U.S. 344, 349 [shooting at a federal marshal establishes "a *substantial step* toward [attempted murder], and *perhaps* the necessary intent." [emphasis added]].) On the contrary, firing gun shots in rapid succession while in a furious rage is "consistent with a sudden, random 'explosion' of violence" or an eruption of "animal fury" which is insufficient to prove premeditation and deliberation. (*People v. Alcala, supra,* 36 Cal.3d at p. 623; *People v. Tubby* (1949) 34 Cal.2d 72, 78.)

Even if, as the prosecutor theorized, appellant shot Bruni and then walked up the stairs to David's room to shoot him, these facts are not persuasive evidence of premeditation and deliberation in the context of this case. The entire incident was part of a single course of conduct which is "consistent with a sudden, random 'explosion' of violence," and not evidence of the calm, calculated thought associated with premeditation and deliberation. (*People v. Alcala, supra,* 36 Cal.3d at p. 623.) Cases where the defendant's pursuit of the victim is noted as a circumstance indicating planning are distinguishable. The defendant's pursuit of the victim after an intervening event which should have provided a "cooling down" period may indicate persistence in carrying out a preconceived plan. (See, e.g.,

People v. Davis, supra, 10 Cal.4th 463 [premeditation and deliberation inferred from manner of killing where victim was severely injured in car crash, was pursued by defendant and strangled over a period of five minutes when she was debilitated and in severe pain from internal injuries]; *People v. Raley, supra,* 2 Cal.4th 870 [defendant's premeditation inferred from, *inter alia*, elaborate advance planning and number of hours after stabbing during which he made a calculated decision to let victims bleed to death rather than seek medical attention]; *People v. Rittger* (1960) 54 Cal.2d 720, 730 [defendant attacked victim with a knife, stabbed him repeatedly and persisted in attack for some time before fatal wounds inflicted]; *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 101-102 [entire course of conduct indicated premeditation where defendant and his friends engaged victim in conversation in a bar and then returned to their own tables, and after some interval defendant knocked the victim to the ground, met no resistance and began shooting].)

3. The prosecution did not establish a motive.

Motive evidence consists of "facts about the defendant's prior relationship and/or conduct ***with the victim*** from which the jury could reasonably infer a motive to kill." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27 [emphasis added].) Such facts were not present in this case.

Appellant had a long history of acting out violently. According to Clari's testimony, he had been beating her and threatening to kill her and/or other family members for years. Appellant clearly tried to dominate and control his wife and daughter. However, there was no evidence whatsoever that he had ever bullied, intimidated or threatened his mother-in-law. (Compare *People v. Pride, supra,* 3 Cal.4th 195, 247 [defendant killed the victim "to silence her as a possible witness to her own sexual assault"].) Nor was there anything in appellant's history of violence to suggest that he would formulate and carry out a plan to kill. Appellant's behavior pattern revealed his tendency to irrational anger and a lack of self control which occasionally led to violence. This history did not, however, support an inference of premeditated and deliberate murder. Appellant's statements are also contrary to the prosecution's theory of the case. According to witnesses, appellant talked about confronting Bruni to get information. This evidence was obviously inconsistent with a motive to kill.

E. Conclusion.

The circumstances surrounding the shootings of Bruni and David do not imply premeditation and deliberation. Even when the evidence is viewed in the light most favorable to the prosecution, there is insufficient support in the record from which to conclude that appellant premeditated

and deliberated in connection with the shootings. The prosecution cannot lawfully substitute a plausible theory for sufficient evidence. Although the context was different, the legal principle noted in a recent California Supreme Court opinion applies with equal force to appellant's case. There, Justice Werdegar stated:

> That an event could have happened, however, does not by itself support a deduction or inference that it did happen. *** ***Jurors should not be invited to build narrative theories of a capital crime on speculation.***

(*People v. Moore* (2011) ___ Cal.Rptr.3d ___ [2011 WL 322379], at p. 13 [discussing a claim regarding the adequacy of the foundation for a hypothetical question posed to an expert witness] [emphasis added].)

Appellant's first degree murder convictions were not supported by sufficient evidence of premeditation and deliberation and were, therefore, obtained in violation of state law. (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 34-35.) The improper convictions also violated appellant's federal constitutional rights to due process of law. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 313-314.) For all of the reasons discussed above, this Court must reverse appellant's first degree murder convictions.

III.

THE EVIDENCE DID NOT ESTABLISH THAT APPELLANT HAD BEEN LYING-IN-WAIT.

A. Introduction and Overview.

Appellant was charged with two counts of first degree, premeditated murder in the deaths of Bruni and David. For each murder count, it was alleged that the murders were committed while lying-in-wait within the meaning of Penal Code section 190.2, subdivision (a) (15). [36] Two theories, premeditated and deliberate murder and lying-in-wait murder, were premised on the same facts and evidence. According to the prosecution, appellant hid the shotgun in the laundry basket and arrived at Bruni's pretending to be there to return some of Clari's clothes. Using this ruse, he

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At the time of the homicides, this sub-section made a defendant death eligible if "[t]he murder was committed while the defendant was lying-in-wait." (Former Pen. Code §190.2, subd. (a) (15) [Stats. 1998].) In the year 2000, Section 190.2, sub-division (a) (15), was amended to state that this special circumstance requires that the murder occur "by means of lying-in-wait." The crimes at issue in appellant's case occurred in November of 1998. The amendment therefore did not apply to appellant pursuant to the prohibition on *ex post facto* laws in the California and United States Constitutions. (U.S. Const., art. I, § 10; Cal.Const., art. I, § 9; *People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178 [a statute that inflicts greater punishment than the applicable law when the crime was committed is an *ex post facto* law], citing *Collins v. Youngblood* (1990) 497 U.S. 37, 42-43.)

gained access to the house and then shot the victims.

The requirements of the lying-in-wait special circumstance are more stringent than the requirements for lying-in-wait murder. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228 [242 P.3d 68, 82, fn. 3].) The special circumstance requires proof beyond a reasonable doubt that the crime was preceded by a "substantial period of watching and waiting." (*People v. Lewis* (2008) 43 Cal.4th 415, 508; *People v. Jurado* (2006) 38 Cal.4th 72, 119.) The California Supreme Court has not specified the minimum amount of time of watchful waiting necessary to the special circumstance, and the Court has indicated that a brief period of time might suffice in particular cases. (*People v. Russell, supra,* 242 P.3d at p. 68.) In appellant's case, however, there is no evidence of watchful waiting. The evidence at most establishes concealment of purpose which is insufficient. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 508.) Because the evidence was insufficient to sustain the jury's special circumstance findings, appellant was deprived of his rights to due process of law and a fair trial under both the state and federal constitutions. (U.S. Const., Amends. V, VI and XIV; Cal. Const., art I, §§ 5, 15 and 16.) This Court should vacate the jury's true finding on the lying-in-wait special circumstance. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 509.)

B. The Legal Standard.

The Due Process Clause of the Fourteenth Amendment requires that there be sufficient evidence, found to be true beyond a reasonable doubt, of each element of a charged crime. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 315-319.) In *Jackson v. Virginia*, the United States Supreme Court defined sufficient evidence as that which allows the trier of fact to reach a "subjective state of near certitude of the guilt of the accused. . ." (*Jackson v. Virginia, supra,* 443 U.S. at p. 315.) California's legal standard for sufficiency of the evidence is well-settled. When viewed in the light most favorable to the judgment, there must be "substantial evidence, i.e., evidence that is credible and of solid value from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) The same standard applies to special circumstance findings. (*People v. Stevens* (2007) 41 Cal.4th 182, 201; *People v. Carter* (2005) 36 Cal.4th 1215, 1258.)

C. Proceedings Below.

1. The prosecution's evidence and argument.

One piece of evidence was emphasized and claimed to be conclusive proof of premeditation and deliberation. On two previous occasions,

appellant carried a shotgun or rifle into his apartment concealed inside a laundry basket covered with clothing.[37] (6 RT 834.) Clari testified that the most recent incidence was around one month before the crimes. (6 RT 834-835.) She told appellant that she objected to having a gun when they had children in the home. (6 RT 835.) Appellant then put the gun back into the basket, placed the laundry basket inside the trunk of his car, and drove off. (*Id.*)

In closing argument, the prosecutor first addressed the evidence claimed to prove premeditation and deliberation. The prosecutor noted appellant's threats to Clari, his desire to control her and the evidence that he put sugar in the gas tank of her car. (11 RT 1578.) The prosecutor also relied on appellant's comments to Jason Tipton and Kevin Neal where, referring to Bruni, he reportedly said "I ought to put a gun to her and make her call Clari. I ought to put a gun to her head and make her return my son." The prosecutor argued: "What is that telling you . . . [t]he defendant

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Defense counsel objected on notice grounds. (6 RT 786-787.) The prosecution had previously advised that Clari would testify to one incident with the laundry basket. The prosecutor stated that Clari had only told her about the second incident when they met to prepare for her testimony the evening before. (6 RT 786.) The court allowed the testimony, finding that there had been no discovery violation under Penal Code section 1054. (6 RT 788.)

was expressing to Jason Tipton what his state of mind was ahead of time." (11 RT 1579.) Other circumstances were viewed as "steps" appellant took in preparation. Here the fact that appellant "got the shotgun," and "took at least 10 rounds of ammunition." (11 RT 1579.) Finally, the laundry basket was the definitive evidence of premeditation and deliberation. The prosecutor argued: "and then he conceals the weapon, putting it into the laundry basket, taking it over there to the house. The evidence of the premeditation and deliberation in this case is overwhelming." (*Id.*)

Next the prosecutor reviewed the evidence claimed to support first degree murder based on the lying in wait theory. According to the prosecutor, Clari's testimony proved that appellant had made a "plan" to use the laundry basket to hide the gun. The prosecutor stated:

> The judge just read to you an instruction of the theory first-degree murder, lying-in-wait. And this is my attempt to summarize it here.
>
> "Murder, which is immediately preceded by lying-in-wait is murder of the first degree." That's what the judge just read to you. So if you find that the facts fit this, which I submit that they do, this is automatically first degree. There is no first or second here. The term "lying-in-wait" is defined as, "A waiting and watching for an opportune time to act, and concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence."
>
> So what does that mean? When you think of this in

layman's terms, "lying-in-wait," you think of the killer hiding in the bushes until the person comes out and concealed their person. But that's why those words, "even though the victim's aware of the murderer's presence" are in bold because the law says, no, you can still conceal your purpose and still see the murderer, which is exactly what happened in this case.

When the defendant used that ruse to get into that house, he was acting like he was doing a good thing, returning Clari's clothes so that Bruni would open the door. Of course if he had the shotgun there, she wasn't going to open the door so he uses the clothes as a ruse to get in there. He's concealing his purpose from her. He has a secret design.

Then we look at the bottom one, "The lying in wait need not continue for any particular period of time, as long as the duration shows the state of mind equivalent to premeditation or deliberation." Remember what Clari told you? She had seen the defendant carrying the gun into their apartment. Carrying a gun into their apartment on two prior occasions, two other guns the same way. So the defendant had this plan going for a long time. This is how I can get the gun over there because I've done it before. Nobody is going to think anything twice.

Who's going to think a shotgun would be in the laundry basket? No one. He concealed his purpose from her. He waited for his golden opportunity. He caught her by surprise and he ambushed her. That is lying-in-wait.

(11 RT 1580-1581.) The prosecutor returned to the lying-in-wait special circumstance as the last area she discussed in closing argument. Once again, the concealed shotgun is the stated basis for the special circumstance.

[Y]ou have to figure out what is the lying in wait special circumstance. Well, the whole first part of the instruction is exactly like the wording that we heard in that

theory of first-degree murder. And that instruction is very long as well. The judge just read it to you. Here's my shorthand version.

The same as first degree murder – concealment, waiting, and killing all occurred during the same time, concealing of the purpose, waiting for the moment to act and then killing, all must happen at the same time or in an uninterrupted attack beginning when the concealment ends.

Here, the concealment ends the moment the defendant pulled that shotgun out of the laundry basket and then Bruni knew what was up. That's when the concealment ends. They both apply in this case.

So what do you need? Well, the instruction says you need more than just a mere concealment of purpose. You also need a substantial period of watching and waiting, which we have in this case, and immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage. Clearly that is what we have in this case. She had no idea what was coming or she would have never opened the door and let the defendant in.

I submit to you that that special circumstance is supported by the evidence as to both of the victims in this case.

(11 RT 1583-1584.)

2. The jury instructions.

The trial court gave the following version of CALJIC 8.25 to address the first degree murder pursuant to a lying in wait theory:

Murder which is immediately preceded by lying-in-wait is murder of the first degree.

The term "lying-in-wait" is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take

the other person by surprise even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.

(13 CT 3560; 11 RT 1565.) The special circumstance instruction given was CALJIC 8.81.15, stating:

> To find that the special circumstance referred to in these instructions as murder while lying-in-wait is true, each of the following facts must be proved:
>
> 1. The defendant intentionally killed the victim, and
> 2. The murder was committed while the defendant was lying-in-wait.
>
> The term "while lying-in-wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> Thus, for a killing to be perpetrated while lying-in-wait, both the concealment and watchful waiting as well as the killing must occur in the same time period, or in an uninterrupted attack commencing no later than the moment the concealment ends.
>
> If there is a clear interruption separating the period of lying-in-wait and the period in which the killing take place, so that there is neither an immediate killing or a continuous flow

of the uninterrupted lethal events, the special circumstance is not proved.

A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder by lying-in-wait has been established.

(13 RT 3562; 11 RT 1567-1568.)

D. There Was No Evidence of Watchful Waiting to Sustain the Special Circumstance or the First Degree Murder Theory.

As this Court recently observed, there is considerable overlap between the lying-in-wait special circumstance and lying in wait as a theory of first degree murder; some period of "watching and waiting" is essential to both. (*People v. Russell, supra,* 242 P.3d at p. 68.) The lying-in-wait special circumstance requires proof of: "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*People v. Morales* (1989) 48 Cal.3d 527, 558; see also *People v. Hillhouse* (2002) 27 Cal.4th

469, 500; *People v. Carpenter* (1997) 15 Cal.4th 312, 388.) The requirements of lying-in-wait first degree murder under Penal Code section 189 are "slightly different" from the lying-in-wait special circumstance under Penal Code section 190.2, subdivision (a)(15). (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2.) Section 189 provides that a murder "perpetrated by means of " lying-in-wait is first degree murder. The time spent lying-in-wait must be of sufficient duration "such as to show a state of mind equivalent to premeditation and deliberation." (See CALJIC 8.25; 13 CT 3560; 11 RT 1565.) When used as a first degree murder theory, all three of the elements above must be proven, but then the lying-in-wait serves as "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Stanley* (1995) 10 Cal.4th 764, 794-795; *People v. Hardy* (1992) 2 Cal.4th 86, 162-163. See also, 89 A.L.R.2d 1140 [Homicide: What constitutes "lying-in-wait"].)

The California Supreme Court has not determined what amount of time constitutes "a substantial period of watching and waiting." [38]

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The critical distinction between lying-in-wait as a means of committing first degree murder, and the lying-in-wait special circumstance is the "temporal element," which creates a "thin but meaningfully distinguishable line between first-degree murder by means of lying-in-wait and capital murder with the special circumstances of lying-in-wait." (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 908. See also *People v.*

However, the Court has often described the paradigm case for a conviction of premeditated murder based on a lying-in-wait theory. Under the "typical scenario" for the lying-in-wait special circumstance, the killer watches and waits for the victim to fall asleep. (See *People v. Michaels* (2002) 28 Cal.4th 486, 516 ["[w]aiting and watching until a victim falls asleep before attacking is a typical scenario of a murder by means of lying-in-wait"]; *People v. Ruiz* (1988) 44 Cal.3d 589, 615 ["[f]rom such evidence, the jury reasonably could infer that defendant watched and waited until his victims were sleeping and helpless before executing them"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1206 [evidence established that "defendant had watched and waited until the victim was sleeping and helpless before he poured the flammable liquid on her and ignited it"].)

The "sleeping victim" is not the only scenario capable of sustaining a lying in wait special circumstance. However, in other decisions upholding the special circumstance findings the defendant had time to reconsider his

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Morales, supra, 48 Cal.3d at p. 557; *People v. Moon* (2005) 37 Cal.4th 1, 22, 32.) While this temporal element has been addressed in California case law, most of the analyses have focused on aspects slightly different from the length of time required. (See, e.g., *People v. Morales, supra,* at p. 558 [killing must either be contemporaneous with or "follow directly on the heels of the watchful waiting."]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149 ["the killing [must] take place *during the period of concealment and watchful waiting.*" [emphasis in original].)

or her plan and persisted, often using the "watching and waiting" period of time to perfect the crime. (See *People v. Edwards* (1991) 54 Cal.3d 787 ["jury could reasonably infer defendant waited and watched until [victims] reached the place of maximum vulnerability before shooting"]; *People v. Michaels, supra,* 28 Cal.4th at p. 517 [defendant and companion concealed themselves outside of victim's apartment, waited one half hour after her lights went out for getaway car to arrive, then went inside to kill her]; *People v. Hillhouse, supra,* 27 Cal.4th at pp. 500-501 [substantial period of watching and waiting for opportune time to attack from position of advantage].)

Appellant's case is readily distinguishable from the classic "sleeping victim" murder. Here there was *no* period of watching and waiting preceding the killings. All of the evidence indicates that the shootings occurred within moments of appellant's arrival. Appellant's friend, J.D. Sovel, drove appellant to Bruni's that night. He and appellant pulled into the driveway at 10:40 p.m. Both men got out of the car, and had a brief conversation before Sovel left. (1 CT 61-62.) Appellant was so drunk and high that Sovel would not let him borrow the car. Appellant retrieved some bags of clothing and the laundry basket from Sovel's car, and walked to Bruni's front door. (1 CT 61-62.) As he backed out of the driveway, Sovel

saw appellant standing on the threshold. Bruni had opened the door, and Sovel looked back through the passenger side window to see appellant walk into the house carrying the laundry basket and the bags. (1 CT 62.) Next-door neighbor Sarah Phipps, and the other neighbor, Mr. Valdez, testified that the shots came between 10:30 and 10:45 p.m. (7 RT 934-935; 1059-1060.) Bruni's body was found just inside the front door close to the stairs. (See 9 RT 1237 [testimony of Ronald Heim].) Evidence from multiple sources indicates that appellant made no effort to watch and wait in order to gauge an optimal time to attack.

Nothing in appellant's activities in the weeks before the shootings implied that he was watching Bruni and waiting to catch her unawares. The several hours leading up to the crimes do not suggest preparation. It was undisputed that appellant was at home in his apartment on the evening of November 9, 1998. Appellant had spent the entire evening drinking heavily, using drugs and playing dominoes with his downstairs neighbors. (See, e.g., 7 RT 971-974 [testimony of Jason Christopher Tipton].) There was no testimony indicating that he had any plans to go out that night. Appellant's plans changed purely by chance and for reasons not related to any activities of the victims. Appellant's friend, J.D. Sovel, happened to stop by the apartment that evening at approximately 8:45 p.m. (1 CT 59.)

The domino game broke up at approximately 10:30 p.m. (7 RT 1025 [testimony of Kevin Neal].) At that point, appellant asked Sovel for a ride over to Bruni's house. (1 CT 60.) (Compare *People v. Hyde* (1985) 166 Cal.App.3d 463 [defendant disguised as police officer stopped victim's car on freeway, evidence established that defendant had been stalking the victim at the victim's workplace for several days, and after the stop defendant kidnapped the victim to move him to a less visible location before the killing].)

The prosecution emphasized appellant's supposed "plan" to conceal the gun, arguing that this concealment of purpose was strong evidence of lying-in-wait. Appellant disagrees with the characterization of this conveyance as a plan. However, even if appellant's use of the laundry basket could be considered a "plan," concealment alone is not enough to support the lying-in-wait findings. The applicable jury instruction for the lying-in-wait special circumstance states "[a] *mere concealment of purpose* is not sufficient to meet the requirement of concealment set forth in this special circumstance." (CALJIC 8.81.15 [emphasis addded].) Both concealment *and* a substantial period of watching and waiting must be proven. The California Supreme Court has insisted on proof of both elements. Recently, the Court held:

> a person may satisfy the requirement by concealing both his purpose and presence, or only his purpose, not presence, *so long as he watches and waits for a substantial period* and then launches a surprise attack from a position of advantage.

(*People v. Bonilla* (2007) 41 Cal.4th 313, 333, citing, *People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204.)

Appellant's use of the laundry basket was not sufficient on its own. Concealment of purpose may be one component of lying-in-wait, but it must be accompanied by other factors. In *People v. Gutierrez*, *supra*, 28 Cal.4th 1083, the defendant planned a trip to where the victim and his second wife lived. The defendant brought his son along to help carry out the plan. He parked his van on a hill nearby, and they watched and waited for several hours until the couple returned home. It was Halloween night, and the defendant and his son put on masks to get the victims to open the door. *People v. Gutierrez* is similar to appellant's case insofar as the use of a ruse to get inside the victims homes. This, however, is the only common feature and the ruse was not the determining factor in the California Supreme Court's decision to uphold the special circumstance there. The evidence established that the defendant in *Gutierrez* did considerable planning (i.e., bringing his son, procuring appropriate masks, and timing the journey to coincide with Halloween) and spent several hours watching and

waiting to carry out his preconceived design.

Appellant's case is different. There was no comparable evidence of preparation in this case, even with the use of the laundry basket. Appellant ended up at Bruni's that evening purely by chance after James Sovel stopped by unexpectedly. By the time appellant asked Sovel for a ride (at approximately 10:30 p.m.) he was highly intoxicated in addition to being mentally unbalanced. Most notably, appellant spent no time at all watching and waiting. All of the evidence indicates that events unfolded in rapid succession. Given these circumstances, the evidence does not permit the same inference of premeditation and deliberation as a substantial period of "watching and waiting" might have allowed.

The prosecution persuaded the jury to adopt its theory by piling up a series of mutually reinforcing inferences. This is not competent and sufficient evidence. The jury may base its findings on "reasonable inferences," but cannot rely on "suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Morris* (1988) 46 Cal.3d 1, 21 [internal citations omitted].) The California Supreme Court has confronted a case similar to appellant's in this respect. In *People v. Lewis*, *supra*, 43 Cal.4th 415, the Court reversed the jury's finding, holding that the evidence was insufficient to support the lying-in-

wait special circumstance. The defendant faced capital charges arising from a series of robberies and murders. With respect to one incident, a codefendant testified that the plan had been to drive around to find a nice car which they would intentionally "bump" into. After forcing the other driver to stop to deal with the minor traffic accident, the defendants planned to steal the car and any valuables and to shoot the driver if they met with any resistance. (*Id* at p. 509.) The defendant admitted to demanding the car keys from the victim, Avina, then shooting Avina and taking property from Avina's truck. The Supreme Court found that the codefendant's statement should not have been admitted, and further found that without the statement the evidence of lying-in-wait was insufficient. No admissible evidence established that the taking of the truck and the other property was not an afterthought following a genuine traffic accident and a confrontation with the victim. The Court noted that the physical evidence was equivocal:

> Finally, the physical evidence of the manner of the killing did not supply the missing "watching and waiting" evidence. Although it suggested that defendant shot Avina while Avina was sitting up and facing forward, the physical evidence shed no light on what occurred before the confrontation with and the killing of Avina.

(*Id* at p. 508.)

Appellant's case was similarly lacking in evidence. The State has

not met its burden of proving beyond a reasonable doubt that the killings of Bruni and David constituted lying-in-wait special circumstance murder or first degree murder on a lying-in-wait theory. Reversal is required because the evidence was insufficient as a matter of law to support either the Penal Code section 190.2, subdivision (a) (15) special circumstance findings or the first degree murder conviction.

IV.

THE JURY INSTRUCTIONS PERTAINING TO THE LYING IN WAIT SPECIAL CIRCUMSTANCES AND THE FIRST DEGREE MURDER THEORY WERE CONFUSING AND DEPRIVED APPELLANT OF A FAIR TRIAL.

A. Introduction and Overview.

In the guilt phase of appellant's capital trial, the jury was given convoluted and contradictory instructions concerning the lying-in-wait special circumstance and first degree murder by lying-in-wait. The special circumstance instruction, CALJIC 8.81.15, was lengthy, confusing and internally inconsistent. This instruction also conflicted with other instructions specifically defining key concepts utilized within CALJIC 8.81.15, such as premeditation and deliberation. CALJIC 8.81.15 (special circumstance, lying-in-wait) and CALJIC 8.25 (first degree murder, lying-in-wait) used identical language to state the temporal elements of the

crimes, leaving jurors with no meaningful way to separate lying-in-wait first degree murder from the lying-in-wait special circumstance. By giving these instructions, the trial court violated appellant's state and federal constitutional rights to a fundamentally fair jury trial, to due process of law, and to a reliable verdict and penalty determination. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7 and 15.) For all of the reasons set forth below, appellant's convictions and sentence of death must be set aside.

B. The Instructions Pertaining to Lying-in-wait Were Confusing and Inconsistent.

Appellant's jury was instructed on the elements of the lying-in-wait special circumstance with CALJIC No. 8.81.15. The version this court used included the final paragraph which was set in brackets in the CALJIC Volume. (See CALJIC No. 8.81.15 (6th ed. 1996).)

> To find that the special circumstance referred to in these instructions as murder while lying in wait is true, each of the following facts must be proved:
>
> 1. The defendant intentionally killed the victim, and;
>
> 2. The murder was committed while the defendant was lying-in-wait.

> The term "while lying-in-wait" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.
>
> Thus, for a killing to be perpetrated while lying-in-wait, both the concealment and watchful waiting as well as the killing must occur in the same time period, or in an uninterrupted attack commencing no later than the moment the concealment ends.
>
> If there is a clear interruption separating the period of lying-in-wait from the period during which the killing takes place, such that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, a special circumstance is not prove
>
> A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder by lying-in-wait has been established.

(13 RT 3562; 11 RT 1567-1568.)

The length of this instruction alone is cause for concerns about juror comprehension. The California Supreme Court has consistently urged lower courts to translate legal principles for juries with brevity and simplicity. "It cannot be overemphasized that instructions should be clear

and in order to avoid misleading the jury." (See, e.g., *Guerra v. Handlery Hotels, Inc.*(1959) 53 Cal.2d 266, 272.) This instruction, however, contains even more serious flaws.

CALJIC 8.81.15 is internally inconsistent in its treatment of major elements of the crime. The temporal element of lying-in-wait is conceptualized differently from one paragraph to another. In the second paragraph, CALJIC 8.81.15 states: "The lying-in-wait *need not continue for any particular period of time* provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation." (CALJIC 8.81.15, ¶ 2.) The court in appellant's case included the bracketed paragraphs at the end of the instruction. There, jurors were told that the special circumstance of lying-in-wait is established where there is, *inter alia*, a "substantial period" of watching and waiting for an opportune time to act. (13 CT 3562; 11 RT 1567-1568.) The instruction is thus internally inconsistent with respect to a critical element of the special circumstance.[39] It is also at odds with the central concepts of premeditation

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Similar inconsistencies plagued the element of concealment. First jurors were advised that "concealment by ambush" or "some other secret design" would suffice, "even though the victim is aware of the murderer's presence." (CALJIC 8.81.15 at ¶ 2.) However, in the fifth paragraph appellant's jurors were told that a "*mere* concealment of purpose" is not sufficient. (CALJIC 8.81.15, ¶ 5.) There must also be a "position of advantage," but this pertains only if there is a "a substantial period of

and deliberation as these were defined elsewhere in the set of jury instructions. CALJIC 8.20 in its final paragraph told the jury that premeditation and deliberation could potentially last only a "short period," no more than needed to weigh and consider the question of killing. (13 CT 3560; 11 RT 1565.)

C. The Instruction on Lying-in-wait, First Degree Murder Was Improper.

In addition to the special circumstance instruction of CALJIC 8.81.15, the jurors were instructed with CALJIC 8.25 setting forth the elements of first degree murder pursuant to a lying-in-wait theory:

> Murder which is immediately preceded by lying-in-wait is murder of the first degree.
>
> The term "lying-in-wait" is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.
>
> The word "premeditation" means considered beforehand.

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watching and waiting." In the first part of the instruction, watching and waiting need not take any longer than the premeditation required for a first-degree murder. (*Id.*)

> The word "deliberation" means formed or arrived at or determined as a result of careful thought and weighing of considerations for and against the proposed course of action.

(13 CT 3560; 11 RT 1565.) [40]

D. The Instructions on the Temporal Elements of Lying-in-wait Were Identical for Both Crimes.

The temporal element of lying in wait, first degree murder is stated in CALJIC 8.25 in the *identical language* used in the special circumstance instruction, CALJIC 8.81.15, paragraph two. Both jury instructions provided in relevant part: "*The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation.*" (See 13 CT 3560, 11 RT 1565 [CALJIC 8.25]; 13 CT 3562, 11 RT 1567-1568 [CALJIC 8.81.15] [emphases added].) As this Court recently specified, "first degree murder *by means of* lying in wait . . . is distinct from intentional murder *while* lying in wait, as required by the related but distinct special circumstance." (*People v. Russell, supra,* 242 P.3d at p. 68, fn. 3 [emphasis

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40 The version of CALJIC 8.25 in the Clerk's Transcript omits the last two paragraphs defining premeditation and deliberation. These paragraphs appear in brackets in the CALJIC Volume. (See CALJIC No. 8.25 (6th ed. 1996).) The Reporter's Transcript reveals that the jury was verbally instructed with these final two paragraphs. (See 11 RT 1565.)

in original].) A constitutional sentence requires that jurors be given standards by which they may meaningfully distinguish a first degree premeditated murder from a death eligible, special circumstance killing. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *People v. Holt* (1997) 15 Cal.4th 619, 697.) In appellant's case, the jury instructions stated the temporal element in the same way leaving the jurors no basis for making such a distinction. [41]

This Court has repeatedly upheld the CALJIC 8.25 instruction on the elements of lying-in-wait murder. (*People v. Russell, supra,* 242 P.3d at p. 82, citing, *People v. Moon*, *supra*, 37 Cal.4th at p. 23; *People v. Hardy*, *supra*, 2 Cal.4th 86, 161-163.) In *People v. Russell,* however, the instructions addressed only the murder theory and not the lying-in-wait special circumstance. (*People v. Russell, supra,* 242 P.3d at p. 82, fn. 3.) That case did not present the confusing predicament of appellant's jurors who were left to puzzle through two related but supposedly distinct

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As discussed above, the fifth paragraph of CALJIC 8.81.15 contains another variation of the temporal element, requiring "a substantial period of watching and waiting." (See Section B.) This would seem only to add to the confusion. It is not a basis on which to contend that the jury may have distinguished between the elements of the two crimes, first because the internal inconsistency of 8.81.15 was confusing, and second because it is impossible to know which of the instructions the jurors actually followed. (See *People v. Rhoden* (1972) 6 Cal.3d 519, 526.)

instructions on rather esoteric legal concepts. Assuming, *arguendo*, that the version of CALJIC 8.25 given to appellant's jury was a correct statement of the law, reversal is still necessary. Where the jury is given an incorrect instruction, merely giving a correct one as well does not cure the harm as it is impossible to know which of the instructions the jurors actually followed. (See *People v. Rhoden, supra,* 6 Cal.3d 519, 526.) Reversal is, therefore, required.

V.

THE TRIAL COURT ALLOWED THE JURY TO CONSIDER IRRELEVANT AND HIGHLY PREJUDICIAL VICTIM IMPACT TESTIMONY IN THE GUILT PHASE OF APPELLANT'S TRIAL.

A. Introduction.

The guilt phase testimony in appellant's case included substantial descriptions of the survivor's immediate reactions to the murders. Clari gave a lengthy account of how she received the news, and also described her reactions upon viewing the crime scene. Richie testified about returning home to find the bodies of his mother and brother.[42] Other witnesses,

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Richie's understandable shock and upset are apparent from his testimony. Richie was a percipient witness and appellant does not contend that *his* guilt phase testimony was improper victim impact. However, the other witnesses should not have included descriptions of the crime's effect on Richie in their guilt phase testimony.

including friends, neighbors and police, described Richie's intense emotional distress and hysteria in the late evening of November 9th and the early morning hours of November 10th.

This testimony was in fact victim impact evidence which had no relevance to the jury's guilt phase determinations. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334; *Payne v. Tennessee* (1991) 501 U.S. 508; *People v. Haskett* (1982) 30 Cal.3d 841.) Moreover, the testimony was an improper appeal for sympathy of the type the California Supreme Court has repeatedly found to be "out of place during an objective determination of guilt." (*People v. Jackson* (2009) 45 Cal.4th 662, 691.) For all of the reasons discussed below, this Court should reverse appellant's convictions.

B. The Evidence and Testimony.

1. Clari Burgos.

Clari left appellant on Thursday, October 15, 1998, and she and the children flew to Puerto Rico on Sunday, October 18, 1998. (6 RT 827.) In her direct examination in the guilt phase, Clari gave a detailed account of how she learned of her mother's and brother's deaths on November 10, 1998:

> November 9th I didn't talk to my mom all day so I was anxious because I'm used to talking to my mom every day. I really couldn't sleep. And I woke up really early too because I wanted to talk to her. And I had to wait because there's a

time difference between Puerto Rico and here. So I waited and waited.

And when I thought it was, like, 6:45, 7:00 in the morning, I figured my mom would be awake because she would have to take David to school so I called on the phone on the 10th. *** And the phone rang and rang and nobody answered. And then finally the answering machine came on and I left my mom a message. "Where are you? I don't – I can't believe you're not home. I want to talk to you. I haven't talked to you all day yesterday. Call me when you get this message." But I didn't realize that she was already gone, and that she wouldn't reply to my message.

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My Uncle Quiles called and he spoke to me later on that day over the phone. And he said, "Are you sitting down? Are you sitting down?" And I said, "Yeah, why? What's the matter?" He said, "I have bad news. Your mom and your brother are dead." And I said, "Yeah, whatever." And because he joked around a lot with me, not about that kind of thing, but he played with me like that so I didn't believe him. I said, "Yeah, whatever." And he said, "Put your aunt on the phone. Put your aunt on the phone." So I gave the phone to my Aunt Rose.

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So my Aunt Rose, he was talking to her on the phone, and she didn't let it be obvious to me because I was sitting there. Her face didn't change. So they were talking on the phone and my Aunt put the phone down and she said, "Go ahead and go. Do what you have to do." And I got in the car. And she said, "Take your grandmother with you."

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So I took my grandmother with me and got in my Aunt Rose's car and we went around the corner to put gas in the car. And when I was pumping the gas, that's when I was realizing like something isn't right. Why would she ask me to take my grandmother to a job interview?

And so I'm pumping the gas and I realized something wasn't right so I went back to the house. But by then some of my family members were in the driveway, and they wouldn't let me come in.

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So then somebody – one of my aunt's [sic]– one of my aunt's husband [sic] came and picked me up. And I was asking, "What happened? What happened?" And they wouldn't tell me what happened. So he didn't know how to tell me so he wanted to take me over to my Aunt's job to pick her up so that maybe she could tell me. She's like the head of the family over there. [43] *** And we went to her job to pick her up. And we left my grandmother there. She went to a neighbor's house, or something. Or she – they let her come inside the house. We left my grandmother there.

We went to go pick up my Aunt Carmen. And when she came to the car, she already knew. I guess my Aunt Rose had called her, but she didn't tell me either. We were driving around. And they wanted to go to my grandmother's doctor because my grandmother had previously had a stroke, and they didn't want her to suffer another stroke because of this. So we went to talk to her doctor to get some medication.

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Then [after going to the doctor's office] I kept asking her, "Tell me what happened. Tell me now. I want to know what happened."Is my mom okay?" Because by then I figured out from the previous phone call that something had happened.

So we pulled over. And this is in this parking lot somewhere. And we got out of the car and she told me that my mom had passed away.

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The aunt was identified as one of Bruni's sisters, Carmen Montanez Echevarria. She is not the same person as the Carmen Burgos who testified at trial. (6 RT 829.)

(6 RT 827-830.) Clari was told about David at the same time. In response to the news she testified, "I just lost it." (6 RT 830.) Clari continued her testimony, relating her conversation with Detective Michelle Amicone - who, as the lead investigator for the Riverside County District Attorney's Office, was present in court when Clari testified:

> I went back to the house, but they still wouldn't let me in because I was emotional. And they still hadn't told my grandmother what had happened. So I went to a neighbor's house. And at the neighbor's house I spoke – somehow Michele called and *** I spoke to Michele. And I remember asking her, "Are they okay? Are they in Riverside County?" Or, you know, "Are they okay? What's – what happened to them? Where are they? Did they have a car accident?" And then Michele said, "No." And she told me what happened.

(6 RT 830-831.)

Clari also testified that she left Puerto Rico as soon as possible. At the Los Angeles Airport she met her Aunt Lupe who had flown in from Florida. (6 RT 831.) They drove straight to Bruni's house. (*Id.*) Asked to relate her observations when she walked through the door of her mother's home, Clari testified:

> I saw blood all over the floor and all over the carpet. And behind the front door there was blood that reached all the way up to the ceiling. And there was a basket full of clothes. A laundry basket of – clothes basket on the floor.

Q. Did you recognize any of the items of clothing in that laundry basket?

A. When I was walking out. Because when I first walked in, even though I saw everything, I didn't see anything. I was in shock."

(6 RT 832.)

2. Richie Burgos.

Richie Burgos testified on the first day of trial, as the third witness in the prosecution's case in chief. (6 RT 863.) He related the events of the evening of November 9, 1998. (6 RT 864-865.) Reaching the point in the narrative where he arrived home to find the crime scene, Richie's testimony conveyed some of the sense of hysteria he felt in the moment:

Q. What happened when you got home?

A. The door was open about that much (indicating).

Q. About an inch?

A. Yeah, a little inch. My mom was laying – laying there on the floor right by the stairs with her face blown off.

Q. Your mom was laying there?

A. With – with her face blown off. With her face blown off. And I run upstairs. I saw my brother laying there dead. I went in. My– my – my door wasn't shut. The door was open. I called 9 - 1 - 1.

(6 RT 865.) At that point, the prosecutor played the tape of the call to 911. (People's Exh. Nos. 92 [tape], 93 [transcription].) Richie became so upset upon hearing the tape that the court called a recess to allow the prosecutor to calm him down before resuming the testimony. (6 RT 865-867.)

Several other witnesses described Richie's emotional upset in considerable detail. Next-door neighbor Sarah Phipps heard Richie's first "blood-curdling scream." (8 RT 1064.) Sarah's brother, Steve Phipps, testified that Richie could be heard screaming continuously for five minutes before he emerged from the house. (7 RT 914-915.) He and cab driver Curtis Wilhousen tried to calm Richie before the police arrived:

> He – Richie came out to the car where we were and said that his mom is dead, his brother is dead. And he just kept saying, "Why? Why? Why?" *** We sat there. I tried to – I just talked to him. And he kept – you know, there was no talking to him. He just kept crying.

(7 RT 915-916.) Richie's entire body was covered with blood. Even after police arrived and placed him in the back of the patrol car, Richie remained hysterical. (*Id.*)

Officer Heim was the first person from law enforcement to arrive at the scene. (9 RT 1230-1231.) He testified about encountering a frantic Richie Burgos: "Upon arrival at the scene, I initially saw a subject that was

in the front yard. He was quite hysterical, screaming, crying." (9 RT 1233.)

Asked to continue relating his immediate impressions, Officer Heim stated:

> Well, initially, we were – myself and Deputy Alves were trying to calm down and basically catch the person, Richard, who was hysterical. We were trying to basically control him just to find out what's going on. Richard was covered in blood and what appeared to be fleshy matter that was about him and his face, and he was our main concern at that point.

(9 RT 1233-1234.) The prosecutor asked several more questions to elicit additional testimony about the extent of Richie Burgos's hysteria:

> Q. How did you get Richard calmed down enough to put him into the patrol car?
>
> A. Basically just telling him, "Calm down, calm down. You're okay. You're safe. We're here to help." He just kept screaming, "They're dead," and we just kept telling him to calm down. "We'll help out." And we kept trying to reassure him that we had to get him in the car. Initially he didn't want to get in the car at all. He was very panicky. We did have to use some force to get him into the car. But it wasn't anything, you know, like a normal arrest or anything of that nature. It was just more to guide him in there. And once he was inside, we just asked him to calm down; stating that he was safe.
>
> *****
>
> Q. Once he was in the back of the patrol car, was he still screaming hysterically or –
>
> A. Yes. He was crying through – any time that I saw him, he was crying. But after getting him into the patrol car

> and telling him that we would be right back – from there, I diverted my attention to the cab driver.

(9 RT 1234-1235.) Later in his testimony, Officer Heim again mentioned that Richie was covered in "blood and human matter." (9 RT 1235.)

Lead Investigator Michele Amicone was the last witness to testify before the guilt phase closing arguments. She gave a poignant account of her interactions with Richie:

> He was upset. He was in the back of the car crying, screaming. I kind of wanted to explain who I was and calm him down a little bit, if it was possible. So I took him out of the car and I told him who I was, and that I would be investigating the crime. ****** After I introduced myself and explained who I was, he started crying a little bit harder and he hugged me, so we had that contact.

(11 RT 1526-1527.) Amicone described how she had hugged Richie back, despite the fact that he was covered with "blood and tissue; possibly brain matter." (11 RT 1527.) She explained her reasons for doing so. "He was obviously upset. It was obvious from his appearance that he had just been through something horrible. I mean, what do you do? You know, I wanted to calm him down and comfort him." (11 RT 1527.) Over defense objection, Amicone testified about some alleged inconsistencies between Richie Burgos's trial testimony and his statements at the time of the crimes. In his initial interview, Richie said that when he discovered his mother's

body and was hugging her he said, "Mommy, wake up, Mommy, wake up." (11 RT 1529.)

C. Overview of Legal Claims.

Evidence describing the impact of the crimes on the victims survivors (family, friends, and or members of the community) is prohibited in the guilt phase of a capital case. (See *People v. Smith, supra*, 35 Cal.4th 334; *Payne v. Tennessee, supra*, 501 U.S. 508; *People v. Haskett, supra*, 30 Cal.3d 841, 846.) Clari's and Richie's reactions upon learning of the crimes were irrelevant to any issues pertaining to guilt. This evidence was, however, cumulative and highly prejudicial, and its admission deprived appellant of his constitutional rights to due process of law (*Hicks v. Oklahoma, supra*, 447 U.S. 343), to a fundamentally fair trial (*Estelle v. McGuire, supra,* 502 U.S. at p. 72), and a reliable determination of the penalty (*Beck v. Alabama, supra,* at p. 638). (U.S. Const. Amends. V, VI, VIII and XVI; Cal.Const., art I, sections 7, 15 and 17.) By allowing this testimony, the trial court abused its discretion under California law as the evidence had no relevance to disputed facts or material issues in the guilt phase. (Evid. Code §§ 210, 350; *People v. Alcala, supra,* 36 Cal.3d at pp. 631-632; *People v. Cardenas, supra,* 31 Cal.3d at pp. 904-905.) Any marginal relevance this evidence had was vastly outweighed by the

inflammatory effect it was certain to have on the jury. (Evid. Code §§352; 1101; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) For the reasons discussed below, this Court must reverse appellant's conviction of first-degree murder, and overturn his sentence.

D. Standard of Review.

The California Supreme Court customarily reviews a trial court's evidentiary rulings for abuse of discretion. (See *People v. Hoyos* (2007) 41 Cal.4th 872, 908; *People v. Salcido* (2008) 44 Cal.4th 93, 147-148. See also *People v. Burgener*, *supra*, 41 Cal.3d 505; Evid. Code §§ 350, 352.) Appellant respectfully submits that heightened scrutiny is appropriate and necessary because these claims involve errors infringing upon fundamental, constitutional rights, and because the claims arise in the context of a capital case. (*Gardner v. Florida* (1977) 430 U.S. 349, 357-358.) This Court should, therefore, independently examine the record to determine whether the trial court's erroneous admission of this irrelevant and prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, at p. 24.)

E. Evidence of Clari's and Richie's Reactions to the Crimes Had No Relevance to Any Issues in the Guilt Phase.

Evidence is not admitted in a criminal trial unless it is relevant to

material issues or disputed facts. Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Only relevant evidence is admissible under California law, and a trial court lacks discretion to admit irrelevant evidence. (Evid. Code § 350; *People v. Heard* (2003) 31 Cal.4th at pp. 972-973; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau, supra*, 6 Cal.4th at pp. 176-177.)

The testimony detailing the responses of Clari and Richie in the immediate aftermath of the murders contributed nothing to the jury's determinations of any material issues in the guilt phase of trial. Richie's testimony about discovering the crime scene was relevant in the guilt phase because it concerned the circumstances of the crime. However, the testimony of several other witnesses contained extensive descriptions of Richie's hysteria and his gruesome appearance after handling the bodies, facts in no way relevant to the circumstances of the crime. To the extent that any other witnesses testimony in this area was marginally relevant, it was far more prejudicial than probative and should not have been admitted. No part of Clari's testimony describing how she received the news was relevant in the guilt phase. (Compare *People v. Mills* (2010) 48 Cal.4th

158, 205 [videotape of relative receiving news of the murder was admissible victim impact in the *penalty* phase].) Clari was thousands of miles away at the time, having gone to Puerto Rico more than three weeks earlier. The specific account of how she learned about the crimes and her reactions to the news had no bearing on any legitimate guilt phase issues.

F. The Testimony was Unduly Prejudicial, Particularly in Conjunction with the Erroneous Admission of Other Prejudicial Evidence in the Guilt Phase.

The testimony relating Clari's and Richie's reactions to a horrifying situation was certain to have engendered tremendous sympathy from the jurors, and an equal amount of enmity toward appellant. "[T]he presumption of prejudice from jury contact with inadmissible evidence is...strong[ ] in the context of a capital case." (*People v. Lucero, supra,* 44 Ca1.3d at p. 1023.) This type of victim impact evidence is highly prejudicial under any circumstances. Where the jury is exposed to testimony of this sort in the guilt phase of trial the risk of improper prejudice is too great. The jury in a capital trial "should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." (*Id.*)

G. Reversal is Required.

The inclusion of this testimony added to the other prejudicial

features of this trial created a courtroom environment which allowed "emotion [to] reign over reason," and gave rise to a substantial likelihood "that irrational, purely subjective responses should carry the day." (*People v. Pinholster* (1992) 1 Cal.4th 865, 959.) As a result, appellant was denied his constitutional rights to due process of law (*Hicks v. Oklahoma, supra*, at p. 346), to a fundamentally fair trial (*Estelle v. McGuire, supra,* at p. 72), and a reliable determination of the penalty (*Beck v. Alabama, supra,* at p. 638). (U.S. Const. Amends. V, VI, VIII and XVI; Cal.Const., art I, sections 7, 15 and 17.) Reversal is required.

VI.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER CALIFORNIA LAW AND DEPRIVED APPELLANT OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY ADMITTING INTO EVIDENCE AN EXCESSIVE NUMBER OF GRUESOME AND HIGHLY PREJUDICIAL PHOTOGRAPHS.

A. Introduction.

Over defense objections, the trial court admitted nine photographs of the victims taken at the crime scene and during the autopsies. These photos displayed the most disturbing images of what was, by all accounts, an exceptionally bloody and gruesome crime. Two of the most senior law enforcement officials each described it as the worst they had ever seen

areas of stippling and gun powder residue. (See 2 RT 319; People's Exh. No. 85.) The trial court overruled the objections, and admitted all five of the David Burgos autopsy photographs the prosecutor offered. (2 RT 321.) The photographs from Bruni's autopsy received similar treatment. Defense counsel objected to four from a total of nine proffered exhibits. The contested photos were, as the trial judge stated, especially "gory" and disturbing because the massive facial wounds were visible. (See 2 RT 329-331; People's Exh. Nos. 69, 70, 71 and 73.) The trial court admitted all of these photographs in despite the fact that defense counsel had agreed to a number of other autopsy pictures. (See 2 RT 327-330.) With respect to the crime scene photographs, defense counsel objected to only a few on the grounds that they were cumulative and unduly prejudicial. Here counsel pointed out that the prosecutor was seeking to admit two or three photographs showing similar views of Bruni in the entryway and the blood and matter spreading into the living room of the house. (See 2 RT 323-325; People's Exh. Nos. 33, 34, and 35.) Three photos of David Burgos showed the same relevant information. (See 2 RT 325-327; People's Exh. Nos. 39, 40, and 41.)

Defense counsel objected to all of the items noted above, arguing that the photos were gory and disturbing, cumulative, and unduly prejudicial

under Evidence Code section 352. (2 RT 320-321.)[48] Additionally, counsel pointed out that the inflammatory effects would be amplified when the images were viewed on the Riverside court system's "tremendous" graphic display system. Aided by this technology, jurors would be seeing every detail of the horrific images on a large screen monitor. (See 2 RT 330-332.) Although the judge commented on the bloody and gruesome nature of the photos, the court overruled the defense objections and admitted all of the photos offered by the prosecution. (See 2 RT 322, 330-331.)

The photos were displayed and referenced often during the prosecutor's direct examination of forensic pathologist Darryl Garber, M.D. (See 10 RT 1452-1476.) Dr. Garber went into considerable detail in his testimony about Bruni's fatal head and face wound. (See 10 RT 1465-1476.) Using the photos, the doctor pointed out the various aspects of the "massive destruction" resulting to Bruni's face and brain. (See 10 RT 1472-1475; People's Exh. Nos. 69-77.)

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48 The court and counsel expressly stipulated that all defense objections would be deemed to have been made on state and federal constitutional grounds as well in order to preserve all isues for appeal. (7 RT 897.)

C. Overview of Legal Claims.

The trial court's admission of this irrelevant and highly prejudicial evidence was improper under California law. (Evid. Code §§ 210, 350, 352; *People v. Partida* (2005) 37 Cal.4th 428, at 431-439; *People v. Turner* (1984) 37 Cal.3d 302, 320-321.) The erroneous admission of this evidence denied appellant his state and federal constitutional rights to due process of law, to a fundamentally fair trial, and to reliable adjudications at both phases of his capital trial. (U.S. Const. Amends. V, VIII, and XIV; Cal. Const., art. I, §§ 7, 15, and 17; *Beck v. Alabama, supra,* at p. 638; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina, supra,* 428 U.S. 280, 304; *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585.) Because the trial court's ruling contravened established state law, its actions also deprived appellant of a state-created liberty interest and denied him due process of law under the Fifth and Fourteenth Amendments to the federal constitution. (*Hicks v. Oklahoma, supra,* at p. 346; *Lambright v. Stewart, supra,* 167 F.3d 477.)

D. Standard of Review.

The California Supreme Court typically reviews a trial court's evidentiary rulings for abuse of discretion. (See *People v. Hoyos, supra,* 41 Cal.4th 872, 908; *People v. Salcido, supra,* 44 Cal.4th 93, 147-148.)

Appellant contends that heightened scrutiny is appropriate and necessary because these claims involve constitutional error in the context of a capital case. (*Gardner v. Florida, supra*, 430 U.S. 349, 357-58. Therefore, this Court should independently examine the record to determine whether the trial court's erroneous admission of this prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, at p. 24.)

E. These Nine Photographs Were Largely Irrelevant, and Any Marginal Relevance Was Vastly Outweighed by the Accompanying Prejudice.

A determination on appeal of whether or not the trial court abused its discretion focuses on two factors: (1) whether the photographs were relevant; and (2) whether the trial court abused its discretion in finding that the probative value of this evidence outweighed its prejudicial effect. (*People v. Hoyos, supra,* 41 Cal.4th at p. 908; *People v. Salcido, supra,* 44 Cal.4th at pp. 147-148.) The trial court has broad discretion in the first instance to decide whether photographs of the deceased should be admitted and whether the probative value of such evidence outweighs any prejudicial impact under Evidence Code section 352. (*People v. Carpenter, supra*, 15 Cal.4th at p. 385; *People v. Scheid* (1997) 16 Cal.4th 1; *People v. Staten* (2000) 24 Cal.4th 434, 462-464; *People v. Vieira* (2005) 35 Cal.4th 264, 291-292.) Nonetheless, this Court, as well as the Court of Appeal, has

found in a number of previous cases that the trial court abused its discretion in allowing such evidence to be presented to the jury.

Photographs of the crime scene and/or the autopsy are not admissible absent a probative connection to disputed issues. (See, e.g., *People v. Turner, supra,* 37 Cal.3d at p. 321; *People v. Ramos* (1982) 30 Cal.3d 553, 578.) Where the defense does not dispute the point to which the picture supposedly pertains, the exhibit has no relevance should not be admitted. (*People v. Hendricks* (1987) 43 Cal.3d 584, 594.) In appellant's case the trial court admitted without question any photos which might be used in connection with the testimony of the forensic pathologist. (See 2 RT 330-332.) This was not an adequate basis for the court's rulings.

In *People v. Poggi* (1988) 45 Cal.3d 306, this Court held that the trial judge had improperly admitted two photographs of the murder victim, one depicting the victim while still alive and a second autopsy photograph showing incisions that the surgeons made performing a tracheotomy, rather than revealing the stab wounds inflicted during the offense, after defense counsel offered to stipulate that the victim was a human being, that she was alive before the attack, and that she died as a result of the attack. The California Supreme Court stated:

The admission of the photographs was error. It is true, as the

> People argue, that the admissibility of photographs lies primarily in the discretion of the trial court. But it is also true that the court has no discretion to admit irrelevant evidence. The photographs here are not relevant to any disputed material issue. The only matters on which they have probative value are the following: [the victim] was a human being; she was alive before the attack, and she is now dead. In view of defense counsel's offer to stipulate, these issues were removed from the case as matters in dispute. When, as here, a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence to prove that element to the jury.

(*People v. Poggi, supra,* 45 Cal.3d at pp. 322-323.) In *People v. Gibson* (1976) 56 Cal.App.3d 119, the Court of Appeal similarly condemned the admission of certain gruesome photographs of the deceased. In that case the prosecutor argued that the photographs were relevant to illustrate the anticipated testimony of the coroner, and the trial court admitted the photographs for that purpose. The Court of Appeal reversed the subsequent conviction, stating:

> The two photographs, to which objection was made, are gruesome, revolting and shocking to ordinary sensibilities. In light of the many other photographs of the deceased victim used in connection with the testimony of Deputy Coroner Phillips, [these photographs] represented cumulative evidence of slight relevancy. Their probative value was substantially outweighed by the danger of undue prejudice to defendant.

(*People v Gibson, supra,* 56 Cal.App.3d at pp. 134-135.)

The admission of the photographs at issue in appellant's case was error for the same reasons. As in the *Poggi* and *Gibson* cases, there was no question that the two victims died as a result of multiple shotgun wounds. The prosecutor stated that the head wound Bruni sustained was sufficient by itself to have killed her. (See 2 RT 330.) Admitting the photographs with the *most* graphic and disturbing depictions of the victims wounded bodies with the splattered blood and brain tissue was error according to the reasoning of the California Supreme Court in *People v. Poggi*, and that of the reviewing court in *People v. Gibson*. The nine photos which were the subjects of defense objections were merely cumulative to the testimony of the prosecution's experts (a forensic pathologist, several criminalists, and various investigators) and had no *additional* probative value. Multiple prosecution witnesses presented clear and unchallenged evidence illustrated, *inter alia*, by the 19 photographs defense counsel did not object to, as well as via charts and other evidence. There was no need to amplify or corroborate this substantial body of evidence with the most graphic and gory photographs at hand.

Any probative value that these photographs might have had was substantially outweighed by their undoubted prejudicial impact on the jury. These exhibits were of the type "most likely to inflame the passions of the

jurors and cause them to vote guilty regardless of the evidence." (*People v. Scheid, supra,* 16 Cal.4th at p. 19; *People v. Turner, supra,* 37 Cal.3d at pp. 320- 321.) Under these circumstances, the trial court's admission of this evidence was an abuse of its discretion under Evidence Code section 352, and violated appellant's constitutional rights.

F. These Photographs Were Unduly Prejudicial.

Appellant recognizes that California law permits the introduction of unpleasant photographs under certain circumstances. (See, e.g., *People v. Ramirez* (2006) 39 Cal.4th 398, 453-454; *People v. Carter, supra,* 36 Cal.4th 1114, 1166; *People v. Moon, supra,* 37 Cal.4th 1, 32.) However, the California Supreme Court has long recognized the unique ability of the visual image to "evoke an emotional bias against the defendant as an individual." (*People v. Karis* (1988) 46 Cal. 3d 612, 638.) While trial courts generally have considerable discretion to admit evidence, they also have a duty to shield the jurors from photographs which may "sensationalize an alleged crime, or are unnecessarily gruesome." (*People v. Ramirez, supra,* 39 Cal.4th at p. 453.) Gruesome photographs are among the types of evidence "most likely to inflame the passions of the jurors and cause them to vote guilty regardless of the evidence." (*People v. Scheid, supra,* 16 Cal.4th at p.19; *People v. Turner, supra,* 37 Cal.3d at pp. 320-

321.) Explicit photos of any homicide victim are certain to be disturbing on some level. These photographs, however, were notably horrific. Several of the investigators (each with more than 20 years of experience) commented that this case was the most bloody and gruesome crime scene they had ever seen. Dr. Garber, the forensic pathologist explained that the shotgun blast "triggered a massive explosion" which "destroyed most of her head." (10 RT 1465.) One of the photos showed what was essentially a headless woman covered with blood brain matter and fleshy tissue. All that remained to be seen of her face was part of the chin and lower jaw. (10 RT 1472.) These macabre images served no purpose, especially as defense counsel challenged none of the evidence regarding the causes and manner of the victims deaths. (See 10 RT 1476.) Under these circumstances, the trial court's admission of this evidence was an abuse of its discretion under Evidence Code section 352, and violated appellant's constitutional rights to due process of law and to a fair trial. (*Lisenba v. California* (1941) 314 U.S. 219, 228; *People v. Partida, supra,* 37 Cal.4th at pp. 434-435.) In the context of a capital case where the mental state of the perpetrator was challenged by the defense, the erroneous admission of evidence may deprive the defendant of a reliable adjudication of both the guilt and penalty

phases.[49] (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama*, *supra*, at p. 638.) In appellant's case, it is at least reasonably probable that, without this evidence, the jury would have reached a different conclusion about the degree of murder and different findings with regard to the special circumstances. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Appellant's convictions and sentence of death must, therefore, be reversed.

VII.

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY PURSUANT TO CALJIC 2.51.

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(13 CT 3556; 11 RT 1559.) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive, and shifted the burden of proof to appellant to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof. The instruction violated appellant's state and federal constitutional rights to a fundamentally fair jury trial, to due process of law, and to a reliable verdict

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[49] See Arguments I and II.

and penalty determination. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7 and 15.) Appellant recognizes that the California Supreme Court has upheld CALJIC 2.51, rejecting similar claims in other cases. (See *People v. Moore* (2011) ___ Cal.Rptr.3d ___ [2011 WL 322379]; *People v. Lee* ___ Cal.Rptr.3d____ [2011 WL 651850].) For all of the reasons discussed below, appellant respectfully asks the Court to reconsider.

A. This Instruction Allowed the Jury to Determine Guilt Based on Motive Alone.

CALJIC No. 2.51 states that the presence of motive may tend to establish that a defendant is guilty. The premise of this instruction is a misleading and incomplete statement of the law. It is axiomatic that due process requires substantial evidence of guilt, and the prosecution must prove each element of the offense beyond a reasonable doubt in order to hold the defendant criminally liable. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) A conviction based solely on evidence of motive (no matter how compelling the motive may appear on an intuitive level) cannot satisfy this standard because the evidence would be speculative and conjectural. (See e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].) Plainly stated, motive alone is insufficient to prove

guilt. CALJIC 2.51 allows the jury to determine guilt based on motive alone. Indeed, it may encourage them to do so because of the marked difference between it and other instructions. Other standard evidentiary instructions addressing a single circumstance specifically state that the circumstance is *insufficient* to establish guilt. (See, e.g., CALJIC 2.52 [flight] 13 CT 3556; 11 RT 1560.) The contrast was readily apparent here because the trial court gave CALJIC 2.52 immediately after CALJIC 2.51. (*Id.*) The jurors could have reasonably concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Ca1.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

B. The Instruction Was Especially Prejudicial in this Case Because it Improperly Supported the Prosecution's Theory for First Degree Murder.

It was highly likely that the jury in appellant's case would adopt this improper permissive inference. Motive was the key to the prosecution obtaining a conviction for first degree murder and a "True" finding on the "lying-in-wait" special circumstance. This was not a case in which the facts of the offense alone were sufficient to support such a verdict. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616 [systematic starvation of a child]; *People v.*

Catlin, supra, 26 Cal.4th at p. 158 [use of poison].) The parties were largely in agreement on the basic outline of the case. The state's evidence established: 1) appellant habitually became violent and abusive when angry at his wife or his daughter; 2) the wife and daughter left and were unavailable; 3) appellant then acted out by shooting his wife's mother and younger brother. Assuming that these facts were accepted as proven, the remaining issue was appellant's mental state. The jury was instructed on the general definitions of murder and malice aforethought (CALJIC Nos. 8.00; 8.10; 8.11). (13 CT 3559; 11 RT 1563-1564.) They were also instructed on first degree murder (CALJIC Nos. 8.20; 8.25), and second degree murder (CALJIC Nos. 8.30; 8.70; 8.71). (See 13 CT 3559-3561; 11 RT 1563-1566.) The prosecution's case for first degree murder was entirely circumstantial. Success (in the form of a conviction and/or lying-in-wait special circumstance finding) depended upon the jurors making a tricky series of inferential leaps. Jurors needed to use *different* past crimes (domestic violence), requiring a *different* and less culpable mental state (general intent), and involving *other* victims, to infer that appellant carried out these crimes with the specific intent required for first degree capital murder. Something was needed to persuade the jury to connect the instant case to the past crimes. [50] The prosecution contrived a concept of "motive" to paper over

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[50] See Arguments I and II.

the logical gaps in this series of inferences.

According to the prosecution, the past crimes and the homicides sprang from the same motive. All of appellant's conduct, past and present, was part of an overarching plan to dominate and control this family. (See, 11 RT 1578-1580 [prosecutor's guilt phase closing argument].) This "motive" theory connected the two sets of circumstances, and established the specific intent needed for the first degree murder finding. Instructing the jurors that they could infer guilt from motive encouraged them adopt the prosecution's theory about motive, which in turn led to a finding of premeditation and deliberation in the shootings. As discussed in Argument I, above, this theory stretched the concept of motive too far, and the trial court should not have admitted the past misconduct evidence to support it.

A concurrent problem was the lack of consistency in the instructions as a whole. This Court has recognized that differing standards in jury instructions create erroneous implications. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [the trial court's failure to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a

finding of guilt of the lesser offense applied only as between first and second degree murder]; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) In appellant's case the juxtaposition of CALJIC Nos. 2.51 and 2.52 highlighted the fact that proof beyond a reasonable doubt was *not* required to infer guilt from motive. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial, and a reliable determination of guilt and of the penalty. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, §§ 7 and 15.)

C. The Instruction Impermissibly Lessened the Prosecution's Burden of Proof and Violated Due Process.

Appellant's jury was instructed according to CALJIC 8.20, stating that first degree murder is a "willful, deliberate and premeditated killing with malice aforethought." (13 CT 3559; 11 RT 1564-1565.) The prosecution's theory held that appellant was motivated by his long-standing plan to dominate his family. By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on this crucial, contested element of the prosecutor's capital murder case - *i.e.*, that appellant had premeditated and deliberated the killings rather than simply

exploding in a violent rage. The instruction thus violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

CALJIC No. 2.51 impermissibly lessened the state's burden of proof because appellant's jury would not have been able to separate instructions defining "motive" from "intent." The distinction between "motive" and "intent" can be difficult, even for lawyers and judges. Judicial opinions have sometimes used the two terms as synonyms. (See, e.g., *People v. Vasquez* (1972) 29 Cal.App.3d 81, 87; *People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008.) The terms "motive" and "intent" are commonly used interchangeably under the rubric of "purpose." In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "motivated by an unnatural or abnormal sexual interest or intent." (*People v. Maurer*, *supra*, at pp. 1126-1127.) The Court of Appeal emphasized, "We must bear in mind that the audience for

these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id* at p. 1127.) The court found that giving the CALJIC No. 2.51 motive instruction - stating that motive was not an element of the crime charged and need not be proved - was reversible error. (*Id* at pp. 1127-1128.)

D. The Instruction Shifted the Burden of Proof to Imply That Appellant Had to Prove Innocence.

CALJIC 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) Appellant was also denied the benefit of the Eighth Amendment's requirement of particular reliability in capital sentencing, because the erroneous instruction allowed the prosecution to convict appellant on less than the full measure of proof. (See *Beck v. Alabama*, *supra*, at pp. 637-638 [reliability concerns extend to guilt phase].)

E. Reversal is Required.

The motive instruction given in this case diluted the state's obligation to prove beyond a reasonable doubt that appellant had the specific intent needed for first degree, deliberate and premeditated murder. CALJIC No. 2.51 encouraged the jury to conclude that motive could be substituted for proof of specific intent to kill. Such a conclusion was clearly erroneous, as specific intent to kill must be proven beyond a reasonable doubt in order to sustain guilty verdicts on the first degree murder charges and "True" findings on the lying-in-wait special circumstance allegations. Accordingly, this Court must reverse appellant's convictions on Counts One and Two, and the jury's "True" findings on the special circumstance allegations, because the instructional error - affecting the central issue before the jury - was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, at p. 24.)

VIII.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

The trial court instructed the jury with CALJIC No. 2.52, pertaining to flight after the commission of a crime:

> The flight of a person immediately after the commission of a crime is not sufficient in itself to establish his guilt but is a fact

> which, if proved, may be considered by you in light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(13 CT 3556; 11 RT 1560.) This instruction should not have been given because it allowed the jury to draw an inference against appellant which lacked sufficient support in the evidence. Especially when considered in conjunction with the other errors in the guilt phase of trial, this error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const. Amends. V, VI, VIII and XIV; Cal.Const., art I, §§ 7, 15, 16 and 17.) Appellant recognizes that the California Supreme Court has rejecting similar claims in other recent cases. (See *People v. Lynch* (2010) 50 Cal.4th 693, 761; *People v. Taylor* (2010) 48 Cal.4th 574, 630.) Appellant respectfully asks the Court to reconsider, and to reverse his convictions and the judgment of death.

A. CALJIC 2.52 Improperly Duplicated the Circumstantial Evidence Instructions.

It was unnecessary for the trial court to instruct appellant's jury with CALJIC No. 2.52. The California Supreme Court has repeatedly disapproved of specific instructions relating to the consideration of evidence which simply

reiterate a general principle upon which the jury already has been instructed. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on another ground, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court gave the jury the standard CALJIC Nos. 2.00 and 2.01 circumstantial evidence instructions. (13 CT 3551; 11 RT 1552-1553.) These instructions told the jurors that they might draw inferences from the circumstantial evidence. In other words, they could infer facts tending to show appellant's guilt from the circumstances of the crimes. There was no need to repeat this general principle under the guise of permissive inferences of consciousness of guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [state rule requiring defendant to reveal his alibi defense, without providing discovery of prosecution's rebuttal witnesses, violates due process by giving an unfair advantage to the prosecution]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [an arbitrary preference to particular litigants violates equal protection].)

B. The Instruction Was Partisan and Argumentative.

The consciousness-of-guilt instruction was not only unnecessary, it was also impermissibly argumentative. The trial court must refuse to deliver

argumentative instructions. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of these instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted].) Even if they are neutrally phrased, argumentative instructions are improper because they "ask the jury to consider the impact of specific evidence," (*People v. Daniels, supra,* 52 Cal.3d at pp. 870-871) or "imply a conclusion to be drawn from the evidence." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9.) Judged by this standard, CALJIC No 2.52 was impermissibly argumentative. The structure of CALJIC No 2.52 is very similar to the instruction the California Supreme Court disapproved in *People v. Mincey*, *supra*, 2 Cal.4th 408. The proposed defense instruction in *People v. Mincey* provided:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as

> defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*Id* at p. 437, fn. 5.)

The use of CALJIC 2.52 here told the jury, "[i]f you find" certain facts (flight in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). The California Supreme Court found the instruction in *Mincey* to be argumentative. (*Id* at p. 437.) Appellant submits that this Court should hold CALJIC No. 2.52 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, the California Supreme Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408. In *People v. Nakahara*, the Court reasoned that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but, rather, a proposed defense instruction which "would have invited the jury to infer the existence of [the defendant's] version of the facts, rather than his theory of defense." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.) However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or

why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his constitutional rights to a fair trial and to due process of law. (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474.) The arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.) In appellant's case, the use of this prosecution-slanted instruction given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship, supra,* 397 U.S. at p. 364.)

To insure fairness and equal treatment, appellant respectfully submits that this Court should reconsider the cases in which it has held that California's consciousness-of-guilt instructions were not argumentative. (See, e.g., *People v. Lynch, supra,* 50 Cal.4th at p. 761; *People v. Taylor, supra,* 48 Cal.4th at p. 630.) Except for the party benefitted by the instructions, there is

no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103,123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright, supra*, 45 Cal.3d at p. 1137.)

The alternate rationale the Court employed in *People v. Kelly* (1992) 1 Cal.4th. 495, 531-532 (and a number of subsequent cases, *e.g.*, *People v. Arias* (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly, supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the

allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming has held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. [51] The reasoning of two

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Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950 [297 Mont. 127]; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295 [17 Fla. Weekly S101]; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686 [260 Ga. 515]; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171 [275 S.C. 404]; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234 [99 Idaho 506]; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749 [24 Kan. 715]; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333 [25 Wash.App. 46]; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [194 Colo. 338] [same].) Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant

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of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id* at p. 1232, fn. omitted.) In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction, and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id* at pp. 748-749 [citation omitted]. Accord, *State v. Nelson* (Mont. 2002)

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[51](...continued)
discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230 [285 Or. 293].)

48 P.3d 739, 745 [reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

In appellant's case the argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jurors' attention on evidence favorable to the prosecution. Additionally, these instructions placed the trial court's imprimatur on the state's theory of the case and lightened the prosecution's burden of proof. The use of these improper instructions violated appellant's rights to due process of law, to a fair trial, and to equal protection of the laws. (U.S. Const. Amends. V, VI, VIII and XIV; Cal. Const., art I, §§ 7, 15, 16.)

C. The Consciousness-Of-Guilt Instruction Allowed An Irrational Permissive Inference About Appellant's Guilt.

All the consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. Each instruction permits the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, *i.e.*, flight (CALJIC No. 2.52). (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook

exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Id.* See also *United States v. Warren,* at p. 900 (conc. opn. of Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or

reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the United States Supreme Court has required "substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it is made to depend."].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the prosecution needed a way to conform this set of facts to fit the criteria for first degree and/or special circumstance lying-in-wait murder charged under Penal Code section 190.2(a)(15). (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 32-33.) This was accomplished through a series of inferences by which appellant's mental state was elevated to the most culpable level - deliberate and premeditated murder. These inferences were based on circumstantial evidence and the improper and inflammatory evidence of appellant's other crimes and misconduct. (See Argument I.) Added support came in the form of the instructions regarding evidence of consciousness-of-guilt.

In closing argument, the prosecutor pointed out a few of appellant's actions after the crimes. Appellant allegedly walked away from Bruni's

house, exchanged a brief greeting with the neighbor, Mr. Valdez, and continued walking in the direction of a trail he frequently used as a shortcut when walking to and from his apartment and Bruni's home. Valdez testified that appellant walked past him and began to run when an "alarm type" sound was heard. (7 RT 947-948.) Within a few hours, investigators found the Mossberg shotgun crudely concealed under a bush alongside a public trail. (See 8 RT 1133-1134.) These circumstances were claimed to support consciousness of guilt. (See 11 RT 1578-1579 [prosecution's closing argument in the guilt phase].) [52]

In reality, the evidence the prosecution relied on in this endeavor was not adequate to the task. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer an intent or mental state which the entire evidentiary picture did not support. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that appellant killed the victims, but also that he had done so while harboring the intent or mental state required for conviction of first degree murder. Although the consciousness-of-guilt evidence in a murder case may bear on a

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Not surprisingly, the prosecutor did not call the jury's attention to others of appellant's actions, specifically that he went back to his apartment and was wearing the same clothing when police arrested him without incident the following morning. (See 9 RT 1193-1200; 11 RT 1532.)

defendant's state of mind after the killing, it is *not* probative of his state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained:

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*People v. Anderson*, *supra*, 70 Cal.2d. at p. 33.) [53]

Appellant's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental state for first degree premeditated murder at the time of the shooting. There was no rational connection – much less a link more likely than not – between appellant's alleged flight and consciousness by him of having committed the homicides with (1) premeditation; (2) deliberation, (3) malice aforethought, or (4) a specific intent to kill. The fact that appellant walked home cannot reasonably be deemed to support an inference that he

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Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, SUBSTANTIVE CRIMINAL LAW (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

had the requisite mental state for first degree murder. This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (*People v. Russell, supra*, 50 Cal.4th 1228, 242 P.3d 68, 89.) [54] Appellant respectfully asks this Court to reconsider and to hold that, in this case, instructing his jury with CALJIC 2.52 was reversible constitutional error.

The foundation for this ruling is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833. There the California Supreme Court noted that the consciousness-of-guilt instructions do not specifically mention mental state, and concluded:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id* at p. 871.) Appellant respectfully submits that the *Crandell* analysis is mistaken.

First, the instructions do not speak of "consciousness of some wrongdoing;" they speak of "consciousness of guilt." The *Crandell* opinion

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(See also *People v. Hughes, supra,* 27 Cal.4th at p. 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 and 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 and 2.52].)

does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 13 CT 3558; 11 RT 1562 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.) Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[55]

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In a different context, the California Supreme Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. A trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of

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Because the consciousness-of-guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, use of those instructions undermined the reasonable doubt requirement and denied him a fair trial and due process of law (U.S. Const. Amends. V and XIV; Cal.Const., art I, §§ 7, 15.) The instructions also violated his right to have a properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. Const. Amends. VI and XIV; Cal.Const., art I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his right to a fair and reliable capital trial (U.S. Const. Amends. VIII and XIV; Cal.Const., art I, § 17.)

D. Reversal is Required.

Appellant's jury was given an instruction which encouraged them to draw impermissible inferences. The use of CALJIC 2.52 was an error of federal constitutional magnitude as well as a violation of state law.

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[55](...continued)
circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

Accordingly, appellant's murder conviction, the special circumstance findings, and the death judgment, must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) The state cannot make the required showing here.

The instruction affected the jury's determination of the central contested issue in the case: appellant's intent in connection with the homicides. Without the first degree murder verdicts, appellant would not have been death-eligible. In this context, the erroneous use of the improper instruction cannot have been harmless beyond a reasonable doubt. Appellant's convictions and sentence of death must, therefore, be reversed.

IX.

THE INSTRUCTIONS GIVEN TO APPELLANT'S JURY IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

A. Introduction and Overview of Legal Claims.

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law," (*In re Winship*, *supra*, 397 U.S. at p. 363) and is at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial judge in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.) [56]

B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 8.83 and 8.83.2).

The jury was instructed according to CALJIC 2.90, stating in relevant part: "[a] criminal defendant in a criminal action is presumed to be innocent until the contrary is proved," and "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (13 CT 3558; 11 RT 1562.) These principles were supplemented by other instructions explaining the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(13 CT 3558; 11 RT 1562.)

The jury was given two interrelated instructions – CALJIC Nos.

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56 Appellant acknowledges that the California Supreme Court has rejected these arguments in other cases, and that this Court recently upheld the use of these standard instructions in another capital case. (*People v. Moore, supra,*___ Cal.Rptr.3d ___ [2011 WL 322379].) Appellant respectfully asks the Court to reconsider.

2.01 and 8.83– that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (13 CT 3551, 11 RT 1553 [sufficiency of circumstantial evidence to prove specific intent or mental state]; 13 RT 3562-3563; 11 RT 1568-1569 [special circumstances - sufficiency of circumstantial evidence - generally].) These instructions were relevant to different evidentiary issues but addressed them in nearly identical terms. Appellant's jury was thus repeatedly advised that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (*Id.*) These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt.

This twice repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17); see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, at p. 638.)

First, these instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship, supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." *An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt.* A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana, supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," emphasis added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions in this case were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required

the jury to accept any reasonable *inculpatory* interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable *exculpatory* interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 [emphasis added, fn. omitted].) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Francis v. Franklin, supra,* at pp. 314-318; *Sandstrom v. Montana, supra,* 442 U.S. at p. 524.)

These two instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, they *must* accept the reasonable interpretation and reject the unreasonable. (13 CT 3551, 11 RT 1553; 13 RT 3562-3563; 11 RT 1568-1569 [emphasis added].) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, the California Supreme Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to

his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. First, they allowed the jurors to accept one or more of the prosecution's theories about the first degree murder and the special circumstances simply because the theory (or theories) was "reasonable" even though the evidence might not be sufficient. The circumstantial evidence instructions, therefore, permitted and indeed encouraged the jury to convict appellant of first degree murder and to find the two special circumstance allegations true upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship, supra*, 397 U.S. at p. 364, and *Mullvaney v. Wilbur, supra,* 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.) The instructions, however, undercut the defense by requiring that appellant prove that his mental state defense was reasonable rather than requiring that the prosecution meet its reasonable doubt burden.

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant guilty on a standard that is less than constitutionally required.

C. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 And 2.52).

The trial court gave seven other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (13 CT 3549; 11 RT 1550); CALJIC No. 2.21.1, regarding discrepancies in testimony (13 CT 3553; 11 RT 1556); CALJIC No. 2.21.2, regarding willfully false witnesses (13 CT 3554; 11 RT 1556); CALJIC No. 2.22, regarding weighing conflicting testimony (13 CT 3554; 11 RT 1556-1557); CALJIC No. 2.27, regarding sufficiency of the evidence of a single witness (13 CT 3555; 11 RT 1557); CALJIC No. 2.51, regarding motive (13 CT 3556; 11 RT 1559);[57] and CALJIC No. 2.52 regarding flight (13 CT 3556; 11 RT 1560). [58] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively

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In Arguments VII and VIII, appellant demonstrates that CALJIC Nos. 2.51 and 2.52 were improper for additional reasons.

stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

CALJIC Nos. 2.21.1 and 2.21.2, also lessened the prosecution's burden of proof. CALJIC No. 2.21.2 authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (13 CT 3554; 11 RT 1556 [emphasis added].) This instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) [59] The

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

essential mandate of *Winship* and its progeny – that each specific fact necessary to establish the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

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

(13 CT 3554; 11 RT 1556-1557.) This instruction informed the jurors that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with

something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (13 CT 3555; 11 RT 1557), was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC No. 2.27, by telling the jurors that "[t]estimony concerning any fact by one witness, which you believe, is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of that fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant had the burden of convincing them that the homicide was not a premeditated and deliberate murder and (2) that this burden was a difficult one

to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) The above-quoted observation from the *Turner* opinion does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find the instruction unconstitutional as it violates the Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here thus violated appellant's constitutional rights.

D. This Court Should Reconsider its Prior Rulings Upholding these Defective Instructions.

Each one of the challenged instructions violated appellant's federal

constitutional rights by lessening the prosecution's burden of proof and by operating as a mandatory conclusive presumption of guilt. The California Supreme Court has repeatedly rejected constitutional challenges to many of the instructions discussed herein. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) [60] While recognizing the shortcomings of some of these instructions, the California Supreme Court has consistently stated that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of

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Although the California Supreme Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of appeal have echoed the pronouncements of the Supreme Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep* (1993) 42 Cal.App.4th 733, 738-739, citing *People v. Wilson* (1992) 3 Cal.4th 926, 943 [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

any reasonable doubt; and, that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. Appellant respectfully submits that the Court's analysis is incorrect.

First, what the California Supreme Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the federal constitution (*Estelle v. McGuire, supra,* at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms. Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of

law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.) Moreover, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[61] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. As discussed above, the jurors in this case heard several separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable

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A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

doubt standard: CALJIC No. 2.90. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943 [citations omitted].) Under this principle, it cannot seriously be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

E. Reversal is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. The questions of guilt of first degree murder and the truth of the lying in wait special circumstance were close ones

(assuming *arguendo* that there even was legally sufficient evidence to support the verdicts on these charges), and the dilution of the reasonable doubt requirement by the guilt phase instructions, particularly when considered cumulatively with the other instructional errors set forth in Arguments IV, VII, and VIII, must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) Accordingly, the judgments on counts 1 and 2, and the "true" findings for the special circumstances must be reversed.

X.

THE PENAL CODE SECTION 190.2(A)(15) LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL.

The Eighth Amendment prohibition against cruel and unusual punishment imposes a "fundamental requirement" on states employing capital punishment: they must "adequately protect[] against the wanton and freakish imposition of the death penalty." (*Zant v. Stephens, supra,* 462 U.S. at p. 876.) To comply with this requirement, a state must ensure that its capital sentencing scheme "genuinely narrow[s] the class of persons eligible for the death penalty and ... reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens*, *supra*, at p. 877; see also *Romano v. Oklahoma* (1994) 512 U.S. 1,7; *Arave v.*

Creech (1993) 507 U.S. 463, 474; *Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Godfrey v. Georgia, supra,* 446 U.S. at p. 427.)

California's lying-in-wait special circumstance has been expanded so far over the past twenty years that it does not meet either prong of this constitutional standard. (See *Maynard v. Cartwright* (1988) 486 U.S. 356.) First, the test for this special circumstance has been applied so loosely that it no longer performs a narrowing function at all. A murder eligible for the death penalty on the basis of "lying-in-wait" has become virtually indistinguishable from any premeditated murder. (See *People v. Stevens, supra,* 41 Ca1.4th at p. 213 [Werdegar, J., concurring].) Second, the expansive construction given to this special circumstance fails to distinguish "in a meaningful way the category of defendants upon whom capital punishment may be imposed." (*Arave v. Creech*, *supra*, 507 U.S. at p. 476 [statutory factors making a defendant eligible for the death penalty "must provide a principled basis for doing so."].) Appellant therefore respectfully requests that the Court reconsider its previous decisions regarding the constitutionality of the lying-in-wait special circumstance and set aside the jury's "true" findings on the grounds that this special circumstance is invalid because it fails to perform the narrowing function required by the Eighth Amendment. (But see *People v. Carasi* (2008) 44 Cal.4th 1263, l310 [holding

statute is constitutional]; *People v. Lewis, supra,* 43 Cal.4th at pp. 515-517 [same].)

A. This Special Circumstance Fails to Narrow the Class of Persons Subject to the Death Penalty.

The lying-in-wait special circumstance is established if the defendant commits an intentional murder that involves (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Morales, supra,* 48 Cal.3d 527, 557.) The California Supreme Court stated in *People v. Morales,* "We believe" that this combination of elements "presents a factual matrix sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (*Id.*) As construed and applied by the courts of this state, each of these elements can be found in most cases of premeditated murder. Traditionally, "lying in wait" has referred to a physical concealment of the perpetrator in an ambush situation. [62] (See *People v. Merkouris* (1956) 46

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See Dictionary.com. Merriam-Webster's Dictionary of Law, Merriam-Webster, Inc., http://dictionary.reference.com (defining "lying in wait" as "holding oneself in a concealed position to watch and wait for a victim for the purpose of making an unexpected attack and murdering or

(continued...)

Cal.2d 540, 559-560 [lying in wait was not established because there was no evidence the defendant hid his presence].)

In *People v. Morales* the California Supreme Court eliminated the physical concealment requirement. There, the Court held that "the concealment element 'may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer.'" (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) As explained by Justice Mosk in his dissent in *Morales*, a perpetrator almost always "conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." (*Morales*, *supra*, at p. 575 [Mosk, J., dissenting]; accord *People v. Stevens*, *supra*, 41 Cal.4th at p. 223 [Moreno, J., dissenting and concurring].) Moreover, the concealment element has become so malleable in the years since *Morales*, that it has been found even in cases in which the perpetrator has frankly announced "his bloody aim." (See *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 501 [the defendant stated "I ought to kill you" before striking the victim]; see also *People v. Arellano* (2004) 125 Cal.App.4th 1088, 1091-92, 1094-95 [concealment of

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[62](...continued)
inflicting bodily injury on the victim").

purpose found despite defendant having threatened to kill his ex-wife several times, and telling the ex-wife and her mother he was going to kill her on the day of the homicide].) Given this state of the law, it is not clear that the concealment of purpose requirement serves any narrowing function as it appears to impose no meaningful limits on the class of persons eligible for the death penalty.

The California Supreme Court has also given expansive meaning to the "watching and waiting" element of this special circumstance, thereby compounding the constitutional infirmity caused by its broad interpretation of the concealment element. In *Morales*, the Court held there must be a "substantial" period of watching and waiting to support a Penal Code section 190.2(a)(15) lying-in-wait special circumstance. (*Morales*, *supra*, at p. 457.) As Justice Kennard explained in her concurrence in *People v. Stevens*, the Court in *Morales* required "a substantial period of watching and waiting for an opportune time to act" in order to distinguish between the lying-in-wait special circumstance and first degree premeditated murder. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 215 [Kennard, J., concurring] [emphasis in original]. See also *People v. Lewis*, *supra*, 43 Cal.4th at pp. 512-515.) The word "substantial" remains a part of the test for this special circumstance. (*People v. Stevens*, *supra*, at pp. 201-202, citing *People v. Morales*, *supra*, 48 Cal.3d at p. 557.)

Subsequent decisions, however, have approved jury instructions stating that the period of watching and waiting "need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (*People v. Stevens*, *supra*, at pp. 201-202; *People v. Sims* (1993) 5 Cal.4th 405, 433-34.) Given that "[p]remeditation and deliberation do not require much time" (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127), this new construction effectively nullifies the "substantial period" requirement. (See *People v. Stevens*, *supra*, 41 Cal.4th at p. 215 [Kennard, J., concurring] [the new standard "undercuts" the test set forth in *Morales*]. See also *People v. Stevens*, *supra*, at pp. 220-221 [Moreno, J., dissenting] ["substantial period of watching and waiting" as interpreted in *Morales* has become no more than the watching and waiting needed to establish the premeditation and deliberation required in 'ordinary' premeditated murder."). As a result, this element no longer serves to distinguish the special circumstance from non-capital premeditated murder. (See *Stevens*, *supra*, 41 Cal.4th at p. 216 [Kennard, J., concurring] [concluding that the Court was "wrong in departing from this [its] earlier holding in [*Morales*] that the lying-in-wait special circumstance requires a 'substantial' period of watchful waiting."].)

The final requirement, "a surprise attack on an unsuspecting victim

from a position of advantage" immediately following the period of watching and waiting, is routinely treated as if it were a separate, additional factor. The purpose of concealing the intent to kill is to gain a position of advantage and catch the victim unawares. A surprise attack will always require some concealment, whether of the person or the purpose, to be successful. Surprise is "a common feature of murder - since murderers usually want their killings to succeed, and victims usually don't want to be murdered ...." (*Stevens* at p. 223 [Moreno, J., dissenting].) In her concurrence in *Stevens*, Justice Werdegar expressed serious concern that "the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*Stevens* at p. 213 [Werdegar, J., concurring]. As shown above, that threat has been realized. The lying-in-wait special circumstance as currently applied is more likely to include than exclude a defendant found guilty of premeditated murder. Penal Code section 190.2(a)(15) special circumstance therefore fails to "genuinely narrow" the class of death-eligible defendants, in contravention of the Eighth Amendment. (*Zant v. Stephens*, *supra*, at p. 877.)

B. This Special Circumstance Fails to Provide a Meaningful Basis for Distinguishing among Defendants Found Guilty of Murder.

Even if the lying-in-wait special circumstance were not applicable to most premeditated murders, there is a second reason this special circumstance provision is unconstitutional. To protect the defendant's Eighth Amendment rights, a special circumstance must not only narrow the class of murderers, but must do so in a principled and meaningful way that "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder," (*Romano v. Oklahoma*, *supra*, 512 U.S. at p. 7 [internal citations omitted].)

California's lying-in-wait special circumstance, as it is presently construed, does not provide a meaningful basis for identifying a subclass of defendants who are "more deserving of death." (*Arave v. Creech*, *supra*, at p. 476.) As Justice Moreno observed in *People v. Stevens*, "[t]he lying-in-wait special circumstance as interpreted by this court declares in effect: 'The defendant deserves a greater punishment than the ordinary first degree murderer because not only did he commit first degree murder, but he failed to let the person know he was going to murder him before he did.'" (*People v. Stevens*, *supra*, at p. 223.) It is not clear, though, why a murderer who

confronts his victim and tells him, "I'm going to kill you" is less culpable than one who hides his intentions and surprises the victim. The former is most likely either sadistic or confident of his ability to overpower a defenseless victim, or both. A special circumstance that qualifies a defendant for the death penalty based on the use of surprise while allowing a defendant who declares his intent to kill to a defenseless victim or sadistically toys with his victim to escape the most severe penalty does not provide a "meaningful basis" for identifying those few defendants who are more deserving of death. (*Arave v. Creech, supra*, at p. 476.)

ERRORS IN THE PENALTY PHASE

XI.

THE VICTIM IMPACT EVIDENCE AND TESTIMONY IN THE PENALTY PHASE WAS UNDULY INFLAMMATORY IN LIGHT OF THE CIRCUMSTANCES OF THIS CASE, AND THE ADMISSION OF THIS EVIDENCE WAS ERROR UNDER STATE AND FEDERAL LAW.

A. Introduction.

The quantity of victim impact evidence presented in the penalty phase was not unusually large in comparison to other cases decided by the California

Supreme Court over the last ten years. [63] Four witnesses testified in appellant's case: Bruni's mother Celena Rodriguez; her sister Lupe Quiles; Clari Burgos; and Vallerie Cage. The testimony occupied approximately 43 transcript pages, and was accompanied by 11 exhibits. The exhibits were photographs of the victims, David and Bruni, taken throughout their lives and often showing the victims with the witnesses and other family members. The victim impact evidence was not voluminous. It was, however, highly prejudicial for two reasons.

First, the testimony touched upon areas expressly forbidden by the decisions of this Court and the United States Supreme Court. Mrs. Rodriguez testified about Bruni as a baby and young girl growing up in Puerto Rico, accompanying her testimony with some of Bruni's baby pictures. (See 14 RT 1928-1930.) Bruni's sister, Lupe Quiles, gave very graphic and disturbing testimony about her experience upon viewing the crime scene several days after the shootings. (See 14 RT 1941-1944.) Finally, Clari Burgos expressed her opinion of appellant and the crime. (See 15 RT 2092.) The second reason for the especially prejudicial impact of this evidence was the relationships of the parties. These were inter-family crimes, and the family dynamic played out

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Compare *People v. Brady* (2010) 50 Cal.4th 547, 567-573 [no error when 60 witnesses over 12 days testified] *People v. Taylor, supra,* 48 Cal.4th 574, 656 [testimony of six relatives filled 30 transcript pages].

in the courtroom in full view of the jurors and distracted them their duty to rationally determine whether or not to impose a sentence of death. For all of the reasons discussed below, the victim impact evidence presented in the penalty phase of appellant's trial was unduly prejudicial and reversal is required.

B. Overview Of Legal Claims.

The admission of this irrelevant and unduly prejudicial victim impact evidence and argument created a fundamentally unfair atmosphere for the penalty phase of appellant's capital trial, thereby depriving him of his state and federal constitutional rights to due process of law and a reliable sentencing determination. (U.S. Const. Amends. V, VIII, XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; *Payne v. Tennessee, supra,* 501 U.S. 808; *People v. Edwards supra*, 54 Cal.3d 787.) The trial court also abused its discretion under California law by admitting irrelevant victim impact evidence with no connection to the circumstances "materially, morally or logically" surrounding the capital crimes. (Evid. Code §350; *People v. Edwards*, *supra*, 54 Cal.3d 787, 835.) In other instances the evidence, although arguably relevant, ought to have been excluded because the potential for undue prejudice outweighed its probative value. (Evid. Code §352; *People v. Haskett*, *supra*, 30 Cal.3d at p. 846; *People v. Edwards, supra*, 54 Cal.3d 787; *People v. Love* (1960) 53

Cal.2d 843.)

Appellant also urges this Court to reconsider its rejection of certain other claims in previous cases. [64] First, he contends that the trial court deprived him of a state created liberty interest and due process of law by admitting this evidence and argument contrary to established California law. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Lambright v. Stewart, supra,* 167 F.3d 477; contra, *People v. Boyette, supra,* 29 Cal.4th at pp. 445-446, fn. 12.) Second, the California Supreme Court's construction of Penal Code Section 190.3 (a) under which the "circumstances of the crime" encompasses virtually everything which "materially, morally, or logically" surrounds the crime is unconstitutional. This broad interpretation of Section 190.3(a) renders the statute void for vagueness, encourages arbitrary decision-making, and fails to provide proper notice to the defendant. (U.S. Const. Amends. V, VIII and XIV; Calif. Const. Art. I, §§ 7, 15, 17 and 24; contra, *People v. Wilson* (2005) 36 Cal.4th 309, 358; *People v. Boyette*, *supra*, 29 Cal.4th 381.) For all of the reasons discussed below, this Court must reverse the judgment of death.

C. Standard of Review.

The California Supreme Court generally reviews a trial court's

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64 See, e.g., *People v. Brady, supra*, 50 Cal.4th at pp. 567-573.

evidentiary rulings for abuse of discretion. (See *People v. Brady*, *supra*, 50 Cal.4th at p. 567; *People v. Burgener*, *supra*, 41 Cal.3d 505; Evid. Code §§ 350, 352.) Appellant contends that heightened scrutiny is appropriate and necessary because these claims involve constitutional error in the context of a capital case. (*Gardner v. Florida*, *supra*, 430 U.S. at pp. 357-358.) This Court should independently examine the record to determine whether the trial court's erroneous admission of this prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, at p. 24.)

D. The Basic Law Of Victim Impact.

1. The Limited Constitutional Authorization Provided by *Payne v. Tennessee*.

In 1991 the United States Supreme Court decided *Payne v. Tennessee, supra,* 501 U.S. 808, partially overruling its previous decisions in two cases (*Booth v. Maryland, supra,* 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805), which had strictly prohibited the introduction of victim impact evidence or prosecutorial argument on the subject in the sentencing phase of a capital trial. A divided Supreme Court held that the Eighth Amendment is not a per se bar to all "evidence about the victim and about the impact of the murder on the victim's family." (*Payne v. Tennessee*, *supra*, 501

U.S. at pp. 825, 827.) The *Payne* majority reasoned that *Booth v. Maryland*, *supra*, had been too restrictive as it "barred [the state] from either offering a 'glimpse of the life' which a defendant 'chose to extinguish,' [citation omitted] or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) Two general rationales were advanced in support of allowing victim impact. First, victim impact evidence may demonstrate "the specific harm" caused by the defendant's capital crimes which would be relevant "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness . . . ." (*Id* at p. 825.) Second, the state was entitled to present victim impact to balance mitigating evidence presented by the defense. (*Ibid.*) In the event that unduly prejudicial victim impact evidence was admitted, the defendant could seek relief under the due process clause of the Fourteenth Amendment. (*Id* at p. 825.)

Payne v. Tennessee removed the "bright line" prohibition on victim impact imposed by *Booth* and *Gathers* and authorized the use of two types of evidence about the capital murder victim: "victim character," *i.e.*, evidence concerning the victim's good qualities, life history and personal achievements; and "victim impact," which is evidence of the effect of the victim's death on

others.[65] However, the United States Supreme Court did not specify the constitutional limits of this authorization in *Payne* and has not done so in any subsequent case. [66]

If the Court's holding is interpreted in light of the case in which it was made, *Payne v. Tennessee* plainly does not imply approval of extensive victim

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As used herein, "victim character," refers to evidence concerning the victim's good qualities, life history and personal achievements; and "victim impact" is evidence of the effect the victim's death will have on others. Although recognizing that the United States Supreme Court has not distinguished between these two types of evidence, the Texas Court of Criminal Appeals adopts these categories for purposes of the discussion in *Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 261.

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The nearly 20 years following *Payne v. Tennessee* and the California Supreme Court's decision in *People v. Edwards,* have seen a substantial expansion in the use of victim impact evidence. Legal scholars have observed the "overwhelming trend" toward the admission of victim impact in greater quantities and in a widening array of forms. (See Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases* (2003) 88 Cornell L.Rev. 257, 280.) The law, however, has not developed apace at either the state or federal level. Writing concerning the denials of petitions for certiorari in two California cases, Justice Stevens not long ago observed the need for more precise constitutional standards. As Justice Stevens noted, the United States Supreme Court has "left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms." (*Kelly v. California* (2008) 129 S.Ct. 564, 566.) Justice Breyer wrote separately, expressing his belief that the high court should begin devising workable standards for victim impact because "the due process problem of disproportionately powerful emotion is a serious one." (*Kelly v. California, supra,* 129 S.Ct. at p. 568.)

impact material. The victim impact evidence challenged in *Payne* was actually quite restrained, particularly in light of the underlying facts. In *Payne*, a twenty-eight-year-old mother and her two-year-old daughter were killed with a butcher knife in the presence of the mother's three year-old son who survived critical injuries in the attack. The disputed testimony was a brief response to a single question posed to the surviving child's grandmother. When asked about what she had observed in the child after witnessing the murders of his mother and sister, the grandmother testified that the boy cried for his mother and that he missed her and his sister. In closing argument, the prosecutor said, "His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Ibid.*)

The precise constitutional parameters of victim character evidence are also uncertain based on the Court's opinion in *Payne v. Tennessee.*[67] *Payne*

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The Supreme Court did not need to address this question directly in *Payne* because the testimony at issue there was actually "victim impact" as opposed to "victim character" evidence. The grandmother in *Payne* testified very briefly about her grandson's reactions to the deaths of his mother and younger sister. The prosecutor's closing argument also focused on the crime's immediate and long term impact. No specific qualities were attributed to the victims and, as noted by the *Payne* dissenters, the jurors gained no more information about the victims in the penalty phase than they had received in the guilt phase of the trial. (*Payne, supra*, at pp. 865-866 (dis. opn. Stevens, J. and Blackmun, J.).)

allows jurors to receive some information about the victim's personal characteristics beyond those facts disclosed in the guilt phase of trial. The Supreme Court's references to victim character evidence, however, cannot reasonably be understood as authorizing the introduction of extensive biographical information or detailed descriptions of specific character traits. *Payne* speaks of permitting the jury to see a "quick glimpse of the [victim's] life." The majority comment that the victim need not remain a "faceless stranger" in the penalty phase of a capital trial. (*Payne* at p. 825, quoting *South Carolina v. Gathers*, *supra*, 490 U.S. at p. 821 (O'Connor, J., dissenting).) Elsewhere, the Court notes that the "uniqueness" and "individuality" of the victim may be considered as a means of balancing the defense evidence in mitigation. (See, e.g., *Payne* at pp. 839-839 (conc. opn. of Souter, J., and Kennedy, J.).) It could reasonably be argued that *Payne* sanctions **only** a very limited amount of victim character information, i.e., enough to prevent the victim from becoming "faceless." (See Blume, *Ten Years of Payne*, *supra*, at pp. 266-267.) What is clear from the *Payne* opinion is the conspicuous absence of blanket approval for any and all victim impact and victim character evidence. *Payne* does not sanction the wholesale admission of evidence about the victim's character, personal history, unique

attributes and accomplishments. Nor does the Supreme Court in *Payne* suggest that evidence about the "impact" of the crime is unlimited in terms of quantity, or admissible irrespective of its potential for undue prejudice.

Appellant's case contains a substantial amount of victim impact and victim character evidence; far beyond anything contemplated in *Payne v. Tennessee*. As discussed further below, the reasoning of *Payne* and other decisions in the state and federal courts requires that the sentence of death be reversed due to the enormity of the prejudice which surely flowed from the evidence and argument in this case.

2. Victim Impact Evidence under California Law.

Shortly after the United States Supreme Court's decision in *Payne v. Tennessee,* the California Supreme Court decided *People v. Edwards, supra,* 54 Cal.3d 787, holding that victim impact evidence and argument is relevant and admissible under factor (a) of Section 190.3 – which allows the jury to consider the circumstances of the capital murder when deciding whether to impose life imprisonment or the death penalty. (*Id.* at pp. 835-836.)[68] The

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The California Supreme Court has long held that aggravating evidence is admissible in the penalty phase only where it is relevant to one of the factors set forth in California's death penalty statute. (Pen. Code §190.3; *People v. Boyd* (1985) 38 Cal.3d 762, 775-776.)

Edwards Court defined "circumstances" so broadly as to include almost any imaginable form of victim impact evidence:

> The word circumstances as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather, it extends to "[t]hat which surrounds morally, materially, or logically" the crime. (3 Oxford English Dict. (2d ed. 1989) p. 240, "circumstance," first definition.)

(*People v. Edwards, supra,* at p. 833.)

It is generally agreed that this set of relevant circumstances includes the guilt phase evidence,[69] and any of the victim's personal characteristics which were known or apparent to the defendant. [70] Although both federal and state principles require that there must be some "outer limits" for victim impact evidence,

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69 See, e.g., *People v. Clark* (1993) 5 Cal.4th 950 [prosecutor's argument concerning victim's age, vulnerability and innocence]; *People v. Zapien* (1993) 4 Cal.4th 929 [argument about the crime's impact on victim's children] *People v. Fierro* (1991) 1 Cal.4th 173 [prosecutor's comment that victim was killed in front of his business of 40 years and that his wife, who was present, will have to live with the memory of the shooting].

70 See, e.g., *People v. Wash* (1993) 6 Cal.4th 215, 267 [victim's plan to enlist in the army which she discussed with the defendant]; *People v. Montiel* (1993) 5 Cal.4th 877 [victim's general good health and positive outlook in spite of his need for a walker]; *People v. Edwards, supra,* 54 Cal.3d at p. 832 [photographs of victims shortly before their death to demonstrate how they appeared to the defendant].

the California Supreme Court has given few indications, in the fifteen years since *Edwards*, of where they may be found. The Court has refused to exclude from the realm of relevant circumstances matters which the defendant did not know and could not readily observe,[71] and has been similarly disinclined to confine victim impact in other respects. For example, victim impact witnesses are not limited to persons who were present at the scene or soon thereafter,[72] and need not be members of the victim's immediate family. [73]

As discussed below, a substantial portion of the victim impact evidence in this case was irrelevant under California law because it could not reasonably be connected to a circumstance of the capital crimes. Appellant also observes, however, that much of this evidence and testimony would not have been admitted under a narrower definition of "circumstances." Other jurisdictions have adopted clear and specific guidelines for victim impact which provide notice to the defense and reduce the risk of a trial court erroneously admitting

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See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646; *People v. Pollock* (2004) 32 Cal.4th 1153.

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People v. Taylor (2001) 26 Cal.4th 1155.

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People v. Pollock, supra, 32 Cal.4th 1153; *People v. Marks, supra,* 31 Cal.4th 197.

irrelevant victim impact in an unconstitutionally vague and arbitrary application of California's statute. [74] Appellant respectfully asks the California Supreme Court to reconsider its previous rulings declining to limit the admission of victim impact evidence. (See, e.g., *People v. Roldan, supra,* 35 Cal.4th 646; *People v. Pollock, supra,* 32 Cal.4th 1153.) Alternatively, it is respectfully suggested that this Court refine and narrow the definition of relevant circumstances set forth in *People v. Edwards*. A narrower definition of "circumstances" for purposes of Penal Code section 190.3 would be easier for lower courts to administer, would be less susceptible to arbitrary decision-making, and would provide more effective notice to the defendant. [75]

Under present California law, victim impact evidence offered under

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The California Supreme Court has acknowledged that the United States Supreme Court has not considered whether factor (a) is unconstitutionally vague to the extent that it "is interpreted to include a broad array of victim impact evidence . . . " (*People v. Boyette, supra,* 29 Cal.4th 381, 445, fn. 12.)

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A more traditional and conservative approach to statutory interpretation would be to define "circumstance" as "[a]ttendant or accompanying facts, events or conditions." (Black's Law Dict. (6th ed. 1990) p. 243.) A federal court has defined "circumstances" as "facts or things standing around or about some central fact." (*State of Maryland v. United States* (4th Cir. 1947) 165 F.2d 869, 871.) Another state court has defined "circumstances of the offense" as "the minor or attendant facts or conditions which have legitimate bearing on the major fact charged." (*Commonwealth v. Carr* (1950) 312 Ky. 393, 395 [227 S.W.2d 904, 905].)

Penal Code Section 190.3(a), is subject to exclusion if it is cumulative, misleading or unduly prejudicial. (Evid. Code §352; *People v. Box* (2000) 23 Cal.4th 1153, 1200-1201; *People v. Staten, supra,* 24 Cal.4th 434, 462-463.) Victim impact should, therefore, be subject to exclusion or limitation like any other proffered evidence. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 654.) *People v. Edwards* cautions that excessively emotional victim impact evidence carries an unacceptable risk of improper prejudice:

> Our holding does not mean that there are no limits on emotional evidence and argument. In *People v. Haskett, supra*, 30 Cal.3d at page 864, we cautioned, 'Nevertheless, the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. [Citation.] In each case, therefore, the trial court must strike a careful balance between the robative and the prejudicial. [Citations.] On the one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.

(*Id* at p. 836, fn. 11.)

The California Supreme Court has repeatedly stated that reversible error would result in the "extreme case" where victim impact evidence was likely to "divert the jury's attention from its proper role." (*People v. Smith,*

supra, 35 Cal.4th at p. 365.) [76] In practice, however, this Court has never reversed a capital case due to the trial court's failure to exclude victim impact evidence. Reversal is required here because several distinct forms of improper victim impact were admitted. This evidence was especially inflammatory in the context of this case, where the defendant, victims and witnesses were part of the same family. The result was a prejudicial atmosphere in which the jury was unable to perform its proper function at sentencing. Under these circumstances, reversal of appellant's sentence is required as there is an unacceptable risk that this jury's decision to impose a death sentence was based on emotion rather than reason. (*Gardner v. Florida, supra,* 430 U.S. at p. 358; *Gregg v. Georgia* (1976) 428 U.S. 153, 189.)

E. The Penalty Phase Testimony.

1. The testimony of Bruni's mother, Mrs. Celena Rodriguez.

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76 The Court in *Smith* found the brief testimony of the mother of the child victim was not inflammatory. The Court commented: "We do not, however, know of any cases after *Payne* and *Edwards* holding victim impact evidence inadmissible, or argument based on that evidence improper. The references in *Payne* and *Stanley* [*People v. Stanley,supra,* 10 Cal.4th 764, 832] to the exclusion of unduly inflammatory victim impact evidence contemplates an extreme case, which is not the situation here." (*People v. Smith, supra,* at p. 365.)

Bruni's mother, the 83 year-old Mrs. Celena Rodriguez, came from Puerto Rico to testify in the penalty phase. (14 RT 1926.) Mrs. Rodriguez had 18 children, the first was born when she was 20 years old. (*Id.*) Bruni was her sixth child. [77] The prosecutor asked: "Can you tell us about the family that you have, all of your children? Were you a close-knit family?" (14 RT 1927.) Mrs. Rodriguez agreed that hers had been a very close family. All the children were raised in Puerto Rico. (14 RT 1927-1928.) After Bruni married, she lived across the street from her parents. (14 RT 1930.) Mrs. Rodriguez sent Bruni to be with her older sister in California when Bruni was having trouble with an abusive husband. (14 RT 1927-1928.) Clari had been around 5 years-old, and Richie around 4 years-old at the time. (*Id.*) In California Bruni stayed with her elder sister, Mrs. Rodriguez's fourth child Guadalupe "Lupe" Montanez. (14 RT 1927-1928.) Mrs. Rodriguez spoke to Bruni on the telephone often, and visited the US once a year. (14 RT 1929.) Bruni also came to Puerto Rico for visits. (*Id.*) Mrs. Rodriguez last saw Bruni alive in July of 1998. Mrs. Rodriguez stayed at Bruni's home for around two weeks before leaving on

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When Mrs. Rodriguez had trouble recalling the year Bruni was born, a spectator said "1948." The court cautioned the audience not to testify or comment. (14 RT 1926.)

July 19, 1998, to spend a week in Florida with her daughter Lupita before returning to Puerto Rico. (14 RT 1930.)

2. The testimony of Bruni's sister, Lupe Quiles.

Bruni's younger sister, Lupe Quiles, also testified. (14 RT 1934.) Bruni was two years older than Lupe, and she was Lupe's best friend. (14 RT 1935.) Bruni's was like a second mother to her younger siblings. (*Id.*) Two or three years after Lupe and her husband came to the United States, their mother sent Bruni and her children, Clari and Richie, to get Bruni away from an abusive husband. Lupe was living in Carson, California, at the time. (14 RT 1935.) Bruni had been a legal secretary in Puerto Rico. (14 RT 1937.) Lupe got her a job where she worked, at the Carson Metal Container Company. (*Id.*)

In the mid to late 1980s Lupe bought a house and left her entire apartment for Bruni and the kids. (14 RT 1936.) Lupe was still close by and they saw each other all the time. In 1985, Lupe moved to Diamond Bar and Bruni stayed in Carson. (14 RT 1936.) In 1991, Lupe moved to Florida because of her husband's job. (*Id.*) She had wanted Bruni to move also, but Bruni didn't want to leave Clari. (14 RT 1937.)

Lupe gave a detailed and dramatic description of how she learned of Bruni's and David's deaths. When she received the news she became so ill

and emotionally overcome that she fainted. (14 RT 1938-1940.) Lupe related how she had flown to Los Angeles, and met Clari at the airport. (14 RT 1940-1942.) She and Clari drove to Bruni's house together. Lupe's description of the crime scene and its effect on her was very dramatic and disturbing. She went into detail about all the blood and brain matter. They cleaned the house with gallons of bleach because she could not stand to keep walking over and in her sister's blood. (14 RT 1940-1942.) The hardest part was sweeping the floor in the entryway. Bone fragments were all over the place. (14 RT 1941-1942.) Lupe knew that she was sweeping up pieces of her sister's face. She couldn't bear to throw out one of the larger pieces of bone which she thinks was part of Bruni's nose. (14 RT 1941-1942.) She kept it and has it hidden away at home and has not told anyone until now. (*Id.*) The court suggested a recess because the witness was getting so upset. (14 RT 1942.)

Lupe planted a tree in her yard to honor Bruni and David. (14 RT 1944.) She places two crosses on the tree and the family gathers there to pray and to lay flowers on Bruni's and David's birthdays. (14 RT 1945.) They buy a cake and they sing Happy Birthday for Bruni. Bruni's birthday is May 11th, and often coincides with Mother's Day. (14 RT 1935; 1945.) The tree is always decorated in Bruni's honor at Christmas, Easter and all

family gatherings and holidays. (14 RT 1945.)

Lupe has been taking care of Richie because she had always promised Bruni that she would if necessary. (14 RT 1948.) Richie is in very bad shape. (14 RT 1948.) He is in a mental hospital in Tampa and they are trying to determine whether he will ever get out. Because of what he saw, he has been very unbalanced. (14 RT 1948.) Over defense objection, Lupe describes how Richie found the bodies and was "hugging a mother without a face." (14 RT 1948-1949.) Richie has become violent and aggressive, and he is too difficult for Lupe and her husband to control. He can't live alone and function in his own apartment even with extensive family support. (14 RT 1950.)

Asked to describe her own feelings, Lupe stated "part of my heart is dead." (14 RT 1952-1953.) Her relationship with her husband of 37 years has suffered. She is very depressed, and the conflicts and stress with Richie have been very difficult. (14 RT 1952-1953.) At the prosecutor's request, Lupe described the difference between losing another sister to illness. (14 RT 1953-1954.) Bruni was so full of life and so healthy. David was too, and she recalls how Bruni was so proud of David. Of her three children Bruni thought David was the one who would grow up to be successful. He was bright and ambitious. (14 RT 1953-1954.)

3. The testimony of Clari Burgos

In her penalty phase testimony, Clari was asked to describe the relationship she had with her brother David. (15 RT 2086.) Clari had been only 14 years-old when David was born. She told the story of how she had been the one to choose David's name. (15 RT 2087.) Clari had taken care of David as a baby. He slept in her bed every night until he was two or three years old. David was like a son to her. She got a job at McDonald's or she could buy clothes and things for him. (15 RT 2087-2088.) David went everywhere with her when he was a small child. When he became a teenager and wanted to be with his own friends, Clari would get him to invite all the kids over and she would cook for them and have them there to play video games. (15 RT 2088.) Clari taught David to drive, and she paid for his drivers education class and his license. (15 RT 2088-2089.) When David finished the class he went right away to get his drivers license. (15 RT 2090.) Clari commented, "he got his license on Saturday was killed on Monday." (*Id.*) The driver's license arrived in the mail after his death when she was there to collect the bodies. (*Ibid.*) [78]

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In connection with her testimony Clari identified two photographs. People's Exh. No. 164, was taken at her Aunt Lupe's house in Diamond Bar, California. She did not recall what year the picture was taken, but (continued...)

Holidays are no longer celebrated as a result of the crimes. (15 RT 2091.) Aunt Lupe calls Clari all day on Mother's Day asking her to come over, but Clari will not answer the phone. (*Id.*) She cannot bear to see or speak to anyone on that day. She is not in counseling, and feels she cannot use her family members for support. (15 RT 2091.) Clari was afraid that if she were to "open up" she would be unable to remain functional for her children. (*Ibid.*) There is no joy or happiness in her life, and she is not okay. (15 RT 2092.) Clari explained that she feels guilty, as it was because of her that defendant was taken in treated like a son by her mother. She stated, "Basically, I live one day at a time. And I try to be here for my kids." (15 RT 2092.)

Clari testified that she would "definitely" feel differently if her mother and her brother had died in a car accident. (15 RT 2092.) In response to a question from the prosecutor, she stated, "Well, how would you feel if you brought the devil to your mom's house and he did it to her?" (15 RT 2092.)

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[78](...continued)
David seems to be about nine or ten years old. The photo represented "a typical holiday for the family back then." People's Exh. No. 165 was a photo of the same occasion with appellant in it. (15 RT 2091.)

4. Vallerie Cage's Testimony.

Vallerie Cage described how she and David were like brother and sister. (15 RT 2053.) David was only two years, nine months older than she. They grew up together, and went to play soccer and other games. Peoples Exhibit 149 is a photograph of David at soccer when they were living in Lakewood . He was about eight years-old at the time, and she was around six. (15 RT 2054.) People's Exhibit 146 is a photograph from birthday party David had at Chuck E. Cheese. (15 RT 2055.) In the photograph David is hugging his mom. She and David spent every birthday together. (*Id.*) People's Exhibit 168 is a photo of David in his sophomore year in high school. (15 RT 2056.) He was around 16 years old then, and looked that way at the time of his death. (*Id.*) Vallerie has lost a large piece of her life and a large part of her family as a result of the crimes. (15 RT 2056-2057.) Her grandmother, Bruni, was really the provider and the father figure for her and for the whole family. (15 RT 2057.) Mother's Day and Christmas are not really celebrated now. (15 RT 2057-2058.)

F. It Was Improper for Clari to Include Her Opinion of Appellant in the Victim Impact Testimony.

One aspect of the victim impact testimony violated a clearly established constitutional prohibition. In the course of her testimony, Clari

expressed her opinion of appellant in no uncertain terms.

> Q. Do you think that if your brother and your mom were to die in a car accident like you had originally thought, do you think that would have had a different affect [sic] on you?
>
> A. Oh, yeah, definitely.
>
> Q. Can you tell us why?
>
> A. Well, how would you feel if you brought *the devil* to your mom's house and he did it to her?

(15 RT 2092 [emphasis added].)

The United States Supreme Court has steadfastly maintained one restriction in the area of victim impact evidence. The witnesses are forbidden to express opinions about the crime, the defendant or the appropriate sentence. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2.) Summary opinions of this sort have been specifically held inadmissible as they are inconsistent with the reasoned decision-making required in capital cases. (See *Booth v. Maryland, supra*, at pp. 508-509 ["the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant"].) While largely

overruling *Booth v. Maryland*, the United States Supreme Court in *Payne* expressly retained this portion of *Booth's* holding. (*Payne v. Tennessee*, *supra,* at p. 830, fn.2.) The California Supreme Court has similarly remarked that the Eighth Amendment and state constitutional standards preclude victim impact testimony stating an opinion about the defendant's character. (See *People v. Robinson* (2005) 37 Cal.4th 592, 656-657 [conc. opn. Moreno, J.].)

The testimony in *Booth v. Maryland* was actually less dramatic, and the stated opinion less harsh, than Clari's characterization of appellant. There the victims daughter opined that "animals wouldn't do this," and that the defendants could not be rehabilitated. (*Booth v. Maryland*, *supra*, at p. 508.) Surely the jurors expected Clari to have some complicated and conflicted feelings about appellant. She could be justifiably angry at appellant for the shootings, and it would be only normal for her to harbor some resentment over events occurring in their fourteen year relationship. However, the jurors might also reasonably expect Clari to have some positive feelings about him as well. Appellant was, after all, Clari's first and only boyfriend, her husband, and the father of her two children. She knew appellant better than anyone else, and obviously had seen positive qualities in him to have stayed in such a tumultuous relationship. It was,

then, especially damning for her to call him "the devil."

The United States Supreme Court in *Payne v. Tennessee* clearly held that victim impact witnesses may not express opinions about the crime, the defendant or the appropriate sentence. (*Payne v. Tennessee*, *supra,* at p. 830, fn.2.) these types of comments are forbidden under state law and federal constitutional standards. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2; see also *People v. Robinson, supra,* 37 Cal.4th at pp. 656-657 (conc. opn. Moreno, J.).)

G. It Was Improper and Highly Prejudicial to Ask Witnesses to Speculate about What Their Responses Would Have Been If the Victims Had Died under Different Circumstances.

The prosecutor asked the victim impact witnesses to describe how they would feel if the victims deaths had been caused by accident or illness. This aspect of the testimony was entirely speculative and irrelevant. It was also highly prejudicial. The questioning in this area provoked considerable emotional reactions on the part of the witnesses and was sure to have had a similar effect on the jurors.

Nearing the end of Clari's testimony, the prosecutor posed the following line of questions.

Q. Do you think that if your brother and your mom were

to die in a car accident like you had originally thought, do you think that would have had a different affect [sic] on you?

A. Oh, yeah, definitely.

Q. Can you tell us why?

A. Well, how would you feel if you brought the devil to your mom's house and he did it to her?

Q. Are you telling us that you're feeling like you're responsible for this?

A. I'm – I'm – I'm telling you, I'm old enough to know that I'm not responsible, that I couldn't have stopped it, but I still feel some guilt because I brought him to the house. I introduced him to the family. If it wasn't for that – my mom treated him like a son because of me.

(15 RT 2092.) The prosecutor persisted with a similar line of questioning with Bruni's mother, Celena Rodriguez.

Q. Have you lost any other children besides Bruni?

A. I had another child, but he – the day he was born he died, so still born [sic].

Q. Any other children?

A. It was a boy.

Q. Have you lost any other children besides the boy that was still born [sic]?

A. I lost a daughter about a month ago. She was the twin sister of one of my other daughters.

Q. How did you first learn about Bruni's death?

A. I found out how Bruni died, and they didn't call me directly. They called one of my daughters in Puerto Rico. In Puerto Rico.

***

Q. And are you aware of the manner of Bruni's death?

A. I found out through the daughter that had to go and identify the bodies.

Q. Can you tell us if the death of Bruni being taken at the hands of another impacted you differently than losing a child in a different way?

A. Well, I don't think so. I think death is the same, but – well, she didn't deserve to die in that manner.

(14 RT 1932-1933.) At this point the witness became so emotional that the prosecutor asked if she needed to take a break before continuing her testimony. (14 RT 1933.)

Lupe Quiles was asked to compare Bruni's death the recent loss of

another sister following a long illness. Lupe's response added further prejudice to her already highly emotional testimony.

> Q. Has the impact of Bruni's death on you, because [of] the way in which she died, has this been different than losing your other sister, Lydia's twin?
>
> A. Yeah, you see, when you have – my sister [Lydia's twin] was sick.
>
> ***
>
> And you expect her – you, you know, to die. When you have a relative that – somebody that hadn't been sick and you expect that person to die, it doesn't affect [sic] you that much. If you have a sister that is healthy trying to get her life together – she bought a beautiful house, Bruni. And, you know, she was so happy with this brand new house. She had never had a house like this before. You know, with her hard work and she got this, and then taken away from this earth is just something that affects them so much. Not only me, but the rest of the family because we didn't expect her – she was only 50 years old. David was only 16. A young boy, full of ambition. He wanted to study. He's not like Richie. My sister was so proud of that boy. He was so neat, so clean, you know, that she said this is – you know, from my three kids, this is the one that's going to be – you know, be something in life.
>
> And taken away from this earth that way, it just impacts the whole family. It's just – it's not the same like when Bombo – we call her Bombo Maria. Clari died. It's sad, but she die. We know that she needed to go rest. But Bruni, she was full of health and ambition. She was just happy. A happy person. But, you know, I don't understand why this person have to

take her away. And I couldn't go away.

(14 RT 1953-1954.)

To the extent that this testimony provided any new information about the victims as individuals, its probative value was far out weighed by the prejudicial effect. Hearing the witnesses speculate and compare levels of grief was not helpful for the task at hand: deciding whether appellant was to live or die. The opinions of these witnesses did not result solely in response to the capital crime, and were a significant contribution to an already inflammatory body of victim impact evidence. (Compare *Young v. State* (Okla. 1999) 992 P.2d 332, 341-342 [inclusion in otherwise 'succinct" victim impact statement of information that the aunt of the two victims had a fatal heart attack upon hearing of their bludgeoning deaths did not violate due process where defendant had opportunity to cross-examine the presenter and did not object to the victim impact statement at trial.]; and *Copeland v. State* (2001) 343 Ark. 327, 334 [37 S.W.3d 567, 572] [defendant's failure to object waived claim based on portion of the victim impact statement stating that the victim's mother "gave up" and succumbed to diabetes following the murder].)

H. The Evidence and Testimony Relating the Victims Life Stories, Memories of Them as Children and at Family Holidays Was Irrelevant and Highly Prejudicial.

The jurors in this case received evidence and testimony about the victims' background dating back nearly 60 years before trial. Mrs. Rodriguez testified about Bruni as a baby and as a young girl growing up in Puerto Rico. She accompanied her testimony with some of Bruni's baby pictures; also depicting the family home and Bruni's father, Mrs. Rodriguez's late husband. (See 14 RT 1926-1932; People's Exhs. 151, 152, 155.) David Montanez's life was the subject of similar evidence and testimony, mainly from Clari and supplemented by Vallerie. (See 15 RT 2086-2091.) This evidence was far too detailed and extensive and its admission requires reversal of appellant's sentence.

Nothing in the United States Supreme Court's decision in *Payne v. Tennessee* suggests that the victim's personal history is relevant. "A 'glimpse' into the victim's life and background is not an invitation to an instant replay." (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336.) In *Conover v. State* (1997) 933 P.2d 904, the Oklahoma Court of Criminal Appeals explained the lack of relevance and inherent prejudice of life history information:

Comments about the victim as a baby, his growing up and his

> parents hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; nor do they show how the circumstances surrounding his death have financially, emotionally, psychologically, and physically impacted a member of the victim's family. These types of statements address only the emotional impact of the victim's death. The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a "reasoned moral response" to the question whether a defendant deserves to die; and the greater the risk the defendant will be deprived of Due Process.

(*Id* at p. 921, quoting *California v. Brown* (1987) 479 U.S. 538, 545.)

Another Oklahoma case notes the especially inflammatory effect produced when life history information is combined with testimony about the victim's exceptional character. In *Cargle v. State* (1995) 909 P.2d 806, the Oklahoma Court held that the trial court erred by admitting this type of evidence. The testimony in *Cargle* covered only twelve transcript pages, far less than the victim impact testimony presented here. [79] In *Cargle* a single victim impact witness (the victim's sister) read a prepared statement for the jury. The Oklahoma Court's opinion characterizes the statement as

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The witness' entire testimony in *Cargle* covered approximately 12 transcript pages. The testimony of the four witnesses in this case comprised approximately 43 transcript pages in the trial record. (See 14 RT 1926-1934 testimony of Celena Rodriguez]; 14 RT 1934-1954 [testimony of Lupe Quiles]; 15 RT 2053-2058 [testimony of Vallerie Cage]; 15 RT 2086-2096].)

"detailing the life [of the victim] from childhood to his death." (*Id* at p. 824.) The sister related a number of anecdotes demonstrating her brother's virtues including self-reliance, kindness and generosity, essentially "eulogizing him as a good kid and adult." (*Cargle, supra,* at pp. 824-825, fn. 12.)

Evidence of an adult victim's childhood is clearly irrelevant and is widely regarded as especially prejudicial. (*Conover v. State*, *supra*, 933 P.2d 904, 921; *Salazar v. State*, *supra*, 90 S.W.3d 330.) The testimony about Bruni and David as young children was inappropriate. Bruni was approximately fifty-one years old at the time of her death. (See 14 RT 1926.) David was sixteen years old, and while his childhood was less remote it was also unrelated to any circumstances "materially, morally or logically surround[ing] the crime." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) In *Salazar v. State* (a case the California Supreme Court recently called an "extreme example of such a due process infirmity") [80] the defendant's sentence was reversed [81] based on the admission of emotionally

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People v. Robinson, supra, 37 Cal.4th 592, 651.

81

The defendant in *Salazar* was 16 years old when helped an adult co-defendant to kill the victim after a dispute arose in connection with a drug deal. Although charged with capital murder and tried as an adult, the

(continued...)

charged victim character and life history evidence. Jurors in *Salazar* saw a 17-minute video montage of approximately 140 still photographs of the 20 year-old victim. The photographs (roughly half of which were taken when he was a young child) showed the victim in a number of charming and sentimental poses, and the videotaped montage was accompanied by a musical soundtrack. (*Id* at p. 333.) The Texas Court of Criminal Appeals observed that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id*, at pp. 335-336.)

I. Lupe Quiles's Testimony Was Cumulative and Inflammatory.

Lupe Quiles gave a detailed and dramatic description of how she learned of Bruni's and David's deaths. When she received the news she became so ill and emotionally overcome that she fainted.

Q. How did you first learn of Bruni's death?

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[81](...continued)
defendant was found guilty of a lesser included, non-capital, murder charge. (*Salazar, supra*, at p. 332 fn.2.) The *Salazar* court noted that, according to Texas law, "victim impact evidence may be admissible at the punishment stage of a [non-capital] criminal trial when that evidence has some bearing on the defendant's guilt." (*Id*, at p. 335, citing *Mosley v. State*, *supra*, 983 S.W.2d 249, 261-262. See also *id* at p. 335, fn.5, and cases cited therein].)

A. Umm, I was – um, ready to go to work. I – all morning I heard the telephone ringing back and forth, you know, somebody calling my husband. But all the time my husband – we work nights. And the telephone keep ringing. And my husband don't let me answer the phone. Usually I answer the phone, most of the time, but this time he kept talking in the phone. And he didn't want to tell me nothing, I guess. I didn't know. I think something's wrong, but he don't want to tell me.

(14 RT 1938.) Lupe continued to describe the multiple telephone calls and confusion of the day. She the reached the part in her narrative where she learned that Bruni was involved.

> Then after that, another friend called. And this was Eddie. And he called me and they tell me – "Listen." I say "Listen. Tell me what's going on. I heard the phone all day ringing and nobody want to tell me what's going on." At that point he told me that Bruni had – had got into a car accident with David. That they're okay. He say, "They're okay. They're just in the hospital."
>
> And then, you know, I said, "Well, what hospital?" I worry about that. But he didn't tell me. He says you still – she's okay. She's just in the hospital with David."
>
> And a little while after that, the telephone keep ringing and ringing, talking to my husband, but my husband already had to go to the store to get something for me because he know I would need something, you know, for my – I'm a very nervous person.

> And at that point, Lydia, my sister that live here in California, she called. She think at this point I already know about Bruni. So she called me and she called me crying so hard. And I said, "Well, why are you crying so hard?" She's okay. She's just in the hospital." And Lydia said, "No, Lupe. She is not okay. She's dead." She told me that. And that – that nothing else because I fell on the floor.
>
> And at that point my husband walked inside the door. He grabbed the phone and talked to Lydia. And Lydia keep saying, "I'm sorry. I'm sorry. I didn't know that she didn't know." At that point, I just went – when my husband was talking to her, I just was -- got ready to go to work. And I don't know. My mind was blank. I jumped in my car. And that car took me to my job, which is far. And I just went to my job shaking. And I just started screaming and yelling over there. And then a friend of mine bring me back home.

(14 RT 1939-1940.)

Lupe next related how she had flown to Los Angeles and met Clari at the airport. (14 RT 1940-1942.) She and Clari drove to Bruni's house together. Lupe's description of the crime scene and its effect on her was dramatic and disturbing.

> Q. And when you got to Bruni's house, did it impact you what had happened there?
>
> A. Oh, yes, very much so. When I opened

that door, my mom – see she's – when I opened that door and I saw that blood everywhere, there were pieces of brain all over, pieces of brain everywhere, blood everywhere, on the wall, ceiling, in the bathroom, at the door, on the floor. There was blood – blood, pieces of tissue, brain all over.

Q. Did you also go upstairs or –

A. Yeah. I went to David's room and I saw the same – the same scene even worse in there too, in David's room. You could see blood everywhere, and on the floor. And then the stereo system that he always cared about, everything. Everywhere. I saw the hole in the – in the door. I saw that too. Everything.

Q. And did you leave after you saw –

A. No. I just – we went to the store with my brother-in-law, and Tito [Lupe's son] was there too.

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We went and bring some bleach. I don't know how many bottles of bleaches [sic] we buy. We decided to clean that mess that – that was in that house. And we -- you know, so many. We – we wanted to walk inside now without stepping on my sister's blood.

Q. And did you actually clean?

A. We cleaned as much as we could. We couldn't clean all that mess, but we rubbed and we threw bleach and water and sweep the floor. And the hardest part was sweeping the floor and sweeping her bones. You know, because that was her face there and –

(14 RT 1941-1942.) At this juncture, the witness was becoming so distraught that the court intervened and announced a recess. (14 RT 1942.) Lupe Quiles resumed her testimony on this subject following the recess.

Q. After you and Lydia finished cleaning, what do you do next?

A. As I was sweeping the floor and – you know, sweeping all the bones and everything, I sweep it out the door. I opened the door to clean. I saw this piece of bone that I thought, you know – maybe I think it's her nose. And I don't want to get rid of that, throw it on the floor. And I keep that piece of bone because I'm – I didn't even tell nobody, not even my family about this. Now they know that this piece of bone I still had at my house, I think, somewhere so my husband won't find it, hid somewhere because I think I had a piece of her with me. I had this piece. I think is her nose. Because she had no face left. And there was bone all over. And I feel so sad sweeping that floor and sweeping bone from her to the ground. So this – I

noticed the big one. I just took it with me and I hide it.

Q. And you still have that?

A. I still have that piece of bone. And I had to hide it so nobody know – my kids, nobody, my husband knows I have it.

(14 RT 1944.)

The record indicates that Mrs. Quiles became emotional during this portion of her testimony. Given the subject matter and the witness's apparent distress, it is highly likely that some of the jurors also reacted with emotion. The California Supreme Court has repeatedly held that emotional testimony is not necessarily inflammatory. (See *People v. Verdugo* (2010) 50 Cal.4th 263 [no error despite the victim's mother having cried while testifying]; *People v. Jurado, supra*, 38 Cal.4th at pp. 132-134 [no error although testimony from multiple family members caused some jurors to cry].) In appellant's case, however, the trial court did not monitor and record its observations (*People v. Brady, supra,* pp. 575-576; *People v. Prince* (2005) 40 Cal.4th 1179, 1289-1291.) Unlike other courts handling emotional testimony, the court did not caution the jury about the need to remain objective despite the influence of emotional testimony. (Compare *People v. Booker, supra*, p. 33, fn. 29 [after a recess following some very

emotional victim impact testimony, the trial court instructed the jury, "You can't probably help notice that some of the testimony will affect people in the audience and it's understandable, and you may see people that are teary-eyed, and they probably can't help it. Again, the decision can"t be based upon the reaction of people in the audience. It has to be based upon the evidence presented in the witness stand."].)

J. The Trial Court Erred by Allowing Other Witnesses to Testify About the Impact of the Crimes on Richie Burgos.

Bruni's mildly retarded son, Richie Burgos, testified in the guilt phase of trial. (See 6 RT 862-871.) Although he did not testify in the penalty phase, Clari and their aunt, Lupe Quiles, testified about the downward spiral of Richie's life in the years after the crimes. Lupe told the jurors about how dependent Richie had been on Bruni. Lupe identified photographs of Richie and Bruni when Richie was 14 years old, and then just a few months before the crimes. (See 14 RT She was then asked about his functioning after her death.

> Q. So how has this actually impacted Richie, his mother's death? Can you give us some examples of how he's changed since his mother's gone?
>
> A. Richie is very – in bad shape as of this moment. As I'm talking, he's in a mental hospital for -- you know,

he's, he's in the hospital in Tampa. And they wanted to put him in the hospital for six months. As a matter of fact, today they're going to decide if he's going to be there for six months in this hospital or for life because he is real, real, umm, mentally ill now since he found his mother dead and his brother.

Q. Does he make references to what he saw, that helps you know that that's what's causing his mental problems?

Defense counsel objected to the question on the grounds that it asked for an expert opinion. The court overruled the objection,, but suggested that the prosecutor rephrase the question slightly. (14 RT 1948-1949.)

Q. Is there anything that Richie has said about what he's seen that's helping you say that this is what's causing him to be now needing to go into a mental hospital?

A. Well, right now he is so confused now. You know, he's the one who finds the bodies. And he hugged a mother without – without a face. You know, that he hugged. Even a person that isn't in his condition, he would be so sick, you know, mentally. Imagine him after this happened. He's having to get counseling.

You know, the only person that talked to him is the family, but he hasn't been able to go to a professional, you know, because if that happened to me – this affected me so much and I'm, you know, healthy. You know, old but healthy.

Imagine Richie, that he was mentally ill already from, you know, birth, since he's born. And now his mother is not here. And finding his mother and his little

brother dead, he's very, very sick mentally.

(14 RT 1948-1949.) Mrs. Quiles continued to describe behavior changes in Richie which she attributed to the crime. Richie has become aggressive and at times violent. He is unpredictable, and she and her husband anticipate they will need to put him in a mental institution because they cannot control him. (14 RT 1949-1950.)

Over further defense objection, [82] Clari also testified about Richie:

Q. Have you had anything to do with Richie since this happened?

****

A. When everything first happened, Richie was living with my grandmother while we made all our arrangements for funerals and whatnot. And then later he came to live with me.

Richie – he's hard to handle. He needs to be, like, in a group home or professionally handled. And for a normal situation it would be hard for him to handle. But with me going through all the stuff that I was going through, and then on top of that Richie blames me for what happened to my mom and David. He feels like it's – "You and your husband killed my mom and David," is what he says. So he was aggressive. And I

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82 The prosecutor asked Clari about Richie in her redirect examination, following a brief cross-examination by defense counsel. Defense counsel objected that the subject was beyond the scope of Clari's direct examination. The trial court overruled the objection. (15 RT 2094-2095.)

couldn't – I couldn't handle him.

(15 RT 2094-2095.) Clari explained that she had to arrange for Richie to be cared for in a group home. (15 RT 2095.)

The testimony describing Richie's difficulties and the ongoing family problems caused by his situation was improper for several reasons. First, neither witness was an expert qualified to give an opinion about the lasting effects of the crimes on Richie. The fact that Clari and Mrs. Quiles were close family members and Richie's primary caretakers did not make their testimony in this area any more reliable. Their testimony as to the causes of Richie's problems was sheer speculation and should not have been permitted. (See *People v. Brady, supra,* at pp. 577-578 [although not prejudicial under the facts of the case, improper speculation for victim's sister testified that their mother "gave up on life" and died six months after the murder], citing, *People v. Carrington* (2009) 47 Cal.4th 145, 197.) Defense counsel had no way to cross-examine the subjects of this testimony and no means to test the accuracy of the witnesses' statements. The California Supreme Court has allowed family members to testify about the crime's impact on other members of the victim's family. In *People v. Panah* (2005) 35 Cal.4th 395, the Court found no undue prejudice where two family members mentioned the crime's impact on the victim's brother. (*People v.*

Panah, supra, 35 Cal.4th 395.) More recently in *People v. Russell, supra*, 242 P.3d at p. 649, the Court relied on *Panah* to hold that the wives and children of the victims could testify about the impact of the crimes on the family. These cases, however, are distinguishable.

In contrast to the witnesses *Panah* and *Russell*, Richie Burgos did not testify in the penalty phase and was not available for defense cross-examination. The aforementioned cases differ from appellant's in other respects. In *Panah*, jurors heard victim impact testimony from the eight-year-old victim's immediate family, both parents and her three older brothers. Two witnesses, the father and eldest brother, stated their suspicion that the victim's 16-year-old brother had begun using drugs and alcohol because of her murder. (*Panah, supra*, 35 Cal.4th at p. 495.) The California Supreme Court found that the testimony had not been unduly prejudicial. The Court noted two circumstances: the brevity of the prejudicial testimony, and the fact that "the jury was specifically instructed that in assessing victim impact evidence it could 'consider only such harm as was directly caused by defendant's act." (*Ibid.*) [83] Neither of those circumstances were present here.

83

Although not discussed in connection with the California Supreme Court's holding, the *Panah* opinion indicates that the 16-year-old brother who was the subject of the testimony did testify in the penalty phase. (See (continued...)

As demonstrated by the excerpts of record set forth above, the testimony by Clari and Lupe Quiles was more extensive and detailed and vastly more prejudicial. It was also cumulative, since both witnesses described the lasting effects to Richie. [84] Finally, in contrast to *Panah*, the jury instructions in this case failed to ameliorate the prejudice. (See 13 CT 3601-3609.) Unlike the jurors in *Panah*, the jurors in this case were free to consider these speculative harms without first finding a causal connection between the harms and the homicide.

K. Conclusion.

The penalty phase of a capital trial should be as free from extraneous emotion as possible. The victim impact evidence in appellant's case was improper for all of the reasons discussed above. Reversal of appellant's sentence is, therefore required.

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[83](...continued)
People v. Panah, supra, at p. 490.) Defense counsel in *Panah*, therefore, had an opportunity to cross-examine the witness in contrast to appellant's case where this was an impossibility.

[84]
The California Supreme Court has not indicated the amount of overlap in the victim impact testimony which will be permitted. (See *People v. Booker*, *supra*, at p. 34 [although two witnesses testified on the same topic the testimony was not "unduly cumulative," where portions of one witness's testimony was unique].)

XII.

THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR AND RELIABLE PENALTY DETERMINATION BY REFUSING ALL DEFENSE REQUESTS FOR MODIFICATIONS TO THE STANDARD INSTRUCTIONS.

A. Introduction and Overview.

Defense counsel filed a Request for Special Instructions before closing arguments were held in the penalty phase. (13 CT 3595-3598.) Through the Request, appellant asked for three modifications to CALJIC 8.88, the standard penalty phase concluding instruction. CALJIC 8.88 provides in relevant part:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which

does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(13 CT 3603-3604.)

Appellant's first request was for the following language to be added to the instruction:

In weighing the aggravating and mitigating factors, you are not merely to count numbers on either side. You are instructed, rather, to weigh and consider the factors. You may return a verdict of life imprisonment without possibility of parole even though you should find the presence of one or more aggravating factors.

(13 CT 3596.) Next, appellant requested that the term "totality" be removed from the instruction. (13 CT 3597.) Finally, appellant asked for

another brief addition to CALJIC 8.88: "One mitigating circumstance may be sufficient for you to return a verdict of life imprisonment without possibility of parole." (13 CT 3598.) The trial court refused all three defense requests. (See 13 CT 3596-3598.)

B. The Requested Modifications Were Appropriate and Necessary to Clarify the Law and to Guide the Jury's Discretion.

The trial court's refusal to modify CALJIC 8.88 as requested was improper for several reasons.

The alterations to CALJIC 8.88 which appellant proposed correctly stated the law. As the California Supreme Court has repeatedly held, one mitigating factor can outweigh any number of aggravating circumstances. (*People v. Hayes* (1990) 52 Cal.3d 577, 642; *People v. Visciotti* (1992) 2 Cal.4th 1, 64; *People v. Cooper* (1991) 53 Cal.3d 771, 845.) Indeed, in *People v. Duncan* (1991) 53 Cal.3d 955, 979, the Court held that a jury has discretion to impose a sentence of life without parole even if evidence is presented in aggravation and there is *no* evidence presented in mitigation.

The California Supreme Court has found it to be proper to instruct a jury that a single mitigating factor may outweigh all of the aggravation. (See *People v. Grant* (1988) 45 Cal.3d 829, 857, fn. 5.) Moreover, the Court has

held that instructions similar to the modified CALJIC 8.88 requested by appellant were useful as they, "significantly reduced the risk of juror misapprehension." (*People v. Sanders, supra,* 11 Cal.4th 475, 557; see also *People v. Webb* (1993) 6 Cal. 4th 494, 534 [instruction eliminated any possibility that the jury might not understand its sentencing discretion].)

The possibility of such a risk should have compelled the trial court in this case to instruct the jury in accordance with appellant's request. In *People v. Jones* (1998) 17 Cal.4th 279, 314, this Court held that an instruction that "one mitigating circumstance may be sufficient to support a decision that death is not the proper penalty" was duplicative and, therefore, properly rejected. This conclusion was based on the fact that the trial court in *People v. Jones* instructed the jury to "return a verdict of life imprisonment without possibility of parole if it found that the aggravating factors did not substantially outweigh the mitigating factors, if it outweighed them at all." (*Id.*) The instruction used in appellant's case is distinguishable, as it emphasized the "totality of the aggravating circumstances" and "the totality of the mitigating circumstances." (13 CT 3603-3604 [CALJIC 8.88].) This emphasis on "totality" implies a quantitative judgment. The concept of a single mitigating factor justifying life without possibility of parole is not encompassed by such an instruction.

The Eighth Amendment standard for reliability in a capital case requires sufficient procedural protection and "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172 [conc. opn. of Souter, J.], citing *Gregg v. Georgia, supra,* 428 U.S. at p. 190.) The jury should fully understand the role of mitigating evidence and its importance in the sentencing process. Accordingly, instructions which clarify the sentencing process should be given upon a defendant's request. (*Simmons v. South Carolina*, *supra*, 512 U.S. at p. 172.)

It is not enough for the jury to be instructed that it can determine the appropriate verdict. Upon a defendant's request, the jury should be informed that an appropriate verdict may be based upon a single mitigating factor. The trial court's refusal to give such an instruction in appellant's case undermined the likelihood that the jurors fully understood the process by which they were to determine the penalty or the overriding significance of mitigating evidence. The trial court's error thus violated due process and failed to provide the "specific and detailed guidance" necessary to meet Eighth Amendment standards (*Gregg v. Georgia*, *supra*, at p. 189; *Proffitt v. Florida* (1976) 428 U.S. 242, 253; *Woodson v. North Carolina, supra,* 428 U.S. at p. 303.)

C. Reversal is Required.

In appellant's case the trial court's error cannot be deemed harmless. There was mitigating evidence concerning appellant's diagnosis of schizophrenia, his brain abnormalities, and his long history of bizarre behavior in the form of sudden irrational violence. Given the normative decision inherent in the penalty deliberations, the presence of one mitigating factor may be enough to warrant life without parole even if it is substantially outweighed by the aggravation. The law is clear that the jury may return a life verdict even if it finds that aggravation outweighs mitigation. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1250.) This Court cannot assume that a death verdict would have been imposed had the jury been instructed as appellant requested. The penalty verdict must be reversed. (*Chapman v. California, supra*, at p. 24; *People v. Robertson, supra,* 33 Cal.3d at p. 54.)

XIII.

THE USE OF CALJIC NO. 8.88 VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Introduction and Overview.

The trial court's use of the standard version of CALJIC 8.88 violated appellant's rights under the Fifth, Sixth, Eight and Fourteenth Amendments

to the United Stated Constitution and the corresponding sections of the California Constitution. The instruction was vague and imprecise in that it failed to accurately describe the weighing process the jury must apply in capital cases, and deprived appellant of the individualized consideration the Eighth Amendment requires. Further, the instruction contradicted the requirements of Penal Code section 190.3 by indicating that a death judgment could be returned if the aggravating circumstances were "substantial" in comparison to mitigating circumstances. The instruction was therefore, improperly weighted toward death. In addition, the instruction effectively informed the jury that a single mitigating factor was not sufficient to prevent imposition of the death penalty. Moreover, the instruction's definition of mitigating circumstances was defective and failed to inform the jury of the full scope of evidence which may be considered in mitigation. The instruction also mislead the jury by referring to "life without parole" rather than "life without *the possibility* of parole" and then failed to provide the jury with a definition of this technical, legal term. Because the infirmities of the instruction affected appellant's substantial constitutional rights, reversal of the death judgment is required.[85]

85

Appellant acknowledges that similar arguments have been rejected by the Court recently as well as in the past. (See e.g., *People v. Lee, supra,*

(continued...)

B. The Version of CALJIC 8.88 Given Here Improperly Reduced the Prosecution's Burden of Proof below the Level Required by Penal Code Section 190.3.

California Penal Code section 190.3 states that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code § 190.3.) [86] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (*Boyde v. California* (1990) 494 U.S. 370, 377.)

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[85](...continued)
2011 WL 651850; *People v. Coffman* (2004) 34 Cal.4th 1, 124, *People v. Ochoa* (1998) 19 Cal.4th 353, 457-458; *People v. Duncan, supra*, 53 Cal.3d at p. 978; *People v. Berryman, supra*, 6 Cal.4th 1048, 1099-1100, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 820.) However, appellant respectfully submits that these cases were incorrectly decided for the reasons set forth herein and that the questions raised herein should therefore be reconsidered. In addition, appellant must presents these issues in order to preserve it for federal review.

[86]
The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. However, this court has held that this formulation of the instruction improperly misinformed the jury regarding its role and disallowed it. (*People v. Brown* (1985) 40 Cal.3d 512, 544, n.17.)

However, this mandatory language is not included in CALJIC 8.88. Instead, the instruction informs the jury merely that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. In *People v. Duncan*, this court held that this formulation was permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating (sic)." (*People v. Duncan, supra,* 53 Cal.3d at 978.) However, this is simply not so. The word "substantial" means only "of or having substance." (Webster's New World Dict. (3d College ed. 1989) p. 1336.) Although the word carries with it connotations "considerable," "ample," and "large" (*ibid*), it neither means nor suggests "outweigh." The instruction therefore fails to conform to the requirements of Penal Code section 190.3. The instruction by its terms would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances. By failing to conform to the specific mandate of Penal Code section 190.3, CALJIC 8.88 violates the Fourteenth Amendment. (*Hicks v. Oklahoma, supra,* at pp. 346-347.)

In addition, appellant submits that the instruction improperly reduced

the prosecution's burden of proof below that required by the applicable statute. An instructional error which misdescribes the burden of proof, and thus, "vitiates *all* the jury's findings," can never be shown to be harmless. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 281, emphasis in original.) Appellant respectfully requests that this court reconsider this issue.

C. The CALJIC 8.88 Instruction Incorrectly Described the Weighing Process Applicable to Aggravating and Mitigating Evidence Under California Law.

A trial court has a *sua sponte* duty to correctly instruct the jury on the general principles of law governing the case before it. (*People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Avalos* (1984) 37 Cal.3d 216, 229.) A trial court's instructions should be correctly phrased and not misleading. (*People v. Forte* (1988) 204 Cal.App.3d 1317, 1323.)

Here, CALJIC 8.88 mislead the jury not only regarding the weighing process required by California law, but also in a number of other respects. For example, the instruction was defective because it improperly suggested that a quantitative comparison of the "totality" of mitigating factors was required. The California Supreme Court has repeatedly indicated that one mitigating factor, standing alone, may be sufficient to outweigh all other factors. (*People v. Grant, supra,* 45 Cal.3d at p. 857, fn. 5; *People v. Hayes, supra,* 52 Cal.3d at p. 642; *People v. Cooper, supra,* 53 Cal.3d at p. 845.)

The language of CALJIC 8.88 not only failed to communicate this important concept to the jury but also suggested that the jury was required to consider the "totality" of the mitigating circumstances and balance them against the "totality" of the aggravating circumstances. This was prejudicial because, in the absence of qualitative considerations, this quantitative formula could weigh the scales in favor of a judgment of death, thereby depriving appellant of the individualized consideration guaranteed him by the Eighth Amendment to the United States Constitution. (*Stringer v. Black* (1992) 503 U.S. 222, 231-232.)

Further, although CALJIC 8.88 instructed the jury not to engage in "a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them," it is difficult to believe that the jury would have interpreted an instruction to consider "the totality of the aggravating circumstances with the totality of the mitigating circumstances" as anything other than a specific direction to mechanically take the sum of these factors and weigh them against each other in the aggregate. The term "totality" plainly implies a quantitative weighing process rather than a qualitative analysis.

In addition, as previously noted, the last sentence of CALJIC 8.88 quoted above states "[t]o return a judgment of death, each of you must be

persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." This language further implies a mechanical, quantitative weighing process and undermines the concept that one mitigating factor can outweigh all of the aggravating factors and warrant a sentence of life without the possibility of parole.

Moreover, CALJIC 8.88 is death oriented because it tells the jury what warrants death but fails to inform them what warrants life without the possibility of parole. The jury was never told that one mitigating factor can be deemed sufficient to outweigh all the aggravating factors no matter how "substantial" those factors are. The instruction reinforces a notion of quantity and not quality of the factors involved. As previously stated, this Court has repeatedly indicated that one mitigating factor may be found sufficient to outweigh a number of aggravating factors and permit the jury to return a judgment of life without parole, rather than death. (*People v. Grant, supra*, 45 Cal.3d at p. 857, fn. 5; *People v. Hayes, supra,* 52 Cal.3d at p. 642; *People v. Cooper, supra,* 53 Cal.3d at p. 845.) However, the misleading language if CALJIC 8.88 failed to effectively communicate this rule to the jury in appellant's case.

The instruction was also defective in its description of mitigation. As

noted above, the instruction stated that "[a] mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." This definition of mitigation was insufficient to inform the jury of the full scope of evidence that must be considered in determining the appropriate sentence and was reasonably likely to be understood as a limitation on mitigating evidence.

The California Supreme Court's assumption that "mitigating" is a commonly understood term necessitating no further definition is refuted by empirical evidence. The same empirical evidence indicates that one of the primary misconceptions harbored by jurors concerning mitigation is that it relates only to the circumstances of the crime. (See Haney & Lynch, *Comprehending Life and Death Matters; A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 422-424; Haney et al, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* (1994) J. Soc. Iss., vol. 50, No.2.) The definition of mitigation given in this case, with its focus limited to "the crime in question," was thus substantially likely to have been understood as limiting the jury's consideration solely to the circumstances of

the crime, in violation of the state and federal Constitutions. Numerous authorities have noted the importance of mitigation evidence which is wholly unrelated to the crime, (See e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 398 [defendant's childhood "filled with abuse and deprivation, or reality that he was 'borderline mentally retarded'" may influence jury's determination of moral culpability]; *Lambright v. Stewart*, *supra*, 241 F.3d at p. 1208 [evidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case."]; on impact of mental retardation and other factors, see generally Garvey, *Aggravation and Mitigation in Capital Cases; What do Jurors Think?* 98 Columbia L.Rev. 1538.) The trial court's failure to provide the jury with an adequate understanding of this critical concept undermined the reliability of the ensuing death judgment, failed to properly channel the jury's decision-making process, and effectively eliminated from consideration relevant mitigating evidence. (U.S. Const. Amends. V, VI, VIII, XIV; *Hitchcock v. Dugger*, *supra*, 481 U.S. at pp. 398-399; but see *People v. Welch* (1999) 20 Cal.4th 701, 722.)

D. Reversal is Required.

Reversal per se is mandated if the error necessarily rendered the trial fundamentally unfair, if it aborted the basic trial process, or denied it

altogether (*Rose v. Clark* (1986) 478 U.S. 570, 577-578), thereby permitting a presumption of prejudice. (*Bank of Nova Scotia v. United States* (1988) 487 U.S. 250.) Otherwise, the *Chapman* standard of review applies. (*People v. Odle* (1988) 45 Cal.3d 386, 414-415, 247.) Instructional error must be analyzed in terms of its potential impact on the actual trial. (*Id* at p. 413.)

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) The numerous errors in this instruction improperly impaired, to appellant's disadvantage, the jury's assessment as to whether life without possibility of parole or death was the proper verdict to reach in this case. It cannot be established beyond a reasonable doubt that these errors did not contribute to the judgment of death. (*Chapman v. California, supra,* at p. 24.) It certainly cannot be established that these errors had "no effect" on the penalty verdict. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Accordingly, appellant's sentence of death must be reversed.

XIV.

THE TRIAL COURT FAILED TO ENSURE IMPARTIALITY AND PARITY BETWEEN CALJIC INSTRUCTIONS 8.85 AND 8.87 REGARDING JURY NON-UNANIMITY, THUS SKEWING THE INSTRUCTIONS TOWARD A DEATH VERDICT AND VIOLATING APPELLANT'S EIGHTH AMENDMENT RIGHT TO A FAIR AND RELIABLE PENALTY DETERMINATION.

"There should be absolute impartiality as between the People and the defendant in the matter of instructions ..." (*People v. Moore, supra*, 43 Cal.2d at pp. 526-527; accord *Reagan v. United States, supra,* 157 U.S. 301, 310.) Lack of parity skews the proceeding toward death thus promoting the random and arbitrary imposition of death in violation of appellant's constitutional rights to be free from cruel and unusual punishment, to due process of law, and to equal protection of the law. (U.S. Const. Amends. VIII, XIV; *Sochor v. Florida* (1992) 504 U.S. 527; *Gregg v. Georgia, supra,* 428 U.S. 153.)

The jurors in appellant's case were instructed with CALJIC 8.85, which sets forth the factors the jury may consider in weighing aggravating and mitigating evidence to determine the penalty. [87] (13 CT 3601-3602.) CALJIC 8.87, given in modified form in the prosecution's requested special

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[87] This instruction mirrors the relevant portion of Penal Code section 190.3.

instruction No. 14, instructed the jury on the burden of proof required for "other criminal activity" evidence. (13 CT 3603.) Paragraph two of this instruction specifically told the jury that "it is not necessary for all jurors to agree" as to other unadjudicated criminal activity. (*Id.*) The instruction states the law as interpreted by the California Supreme Court, as does the comparable rule regarding mitigation. (See, e.g., *People v. Foster*, *supra*, 242 P.3d at pp. 157-158; *People v. Breaux* (1991) 1 Cal.4th 281, 314.) However, because *Breaux* precludes the defendant from obtaining a specific non-unanimity instruction as to mitigation, the prosecution should not be permitted to obtain such an instruction in the specific context of other crimes aggravation. This is particularly so because the United States Supreme Court has not resolved the issue of whether juror unanimity is required for unadjudicated crimes.

It is the trial court's duty to see that jurors are adequately informed on the law. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 490-491.) The trial court also has a duty to refrain from instructing on principles of law that have the effect of confusing the jury. (*People v. Satchell* (1971) 6 Cal.3d 28, 33 fn. 10.) Thus, the language that "it is not necessary for all jurors to

agree" should be deleted from CALJIC 8.87 *sua sponte* [88] or, alternatively, the same non-unanimity language should be added to the instructions defining the burden of proof regarding mitigation evidence (CALJIC Nos. 8.85, 8.88) so that the instructions are symmetrical.

XV.

THE FAILURE TO INSTRUCT THE JURY ON THE PRESUMPTION OF LIFE VIOLATED THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In non-capital cases, the presumption of innocence acts as a core constitutional and adjudicative value to protect the accused and is basic component of a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) Paradoxically, at the penalty phase of a capital trial, where the stakes are life or death, the jury is not instructed as to the presumption of life, the penalty phase correlate of the presumption of innocence. (Note, *The Presumption of Life; A Starting Point for a Due Process Analysis of Capital Sentencing*

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Although appellant did not object, the error is still preserved for appeal since the error consists of a breach of the trial court's fundamental instructional duty. (See *People v. Hernandez, supra,* 47 Cal.3d at p. 353; *People v. Harris* (1981) 28 Cal.3d 935, 956; *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249 [if a defendant's substantial rights will be affected by the asserted instructional error, the court may consider the merits and reverse the conviction if error indeed occurred, even though the defendant failed to object in the trial court.]

(1984) 94 Yale. L.J. 352; cf. *Delo v. Lashley* (1993) 507 U.S. 272.) Appellant submits that the court's failure to instruct that the presumption favors life rather than death violated appellant's right to due process of law under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable determination of the penalty and to be free of cruel and unusual punishment, and his right to equal protection under the Fourteenth Amendment.

The California Supreme Court has considered, and rejected, similar arguments concerning the necessity of a "presumption of life" instruction. (See, e.g., *People v. Howard* (2010) 51 Cal.4th 15, 118 Cal.Rptr.3d 678, 700; *People v. Jennings*, *supra*, 50 Cal.4th at p. 689; *People v. Arias, supra,* 13 Cal.4th 92.) Appellant respectfully asks this Court to reconsider. The United States Supreme Court has consistently held that as long as a state's law properly limits death eligibility, "the state may otherwise structure the penalty determination as it sees fit." (*People v. Arias, supra,* at p. 190; *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976, 978.) California's death penalty scheme, however, does not properly limit death eligibility. Among other serious defects, the current law gives prosecutors unbridled discretion to seek the death penalty, fails to narrow the class of death-eligible murderers, fails to require written findings regarding aggravating

factors, and fails to require proportionality review. [89] Accordingly, appellant submits that a presumption of life instruction is constitutionally required at the penalty phase, and in its absence, reversal of the penalty judgment is required.

XVI.

APPELLANT'S CONVICTIONS AND SENTENCE MUST BE REVERSED DUE THE CUMULATIVE EFFECTS OF THE ERRORS IN THIS TRIAL.

Appellant has demonstrated that a number of errors occurred in the course of this trial. For the reasons discusses above, these errors were highly prejudicial and each would be sufficient to require reversal. Even if this Court disagrees, and finds that only some claims are valid or finds some claims valid but not sufficiently prejudicial viewed in isolation, reversal is required due to the cumulative effects. (See *People v. Holt, supra*, 37 Cal.3d at p. 459.)

The jury considered the trial as a whole. It was instructed at the close

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Appellant is aware that the California Supreme Court has specifically rejected each of these contentions. (See, e.g., *People v. Foster, supra*, 117 Cal.Rptr.3d at p. 722 [neither intercase proportionality review nor written findings required]; *People v. Brady, supra*, at p. 345 [prosecutorial discretion with respect to charging decisions in capital cases].)

of the penalty phase to consider the facts from the evidence received during the entire trial. (13 CT 3601 [CALJIC 8.84.1].) To satisfy due process and the Eighth Amendment the accumulation of errors must be viewed in the context of the entire trial as well. "A balkanized, issue-by-issue harmless error review is far less effective than analyzing the overall effect of errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

"The Supreme Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 928. See also *Chambers v. Mississippi, supra*, 410 U.S. at pp. 289-290, n. 3, 303-303; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1210; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"].)

The California Supreme Court has recognized that reversal is required when the whole is greater than the sum of its parts. (See *People v. Sturm* (2006) 37 Cal. 4th 1218,1244 [reversing due to cumulative misconduct]; *People v. Hill, supra,* 17 Cal.4th 800, 844-847 [reversing for multiple cumulative errors].) Appellant has identified numerous errors that occurred

during both the guilt and penalty phases of this trial. Each of these errors, individually and cumulatively, deprived appellant of his constitutional rights to a fair trial before an unbiased jury, the right to confront the witnesses against him, the right to present a meaningful defense, and the right to fair and reliable determinations of guilt and of the penalty, guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Further, each error, by itself and in combination with others, is sufficiently prejudicial to require reversal of appellant's convictions and death sentence.

XVII.

THE DEATH PENALTY IS DISPROPORTIONATE TO APPELLANT'S INDIVIDUAL CULPABILITY.

Because the death penalty is disproportionate to appellant's culpability, its imposition in this case would violate the state and federal constitutions. While the California Supreme Court has previously held that proportionality analysis is not *required* (see, e.g., *People v. Foster, supra,* at p. 722; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), the Court does have the inherent discretion to conduct an intra-case proportionality analysis in the interests of justice. (See *People v. Lang* (1989) 49 Cal.3d 991,1043.) Appellant respectfully urges that the Court exercise its discretion in this

case. In addition, appellant urges reconsideration of the California Supreme Court's decisions holding that proportionality analysis is not required in capital cases in view of the analysis set forth below.[90]

"The cruel and unusual punishment clause of the Eighth Amendment prohibits the imposition of a penalty that is disproportionate to the defendant's personal responsibility and moral guilt." (*People v. Padilla* (1995) 11 Cal.4th 891, 962.) In *Enmund v. Florida* (1982) 458 U.S. 782, the United States Supreme Court stated "we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must focus on 'relevant facets of the character and record of the individual offender.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, citing and quoting, *Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) This Court has both constitutional and statutory authorization to review the sentence. The trial court's ruling on the automatic motion to modify the sentence pursuant to Penal Code section 190.4 "is subject to independent review: it resolves a mixed question that implicates constitutional rights and hence must be deemed predominantly legal." (*People v. Marshall* (1990) 50

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Appellant also raises this argument here in order to preserve it for federal review.

Ca1.3d 907, 938.) The motion should have been granted in appellant's case, and the death sentence should have been modified to life without possibility of parole following the Penal Code section 190.4(e) hearing. Apart from the discretion contemplated by the statute, this Court has an obligation to give the sentence meaningful appellate review. The Eighth Amendment and the Due Process Clause grant appellant the right to meaningful appellate review to assure that the death penalty is not imposed arbitrarily or irrationally. (*Parker v. Dugger* (1991) 498 U.S. 308, 321.) "It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record. 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (*Parker v. Dugger, supra,* 498 U.S. at p. 321, quoting *Zant v. Stephens, supra,* 462 U.S. at p. 879.)

In analyzing a sentence to determine whether it is disproportionate under the circumstances of the individual case, the Court should examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*People v. Dillon* (1983) 34 Cal.3d 441, 479, citing *In re Lynch* (1972) 8 Cal.3d 410, 425-429.) With respect to the nature of the offense, the court should consider both the severity of the crime in the abstract and the facts of the crime in question.

(*People v. Dillon*, *supra*, 34 Cal.3d, at p. 479.) With respect to the nature of the offender, the court must ask "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." This requirement follows from the principle that "a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 480.) This requirement is also mandated by the federal Constitution, because the "individualized considerations [are] a constitutional requirement in imposing the death sentence, which means that the Court must focus on relevant factors of the character and record of the individual offender." (*Enmund v. Florida*, *supra*, at p. 799.)

In *People v. Dillon*, a 17-year-old boy was convicted of murder during an incident in which he and six other youths had conducted a well-planned invasion of a marijuana plantation they intended to rob. The defendant fired nine rifle shots into the victim, who was merely attempting to protect his property. There was no dispute that the crime of which he was convicted was reprehensible. (*People v. Dillon, supra,* 34 Cal.3d at p. 483.) Nevertheless, this Court reduced Dillon's conviction to second degree

murder, primarily because of his individual background. The court focused primarily on the defendant's youth, the fact that he lacked the intellectual and emotional maturity of an average 17-year-old, his lack of a prior record, and the petty chastisements given to the other six youths involved in the incident. (*Id* at pp. 483-488.)

Death is a disproportionate punishment for appellant. The deaths of two victims in this case were tragic. These events brought suffering to the victims and to surviving family. Appellant, too, is a member of that family and he will have to live with the consequences of his actions for the remainder of his life. That does not, however, mean that appellant is deserving of death. The record shows that appellant had severe neuropsychological impairments. (See 13 RT 1791-1793; 1802-1806 [testimony of Dr. Wu].) Appellant had little education, and left home before he was fifteen years old. (See 15 RT 2114-2122 [testimony of Emly Farmer].) Although he was poorly equipped to deal with the stressors of parenthood and family life, appellant was expected to function as a husband and father by the time he was sixteen. The evidence established that he was impulsive, and at times irrational and even violent. However, nothing in his record or in the trial testimony demonstrated that he was an unfeeling, calculated killer. On the night of the homicides appellant had been drinking

heavily and using illicit drugs. (See 7 RT 971-974 [testimony of Jason Christopher Tipton]; 7 RT 1001-1002 [testimony of Kevin Neal].) Appellant's actions that night arose from an angry, violent impulse and not a deliberate plan. The evidence as a whole compels the conclusion that death is an inappropriate and disproportionate penalty for the tragic events that befell appellant and his family. "The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application. In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." (*Kennedy v. Louisiana* (2008) 128 S.Ct. 2641.)

Death under the circumstances of this case would violate the Eighth Amendment and the California Constitution, Art. I, Section 17. For all of the foregoing reasons, appellant respectfully submits that the death sentence imposed is disproportionate as applied to him and should be set aside.

LEGAL ARGUMENTS CONCERNING CAPITAL PUNISHMENT

XVIII.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by the California Supreme Court, appellant presents these arguments in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for this Court's reconsideration of each claim in the context of the state's entire death penalty system.

In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, the California Supreme Court held that what it considered to be "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us

to reconsider that decision." (*People v. Schmeck, supra*, 37 Cal.4th at pp. 303-304.) In light of this directive, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the opportunity to present supplemental briefing. This Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. "The constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163,179 n. 6.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. California's death penalty statute potentially sweeps virtually every murderer into its grasp. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed

on any burden of proof, who may not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims to put to death.

A. Penal Code, section 190.2 is Impermissibly Broad.

A constitutionally valid death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Ca1.3d 983,1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state genuinely to narrow, by rational and objective criteria, the class of murderers eligible for death. (*Zant v. Stephens, supra,* 462 U.S. at p. 878. California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

According to the California Supreme Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Ca1.4th 857, 868.) However, the

special circumstances found true in this case - multiple murder, and murder committed while lying in wait (Penal Code § 190.2(a)(15) - lack any meaningful narrowing. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to making every murderer eligible for death. The Court should reconsider and overrule its prior precedent and hold section 190.2(a) is so broad that it fails properly to narrow the set of murders eligible for death as required by the Eighth and Fourteenth Amendments.

B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors can weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case the prosecution relied solely on factor (a) in support of its call for death. It relied on the circumstances of the crime itself and victim impact evidence, which the California Supreme Court has said comes within the ambit the circumstances of the crime. (*People v. Zamudio* (2008) 43 Ca1.4th 327, 324-325.) The California Supreme Court has not applied a limiting construction to factor (a). (*People v. Blair* (2005) 36 Ca1.4th 686, 749.) The

"circumstances of the crime" factor can hardly be called "discrete." (*Brown v. Sanders* (2006) 546 U.S. 212, 222.) The concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be, and have been, characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than "that a particular set of facts surrounding a murder ... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (See *Maynard v. Cartwright, supra,* 486 U.S. at p. 363; but see *Tuilaepa v. California, supra,* 512 U.S. 967, 987-988 [rejecting challenge to factor (a)].)

Appellant recognizes that the California Supreme Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3(a) results in the arbitrary and capricious imposition of the death penalty. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) However, for all of the reasons set forth herein, he respectfully urges the Court to reconsider its previous decisions.

C. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard.

The question whether to impose the death penalty for appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (13 CT 3603 [CALJIC 8.88].) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.) The California Supreme Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 316, fn. 14.) Appellant respectfully asks this Court to reconsider.

D. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Prevented Appellant's Jury from Considering Relevant Mitigation.

The inclusion in the list of potential mitigating factors of such

adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.) Appellant is aware that the Court has rejected this argument (see *People v. Avila* (2006) 38 Cal.4th 491, 614), but respectfully urges reconsideration.

E. The Failure to Clarify that Certain Statutory Factors Could Only be Relevant as Potential Mitigators Prevented a Fair and Reliable Penalty Determination.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47 Ca1.3d at p. 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens, supra,* at p. 879.) Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to

one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments. (But see *People v. Morrison* (2004) 34 Cal.4th 698, 730.) The very real possibility that appellant's jury aggravated his sentence on the basis of non-statutory aggravation deprived him of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd, supra*, 38 Cal.3d at pp. 772-775), and thereby violated appellant's Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].) It is likely that appellant's jury aggravated his sentence on the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. For example, the court permitted expansive

testimony attacking appellant's character under the guise of relevant evidence admitted under Evidence Code section 1101(b) and, in the penalty phase, victim impact testimony and evidence. (See Arguments I, V, and X.) At the same time, the trial court excluded mitigating evidence regarding appellant's psychiatric history which could have been presented through the testimony of his mother. (See 15 RT 2122-2124.) This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than [he] might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black, supra,* 503 U.S. 222, 235.)

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

F. Appellant's Death Sentence is Unconstitutional Because it is Not Based on Findings Made Beyond a Reasonable Doubt.

California law does not require a reasonable doubt standard be used

during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) Appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. The United States Supreme Court's decisions, however, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (See *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; and *Apprendi v. New Jersey, supra,* 530 U.S. 466.) In *Ring v. Arizona*, the Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona, supra,* 536 U.S. at p. 593.)

Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Cunningham v. California*, the United States Supreme Court rejected the California Supreme Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range set by the sentencing statute. It explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (See *Cunningham v. California, supra,* 549 U.S. 270.) California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial relied on as an aggravating circumstance, except as to prior criminality- and even in that context the required finding need not be unanimous. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, Section 190.3 requires the trier of fact to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107,

177), which was read to the jury in this case, "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (13 CT 3603 [CALJIC No. 8.88].) Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In *People v. Loker* (2008) 44 Cal.4th 691, 755, the California Supreme Court held, notwithstanding *Cunningham*, *Apprendi*, and *Blakely*, that a defendant has no constitutional right to a jury finding as to the facts supporting a death sentence. In the wake of *Cunningham*, however, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. Under California law, once a special circumstance has been found

true, life without possibility of parole is the default. Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code § 190.3.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 530 U.S. at p. 604.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." *Ring* and *Cunningham*, require the requisite fact-finding in the penalty phase to be made unanimously and beyond a reasonable doubt.

California law violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellant urges this Court to reconsider its decisions holding that California law is consistent with *Cunningham*, *Ring*, *Blakely*, and *Apprendi*. He further urges the Court to reconsider its holdings that the Eighth and Fourteenth Amendments do not require the trier of fact to be convinced death is the appropriate penalty and

that the factual bases supporting the penalty are true beyond a reasonable doubt.

G. California Law Violates the Sixth, Eighth, and Fourteenth Amendments by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal Sixth, Eighth, and Fourteenth Amendment rights to meaningful appellate review. (*California v. Brown, supra,* 479 U.S. at p. 543; *Gregg v. Georgia, supra,* at p. 195.) Because California juries have discretion without significant guidance on how to weigh potentially aggravating and mitigating circumstances (see *People v. Fairbank, supra*), there can be no meaningful appellate review without written findings. It is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) The California Supreme Court has held that the absence of written findings by the sentencer does not render the death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise

considered by the Court to be an element of due process so fundamental that they are even required at parole suitability hearings and routinely in administrative law proceedings. A convicted prisoner who believes that he or she has been improperly denied parole must proceed by filing a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Ca1.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id* at p. 267.) Similarly, administrative decisions must be supported by written findings. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Ca1.3d 506,514-515.) The same analysis applies to the far graver decision to put someone to death.

In a *non-capital* case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Pen. Code § 1170, subd. (c).) [91] Capital defendants are entitled to more rigorous protections

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A determination of parole suitability shares many characteristics

(continued...)

than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant or a civil litigant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen. Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) Even where the decision to impose death is "normative" and "moral" its basis can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. There are no other procedural protections in California's death

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[91](...continued)
with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, Cal. Code Regs., §§ 2280 et seq.)

penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh*, *supra*, 548 U.S. 163 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment. This Court has rejected these contentions. (*People v. Moore*, *supra*, 2011 WL 322379; *People v. Cook* (2006) 39 Ca1.4th 566, 619.) Appellant respectfully urges the Court to reconsider.

H. The Death Verdict Was Not Premised on Unanimous Jury Findings.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) "Jury unanimity ...

is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [conc. opn. of Kennedy, J.].) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Moore, supra*, at pp. 20-21.)

The failure to require jury unanimity also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst, supra*, 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry

only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" violates the right to equal protection and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant respectfully urges this Court to reconsider.

I. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided. Appellant, therefore, is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (*Hicks v. Oklahoma, supra,* at p. 346.) Accordingly, the jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

The California Supreme Court has consistently held that capital

sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (See, e.g., *People v. Foster, supra*, at pp. 157-158; *People v. Lenart, supra,* 32 Cal.4th at pp. 1136-1137.) The Court has also rejected any instruction on the presumption of life. (See, *People v. Howard, supra*, 118 Cal.Rptr.3d 678, 700; *People v. Jennings, supra*, 50 Cal.4th at p. 689.) Appellant is entitled to jury instructions that comport with the federal Constitution and therefore he urges the Court to reconsider these decisions.

J. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The California Supreme Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (See *Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook, supra*, 39 Ca1.4th 566, 618-619; *People v. Ghent* (1987) 43 Ca1.3d 739, 778-779.) Standards of decency are never static. (*Trop v. Dulles, supra,* 356 U.S. at p. 101.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment,

and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant respectfully asks the Court to reconsider its previous decisions and hold the death penalty unconstitutional because, among other things, it violates the "evolving standards of decency that mark the progress of a maturing society" and is a violation of international law. (*Trop v. Dulles, supra,* at p. 101.) "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana, supra,* 128 S.Ct. 2641, 2650.)

CONCLUSION

For all of the foregoing reasons, appellant's convictions and sentence of death must be reversed.

Dated: March 7, 2011

Respectfully submitted,

Susan K. Massey
Attorney for Appellant

CERTIFICATION OF WORD COUNT

Appellate counsel certifies in accordance with California Rules of Court, rule 8.630(b)(2) and (4), that this opening brief contains 68, 551 words as calculated by the WordPerfect software in which it was written.

Dated: March 7, 2011

Susan K. Massey

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Micky Ray Cage
Case Number: Crim. SO120583
Riverside County Superior Court No. RIF-083394

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 9462 Winston Drive, Brentwood, Tennessee 37027.

On March 7, 2011, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelope(s) in a United States Postal Service mailbox at Brentwood, Tennessee, with postage thereon fully prepaid.

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I declare under penalty of perjury, according to the laws of the State of California, that the foregoing is true and correct.

Executed on March 7, 2011, at Brentwood, Tennessee.

Susan K. Massey