No. S150509

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SANTIAGO PINEDA, Defendant and Appellant.	Los Angeles Co. Sup. Ct. No. NA051943-01 c/w NA061271-01

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

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

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DEATH PENALTY

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TEXT AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SANTIAGO PINEDA, Defendant and Appellant.	) Los Angeles Sup. Ct. No. NA051943-01 c/w NA061271-01

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239.)[1]

STATEMENT OF THE CASE

On August 8, 2002, the prosecution filed a one-count information against appellant in Los Angeles Superior Court case no. NA051943. The information charged him with the March 7, 2002, murder of Rafael Sanchez (§ 187, subd. (a)). (1 CT 102-103.) That same day, appellant pled not guilty to the charge. (1 CT 104.)

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

Appellant's trial commenced on April 1, 2004. (1 CT 159-160.) On April 12, 2004, the trial court declared a mistrial due to a medical condition suffered by appellant's then-attorney, Charles Frisco. (2 CT 413.) On May 7, 2004, Frisco was relieved from the case. (CT Supp. VI 5-6.)

On May 13, 2004, Charles Patton was appointed to represent appellant. (CT Supp. IV 66; CT Supp. VI 7-8.)

On June 1, 2004, Los Angeles Superior Court case no. NA051943 was consolidated into Los Angeles County Superior Court case no. NA061271 as Count 1. (CT Supp. VI 9-11.)

On September 23, 2004, the prosecution filed a two-count information against appellant in Los Angeles Superior Court case no. NA061271. (4 CT 749-751.) Count 1 alleged that on March 7, 2002, appellant murdered Rafael Sanchez. (§ 187, subd. (a).) Count 2 alleged that on April 20, 2004, appellant murdered Raul Tinajero. (§ 187, subd. (a).) As to Counts 1 and 2, the information further alleged the special circumstance of multiple murder. (§ 190.2, subd. (a)(3).) The information further alleged as special circumstances that Count 1 occurred during the commission of robbery (§ 190.2, subd. (a)(17), and that Count 2 involved the killing of a witness (§ 190.2, subd. (a)(10)). Appellant pled not guilty to both counts. (4 CT 770-771.)

That same day, the prosecution filed a motion for joinder of the instant case with Los Angeles Superior Court case no. BA260961, in which appellant was charged with attempted escape from custody. (4 CT 752-769.)

On October 19, 2004, appellant filed several motions, including the following: an opposition to the prosecutor's motion to join the offenses (4 CT 775-801); a motion to dismiss the special circumstance allegation that

the murder of Sanchez was committed in the course of a robbery (§ 190.2, subd. (a)(17), and that the murder of Tinajero was committed because he was a witness (§ 190.2, subd. (a)(10)), pursuant to Penal Code section 995 (4 CT 809-821); a motion to recuse the Los Angeles County Sheriff and Deputies (4 CT 822-830); and, a motion to recuse Deputy District Attorney Leslie Klein and the Los Angeles County District Attorney's Office (4 CT 831-849).

On October 22, 2004, the trial court denied the prosecution's motion for joinder, and appellant's "995 motion." (4 CT 850.)

On October 29, 2004, the Attorney General's Office filed an opinion in opposition to appellant's motion to recuse Deputy District Attorney Klein and the Los Angeles County District Attorney's Office. (4 CT 851-872.) That same day, the Office of the County Counsel filed an opposition to appellant's motion for recusal of the Los Angeles County Sheriff and Deputies. (4 CT 873-885.) On November 2, 2004, the trial court denied appellant's recusal motions. (4 CT 888-889.)

On November 10, 2004, appellant filed a motion to suppress his statements to police officers. (4 CT 890-894.) On November 30, 2004, the prosecution filed an opposition to that motion. (4 CT 906-917.)

On December 17, 2004, the prosecution filed a notice of evidence in aggravation pursuant to Penal Code section 190.3. Specifically, the prosecution indicated that it intended to introduce the following evidence pursuant to: factor (a), including victim impact evidence; factor (b), including evidence relating to appellant's possession of a weapon in jail, threats made to deputies, and physical altercations with other inmates; factor (c), i.e., evidence of appellant's prior conviction for grand theft auto (§ 487, subd. (d)); and, factor (i), appellant's age. (4 CT 922-924.) On

January 21, 2005, the prosecution filed a supplemental notice of evidence to be introduced in aggravation, indicating that it would introduce evidence of appellant's December 19, 2003, attempted escape from jail, pursuant to factor (b). (4 CT 931-932.)

On June 2, 2005, appellant informed the trial court that he wished to represent himself. (4 CT 959-960.) On June 7, 2005, appellant reiterated that he wished to represent himself, but explained that he wanted William McKinney, who had been appointed as second-chair counsel (2 RT 44, 49; 4 CT 929), as primary counsel if possible. On June 8, 2005, appellant executed an "Advisement and Waiver of Right to Counsel (Faretta Waiver)" form. (4 CT 963-978.) That same day, the trial court granted appellant's request to waive counsel and represent himself. The court appointed Patton as stand-by counsel. (4 CT 963-980.)

On November 1, 2005, appellant filed a *Marsden* motion. (4 CT 1021-1022.) On January 10, 2006, the trial court heard appellant's *Marsden* motion. The court denied the motion but ordered that advisory counsel be appointed. (5 CT 1044-1045.)

On January 25, 2006, McKinney was appointed as advisory counsel. (5 CT 1048-1049.) On March 29, 2006, the trial court informed the defense that, because the supervising judge would allow only one attorney to be appointed in a pro per case, McKinney was no longer advisory counsel. (5 CT 1069-1070.) On March 29, 2006, Patton was appointed to serve as advisory as well as standby counsel. (3 RT 350-351.)

On May 8, 2006, the prosecution filed a supplemental notice of evidence to be introduced in aggravation, indicating that, pursuant to factor (b), they would introduce evidence relating to incidents involving weapons possession, fights with other inmates, and threats to sheriff personnel and

combative behavior. (5 CT 1075-1076.)

On May 23, 2006, appellant gave up in propria persona status. Patton was re-appointed as counsel. (5 CT 1085; 3 RT 392-397, 404.) McKinney was subsequently re-appointed as second-chair counsel. (See 5 CT 1093; 3 RT 426.)

On October 4, 2006, the prosecution filed a motion to introduce as an exhibit a life-size replica of the jail cell in which Tinajero was killed. (5 CT 1107-1111.) That same day, the trial court granted the motion. (5 CT 1114.)

On October 18, 2006, the prosecution filed a motion to exclude evidence and argument regarding the following, pursuant to Evidence Code section 352: (1) the effect of the imposition of the death penalty on appellant's family; (2) other defendants being wrongfully convicted or sentenced; (3) conditions of death row, execution or life imprisonment without possibility of parole; (4) the cost of the death penalty; (5) deterrence; (6) the amount of time appellant was likely to spend on death row prior to execution; and, (7) what penalty the victims' families deemed appropriate. (5 CT 1119-1126.)

That same day, the prosecution filed points and authorities in support of the admissibility of other crimes/acts pursuant to Evidence Code section 1101, subdivision (b). Specifically, the prosecution sought to introduce evidence regarding the following incidents: (1) appellant attempted to escape from jail on December 19, 2003; (2) he was found in possession of "shank weapons" on March 13, 2003, and July 13, 2004; (3) he was caught without his wristband on October 13, 2004, and on November 5, 2004; (4) he was found in possession of jail-made liquor on November 5, 2004; (5) he was found in possession of an altered paper clip on June 17, 2005; and, (6)

he escaped from a locked shower on July 30, 2005. (5 CT 1127-1135.)

Also that day, the prosecution filed another supplemental notice of evidence to be introduced in aggravation, indicating that they intended to introduce evidence that appellant caused a disturbance by yelling insults and profanities at another inmate. (5 CT 1136-1137.)

Jury selection for appellant's trial began on October 23, 2006. (5 CT 1138-1139.)

On October 27, 2006, appellant filed a motion to suppress statements and evidence. Specifically, he sought to suppress statements he allegedly made to Los Angeles County Deputy Sheriff Maybet Bugarin on April 22, 2004, and statements he allegedly made to Los Angeles County Deputy Sheriff Josue Torres on May 3, 2004. (5 CT 1142-1147; see also 17 RT 2912, 3039.)

On October 30, 2006, appellant filed in limine a motion opposing the prosecution's points and authorities in support of admissibility of other crimes/acts pursuant to Evidence Code section 1101, subdivision (b). (5 CT 1148-1157.) That same day, the trial court granted the prosecution's motion to introduce appellant's statements to deputies. (5 CT 1158-1159.)

The jury was sworn to try the case on November 3, 2006. (5 CT 1188-1189.)

On November 13, 2006, appellant moved for a mistrial based on the ground that a newspaper article published in the November 10, 2006, issue of the Los Angeles Times would prejudice the jury. (5 CT 1200-1208.) That same day, the trial court denied the motion. (5 CT 1210.)

On November 27, 2006, the prosecution filed yet another supplemental notice of evidence to be introduced in aggravation, indicating that it would introduce evidence regarding a letter from appellant which

implicitly threatened another inmate "who provide[d] police information to help catch a murderer." (5 CT 1222-1223.)

On November 28, 2006, appellant filed a motion to dismiss the robbery-murder special-circumstance allegation pursuant to Penal Code sections 1118.1 and 1385. (5 CT 1231-1237.)

On November 29, 2006, appellant moved in limine to exclude two letters written by appellant, which the prosecution sought to introduce. (5 CT 1241-1246.) The trial court admitted one of the letters, and gave the parties additional time to research the admissibility of the second. (5 CT 1247-1249.) Appellant also moved for a mistrial on the ground that a witness, a gang expert, was testifying as to appellant's guilt, denying his right to a jury trial. The trial court denied the motion. (18 RT 3114-3117; 5 CT 1248.) The trial court also denied appellant's motion to dismiss the robbery-murder special circumstance. (5 CT 1248.)

On December 5, 2006, the jury commenced deliberations. (5 CT 1285.)

On December 7, 2006, the prosecution filed a motion to admit evidence of violent criminal activity, pursuant to Penal Code section 190.3, factor (b). Specifically, the prosecution sought to introduce evidence that, on October 1, 2006, a deputy intercepted a letter from appellant in which he threatened to harm an individual who had provided information regarding a fellow inmate to the police. (5 CT 1289-1298.)

On December 11, 2006, the jury returned guilt verdicts as to both counts. (6 CT 1304-1307, 1314-1318.) As to Count 1, the jury found the robbery (§ 190.2, subd. (a)(17)) and multiple murder (§ 190.2, subd. (a)(3)) special circumstances to be true. (6 CT 1305.) As to Count 2, the jury found the killing of a witness (§ 190.2, subd. (a)(10)) and multiple murder

(§ 190.2, subd. (a)(3)) special circumstances to be true. (6 CT 1307.)

On January 2, 2007, the penalty phase of appellant's trial commenced. (6 CT 1329-1331.)

On January 10, 2007, appellant moved in limine to restrict the scope of the prosecutor's penalty phase argument. (6 CT 1347-1376.)

On January 12, 2007, the court and counsel conferred regarding the prosecution's motion to introduce additional evidence from confiscated letters. (6 CT 1417-1418.) The trial court granted the prosecution's motion in part. (30 RT 4915-4927.)

On January 16, 2007, the trial court granted appellant's motion in limine except insofar as the prosecutor would be allowed to present arguments based on victim impact evidence; to argue that a statutory factor does not apply; to argue that appellant was accorded due process, which he did not allow his victims; and, to argue about the pain they suffered. (31 RT 5038-5040; 6 CT 1434.)

The jury began deliberating on January 17, 2007. (6 CT 1435.) On January 23, 2007, the jury foreperson submitted a note which read, "We are not unanimous on one of the counts, do we fill out the 'life without possibility' form?" (6 CT 1445.) After conferring with counsel, the trial court instructed jury that if it could not reach a verdict, life imprisonment was not the default verdict. (31 RT 5172-5173.) The jury's death verdict as to Count 2 was then read. (31 RT 5174-5175; 6 CT 1446.)

The trial court then polled the jurors as to whether it was reasonably probable that further deliberations would result in a verdict and heard argument from counsel with respect to the remaining count. Although the jurors were split as to whether it was reasonably probable that further deliberations would result in a verdict, the trial court agreed with the

foreperson's suggestion that further deliberations might help. (31 RT 5176-5186, 5188-5191.) The jury subsequently resumed deliberations. (31 RT 5194; 6 CT 1452.)

On January 25, 2007, the jury reached a verdict of death as to Count 1. (6 CT 1455, 1457-1458.)

On February 13, 2007, appellant filed a motion for new trial. (6 CT 1459-1464.)

On February 15, 2007, the trial court denied appellant's motion for a new trial (16 CT 4188) and his automatic motion for modification of the death verdict (6 CT 1475-1479; 16 CT 4188-4193). The court then imposed a sentence of death as to Count 1, and a sentence of death as to Count 2. (16 CT 4193-4194.) In addition, the trial court ordered that appellant pay a victim restitution fine of $6,172.33, pursuant to Penal Code section 1202.4, subdivision (f).[2] (6 CT 4187; CT Supp. IV 129-132.) Finally, appellant was given 1,835 days of actual custody credits. (16 CT 4195.)

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[2] The trial court later issued an order nunc pro tunc finding compelling and extraordinary reasons to waive the restitution fine pursuant to Penal Code section 1202.4. (CT Supp. IV 129-132.)

STATEMENT OF FACTS

I. Prosecution Case at the Guilt Phase

A. March 7, 2002, Murder of Juan Carlos Armenta (Rafael Sanchez)

1. Testimony of Raul Tinajero[3]

On March 6, 2002, appellant and Raul Tinajero were passengers in an automobile driven by an unidentified friend of appellant. (11 RT 1798-1799, 1855-1856.) According to Tinajero, he and appellant had been neighbors for years, but had not become friendly until "some time prior" to that date. (11 RT 1794-1795, 1853.)

At the intersection of Pacific Coast Highway and Avalon, they stopped next to a white Infiniti driven by Juan Carlos Armenta, who was alone.[4] (11 RT 1799-1800, 1857.) Armenta "sort of looked drunk." (11 RT 1801.) Appellant and Armenta began talking to one another, and appellant handed a bottle of tequila to Armenta. (11 RT 1801.) Armenta drank from the bottle and handed it back. (11 RT 1802.)

Appellant and his companions continued to appellant's house in Wilmington, and Armenta followed them there. (11 RT 1802-1807, 1810, 1857.) According to Tinajero, he had never met Armenta before, and as far as he was aware, neither had appellant. (11 RT 1803.)

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[3] Because Tinajero was unavailable as a witness – appellant was charged with his murder in count 2 – the prosecution read his testimony from appellant's first trial into the record. (11 RT 1791-1909.) At that trial, Tinajero testified under immunity, which he had been granted in July 2002, following the preliminary hearing. (11 RT 1845-1849, 1851-1853, 1901.) At the time of his testimony, Tinajero was serving a prison term for forgery and stealing a car, and he had suffered a previous conviction for burglary. (11 RT 1848, 1851.)

[4] Armenta also went by the name Rafael Sanchez. (10 RT 1668.)

It was dark when they arrived. (11 RT 1857.) The group, including Armenta, remained for about 20 minutes. (11 RT 1808.) At some point, appellant, Armenta and Tinajero decided to drive to Long Beach in Armenta's Infiniti.[5] (11 RT 1808-1809.) On the way there, they picked up appellant's cousin. (11 RT 1812-1814.)

At some point, they stopped in an alley, where everyone except Tinajero got out to urinate. Appellant and his cousin ran back to the car, and appellant drove away, leaving Armenta in the alley. (11 RT 1814-1816, 1858, 1860.) Appellant drove back to Wilmington and parked the Infiniti on Colon Street, a few blocks from his house. They then walked to appellant's house. (11 RT 1816-1817, 1890, 1990.)

Later, Armenta arrived at appellant's house, now driving a Honda. Appellant was in front of his house, along with his cousin and Tinajero. (11 RT 1817, 1830, 1864.) Armenta, who was very drunk and seemed upset, told appellant he wanted his car back. (11 RT 1817-1818, 1864.) He also said he was going to kill appellant if he did not get it back. (11 RT 1864.)

Appellant agreed to help Armenta find his car, telling him it was in Long Beach. (11 RT 1818, 1820.) Although Tinajero knew the car was parked nearby, he stayed quiet. (11 RT 1820.) Appellant and Tinajero accompanied Armenta to Long Beach, pretending to help him look for the Infiniti. (11 RT 1818-1819, 1821, 1864-1865, 1872.) Armenta was the driver, appellant sat in the passenger seat, and Tinajero sat in the back seat. (11 RT 1825, 1873.)

At some point, Armenta stopped at his sister's house and went inside

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[5] According to Tinajero, they went to Long Beach to meet girls. (11 RT 1809, 1812.)

for about five to ten minutes. (11 RT 1821-1822.) Appellant, who waited outside with Tinajero, said he was going to choke Armenta and take the car. (11 RT 1822-1825, 1873, 1892.) Appellant told Tinajero to do it, but Tinajero said he did not want to be involved. (11 RT 1824-1825.) As they talked, appellant switched seats with Tinajero. (11 RT 1826, 1873-1874.) Appellant never threatened him, but Tinajero was afraid. (11 RT 1875.)

When Armenta returned, appellant and Tinajero continued pretending to look for the car. (11 RT 1826.) Armenta subsequently drove into Palmer Court, an alley in Long Beach, where he stopped the car. (10 RT 1684; 11 RT 1826-1828, 1832.) Appellant reached forward and choked him. After Armenta appeared to pass out, appellant leaned forward, opened the driver's door from the inside, and "threw" him out of the car. (11 RT 1828-1830, 1849-1850, 1876-1877.) Appellant got into the driver's seat and drove over Armenta about four to six times, driving back and forth "kind of fast." (11 RT 1830-1832.)

Driving the Honda, appellant returned to Colon Street, where the Infiniti was parked. Appellant said he wanted to go back to Long Beach, where they had left Armenta, to "check it out." (11 RT 1832-1833.) Appellant then drove the Infiniti back to the alley and drove over Armenta. (11 RT 1832-1833, 1838, 1890-1891, 1893-1895.) Appellant never said he wanted to kill Armenta. (11 RT 1892.)

Appellant saw a fire truck approach, and drove off. (11 RT 1834, 1837-1838, 1899.) Appellant drove to the next block and parked the car. Appellant and Tinajero walked back to Palmer Court and saw that firefighters were attending to Armenta. (11 RT 1839-1840, 1896.) They then walked back to the car and appellant started driving towards Wilmington. (11 RT 1840-1841.) They were subsequently stopped by the

police and taken into custody. (11 RT 1840-1841, 1905-1906.)

Questioned by the police, Tinajero said he had not been involved in an accident. However, Tinajero testified, he had lied during the interview. According to Tinajero, he had denied everything because he was scared and because he knew it is wrong to take other people's cars and run them over. He acknowledged that appellant never indicated that he was not to say anything. (11 RT 1842-1843, 1907.)

On March 15, 2002, Tinajero was again taken to a police station, where he was questioned by Sergeant Gerald Wood of the Long Beach Police Department. Before being taken to the station, Tinajero was told that he was not under arrest but would be handcuffed for his safety. He was also told that he needed to be truthful, and that he would not get into any trouble if he was truthful. During the interview, Tinajero said appellant had run over Armenta with the Honda a couple of times. Tinajero testified that he had told the truth during the interview.[6] (9 RT 1565; 11 RT 1843, 1905-1908.)

In June 2002, Tinajero spoke to other police officers, including Detective Richard Birdsall of the Long Beach Police Department. He told them that appellant had stolen the cars and run over the victim with two different cars. (11 RT 1844-1845, 1982.)

Prior to the preliminary hearing, Tinajero spoke to Deputy District Attorney Leslie Klein. According to Tinajero, Klein told him to tell the

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[6] Tinajero testified that he and appellant drank about six beers each on March 6, 2002, and that he did not remember telling the police that he and appellant had consumed two 12-packs of beer. (11 RT 1801, 1853-1855, 1857, 1867, 1906-1907.) However, he acknowledged that, at the preliminary hearing, he had testified that he and appellant had consumed two 12-packs of beer. (11 RT 1867-1870.)

truth in court, and she did not let him read anything about this case. He told her that Armenta had been run over by the Honda a couple of times; when Klein asked him to define a couple of times, he indicated "like 10 or 5 or 6." He explained that a couple of times did not represent a definite number, and that he had a difficult time distinguishing one time from ten times. He also explained that he did not count the number of times they went forward and backward. (11 RT 1900-1904, 1908.)

2. Testimony of Eduardo Quevedo

Sometime around 11:00 p.m. on March 6, 2002, Armenta visited the home of his friend, Eduardo Quevedo. (10 RT 1645-1646, 1660.) Armenta was with two males, one of whom was appellant. (10 RT 1646-1648, 1657, 1661.) Armenta told Quevedo that the men were his friends, and that he had met them at the car repair shop where he worked. (10 RT 1651, 1660-1661; 11 RT 1927.) Quevedo never spoke to appellant or the other man. (10 RT 1663.)

Because Armenta was drunk, Quevedo was concerned and offered to drive him home, but Armenta declined the offer. (10 RT 1650, 1663.) Quevedo also was concerned because he had never seen the men before. (10 RT 1651.) Armenta and his companions left after about 20 to 30 minutes. (10 RT 1650-1651.) He never explained to Quevedo why he had stopped by. (10 RT 1661-1662.)

About 30 minutes later, Armenta returned to Quevedo's house on foot. (10 RT 1651, 1664, 1666-1667.) He appeared to be upset, and told Quevedo that the two guys had beaten him up and taken his car. (10 RT 1651-1653.) Armenta may have asked Quevedo about getting a weapon. (10 RT 1653.) He agreed to let Quevedo take him home, but later decided he wanted to be dropped off at the shop where he worked. (10 RT 1652-

1654; 11 RT 1923-1924, 1930.) There, Armenta took a wine-colored Honda Accord belonging to his employer, Miguel Aranda. (11 RT 1924-1925, 1929-1930; see also 11 RT 1925 [Aranda confirmed that Armenta had access to the Honda].)

Quevedo parked near the shop, concerned because Armenta was so angry and drunk. He subsequently saw Armenta pass by in the Honda, heading towards Long Beach, then lost sight of him. (10 RT 1654-1655, 1658.) As Quevedo headed home, the Infiniti passed him, heading towards Long Beach and going "really fast." (10 RT 1656, 1658, 1665.) Quevedo could not see who was driving. (10 RT 1665.)

3. Testimony of Patricia Armenta

At about 1:30 a.m., Armenta visited his sister, Patricia Armenta, who lived in Long Beach. (10 RT 1668-1669, 1674; 11 RT 1821.) He appeared to be angry. (10 RT 1669.) It also appeared that he had been drinking, so she gave him some food to try to sober him up. (10 RT 1675.) He told her that his car had been stolen, and said that the people who had stolen it lived on Blinn Street in Wilmington. (10 RT 1669, 1675.) Armenta also told her that he was going to drop off some people. (10 RT 1671, 1676, 1678-1679.) She never saw them. (10 RT 1671.) Armenta was in her house approximately 5 to 15 minutes. (10 RT 1669, 1675.)

4. Testimony of Virginia Ramos and David Rodriguez

Sometime in the early morning hours of March 7, 2002, Virginia Ramos and David Rodriguez, who lived together near 1933 Palmer Court, were in their kitchen. Their kitchen window faced northward, towards 20th Street. (10 RT 1683-1684, 1691.) They noticed a dark-colored car parked in the alley, approximately 100 feet north of their residence. (10 RT 1684-1685, 1691-1692.) Ordinarily, no cars were parked there at night. (10 RT

1685.) Rodriguez saw two or three men standing by the car. (10 RT 1691-1693, 1702-1703.)

About 15 to 30 minutes later, they heard their dog barking and Rodriguez went outside to see why. (10 RT 1686, 1689, 1693, 1701, 1704.) He observed a man crawling in the alley, trying to stand up. The man was moaning, and Rodriguez thought he may have been drunk or beaten up. (10 RT 1693-1694, 1698, 1704-1705, 1708-1709.) The man was about 100 feet from where the dark-colored car had been parked. (10 RT 1701.) Rodriguez did not notice any cars or other people in the alley. (10 RT 1693-1694, 1698.)

Rodriguez went back into his house, called 911, and reported that a man was staggering down the alley. (10 RT 1686, 1688-1689, 1694, 1705.) The dispatcher instructed him to contact the man, but Rodriguez did not do so, reluctant to get involved. (10 RT 1705-1706, 1709.)

After Rodriguez got off the phone, he went back outside. About five to ten minutes later, a small white car approached from the north side of the alley. (10 RT 1687, 1689, 1694-1695, 1706.) Rodriguez estimated that the car was traveling at a speed of about 25 to 30 miles per hour, and he assumed the man was going to be hit. (10 RT 1694-1695, 1706-1707, 1711.) According to Rodriguez, the car's headlights were on. (10 RT 1695-1696, 1711.)

Rodriguez went back into his house and said they were going to run over the man because he was in the middle of the alley. (10 RT 1687, 1689, 1695.) Both Rodriguez and Ramos heard two thumps. (10 RT 1687, 1689, 1695, 1707, 1709.) Through his window, Rodriguez saw the car continue southbound, then make a 3-point turn. Both Ramos and Rodriguez saw the white car pass by, heading northbound. (10 RT 1687, 1689, 1695-1697,

1707.) Ramos told 911 that they hit the guy they had called about earlier. (10 RT 1687-1688.)

Rodriguez did not see any cars other than the white car when he heard the thumps. (10 RT 1698.) Ramos never saw the victim or any of the people in the white car. (10 RT 1688, 1698.)

5. Testimony Relating to the Crime Scene

At approximately 1:50 a.m., Long Beach Fire Department personnel, including Fire Captain Jorge Pedroza and engineer Christopher Tave, responded to Palmer Court, having received a call that a man was staggering in the alley. (9 RT 1538-1539, 1543, 1551-1552, 1554-1555.) Tave was driving the fire truck, and the lights and siren were on. (9 RT 1552, 1554-1555, 1561.)

As Tave turned southbound into the alley, he came face-to-face with the Infiniti. (9 RT 1540-1541, 1551, 1555-1556; 10 RT 1697; 11 RT 1839, 1896.) The Infiniti's headlights were off. (9 RT 1556.) Tave noticed that the front bumper area was damaged and that the windshield was "spiderized." (9 RT 1557.) Pedroza observed that the car's bumper, hood and front windshield were damaged. Because Pedroza thought that the car may have struck someone, he informed the dispatcher that a white compact car with front-end damage and a broken windshield was heading north on Palmer Court, and that there were two male Hispanics in the vehicle. (9 RT 1542-1545, 1552, 1556-1557.) Neither Tave nor Pedroza saw the driver. (9 RT 1553, 1557, 1562.)

The two vehicles were at an impasse, about six to eight feet apart. Tave trained a spotlight on the car and nudged forward, trying to communicate that he wanted to move forward. Initially, the driver of the Infiniti did not move, but eventually he backed into an alley, allowing Tave

to pass. (9 RT 1543-1544, 1547, 1556-1558; 10 RT 1697; 11 RT 1839.) Tave glanced in his mirror to see which way the Infiniti was going. (9 RT 1558.)

The fire department personnel found Armenta lying in the middle of the alley. (9 RT 1545, 1548-1549, 1553, 1558.) He was in critical condition. (9 RT 1539, 1549.) He had no pulse and was not breathing. (9 RT 1549.) He was taken to a hospital but never regained a pulse or resumed breathing. (9 RT 1549-1550.)

At around 1:57 a.m., Norman Mikkelson, an officer with the Long Beach Police Department, and his partner were responding to the scene when they received information that the victim may have been hit by a white Honda containing two male Hispanics. (9 RT 1513-1516, 1523, 1529, 1531.) Because another unit turned into Palmer Court, they decided to look for the suspect vehicle, which Mikkelson spotted about half a block from 1933 Palmer Court. (9 RT 1516-1517, 1519-1521, 1529, 1531.) It had no lights on except for two small lights in the rear, i.e., the reverse lights. (9 RT 1520, 1532.)

As the police car approached, the reverse lights went off and the Infiniti moved northbound. (9 RT 1521.) The officers followed the Infiniti and, after traveling about three and a half blocks, the driver of the Infiniti turned on the lights. Mikkelson's partner activated the police car's lights and siren, and the Infiniti immediately pulled over, about four or five blocks from 1933 Palmer Court. (9 RT 1521-1526, 1529, 1531-1533, 1536; 11 RT 1796-1797, 1840-1841.)

Appellant was in the driver's seat, Tinajero in the passenger seat. (9 RT 1526-1528; 11 RT 1796.) Mikkelson detected a slight to moderate odor of alcohol on appellant's breath. Appellant had bloodshot, watery eyes and

his coordination was somewhat poor, but he exhibited no other signs of alcohol intoxication, leading Mikkelson to infer that he may have been under the influence of something other than alcohol. Mikkelson called a drug recognition expert, pursuant to police department policy. (9 RT 1533-1535.) The expert, Officer Mike Soldin, drove to the location and conducted an initial investigation. (9 RT 1533; see also Sections II.A and II.C, *post.*)

The fire department personnel, summoned to the location by the police, identified the vehicle as the one they had seen in the alley. (9 RT 1529, 1550, 1559-1560.) At that point, appellant and Tinajero were arrested and transported separately to the Long Beach police station. (9 RT 1529-1530, 1537.) There, Officer Soldin examined appellant for drugs and alcohol, and took a blood sample. (9 RT 1533-1535.)

Gerald Wood, who was then the lead investigator in the Long Beach Police Department's Accident Investigation Detail, was called to Palmer Court and directed the initial investigation. He walked from one end of the alley to the other, using placards to identify evidence, and Craig Ogata, an identification technician employed by the Long Beach Police Department, took photographs of that evidence. (9 RT 1530, 1565-1567, 1569-1572, 1581; 10 RT 1624, 1634-1638.) The alley was dark at that time. (10 RT 1626-1627, 1689, 1695-1696.)

Wood found the first item of evidence, a small smudge of a reddish-brown liquid which appeared to be blood, approximately 200 or 225 feet southward of 20th Street. (9 RT 1574, 1580.) As Wood proceeded south, he found what appeared to be fresh tire marks; brownish-red liquid; a heavier tire mark; a larger area of the brownish-red substance, and tire marks; a pair of black shoes; a continuation of tire marks going from north to south;

another large area of reddish-brown liquid, which appeared to be fresh, and a reddish-brown substance over tire marks; a dark blue shirt; and, a belt buckle and a portion of a belt. (9 RT 1575-1580.) Wood observed that Armenta's body came to rest approximately 334 or 335 feet south of 20th Street.[7] (9 RT 1580-1581.) There, he found the largest and most concentrated area of the brownish-red liquid. He found no other brownish-red liquid south of that location. (9 RT 1581.)

During his examination of the crime scene, Wood identified a location where he found a larger area of the brownish-red substance and a heavy rubber residue. He opined that something, perhaps a body, may have gotten stuck under a tire, causing it to slide and leave the rubber residue. (9 RT 1576.) Wood opined that the vehicle was traveling southbound when it struck Armenta because the first signs of what he believed was blood were located north of the area where Armenta's body came to rest. (9 RT 1585-1586.)

Approximately 150 or 160 feet south of the location where Armenta's body came to rest, Wood found tire marks going from the alley into a parking space. Because there was a slight mist, Wood was able to see that the vehicle had traveled southbound, turned into the parking stall, then backed out and headed north. (9 RT 1582-1584, 1588.)

6. Forensic Evidence

On March 7, 2002, Sergeant Wood briefly examined the Infiniti at

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[7] When Wood arrived at the hospital, he observed that Armenta was not wearing shoes or a shirt. (9 RT 1577, 1579.) Moreover, the shirt found at the crime scene appeared to match Armenta's pants in material and color, in the manner of a mechanic's uniform. (9 RT 1579.)

the location where appellant was stopped by the police. (9 RT 1568, 1589.) Later that morning, around 10 a.m., Wood inspected it more thoroughly at a tow yard. (9 RT 1589.)

Wood inspected the Infiniti's undercarriage and observed various scrape marks, brush marks, damage to the oil pan, and a red liquid substance.[8] Wood opined that the oil pan was damaged because it had struck something, and that the brush marks had been caused by the vehicle dragging something along the pavement. (9 RT 1590, 1594-1595.) The red liquid on the undercarriage was fresh. (10 RT 1629.) The denting and brush marks also appeared to be fresh, as dust, dirt, oil and grease were wiped clean from the undercarriage. (10 RT 1629-1630.) There were no markings on the bumper or hood, and the grill was undamaged. (9 RT 1599.) However, Wood determined that other damage to the car – i.e., the windshield was cracked, the front bumper and hood were damaged, a headlight was displaced, the left indicator light appeared to be broken, and there were scratch marks on the left fender – predated the incident. (9 RT 1590-1591, 1599; 10 RT 1628-1629.)

Wood opined that Armenta was lying flat on the ground when he was struck, based on his injuries and the damage visible on the Infiniti. (9 RT 1598-1599.) Based on the damage to the vehicle, the nature of Armenta's injuries, and other evidence at the scene, Wood estimated that the vehicle was traveling at a speed of 30 to 35 miles per hour when it struck Armenta, and that Armenta was struck once. He characterized the impact as a "high speed rollover." (9 RT 1600-1603; 10 RT 1621-1623,

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[8] Wood initially thought the reddish substance around the oil pan was blood, but later discovered it was a fluid that had leaked through a broken seal. (9 RT 1595.)

1625-1627, 1632.)

At the time Wood was handling the case, he was investigating it as a standard hit-and-run of a pedestrian by a possibly intoxicated driver. However, after it was deemed a murder case, it was handed to the Homicide Detail. (10 RT 1631, 1633.) For that reason, he did not read the coroner's report or see any reports indicating whether there were multiple rollovers. (10 RT 1630-1631.)

Identification technician Ogata took photographs of the car and collected samples of red stains from the bottom of the vehicle. (9 RT 1589-1590; 10 RT 1639-1641.) He then took the evidence samples to the crime lab, where he dried and packaged them, and placed them in the property section to be frozen. (10 RT 1640-1641.)

On March 11, 2002, Jeffrey Gutstadt, a physician specialist medical examiner at the Los Angeles County Department of Coroner, performed the autopsy on Armenta. (11 RT 1934-1935, 1972.) He determined that the cause of death was multiple traumatic injuries, i.e., a combination of multiple injuries to both the external surface of the body and to internal organs, which caused a loss of blood into the chest cavity and led to the loss of vital functions and death. (11 RT 1934-1936, 1962, 1975, 1977-1978.)

According to Dr. Gutstadt, Armenta's injuries would not cause immediate death. Instead, a person with those injuries could survive approximately five to forty minutes, depending on how long it takes to lose blood from circulation. It is possible that Armenta could have crawled, staggered and attempted to stand up despite his injuries. (11 RT 1962, 1978.) Dr. Gutstadt estimated that he had performed 600 or 700 autopsies of individuals who had been hit by vehicles, and opined that Armenta's injuries were quite extensive compared with many other traffic fatalities he

had seen. (11 RT 1965; see also 11 RT 1953.)

Armenta's hyoid bone was fractured, which can be consistent with strangulation. There were hemorrhages in the sclera, a very thin covering of the eye, indicating a large amount of pressure in the area of the eye. Such hemorrhages also can be consistent with strangulation. (11 RT 1963-1964, 1974.) However, Dr. Gutstadt could not conclusively determine what caused the breakage. (11 RT 1974-1975.)

Armenta's body was screened for alcohol and major illicit drug classes. The only positive result was for alcohol; his blood-alcohol level was roughly 0.16. (11 RT 1964, 1972-1973.)

Based on Armenta's injuries, Dr. Gutstadt concluded that Armenta was probably run over more than once, but he did not know how many times he had been run over. Moreover, certain abrasions on Armenta's body indicated that he could have tumbled and been scraped along a surface for 20 feet or so, but Dr. Gutstadt did not know whether Armenta had been dragged for some distance. (11 RT 1965-1966, 1976-1977, 1979-1981.)

Approximately two days after the crime, Armenta's employer, Miguel Aranda, found his Honda parked on Colon Street. Aranda did not know at that time that the car had been involved in a crime. (11 RT 1925, 1931.) As Aranda drove the Honda back to his shop, he discovered the gas pressure was too low. (11 RT 1926-1927.) He had an employee replace the gas pump, which required taking out the seat on the lower side. A broken seal was also fixed. (11 RT 1928, 1931-1932.) Aranda did not tell the police anything about the body or undercarriage of the vehicle. (11 RT 1928-1929, 1932.)

On March 18, 2002, Detective Richard Birdsall of the Long Beach Police Department was assigned to investigate Armenta's death. (11 RT

1982.) After learning that Aranda's Honda Accord may have been involved in the incident, Birdsall recovered it and had it examined for trace evidence. (11 RT 1983-1985.) The Honda was very clean and no such evidence was found. According to Birdsall, the undercarriage was free of the debris one would expect to find on a 1986 automobile that had been driven more than 80,000 miles. (11 RT 1985-1987.)

Detective Birdsall learned that appellant lived at 1211 O Street in Wilmington, and that Tinajero lived at 1105 O Street. Appellant's home is about three and a half miles from Palmer Court. According to Birdsall, it took a little over seven minutes to drive from appellant's residence to 1933 Palmer Court. 1419 E. Colon Street, where Aranda said he recovered his Honda, was about two-tenths of a mile from appellant's house.

Armenta worked at 530 West Pacific Coast Highway, about five blocks from where he and appellant first met (i.e., the intersection of Pacific Coast Highway and Avalon), and about a mile from appellant's house. Palmer Court is about two and a quarter miles from 10th and Walnut, where Patricia Armenta indicated she was living. Birdsall estimated that it would take about five or six minutes to drive that distance, but he acknowledged that he had not driven that route. (11 RT 1989-1992, 1994-1995.)

On April 2, 2004, Kenneth Howard, a criminalist with the Los Angeles County Sheriff's Department's forensic biology section, began screening the following evidence, which had been taken from the undercarriage of Armenta's Infiniti, for the presence of human blood: a swab with a reddish-brown stain, labeled "valence" (Item 1); a swab with a reddish-brown substance labeled "left outer floor pan" (Item 2); and, a control sample from Rafael Sanchez (Armenta) (Item 3). The stains on Items 1 and 2 appeared to be blood, and both tested positive for blood in a

chemical presumptive test. Howard issued a report on May 20, 2004. (10 RT 1712-1717, 1724-1725, 1729-1730; see also 11 RT 1988 [testimony of Birdsall that, in April 2004, he submitted the swabs taken by identification technician Ogata from the undercarriage of the Infiniti to the Los Angeles County Sheriff's Department for analysis].)

On November 22, 2004, Howard was asked to perform a DNA analysis. Because he had not yet been trained to perform a complete DNA analysis, he performed the first part only – i.e., the extraction and quantification of DNA in Item 2 (a blood stain on the floor pan) and a reference sample. The DNA was later analyzed by Senior Criminalist Flynn Lamas, who was able to develop a profile from Item 2, a bloodstain from the Infiniti, and he also analyzed the reference sample from Rafael Sanchez. The two profiles matched. (10 RT 1717-1725, 1727-1735.)

B. The Murder of Raul Tinajero

1. Evidence Regarding the Crime and Subsequent Investigation

a. Testimony of Raul Tinajero's Cellmates and Related Witnesses

On April 20, 2004, Raul Tinajero was housed in the 2200 module, Denver Row, cell 13, along with three white inmates, Anthony Sloan, Matthew Good and Shad Davies;[9] a Filipino inmate, Gregory Palacol; and a heavyset Mexican inmate. The cell was located at the end of the row, furthest from the gate where the deputy who watched over the row was

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[9] Approximately two days earlier, Sloan, Good and Davies had been transferred to the 2200 module from a Hispanic gang module in which white inmates served as trusties. They were transferred following an altercation among the trusties, including Sloan. (13 RT 2203-2205, 2215-2216, 2222-2223, 2226-2229, 2307-2309, 2318-2319, 2329-2331, 2337.)

stationed.[10] (12 RT 2126-2127, 2131, 2137; 13 RT 2215, 2280, 2291-2292, 2348; 14 RT 2383-2384, 2386, 2406.)

(i) Anthony Sloan

Anthony Sloan testified that on April 20, 2004, three inmates left the cell: the heavyset Mexican, who went to court; the older "Mexican,"[11] who went to a parole hearing; and, Tinajero, who went to pill call. (12 RT 2126-2127.) Tinajero returned after approximately 15 to 20 minutes. (12 RT 2127.)

Several hours later, the inmate who had attended a parole hearing returned, accompanied by appellant. (12 RT 2128.) After they entered the cell, the door was locked. (12 RT 2155.) At that time, Sloan, Tinajero, Davies, Good, and Palacol, as well as appellant, were inside the cell. (12 RT 2145.) Tinajero was asleep on the top right bunk. (12 RT 2129, 2133.)

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[10] Testimony at the trial described the general layout of the Los Angeles County Men's Jail. On one side, there are two levels, the 2000 and 3000 floors; on the other side are three levels, the 4000, 5000 and 9000 floors. Each floor is divided into separate modules. At the lower end of the 2000 floor are the 2200 and 2400 modules, and across the way are the 2100 and 2300 modules. At the higher end of the floor are the 2600 and 2800 modules, and the 2500 and 2700 modules. (12 RT 2009, 2011-2012.) The 2200 module and the 2400 module each has a lower level with two rows, the "A" (or "Able") Row and the "B" (or "Baker") Row; the two rows are separated by a wall. Each module also has an upper level with two rows, the "C" (or "Charlie") Row and the "D" (or "Denver") Row, similarly separated by a wall. (12 RT 2012-2014.) There are 13 cells on each row, and the cells on each row are numbered 1 through 13. (12 RT 2013, 2019.) Cells on the lower rows are supposed to have six inmates per cell, and the upper rows are supposed to have four inmates per cell. In April 2004, it was common to have more than four people in each of the cells. (12 RT 2014-2015.)

[11] A review of the record shows that Sloan was referring to Palacol. (12 RT 2126-2128, 2145; 14 RT 2383, 2385, 2501.)

Sloan recognized appellant for several reasons: (1) they had been housed in the same module in 2001; (2) appellant had a gap between his teeth; and, (3), earlier that month, they had both been transferred to the courthouse in Long Beach on the county bus.[12] At the courthouse, moreover, Sloan overheard appellant say that his "crimee" was testifying, and figured it was more than likely there was a bounty on appellant's "crimee;" at the time he heard appellant's comment, Sloan did not know he was talking about Tinajero.[13] (12 RT 2173-2174; 13 RT 2201-2203, 2226.)

After appellant entered the cell, he acknowledged Sloan, indicating he recognized him from the Long Beach courthouse. (12 RT 2173-2174.) Sloan did not recall if appellant indicated that he recalled living on the 2000 floor at the same time Sloan did.[14] (12 RT 2174.) After Sloan asked what he was doing, appellant replied that Raul was his "crimee" and had testified in appellant's case. (12 RT 2129; 13 RT 2205.)

Within 10 or 15 minutes after entering the cell, appellant placed Tinajero in a headlock and pulled him off the bed. Appellant sat on the toilet, still holding Tinajero in a headlock, and began choking him.

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[12] The trial court took judicial notice that appellant's prior trial was held at the Long Beach courthouse. (12 RT 2173.) According to Deputy Sheriff John De Vries, who reviewed Sloan's movement information, Sloan's only court appearance in Long Beach was on April 7, 2004. (17 RT 3009-3010.)

[13] The trial court took judicial notice that Tinajero testified in the previous matter on April 7, 2004. (17 RT 3034.)

[14] According to Sloan, if he had told detectives that appellant had mentioned that he believed he and Sloan had both lived in the 2000 floor in the past, that would have been a correct statement. (12 RT 2175.)

Tinajero struggled unsuccessfully to break free. He did not say anything, but was just gasping for air. After Tinajero stopped moving, appellant stuck his head in the toilet for a few minutes. Appellant then threw Tinajero's body on the floor, and, after telling the other inmates to look towards the wall, began stomping on Tinajero's chest. Sloan heard a loud pop or snap. (12 RT 2132-2137, 2173; 13 RT 2193, 2206-2207.) At some point, Sloan turned to see what appellant was doing. (12 RT 2193-2194.) Finally, appellant tied something around Tinajero's neck, placed him on a mattress, threw a sheet over him, and put him underneath Sloan's bunk. (12 RT 2137-2138, 2145.) After appellant killed Tinajero, he did not force Sloan to continue facing the wall. Sloan was able to get a good look at him. (13 RT 2194.)

Appellant cleaned up the cell with towels which had been placed around the toilet, which was leaking. (12 RT 2138-2139.) He threw the towels in a trash bag which hung from the cell bars. (12 RT 2139-2140.) No jail personnel came by during the time he assaulted and killed Tinajero. (12 RT 2151.)

Appellant then made approximately three to seven telephone calls, using a telephone inside the cell. Sloan believed appellant was trying to call his sister. Sloan also gathered that appellant was having a three-way conversation because he blew into the phone, a method used to prevent the telephone from automatically ending the call when the other party presses the call-waiting button. Appellant told the other party, "Tell them it's a touch down." (12 RT 2138-2139, 2141-2143.) After appellant finished making calls, he sent a "kite" down the row, that is, he wrote on a piece of paper and had a trusty forward it. (12 RT 2143-2145; 13 RT 2217.)

Appellant said that he was a "crimee" on a murder case, that

Tinajero had testified against him, that there had been a mistrial and he was going back to court, and that he had a better chance if Tinajero were not there to testify. Appellant also said that his attorney had heart problems or a medical condition.[15] (12 RT 2145-2147.) Sloan could not recall whether he told the police that appellant said that he was going back to court on May 3, 2004. However, Sloan agreed that if the report regarding his statement to police indicates that he did so, then appellant must have done so. (12 RT 2147.) Appellant did not show any remorse. (12 RT 2147.)

Appellant wrote the names and booking numbers of the other inmates in a telephone book. (12 RT 2148, 2150.) When appellant took Sloan's information, he said, "You know what time it is." (12 RT 2150.) Sloan took that to mean that if he were to say anything, he would end up dead. (12 RT 2150-2151.) Sloan believed him and was scared. (12 RT 2151.)

At some point, a deputy came to the cell for clothing exchange. Sloan did not tell the deputy about what had happened because he was afraid and in shock. No other jail personnel came by during the time appellant was in the cell. (12 RT 2151-2153; 13 RT 2208-2210, 2222, 2234.) At another point, a trusty served lunch. (21 RT 2153.) Sloan did not recall whether they were fed lunch before or after the homicide. (13 RT 2208.)

At least two hours after appellant killed Tinajero, Davies was called to be transferred to Wayside, another jail facility. (12 RT 2145, 2154, 2172-2173, 2195; see also 17 RT 3002-3003 [testimony regarding transfer

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[15] The trial court took judicial notice that, due to his then-attorney's medical condition, appellant's first trial ended in a mistrial on April 12, 2004. (12 RT 2146.)

list showing that, at approximately 3:00 p..m., Davies was taken out of his cell for the Wayside call].) The cell door opened, and both Davies and appellant left the cell. (12 RT 2154.) During the next five to fifteen minutes, Sloan and his cellmates discussed what had happened and talked about notifying someone. (12 RT 2171; 13 RT 2208, 2222.) He believed they talked about the incident but did not agree upon anything. (13 RT 2216-2217.)

Sloan then called his mother. He told her what had happened and said he wanted to contact his attorney. He was still upset when he talked to her. (12 RT 2155-2156, 2168, 2170-2172.) He then called his attorney twice. Sloan informed his attorney of what had happened, requesting that he notify somebody and get him out of that cell. (12 RT 2155-2156, 2172.) The inmate who had returned from the parole hearing called his parole agent. (12 RT 2175.)

Sloan acknowledged that, between the four inmates in the cell, they probably could have stopped appellant. However, Sloan did not stop the attack because he feared for his life. He suspected that the others failed to help because they too were fearful. (12 RT 2155-2156; 13 RT 2206-2207, 2216, 2227-2228.) According to Sloan, he never called for help or to notify anyone that Tinajero was dead because he feared for his life. Their cell was the last cell on the tier. If he yelled for help he would be overheard by other inmates on the row, and he feared he would be labeled a snitch. (12 RT 2155-2156; 13 RT 2228, 2233-2234.)

At some point, their cellmate returned from court and the cell door opened. Sloan and the other inmates left the cell, walked to the deputy's cage and notified the guard that there was a "man down" in the cell. The deputy asked them to return to their cell, but they notified him that there

was a "man down" in the cell and said they were not going back. (12 RT 2175-2178; 13 RT 2222.) The deputy went to the cell, returned, and they were placed in separate corners of the day room. (12 RT 2178; 13 RT 2218.)

Sloan was contacted by Detectives Tim Cain and Bob Kenney. He told them he wanted to talk to his attorney first, and they allowed him to do so. (12 RT 2178-2179; see also 16 RT 2872.) The following day, Sloan spoke to his attorney, Andrew Stein, who advised him to tell the truth and cooperate. Stein did not say that he would be able to get a deal for Sloan or that something good would happen because he talked to the detectives. (12 RT 2179.)

That same day, Sloan spoke to Detectives Cain and Kenney. He was still afraid, but told the truth. (12 RT 2179-2180, 2185.) Prior to talking to them, Sloan had not spoken to any law enforcement officers other than answering a few questions in the day room. (13 RT 2216.)

Sloan examined a photographic lineup, and initially said he did not recognize anybody. One of the detectives put the photographs away, but asked him to take one more look. Sloan identified appellant. The detectives had not said or indicated whom they wanted Sloan to pick out, nor had they pressured him to make an identification. According to Sloan, he had not identified appellant initially because when he first looked at the photographs, appellant's hair looked different; on second look he could identify him. (12 RT 2180-2185.) Sloan testified that he had no doubt that he had picked the right person. Sloan recognized the gap between appellant's teeth, and, except for his orange jumpsuit, appellant looked like he did when he entered the cell. (12 RT 2180-2185.)

At the time of Tinajero's murder, Sloan had a kidnaping charge

pending. (13 RT 2125, 2195.) About five months later, Sloan pled guilty to grand theft auto, a disposition negotiated by his attorney. He was sentenced to time served and was released on August 6, 2004. Sloan did not believe that the disposition was a result of his cooperation in this case. The prosecutor in that case never told him that the disposition depended on his truthful testimony in the instant case.[16] (13 RT 2195-2197; 13 RT 2200, 2200, 2220, 2230-2231.) Sloan had written a letter to the judge and District Attorney's office before that, saying he felt that he was in danger. He thought that, since he was going to be labeled a snitch, his life was in danger. According to Sloan, a snitch's life is in danger from basically any other inmate. (12 RT 2200-2201.)

According to Sloan, he had no expectation of financial gain for his testimony. (13 RT 2198.) He also testified that he had filed a lawsuit against the county seeking damages for mental anguish. He did not recall how much he was asking for. The suit was later dismissed. (13 RT 2197, 2219-2220.)

On November 3, 2006, Sloan met with defense counsel and the defense investigator. The prosecutor and two sheriff's investigators were also present. He was told he had a right to refuse to talk to the defense. He refused to talk because he had nothing more to say, having already testified

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[16] Sloan described the circumstances of the crime underlying his conviction as follows: after drinking all day, he was kicked out of the bar; he wanted to get home, saw a car running, jumped into it and began to drive away; after realizing there were kids inside, he put it in neutral and jumped out; the car continued to move until it crashed into something; he was so drunk, he did not know what to do, so he started running back to the bar; and, the car's owner caught him and beat him up. (13 RT 2224-2225, 2235.) Sloan was charged with three counts of kidnaping, charges he had fought for 18 months. (13 RT 2234.)

at the preliminary hearing. (13 RT 2219, 2229.)

Sloan testified that he did not want to be there in the courtroom, and he still feared for his life. Since the day of the murder, he had not spoken to any of the other three people in the cell. He had not read any reports or transcripts of his statements to police or his previous testimony. (13 RT 2198.)

Sloan denied that he had anything to do with the planning or commission of the murder. (13 RT 2231-2232.)

(ii) Andrew Stein

Andrew Stein, an attorney who had represented Sloan in 2002, received a call from Sloan on April 20, 2004 around 3:30 p.m. Sloan, who sounded hysterical and almost in tears, said he was calling from the Los Angeles County Jail. He reported that a man had entered his cell and said to him, "Turn around and don't look what I'm about to do. If you do, I'll do the same thing to you." The man then killed one of his cellmates. (13 RT 2241-2242.) Sloan also told him that he had been locked in the cell with both the body and the killer for a long period of time. (13 RT 2245.)

Stein subsequently found Sloan's module number on the Sheriff's Department website. According to Stein, anyone could determine where an inmate was housed by using that website. He called the jail and, after several attempts, relayed the information. (13 RT 2243-2244, 2253; see also 14 RT 2536-2538 [testimony of Lieutenant Gilbert Aguilar]; 17 RT 3007-3009 [testimony of Deputy Dan De Vries].)

The following day, Stein received another call from Sloan, who wanted to know whether he should talk to the detectives. Stein advised him to tell them the truth. (13 RT 2245-2246, 2252.) According to Stein, he never indicated that Sloan was going to receive any deal or consideration,

and never called the detectives for his benefit. (13 RT 2245-2247.) Rather, he called the bailiff in Long Beach because he knew that both Sloan and appellant had cases at the Long Beach courthouse, and he wanted to ensure that they were not placed on the same bus. (13 RT 2247.)

Stein subsequently resolved Sloan's case. Specifically, Sloan pled guilty to a count of either grand theft auto or joyriding. (13 RT 2247, 2250.) According to Stein, the plea deal was not based on the fact Sloan cooperated with the police, but because he pled guilty to what the facts warranted. Stein explained that a very intoxicated Sloan had left an establishment he was too young to patronize, then came across a car which a drug dealer had left running with three teenagers inside. After Sloan's codefendant told him to steal the car, Sloan jumped into the car, drove it approximately 100 feet and crashed into a pole. The drug dealer beat him up, then the police arrived and arrested Sloan for attempting to steal the car. (13 RT 2248-2250.) Based on his experience as a defense attorney and his reading of the facts of the case, Stein believed the disposition to be fair. (13 RT 2249.)

During the 18 months the case had been pending, the district attorney's office had made no effort to reduce it to a grant theft person. Stein had announced ready for trial and the case was dismissed. After a long period of time, the case was re-filed. Sloan was charged with three counts of kidnaping and with carjacking for kidnaping. Stein did not know the potential maximum sentence on those counts, but he may have faced a life sentence on one of them. Sometime around June 2004, shortly before the parties reached the disposition, the district attorney's office indicated its willingness to work out a disposition of grand theft person after the prosecutor reviewed the preliminary hearing transcript and police report.

(13 RT 2254-2257.)

During the plea hearing, the prosecutor stated that he would try to talk to Detective Kenney about Sloan's safety and housing location. Stein did not believe that the judge conferred ex parte with Detective Kenney. (13 RT 2251-2252.)

(iii) Valerie Gorman

Sloan's mother, Valerie Gorman, testified that he called her on April 20, 2004. He sounded very determined and nervous. He repeatedly said he needed his attorney, and kept repeating the phrase, "One is here and one is gone." He also said, "Mom, I need Andy here now. One is gone and one is under the bunk." After realizing that there possibly was a dead body in the cell, she called Stein. (13 RT 2259-2262.)

(iv) Matthew Good

Matthew Good testified that on the morning of April 20, 2004, two of his cellmates, both of them Hispanic, left the cell; one went to court, the other had a parole hearing.[17] (13 RT 2280-2281, 2330.) The latter returned to the cell around 9:30 or 10:00 a.m., accompanied by appellant.[18] (13 RT 2281, 2283, 2323.) Appellant said, "Face the walls and just mind your own business." (13 RT 2288.) He was carrying a green bag. (13 RT 2331.)

The returning cellmate sat on a bunk, and appellant sat on the toilet. (13 RT 2282-2284.) At that time, one of Good's cellmates had been lying on the floor, while Good and the other two cellmates were in their bunks. (13 RT 2283-2284.)

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[17] One of those inmates was Gregory Palacol. (See 14 RT 2385.)

[18] Good acknowledged that he had no way to tell the time. (13 RT 2281.)

Appellant took a pair of gloves from his bag and put them on. (13 RT 2331.) After about 40 seconds, he grabbed Tinajero, who was asleep in the top right bunk.[19] Appellant placed Tinajero in a headlock and began choking him, pulling him off the bunk as he did so. Tinajero tried unsuccessfully to free himself, and ceased struggling when he passed out. (13 RT 2284-2285, 2287, 2324.)

Appellant placed Tinajero's head in the toilet, which he flushed until it flooded with water. Tinajero's head was in the toilet for about a minute, and he did not move during that time. (13 RT 2285-2286, 2325.)

Next, appellant knocked Tinajero from the toilet onto the concrete floor, stood at the edge of the bed, and jumped on to his chest. Good heard "everything" crack in Tinajero's upper chest. (13 RT 2285-2286.) Appellant put Tinajero's body on a mat, placed something around his neck, and slid him underneath Good's bunk. (13 RT 2286-2288, 2316, 2324.) Appellant had not said anything to Tinajero. (13 RT 2290.)

No one said anything during the attack. (13 RT 2324.) Good did not try to stop it, nor did he call for the deputies. The killer was still inside the cell. In addition, Good feared that, if the attack had been ordered by someone higher up in the jail hierarchy, he would be in trouble if he interceded. If he yelled, everyone on the row would see it as snitching. (13 RT 2296-2300, 2304, 2310, 2318, 2322.) Usually, inmates are killed for what others think is good cause, e.g., snitching. (13 RT 2310-2311.)

After putting Tinajero under the bunk, appellant made at least two telephone calls. He spoke in Spanish, so Good did not "hear" the

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[19] Good did not know Tinajero's name at the time of the incident. (13 RT 2284.)

conversations. (13 RT 2289-2290.) Appellant used a towel to clean up inside the cell, wiping bars and things he had touched. He also went through Tinajero's belongings and flushed paperwork and the gloves down the toilet. (13 RT 2289, 2326, 2331.)

Although appellant had told them not to look, it was difficult not to do so, and Good periodically watched what was happening. (13 RT 2288.) Appellant never said why he killed Tinajero, but he told the cellmate who had returned from a parole hearing that it would help his case, and that Tinajero was going to testify against him for the second time. Appellant also said that they had been caught in a car and that the guy who owned it was dead. (13 RT 2290-2291.) Prior to that, Good knew nothing about Tinajero. (13 RT 2291-2292.)

Appellant copied their names and booking numbers from their wristbands into a jail-issued phone book. Appellant did not tell them not to talk about what had happened, but the fact he took down their names and booking numbers let them know he would be able to find them if they said anything. (13 RT 2301-2302, 2314.)

Everyone sat for approximately three to four hours, until jail personnel called the Wayside line – i.e., called for inmates being transferred to the jail's Wayside facility – and the cell door opened. (13 RT 2287, 2289-2290; see also 12 RT 2154.) Someone, perhaps Shad Davies, walked out of the cell, and appellant followed behind. (13 RT 2287, 2293.) Appellant left in a casual manner, as though nothing had happened. (13 RT 2338.)

At that point, Good was in the cell with two cellmates and Tinajero's body. (13 RT 2294.) Good tried unsuccessfully to call family members and friends, and his cellmates also made telephone calls. (13 RT 2294-2295.)

Good and his cellmates discussed how and what they were going to tell the deputies. (13 RT 2294-2295, 2322.) According to Good, the others tried to come up with an elaborate story, but he told them to keep it simple – the guy came in and told them to face the wall – and that is what they did. (13 RT 2323, 2332.) Good's story was basically true except for his statement that he had faced the wall the entire time and that he had not seen the person. (13 RT 2294-2295.)

When the gate opened, Good and his cellmates grabbed their belongings and left the cell. An officer told them to go back to their cell, and they told him there was a man down. The officer left to look at the cell. Good and his two cellmates were then separated and questioned by Detectives Cain and Kenney. (13 RT 2296, 2300, 2325.) As Good was walking to an interview room to be questioned, he was unnerved because appellant was walking in the opposite direction. (13 RT 2303.)

Good admitted that he lied when he told the detectives that he did not see anything. (13 RT 2300-2302, 2318, 2332-2333.) He wanted to be left alone for his safety. (13 RT 2333.) Although he recognized appellant in a photographic line-up, he said he could not identify anyone. (13 RT 2302-2303, 2305-2306.) Nevertheless, he tried to provide clues about how to investigate the case, telling them to check phone records and to see why Tinajero was there. Good knew Tinajero was testifying, so he thought they could follow that lead. (13 RT 2314.)

Following the interviews, Good and his cellmates were placed back in the same cell for approximately 20 or 30 minutes. During that time, they shared what they had told the detectives. A deputy arrived and separated them. (13 RT 2339.)

According to Good, an order for a "hit" can come from "a lot" of

places, but it goes to the gang module to be carried out. (13 RT 2319.) Hits are always carried out in a neutral zone, whereas Tinajero was killed in Good's "house." (13 RT 2322.) When an order is carried down to the gang module, it is carried out. However, usually the gang members in the module do not carry it out, but find somebody else to do it. (13 RT 2334-2335.)

According to Good, trusties in the gang module were usually white because they were not affiliated with the gangs, and therefore were not necessarily required to follow their orders. (13 RT 2307-2308-2309, 2315.) Although a trusty may do things for gang members he is not supposed to do, e.g., deliver extra lunches or the fruit and bags used to cook food and make wine, Good would not conduct a hit for the gangs. He did not know appellant, and had not known Tinajero before being placed in that cell. According to Good, he would be getting out of prison in about a year, and had no reason to risk spending the rest of his life in prison by killing Tinajero. (13 RT 2315-2316, 2328, 2330-2331, 2335.)

Good testified that he had no doubt that appellant was the person who killed Tinajero. (13 RT 2313.) He claimed that he was now telling what had happened to clear his conscience. (13 RT 2306, 2313.) Good did not discuss the incident with anyone involved until about a week before he testified. (13 RT 2306-2307, 2317, 2329.)

Good acknowledged that in 2001, he was convicted of taking a vehicle without the owner's permission; in 2002, he was convicted for receiving stolen property; in 2003, he was convicted of misdemeanor grand theft; at the time of Tinajero's murder, he was in jail for possession of drugs for sales; in 2004, he was again convicted for receiving stolen property. (13 RT 2313, 2321.) After he was released from jail, he was again arrested,

apparently for a robbery, but he claimed the incident involved a fight. He did not reveal that he had witnessed a murder, nor did he ask for special consideration. Nevertheless, when he went to court he learned that the District Attorney had not filed any charges. He did serve time in the Los Angeles County Jail for probation violation. (13 RT 2320-2321, 2336.)

Good further acknowledged that he could not name anyone who could testify that, up through 2004, he was honest or trustworthy. Nevertheless, Good claimed that he was telling the truth. He had been sober for 16 months, he saw things more clearly, and the incident had been weighing heavily on his conscience. (13 RT 2321, 2329, 2334.) He had not received any special consideration or benefit as a result of his cooperation. (13 RT 2310.)

Good testified that, for about a year after the incident, he had trouble sleeping, and that he was very nervous, always on guard. He saw a psychiatrist a couple of times in prison because he was having a hard time sleeping and eating, and a hard time dealing with his thoughts of the incident. (13 RT 2306, 2312, 2329, 2333, 2337.) He had filed a lawsuit in connection with the incident, but did not know the current status of the suit. (13 RT 2312, 2317-2318, 2327.) He never talked to any of his cellmates about filing a lawsuit, and, after the incident, he never had any contact with any of the people in the cell. (13 RT 2327, 2335.) He had not read any reports or transcripts of any statements he had made to the police. (13 RT 2335.)

(v) Gregory Palacol

At around 7:00 a.m., another of Tinajero's cellmates, Gregory Palacol, left for a parole screening. Another cellmate, a Mexican, had gone to court earlier that morning. (14 RT 2385, 2492.)

Palacol was gone for about two hours. (14 RT 2385.) When he returned to the 2200 module, he was instructed to wait in a large room, known as the "laundry room," used as a waiting room for inmates leaving from or returning to the module. Two or three other inmates, including appellant, were already there. (14 RT 2388-2390, 2492; see also 16 RT 2753-2754 [testimony of Lieutenant Salvador Martinez].) Appellant asked Palacol where he was being housed, and Palacol replied that he was in Denver Row, cell 13. Appellant asked if someone named Smoky from West Side was also housed there, and Palacol replied that he thought so. (14 RT 2390-2391.) After their conversation ended, appellant pocketed a piece of string which he had removed from a cross he had picked up from the floor. (14 RT 2391-2392, 2494-2495, 2505.)

After about 30 or 45 minutes, Palacol was sent back to his cell. Appellant followed Palacol along the tier and into his cell. Palacol looked at appellant and said, "Oh, a new cellmate, huh? A new cellie." (14 RT 2392-2393, 2493-2494.)

Palacol's account of the crime was essentially consistent with that of Sloan and Good (14 RT 2383-2492, 2495-2511), except that it differed or was more detailed in the following respects:

Appellant removed his blue shirt before pulling Tinajero off the bunk. (14 RT 2395-2396, 2458.) He held Tinajero in a headlock for 10 or 15 minutes. (14 RT 2398.) After removing Tinajero's head from the toilet, appellant "bounc[ed]" on his neck. (14 RT 2399-2401.) While appellant was attacking Tinajero, he told Palacol to turn around and "mind [his] own fucking business." Palacol turned around, but continued to look back and see what appellant was doing. (14 RT 2440.)

The string appellant tied around Tinajero's neck was the one he had

found in the laundry room. (14 RT 2404, 2495.)

At the time of the attack, Tinajero was wearing boxer shorts and a t-shirt. Following the attack, appellant dressed Tinajero in his "county blues," then placed him on a mat, covered his body, and slid him under a bunk. (14 RT 2401-2403.)

Appellant said that Smoky had been brought down from state prison to testify against him in an earlier case. He also said that he had choked someone, threw him out, ran him over and taken his car. Appellant said he killed him because it would be better for his case. (14 RT 2406-2407, 2447-2448, 2491, 2505.)

Palacol did not get involved during the attack because he was afraid. In jail, one does not get involved in other's people's business. To do so puts one's life in danger. (14 RT 2408-2409, 2425-2426, 2456.)

After the killing, they were locked inside the cell with appellant and Tinajero's body for about five hours. (14 RT 2410, 2424.) Palacol was "kind of freaked out," but appellant's demeanor was as if nothing happened. (14 RT 2410, 2424.) They did not alert the trusty who brought lunch or the deputy who handled the laundry exchange. No other deputies came by during the time they were in the cell. (14 RT 2408-2409, 2425-2426, 2456.)

After appellant left the cell, Palacol and his cellmates again were locked inside, "freaking out." They asked each other what to do. (14 RT 2412-2413, 2416.) However, he denied that they came up with a story to tell the deputies. (14 RT 2449, 2458-2459.)

Palacol tried to speak with his parole officer, but was unable to reach him. He told the officer of the day that something had happened at the county jail, but said he could not explain it on the phone. He said "187" but the phone cut off. (14 RT 2413-2414.) One of his cellmates called his

lawyer. (14 RT 2416.)

A couple of hours after Palacol and his cellmates left the cell, he was interviewed by Detectives Cain and Kenney. (14 RT 2417.) Palacol testified that he tried to be truthful during the interview, but he acknowledged that he withheld some information until he decided whether to fully disclose it. (14 RT 2503-2504, 2509-2510.) Palacol was shown a photograph of appellant at that time. (14 RT 2454.)

At some point he decided to tell the detectives what he knew because it was the right thing to do. (14 RT 2504, 2508.) During a second interview, Palacol viewed a photographic lineup and identified appellant. (14 RT 2418-2421, 2423-2424, 2454.) The deputy told Palacol that they had been having trouble with appellant, catching him with shanks. (14 RT 2422-2424.)

Palacol denied that he assisted or participated in the murder. (14 RT 2441.) He would not carry out an order for the Southsiders. He would not risk spending his life in prison by killing somebody he did not know (Tinajero) on behalf of someone else he did not know (appellant). (14 RT 2505-2506, 2508.) He did not tell any of his cellmates that appellant had asked for his assistance before he went in the cell. (14 RT 2496.) He did not tell appellant that he could get him in and out of the cell, nor did he discuss "Smoky" (Tinajero) in the laundry room before returning to his cell. Palacol did not know anything was going to happen to Tinajero before appellant entered the cell. (14 RT 2495.)

Palacol expressed concern that his testimony placed him in danger both in jail and on the streets because he would be considered a snitch. (14 RT 2425-2426, 2428.) The first time he was in county jail and the first time he was in state prison, he sometimes "hung out" with Southsiders, i.e.,

Mexicans from Southern California. (14 RT 2453-2454, 2500-2501.) If he had carried out a hit, he would not need to be in protective custody, as he was now. Even if one never talks about having testified against someone, people have ways of finding out. (14 RT 2501-2503, 2508.)

Sometime in late 2004 or early 2005, Palacol filed a lawsuit in connection with the incident. It was his own idea to do so, and he did not discuss the notion with his cellmates. The lawsuit was dropped, but he did not know why. Palacol claimed that he had had no expectation of financial gain. Instead, he wanted to be compensated because he was unable to work or sleep and was "losing it mentally" because of what he had seen. (14 RT 2428, 2456, 2508, 2510-2511.)

Palacol was interviewed by defense counsel on November 3, 2006, in the presence of the prosecutor and detectives. (14 RT 2441.) During the interview, Palacol said he knew of only one person who could testify about whether he was honest and truthful in 2003 and 2004, i.e., his son's mother. (14 RT 2443.)

On the day of the crime, Palacol was in the jail for violating parole following his May 2003 conviction for possession for sale of a controlled substance. Some time after the murder, he was charged with possession of "crystal meth." He was sentenced to an in-house drug treatment program pursuant to Proposition 36. He received that disposition because he was eligible for it, not because he had cooperated with the authorities. He received no special consideration for his cooperation in this case. (14 RT 2383, 2426-2428, 2442, 2505-2506.) However, he failed to complete the program, opting to go to prison rather than undergo the in-house treatment. (14 RT 2442-2443.) Palacol acknowledged that in December 2000 he been convicted for spousal battery. (14 RT 2384.)

(vi) Dennis Wirt

On April 20, 2004, Dennis Wirt, a supervising parole agent, received a telephone call from Gregory Palacol. Palacol, who was very frightened, demanded to speak with his parole agent, Myron Hester. He said it was an emergency, explaining that someone was dead in his cell and that he needed Hester to interview him. (13 RT 2269-2275.) Wirt told him that Hester was unavailable that day. (13 RT 2271.)

After Wirt hung up, he contacted the watch commander at the sheriff's department and informed him there was a potential problem in the cell. He also gave them Palacol's name and booking number. (13 RT 2275-2276, 2278.) Wirt then informed Hester of Palacol's call and that he had contacted the watch commander. (13 RT 2277.)

b. Evidence Regarding Investigation of the Crime

At 2:15 p.m. on the day of the crime, Deputy Sheriff Alexander Khasaempanth conducted a laundry exchange in the 2200 module. (12 RT 2007-2009, 2015-2018, 2022-2024.) Khasaempanth did not notice anything unusual when he reached Tinajero's cell. (12 RT 2031.) Khasaempanth's shift ended at 8:30 p.m., after which he learned that there had been a dead body in the cell during the laundry exchange. (12 RT 2025.)

According to Khasaempanth, floor sleepers (i.e., inmates who do not have beds because the bunks are already occupied) were common, so it was not out of the ordinary for an inmate to be on the floor, covered with a blanket. (12 RT 2025-2026.) It was not his responsibility to check on inmates and he did not pay much attention to those with whom he came into contact. (12 RT 2026-2027.) Inmates commonly hung trash bags outside their cells, and inmate workers collected the trash hourly. (12 RT 2028-

2029.)

At around 3:00 p.m. on April 20, 2004, Deputy Salvador Martinez contacted appellant in the 2200 module "laundry room," at the request of Deputy Otoniel Avila. Appellant had been sent there after Avila found him trying to walk or sneak out of the "Denver Row," located in the 2200 module. (16 RT 2743-2746, 2749, 2752; see also 13 RT 2349-2351, 2353-2357, 2363-2365 [testimony of Deputy Avila].)

Martinez searched appellant for contraband but found none. (16 RT 2746.) He did not notice anything unusual, such as blood or scratches, on appellant or his apparel. (16 RT 2750-2751.) Appellant said that he lived on the 3000 floor, which is located directly above the 2000 floor, and that he had been visiting a friend or cousin on the 2000 floor. (16 RT 2747, 2750.) Martinez escorted appellant to an escalator landing and sent him back upstairs to the 3000 floor. At that point, he left appellant on his own to go to the proper place. (16 RT 2746-2747.)

It was common to have "roamers" in the jail, and roaming was considered a minor infraction, so Martinez chose not to write a report concerning the matter. At the time he encountered appellant, Martinez was unaware that there had been a murder in 2200. But once he found about the murder, the event seemed more significant. (16 RT 2751-2752.) The following day, Detectives Cain and Kenney showed a photo lineup to Martinez, who identified appellant as the person who had tried to walk off the row. (16 RT 2747-2748.)

Deputy Sheriff Otoniel Avila testified that on April 20, 2004, he was stationed in a cage in front of the gate to module 2200. (13 RT 2341-2343.) At approximately 4:20 p.m., he opened cell 13 on Denver Row to allow an inmate named Ramon, who was returning from court, to enter the cell.

Before he made it into the cell, Sloan, Good, Palacol, as well as Ramon, ran pretty quickly down the tier towards Avila's cage. (13 RT 2344-2345, 2366-2367.) They were loudly yelling "Man down," which usually indicates somebody is injured. (13 RT 2345-2346.)

Avila sent the four inmates into a day room, where they were sent to separate corners and admonished not to speak to each other. A deputy monitored them. (13 RT 2346-2347.)

Sergeant Allyn Martin, accompanied by Lieutenant Gil Aguilar, Deputy Avila, and Senior Deputy Florence, subsequently responded to Tinajero's cell. (14 RT 2512-2513; 14 RT 2536-2540.) There, they discovered his body, which was lying on a mat and covered by a blanket, underneath one of the lower bunks. A sheet had been draped over the bunk. (13 RT 2346-2347; 14 RT 2513-2520, 2540.)

Tinajero had a ligature around his neck and appeared to be lifeless. (14 RT 2519-2520.) After Avila found that he had no pulse and said he was cold to the touch, Martin pronounced him dead. (14 RT 2519-2521.)

Martin instructed Avila to exit the cell, had the entire row secured, and started a major incident log. He also posted a deputy at the entrance to the row, instructing the deputy not to permit anyone other than Homicide investigators to enter. (14 RT 2520.)

The discovery of Tinajero's body led Avila to re-evaluate an incident that had occurred earlier that afternoon, at about 3:15 or 3:30 p.m. That is, an inmate, whom Avila later identified as appellant, tried to quickly sneak through the gate without being identified. (13 RT 2349-2351, 2353-2357, 2363-2365.) Avila asked appellant to identify himself and to say where he was going. Appellant showed his wristband and said, "I don't belong here. I'm visiting my cousin." (13 RT 2350-2352.) Appellant appeared to be

afraid or startled when Avila called him over. (13 RT 2362-2363.)

Avila sent appellant downstairs and alerted his partner. There, appellant was searched for contraband, and said he was from the 3000 floor. Appellant was then sent back to his own floor. (13 RT 2351-2352.)

According to Avila, his partner was supposed to conduct hourly safety checks. His partner told Avila that he did conduct them, and a log indicated that safety checks were conducted at 1:15, 2:04, 3:07 and 4:19 p.m., before the body was discovered. However, Avila testified that he had no way to otherwise confirm that they occurred. The log erroneously indicated that Avila himself had conducted the latter three checks. (13 RT 2358-2361, 2368-2373; see also 14 RT 2542-2548 [testimony of Lieutenant Aguilar].)

At about 5:00 p.m., Detective Cain, who was assigned as the lead detective in the case, responded to the jail, accompanied by his partner, Detective Kenney. Other detectives were assigned to assist him. (16 RT 2872-2874.) Cain subsequently interviewed Davies, Palacol, Good and Sloan. (16 RT 2888, 2897-2898.)

Davies was uncooperative, and did not answer any questions about what happened in the cell. Cain did not find that unusual because Davies was an inmate and did not want to be labeled a snitch. The other inmates indicated they were fearful for the same reasons. (16 RT 2888-2889, 2898.) Cain saw no apparent injuries on any of the four inmates. (16 RT 2902.)

During Cain's interview of Sloan, Sloan said that he had a May 5th court date and that appellant had a May 3rd court date. Sloan explained that he knew appellant's court date because they had a conversation inside the cell after the murder. It was Cain's understanding that appellant did in fact have a May 3rd court date. (16 RT 2890.) Sloan also told Cain that

appellant had indicated that he (appellant) recognized him. Both had been housed on the 2000 floor at the same time, and had been at the Long Beach courthouse at the same time. During the interview, Sloan was asked to describe the suspect, and said he had a fairly large gap between his teeth. He subsequently identified appellant from a photograph. (16 RT 2890-2891.)

Deputy Sheriff Cheryl Comstock, who had been assigned to investigate the murder, arrived at the jail between 5:30 and 6:00 p.m. (12 RT 2032-2034, 2043.) She decided appellant should be questioned after learning that Tinajero was a witness against him, and that they were under a "keep-away" order. (12 RT 2033-2036, 2044; see also 16 RT 2756-2757.)

At around 11:45 p.m., Comstock asked Deputy Sheriffs Dan Deville and Charles Warren to locate appellant, examine his person, and search his cell for potential evidence. Deville and Warren proceeded to the 3800 module, where appellant was housed, and had him remove his shirt, pants, and socks.[20] Warren examined his arms and hands for marks or redness, but at trial he did not remember seeing anything on appellant's hands or body. (12 RT 2036-2037, 2044; 15 RT 2683-2692; 16 RT 2755-2761, 2765, 2769.)

Warren also recovered a phone book from appellant's pants pocket; the words "El Chingon" and "Wilmas" were written on it, and appellant indicated that he was Chingon. (12 RT 2036-2037, 2044; 15 RT 2683-2692; 16 RT 2755-2761, 2765, 2769.) Deville searched appellant's cell and recovered transcripts of Tinajero's testimony and a police report regarding

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[20] Seven inmates, including appellant, were housed in the cell at that time. (16 RT 2892.)

appellant's arrest. (15 RT 2688; 16 RT 2759-2761.)

At about 12:05 a.m., Warren turned over appellant's clothing and phone book to Comstock. (12 RT 2036-2037, 2044; 15 RT 2683-2692; 16 RT 2755-2756.) Because Warren said he had seen stains on the cuffs of appellant's pants, Comstock examined them, and observed potential blood stains on the pants legs. (12 RT 2083; 15 RT 2685-2686.) After examining the clothing, she placed it in a paper bag. (12 RT 2038.) She placed the phone book in an envelope, which she turned over to Detectives Cain and Kenney. (12 RT 2040-2043; see also 16 RT 2872-2873.)

Cain subsequently examined appellant's telephone book, which he had received from Detective Comstock. (16 RT 2874-2875.) Written on the very first page of the book was the moniker "El Chingon," as well as "ES Wilmas GTL's." (16 RT 2876.)

At that point, he had obtained the phone records for both Tinajero's cell and appellant's cell. (16 RT 2875, 2892.) Cain compared phone numbers in the telephone records to those in telephone book, and found three numbers that matched. (16 RT 2876-2877.) One of those numbers belonged to Irma Limas. (16 RT 2878-2879, 2886.) Telephone records indicated that two calls were made to Limas on April 20, 2004. The first was initiated at 4:48 p.m. and accepted at 4:50 p.m. The second call was picked up at 4:52 p.m., but the record does not show that it was accepted. (16 RT 2892.)

Cain later contacted Limas, who said she was corresponding both by telephone and letters with a Santiago Pineda, who went by the monikers "Chingon" and "Santi." (16 RT 2877, 2886.) Limas provided Cain with

letters appellant had written to her.[21] (16 RT 2887.)

Another entry in the telephone book was the name "Star," whom Cain learned was one Estrelita Barrios. (16 RT 2880, 2886.) Calls were made to her number from both Tinajero's cell and appellant's cell. The first call from Tinajero's cell was made at 12:25 p.m., and the last one at 12:39 p.m. The first call from appellant's own cell was made at 6:31 p.m., and the last one at 11:22 p.m. (16 RT 2893-2894.)

The initials "R.T." – i.e., Tinajero's initials – were written on the Q-R page of the telephone book. Tinajero's seven-digit booking number was written underneath his initials, except that it was one digit off. (16 RT 2880-2882.)

On the K-L page, the names "Palacol, Gregory," "Good, Matthew," "Davies, Shad" and 'Sloan, Anthony," and their respective booking numbers, were written. Also written on the page was the public information telephone number for the Los Angeles County Jail. Anyone could find out where an inmate was housed by calling that number and providing the inmate's name and booking number. (16 RT 2883-2885.)

Cain first interviewed appellant on April 22, 2004.[22] (16 RT 2895.) Photographs of appellant were taken at that time. Cain and his partner photographed appellant's hands to show what appeared to be scratches, but the scratches cannot be seen in the photographs. Scratches on appellant's

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[21] Cain testified that he had previously examined two of the letters, which were signed Chingon, matching the moniker in the telephone book. (16 RT 2887; People's Exhibits 96 & 97.)

[22] Defense counsel asked Cain to review a transcript in which Cain had indicated the interview was taking place on April 20, 2004, at 2000 hours. Cain testified that that was a typographical error. (16 RT 2895.)

stomach area also cannot be seen in the photographs. Appellant was also depicted smiling. (16 RT 2895-2896, 2900-2901; People's Exhibit 153.)

Cain interviewed inmate Good in November 2006, prior to trial. Prior to that interview, Good had made only generic statements. In retrospect, Cain opined, Good was probably trying to help the investigators but they had not realized it. Specifically, Good had indicated that they might want to look at Tinajero's court case. Good was shown a photographic line-up but did not make an identification. He indicated that even if he could make an identification, he probably would not do so. He was very upset and appeared to be frightened. (16 RT 2898-2899.)

c. Forensic Evidence

On April 20, 2004, Deputy Thomas Kerfoot reported to Tinajero's cell to document the scene and collect evidence. (15 RT 2597-2599, 2606.) Kerfoot observed blood spots on the blanket covering Tinajero's body. (15 RT 2604.) When the blanket was removed, Kerfoot observed that Tinajero was shirtless and shoeless. (15 RT 2601, 2607.) He also observed that Tinajero's pants had not been pulled up all the way. There was blood on Tinajero's boxer shorts and on the inside of his thigh and calf, indicating that the blood was already there before the pants were put on. Kerfoot thought the presence of the blood was curious because there were no corresponding injuries. (15 RT 2603-2604.)

The only items Kerfoot believed he needed to collect were the blanket and a pair of canvas shoes. (15 RT 2600-2602, 2605.) Kerfoot collected the shoes because he noticed that the soles of the shoes were consistent with lineal, evenly-spaced marks on Tinajero's neck. (15 RT 2600.) He never located Tinajero's shirt. (15 RT 2607.)

Jerry McKibben, an investigator with the Los Angeles County

Coroner's Office, arrived at the cell at around 7:30 p.m. (14 RT 2549-2551.) He checked Tinajero's liver temperature, from which he concluded that Tinajero had been dead for about eight hours. (14 RT 2552-2554.) McKibben examined and documented Tinajero's clothing and his injuries; he did not notice any injuries other than bruising and parallel lines, perhaps caused by Tinajero's own hands, around his neck. (14 RT 2554-2561; 15 RT 2579-2580.)

At approximately 9:00 p.m., Eucen Fu, a senior criminalist for the Los Angeles County Department of Coroner, arrived at the jail to collect and process evidence at the crime scene. (14 RT 2524-2526.) Tinajero's body lay on a mattress in the middle of the cell. He was clad only in white boxers, blue pants and socks. (14 RT 2526, 2533, 2535.) Fu observed red stains along with a ligature around his neck. (14 RT 2527.) Fu did not locate a wristband in the cell. (14 RT 2527.)

Fu collected Tinajero's white socks and various forensic samples, or swabs, taken from Tinajero's body. (14 RT 2527-2528.) That night, Fu took additional swabs at the coroner's office, and took both sets of swabs to the coroner's evidence custodian. (14 RT 2528-2530.)

Fu examined the outside of Tinajero's pants but did not notice any red stains. (14 RT 2530.) Fu also removed the ligature. The ligature was tied so tightly that Fu was unable to slip his finger between the ligature and Tinajero's neck. (14 RT 2530-2434.)

On April 22, 2004, senior criminalist Flynn Lamas received the following items from Detective Comstock, items which had been recovered from appellant: a pair of blue jail pants containing red stains, and a jail shirt and two white socks, each containing yellow stains. At Comstock's request, Lamas performed a presumptive chemical test for blood on the

stains on the pants, which yielded a positive result. (10 RT 1735-1744; 12 RT 2038-2039.)

On April 29, 2004, Lamas received the address/phone book from Detective Cain. (10 RT 1735-1736.) Lamas performed a presumptive test on a yellow stain and two small red stains in the phone book. The test results were negative. He cut those portions out of the book and packaged them. (10 RT 1747.)

On May 12, 2004, Lamas received from the coroner's office a package containing neck ligatures, as well as samples taken from Tinajero's body. (10 RT 1735-1737, 1755, 1757-1758.) He never opened or examined the ligatures. (10 RT 1745, 1747.) On May 26, 2004, Cain obtained oral swabs from appellant, which were then provided to Lamas. (10 RT 1035-1037; 16 RT 2889.)

Lamas packaged samples of the following evidence, which was later sent to the Serological Research Institute, which performed DNA analysis: stains from the pants; a substrate control, i.e., an unstained portion of the material containing the stain; a yellow stain from the phone book, along with a control sample; a portion of the oral reference sample from appellant; a portion of Tinajero's blood reference sample; and, the ligatures. (19 RT 1742-1750, 1754-1758.)

Gary Harmor, a forensic serologist, testified that he conducted DNA analysis of the following evidence: (1) a known reference sample from appellant; (2) a reference sample from Tinajero; (3) a cutting from a pair of appellant's blue jail trousers; (4) a piece of paper from a phone book; (5) a ligature made from a piece of synthetic rope; and, (6) swabs from the victim's body. (15 RT 2712-2716, 2723; see also 10 RT 1735-1744; 12 RT 2038-2039.) Harmor determined that the bloodstain on the pants and on the

body matched Tinajero's blood. (15 RT 2716-2718, 2723-2725.) According to Harmor, there was DNA from at least four people on the ligature. Tinajero was the primary source, and Harmor could not exclude the possibility that appellant may have been a minor donor. (15 RT 2719-2723, 2725-2727.) He found no evidence that the stain on the phone book was produced by a bodily fluid. (15 RT 2719.)

Raffi Djabourian, a forensic pathologist employed as a deputy medical examiner at the Los Angeles County Department of Coroner, conducted the autopsy of Tinajero. (16 RT 2832-2833.) Dr. Djabourian opined that the cause of death was asphyxia due to ligature strangulation, though he could not exclude manual strangulation (i.e., the initial chokehold) as a cause of death, nor could he exclude drowning as a contributing cause. (16 RT 2833, 2849-2853, 2860-2861, 2866-2867.) Dr. Djabourian acknowledged that he did not know whether the ligature was placed around Tinajero's neck before or after he died. (16 RT 2861.)

Dr. Djabourian's opinion was based on several factors. First, in conducting an external examination of the body, he noted the following: (1) a ligature, i.e., string or twine, was tied around Tinajero's neck; (2) the ligature was extremely tight and had made a groove completely around his neck; (3) there were abrasions and bruising on the neck; and, (4) there were petechiae, i.e., pinpoint hemorrhages, in both eyes. Second, in conducting an internal examination of the body, he noted the following: (1) evidence of hemorrhages in the front neck muscles; and, (2) a fracture in the cricoid bone. (16 RT 2834-2835, 2838, 2840-2843, 2846.)

According to Dr. Djabourian, the injuries to Tinajero's neck were consistent with being choked in a headlock while he tried to pull the assailant's arm off. (16 RT 2839, 2847-2848, 2854, 2857, 2859.) Bruises

and abrasions on Tinajero's back were consistent with somebody having his knee in Tinajero's back while his head was being shoved into a toilet. (16 RT 2845, 2864.) Red, roughly parallel lines on his back were consistent with the bottom of a shoe. (16 RT 2856, 2865.) Blunt force trauma to the body was consistent with being kicked or stomped. (16 RT 2857-2858.)

d. Evidence Regarding Appellant's Opportunity to Move Around the Jail

Deputy Sheriff Matthew Bounds testified that on May 6, 2004, he was assigned to the court line – i.e., an area in the inmate reception center (hereafter, "IRC") where inmates with court dates were processed into and out of the Men's Central Jail. (15 RT 2615-2619, 2623.) Hundreds of inmates walked to the court line, while there were approximately ten to fifteen deputies to control them. (15 RT 2618.) Given the number of inmates to process, deputies generally just checked to see that an inmate had a piece of paper and scanned his wristband. (15 RT 2623.) If deputies determined that an inmate in the court line was not in fact scheduled to go to court, he would be sent back to his cell unescorted. (15 RT 2622.)

Bounds testified that, at the request of detectives, he printed a report showing appellant's movements on April 20, 2004. According to the document, appellant was first scanned into the IRC at 5:02 a.m. He was scanned out of IRC at 8:31 a.m., apparently never having left the IRC. (15 RT 2619-2624.)

Deputy Sheriff John De Vries testified about the layout of, and the procedures governing the movement of inmates within, the Men's Central Jail. He had been assigned to the Men's Central Jail for 14 years, had worked in almost every module in the jail, and spoke with inmates about the goings-on of the jail. (17 RT 2975-2978.)

The Men's Central Jail is fairly vast, and there are about 53 or 54 modules within the jail. (17 RT 2976, 3026; see also fn. 10, *ante*.) Modules 2100, 2200, 2300, 2400, 2500, 2600, 2700, 2800 and 2900 are on the 2000 floor. Modules 3100, 3200, 3300, 3400, 3500, 3600, 3700 and 3800 are on the 3000 floor. (17 RT 2977.) The jail generally houses approximately 6,800 to 7,000 inmates. (17 RT 2978.) "Keep-away" inmates are housed on the 2000 and 3000 floors, and jail personnel try to keep them separate. (17 RT 2987.)

On an average day, approximately 6,000 passes are issued to inmates who need to move through the jail, e.g., to visit with attorney or doctors, or to report to the court line or for release or transfer to another facility. An inmate who must go to more than one location is issued multiple passes. (17 RT 2979, 2981, 2996.) Perhaps 55 or 60 deputies supervised inmate movement. (17 RT 2978, 2980.)

Inmates are generally escorted from their modules to the escalator on their floor. (17 RT 2980-2981.) Because of the large volume of traffic through the jail, inmates are basically on an honor system with respect to reporting to the right location. (17 RT 2984-2985; see also 14 RT 2386-2389, 2498-2499 [testimony of Gregory Palacol].) They proceed unescorted to the first floor, where a deputy directs them to their respective destinations. From there, inmates continue without escort. (17 RT 2980-2986, 3011-3017.) They generally are not asked to show their passes. If an inmate looks like he knows where he is going, usually he will not be questioned. (17 RT 2979, 2984-2985, 2992.) The majority of inmates are

not handcuffed when they move through the jail.[23] (17 RT 2997.)

Court line, which occurs at approximately 4:30 a.m., is handled differently. (17 RT 2981, 2986.) After passes are distributed, inmates are escorted to the court line, and from there to the inmate reception center, one floor at a time. In this way, "keep away" inmates are kept separate from one another. (17 RT 2986-2987, 2991.) When an inmate leaves the module, the module deputy probably would not check his wristband or the list of inmates scheduled to go to court. (17 RT 3029.)

On a typical day, 900 or more inmates are moved during court line. (17 RT 2986-2987.) The process takes about an hour, during which 120 to 150 inmates from the 2000 floor, and a similar number from the 3000 floor, go to the court line.[24] (17 RT 2987-2988, 2990.)

When inmates return from court, they are processed back into the jail and are just told to return to their cells. (17 RT 2991-2992, 2995.) An inmate can go wherever he wants, and if he appears to know where he is going, he is unlikely to be challenged by a deputy. (17 RT 2992, 2998.)

If a deputy catches an inmate trying to sneak off the row during Wayside line, it would not be uncommon to send him back to his cell on his own. Although deputies might ask a few questions, they probably would not write him up because they are too busy to do so. Once he gets back to his own module, he just knocks on the door and is put in the laundry room until he is sent back to his cell. They probably will not check where he has

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[23] "K-10" or "High Power" inmates, i.e., those housed in gang modules, and inmates whose safety is at risk if they are allowed to walk by themselves, are escorted in handcuffs through the jail. (17 RT 2985, 2997.)

[24] Both jail personnel and inmate witnesses referred to this process itself as "court line." (See, e.g., 17 RT 2986.)

been. (17 RT 3004-3005.)

An inmate entering a module first enters a sallyport, where he tells the deputy which cell to open. (17 RT 3030-3031.) Inmates are not required to show their wristbands while in the sallyport. (17 RT 3031.) Often inmates must wait in the laundry room until a sufficient number gather, then they are sent back to their cells. They are not checked before being sent to their cells from the laundry room. (17 RT 2998-2999.)

Inmates who have been in the jail for some time learn how the system works, including the honor system used in sending inmates back to their cells from the court line. (17 RT 2995.) If one inmate took another inmate's pass, he could get out of his module. If he then goes to the court line and it is discovered that he is not actually going to court, he will be told to go back to his cell. (17 RT 2993-2995, 3030.) He could possibly be free for the entire day. (17 RT 3030.) That presents the inmate with an opportunity to go elsewhere. (17 RT 2995.)

According to a court list, 38 inmates went to court from the 3800 module on April 20, 2004. Of the 14 inmates who went from appellant's row, two went from appellant's cell. Passes were issued to all 38 of those inmates. If appellant was able to obtain one of those passes, he would be able to leave the module. (17 RT 3000, 3001.) He was in the general population at that time, so he would not have been handcuffed. (17 RT 2997, 2999.)

Appellant and Tinajero were kept one floor apart. De Vries had no idea why they were not housed at separate facilities. (17 RT 3027-3028.) According to De Vries, it takes less than five minutes to walk at a normal pace from Tinajero's cell to Able 3800 (appellant's module). (17 RT 3021, 3023.) It is not impossible for someone housed on the 2000 floor to get to

the 3000 floor, or vice versa. Somebody who is very familiar with the system and acts like he knows where he is going could do it. (17 RT 3021-3022.) Although there had been policy changes since the murder, e.g., jail personnel were checking wristbands more carefully, the system still had flaws, and every day they found inmates in the wrong places. (17 RT 3022-3023.)

2. Appellant's Statements to Jail Personnel

On May 3, 2004, at approximately 3:40 p.m., Deputy Sheriff Josue Torres saw appellant, whom he was to escort to his module, 3100, where K-10 inmates were housed. (17 RT 3039-3040, 3053-3055, 3057.) As they were walking, appellant stared at Torres, smiled, and said, "Hey, Torres, I did it." (17 RT 3041-3042, 3054.) Torres looked at appellant as if to say, "What are you talking about?" Appellant said that he had killed the guy testifying against him. (17 RT 3042.)

Appellant's account of the killing, as recounted by Torres, was generally consistent with those of Tinajero's cellmates. (17 RT 3044-3050, 3056, 3059-3061, 3065-3067.) Appellant told Torres that he had obtained approval to carry out the killing from the inmate who ran the 2000 floor. Then he said that he killed the fool who had snitched on him. (17 RT 3049-3051.) Appellant said he was very happy he did it. He was very angry because in court Tinajero would look at him, laugh and smirk. (17 RT 3050.) Following the conversation, Torres placed appellant in his cell, then immediately wrote a report. (17 RT 3043, 3050, 3056, 3061-3062, 3069.)

While housed in modules 3600 and 3800, appellant had worked for Torres as a trusty, and they developed a rapport. According to Torres, appellant liked to talk to him. (17 RT 3041-3042, 3050-3052, 3063-3064.) Torres suggested that appellant may have confided in him because of their

rapport, and maybe he wanted to brag. Appellant was excited, proud, and was "puffing his chest up." (17 RT 3051.) Prior to their conversation, Torres had heard about the killing, but did not know that appellant was a suspect. (17 RT 3058-3059, 3064, 3068.)

Sometime between May 3 and May 6, 2004, Deputy Sheriff Jesus Argueta was escorting the pill call nurse to the 3301 module, which is the disciplinary module, or "hole," for K-10s. (17 RT 2958-2959, 2963-2964, 2971.) For security reasons, K-10s who need medication are not taken out of their cells, but have their medication brought to them. (16 RT 2959-2960.)

After the nurse left, appellant called Argueta to his cell and asked, "Did you hear what happened on 2000 floor?" Argueta replied, "No, what happened?" (17 RT 2960-2961.) Appellant stated that he was being accused of entering the 2200 module and killing his "crimee." Argueta asked, "Why was he your crimee?" Appellant replied, "We committed a murder out on the street." He also said, "Now this fucker, he's snitching on me, so we had to get rid of him." In addition, appellant said, "Now that he's dead, they're going to have to offer me a deal." According to Argueta, appellant also said, "They wouldn't have shit on me now." (17 RT 2961-2962.) The conversation ended when appellant asked if Argueta could check the computer to see what he was in the "hole" for. (17 RT 2962.) No one else was present during the conversation. (17 RT 2966.)

Argueta and appellant already knew each other – having grown up in the same neighborhood and played basketball together in junior high school – and shared some rapport. (17 RT 2960, 2962-2963, 2971.) Argueta guessed appellant thought they were "friends or something." (17 RT 2963.) Argueta had no personal problems with appellant. (17 RT 2970.)

Prior to their conversation, Argueta had heard that there had been a homicide in the 2200 module, but he wanted to know what appellant knew about it. (17 RT 2964, 2970.) When appellant said "We did it," Argueta thought that was important enough to report it to a superior, but failed to do so until May 12, 2004. (17 RT 2964-2967, 2970-2971.) Moreover, Argueta did not take any notes. (17 RT 2965, 2967.) He had "no idea" why he had waited to report the incident. (17 RT 2967-2968.) He reported the matter to a sergeant, not the detectives.[25] (17 RT 2965-2966, 2968, 2972-2973.)

3. Evidence Relating To Appellant's Gang Membership and To Gang Culture and Activity Generally

Irma Limas testified that in April 2004, she was employed as a receptionist; she did not name the company she worked for. At some point, she received and accepted a collect call from a man who identified himself both as "Santi" and "Chingon." Santi indicated that he was in jail and making random phone calls, just to talk. (14 RT 2464-2466, 2486, 2488.) Limas agreed to accept future calls from him. (14 RT 2466-2467.)

Santi began calling a few times a week. Limas believed that he told her he grew up in Wilmas, the San Pedro area. (14 RT 2468.) They talked over a period of a couple of months, maybe longer. At some point, Limas gave him her name, which was then Irma Gardea, and her work address. He started sending letters and a Valentine's Day card. She did not think of him as a friend because she did not know him, but she wrote to him to "lend[] an

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[25] According to Deputy De Vries, if a deputy hears an inmate make incriminating or noteworthy statements, he or she would be required to record that information. (17 RT 3035.) How long the deputy waits to report the information is left to the deputy's discretion. (17 RT 3038.)

ear."[26] (14 RT 2468-2469, 2473-2484, 2486-2487.)

Santi asked her to make three-way calls to his sister and mother, which she did. (14 RT 2469-2470.) He also asked her to use her computer to see if someone named Raul was in the jail. He said Raul was a friend or someone he needed to get a hold of. He did not explain why he needed to contact Raul, but he said Raul was a clown who was testifying against him. Santi told her that he was in for a 187, i.e., murder. She believed that they had run over somebody. (14 RT 2470-2471.) She never tried to find out whether Raul was in the jail, but Santi later reported that his homie, or friend, had obtained the information.[27] (14 RT 2484-2485.) Appellant also mentioned that he got a wristband from an inmate for an escape attempt. (14 RT 2472.)

Limas testified that she had never met Santi and did not know what he looked like. (14 RT 2471, 2488.)

Detective Javier Clift, who was assigned to the Los Angeles County Department's major crimes bureau, focusing on prison gangs, testified about the gang culture and politics within the Men's Central jail.[28] (18 RT

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[26] During her testimony, Limas examined several letters and a Valentine's Day card, which she confirmed had been sent to her by "Santi" and "Chingon." The name Pineda appears in the return address section of two of the letters. (14 RT 2473, 2475-2484; People's Exh. 96.) Limas also examined a phone book (People's Exh. 79) and confirmed that it contained an entry with the name Irma Gardea and the address she had given to Santi. (14 RT 2472-2473.)

[27] The prosecutor also elicited Limas' testimony regarding references to gangs in appellant's letters. That testimony is summarized in greater detail in Argument III, *post.*

[28] Detective Clift's testimony is described in greater detail in

(continued...)

3109-3114, 3136-3155, 3161-3179.)

Among other things, Clift testified about the history of, and connection between, the Mexican Mafia and the Surenos, an umbrella group comprised of many different Hispanic street gangs. (18 RT 3111-3112, 3138-3139.) According to Clift, Surenos "run a lot of situations in the jail," what they called their "business," e.g., killing snitches. (18 RT 3136-3137.) Under Sureno rules, an inmate who testifies against another is automatically subject to being killed. (18 RT 3173.)

Clift explained the term "green light," meaning that an inmate is subject to retaliation, even death. However, Clift never learned whether there was a "green light" on Tinajero. (18 RT 3153-3154, 3177.) Green light lists come from shot callers – i.e., the inmates in charge of modules – not individual inmates. The retaliatory act must first be approved by a "higher-up," who wants to be prepared for the repercussions of a hit carried out in his module. In seeking permission to carry out a hit, an inmate may present "paperwork," i.e., documents showing that someone snitched. (18 RT 3148-3149, 3170, 3178.)

A Sureno member must carry out a Sureno order, or he too will be subject to retaliation. (18 RT 3171-3172.) It is not unusual for a Sureno member to take care of his own business. (18 RT 3154-3155.) On the other hand, Surenos would not order non-Surenos to carry out a hit because they cannot be trusted. (18 RT 3174-3175.)

Clift opined that Tinajero's white cellmates were not involved in the killing because they were in jail for "light weight" felonies. (18 RT 3113-3114.) Clift also testified that non-gang members would not carry out a hit

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[28](...continued)
Arguments II and III, *post*.

on someone living in their own cell, nor would they get involved in gang politics or business. (18 RT 3136, 3138, 3143-3145.) Inmates prefer to carry out hits in isolated, neutral areas. Murders committed inside cells typically involve rifts between inmates. (18 RT 3150-3151.) Moreover, inmates may watch an attack without intervening because, among other things, they may fear that doing so will lead to retaliation. (18 RT 3161-3162.)

According to Clift, the manner in which Tinajero was killed suggested that the killer was sending a message to the witnesses – that if they "rat[ted]" on him, the same thing would happen to them. Clift also suggested that appellant was trying to project the image of his moniker, "Chingon." (18 RT 3173-3174.) He opined that the fact that appellant had written down their names and booking numbers and the Sheriff's Department telephone number indicated that he was tracking them in order to intimidate or have someone hurt them. (18 RT 3152.)

Clift opined that appellant was a Sureno. (18 RT 3143.) In support of his opinion, he testified about People's Exhibit 157, a letter he had intercepted after appellant attempted to send it from his cell. The letter was signed "Chingon," and contained the word "Sur." Underneath the word "Sur" were three dots and two lines, indicating that appellant followed the Mexican Mafia and believed in the Sureno cause. Appellant had also written "GT" and "ESW," meaning that he was from the Ghost Town clique of East Side Wilmas. Another exhibit, a letter marked People's Exhibit 96D, read in part "Mr. Chingon from Bad Ass ES Wilmas, Ghost Town Locos," and was signed, "Santiago Pineda Hernandez Chingon." (18 RT 3140-3143.)

Clift subsequently testified further about People's Exhibit 157,

stating that appellant had written, "I go to trial next month so I have decided to let my hair grow and with a clean shaved face with some retard eyeglasses and a nice suit. The not guilty look." Clift also testified that appellant had drawn a "smil[e]y face," which Clift interpreted to mean that he was making a joke of the system, the jury, and the court. (18 RT 3163-3167.)

4. "Other Acts Crimes" Evidence Admitted Pursuant to Evidence Code Section 1101, Subdivision (b)[29]

Deputy Sheriff Aaron Dominguez testified that on March 13, 2003, he found a jail-made weapon, or shank, in a bag belonging to appellant. (15 RT 2636-2648.)

Luis Montalban and Deputy Sheriff Michael McCarty testified about a December 19, 2003, incident in which appellant attempted to escape from the jail by taking an identification bracelet, or wristband, from Montalban, who had been selected to act as a trusty at the West Hollywood Sheriff's Station. (15 RT 2698-2708; 16 RT 2774-2784.)

Deputy Sheriff Wadie Musharbush testified that on July 13, 2004, he recovered a razor blade during a search of appellant's cell. (16 RT 2826-2831.) Deputy Sheriff Juan Rivera testified that, during the same search, he (Rivera) recovered a jail-made syringe, and opined that such a syringe could be used as a weapon or to inject drugs. (16 RT 2796-2805, 2807-2808, 2810-2815.)

Deputy Sheriff James Milliner testified that on October 13, 2004, appellant was caught without his wristband, lied to a deputy about it, and, when told that he would be written up, said that he did not care. (15 RT

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[29] Each of these incidents is summarized in greater detail in Argument II, *post*.

2583-2596.)

Deputy Sheriff Asael Saucedo testified that on November 5, 2004, appellant was again caught without his wristband, which was later found in his cell. (16 RT 2787-2789.)

Deputy Sheriff David Florence and Deputy Sheriff Saucedo testified that on June 17, 2005, an altered paper clip, which could be used to undo handcuffs, was found in appellant's cell. (15 RT 2653-2659, 2681-2682.)

Deputy Sheriff Florence and Deputy Sheriff Rivera testified about a July 30, 2005, incident in which appellant escaped from a locked shower by lathering his body with soap and slipping between a locked gate and a wall. (15 RT 2659, 2663-2680; 16 RT 2805-2807, 2809.)

Lieutenant Roger Ross was asked to obtain records documenting telephone calls placed from Tinajero's cell on the day he was killed. (15 RT 2626-2630, 2631.) He also obtained records documenting telephone calls made from appellant's cell on that date, which showed that calls were made from 10:21 a.m. until 10:54 a.m., from 2:00 p.m. until 2:39 p.m., and from "just about" 5:00 p.m. until about 5:02 p.m.[30] (15 RT 2631-2634.) The cell may have housed as many as eight inmates, all of whom had access to the telephone. (15 RT 2634-2635.)

On December 29, 2006, Deputy Sheriffs Joe Medina and Salvatore Picarella searched appellant's cell, where they found a manila envelope containing contraband; the envelope was in a box containing his legal material. (30 RT 4950-4951, 4954, 4958-4960.)

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[30] Using military times, Ross testified that the call was made at 1648 hours, accepted at 1650 hours, and ended at 1652 hours. (15 RT 2634; see also People's Exhibit 89.) Ross did not explain why, or even that, he rounded up the time of the telephone call by ten minutes.

II. Defense Case at the Guilt Phase

A. Appellant's Testimony

Appellant was 20 years old on March 6, 2002. (19 RT 3269.) He had had a problem with alcohol and drugs for about a year. (19 RT 3250.)

Appellant's account of how he first encountered Armenta, and how Armenta first arrived at his house, was generally consistent with Tinajero's version of those events. (19 RT 3247, 3308-3312, 3250-3251.) However, appellant testified that he had been friends with Armenta, who worked nearby, for about two weeks. (19 RT 3251, 3299-3300, 3302, 3306, 3308, 3316.)

At some point, the three men left to buy drugs. (19 RT 3251-3252, 3257, 3264, 3312.) Sometime around 11:00 p.m., Armenta stopped by Eduardo's house to try to get drugs, to no avail. (19 RT 3253, 3312-3313.) They subsequently picked up appellant's brother-in-law. (19 RT 3312-3314.)

Sometime later, Armenta and appellant got out to urinate in an alley. As a trick or gag, appellant ran back to the vehicle and returned to Wilmington. (19 RT 3252-3253, 3306-3308, 3314.)

Appellant subsequently returned to Long Beach, trying without success to find Armenta. When appellant returned home, Armenta was already there, having arrived in a brown or red Honda Accord. (19 RT 3254-3255, 3306, 3315.) After appellant explained that he had taken the car to play with him, Armenta was no longer angry. (19 RT 3255.) The Infiniti was parked in front of appellant's house. (19 RT 3256.)

Appellant, Armenta and Tinajero decided to keep looking for drugs, leaving in the Honda. (19 RT 3255.) At some point, Armenta stopped at his sister's house, but appellant did not go inside. (19 RT 3256.) From

there, Armenta drove to Palmer Court, "one of [his] locations," to get drugs. (19 RT 3257.)

Armenta talked to two men in the alley, but they started hitting him. Armenta got out of the car. Appellant did not help him, but drove the car to Colon Street, where he retrieved a gun from a friend's house. (19 RT 3258-3261, 3319, 3321-3326.) He left the Honda on Colon Street, and drove back to Long Beach in the Infiniti. (19 RT 3261.)

Before entering the alley, appellant turned off the lights. (19 RT 3247, 3261-3262.) There was not much lighting, and he sped down the alley in case the men started shooting. (19 RT 3247, 3262.) Appellant felt a big bump, and noticed that the car was dragging something. After a couple of seconds, appellant stopped the car. He and Tinajero saw that the car had dragged Armenta. (19 RT 3262, 3265.)

They were going to take Armenta to the hospital but the fire department arrived. (19 RT 3262-3263.) They left because appellant was drunk, high, and had a gun. Appellant parked nearby, and, after confirming that Armenta was receiving medical attention, walked back to the car. They saw a lot of police officers, so they drove away. (19 RT 3263-3264.)

Appellant was pulled over a few blocks away. (19 RT 3265.) He cooperated with the police, e.g., he took a field sobriety test and gave samples. (19 RT 3246, 3265.) The first thing he told Officer Soldin was that he had run over someone. (19 RT 3297.) Appellant denied telling Officer Soldin that he had not been involved in an accident and that he was going home from a friend's house off Palmer Court. (19 RT 3298.)

Appellant also gave a taped statement on March 7, 2002. (19 RT 3300, 3304.) He acknowledged that he told the police that he had met Armenta that same night, and that he did not know his name. He

acknowledged that he did not know what harm could come from telling them Armenta's name, but explained that he just did not want to do it. He also testified that he had said that he had just met Armenta because he was on probation and did not want to get involved. He gave them Tinajero's name because they had been pulled over together. (19 RT 3300, 3302-3303, 3309, 3328.)

Appellant testified that Armenta had not used drugs that night. (19 RT 3303, 3305.) When he told the police that Armenta "took a little hit," he meant that he drank from a bottle of tequila, not that he smoked crystal meth. (19 RT 3304-3305.) Appellant denied that he was so testifying only because the coroner had testified that Armenta's toxicology results were negative for drugs. (19 RT 3306.)

Appellant told the police that they were looking for drugs, but, because he had had a gun, he did not tell them that Armenta had been beaten up by drug dealers. (19 RT 3305, 3320-3321, 3387.) Appellant acknowledged that he told the police that "we were supposed to pick up some girls," but testified that that was a lie. (19 RT 3326-3328.) According to appellant, he said that to help Armenta, not knowing he was dead. (19 RT 3328.) He did not know whether telling the police he had just met Armenta would get him in trouble after telling them he had done meth, driven while drunk, and run over someone. (19 RT 3301.)

Appellant testified that most of Tinajero's testimony was untrue, though he agreed that Tinajero's testimony with respect to the order of events was consistent with what he (appellant) told the police in March 2002. (19 RT 3252, 3268, 3318, 3326, 3377, 3386.) Appellant admitted that he ran over Armenta, but he testified that he did so just once and that it was accidental. (19 RT 3245, 3247, 3267-3268, 3318-3319, 3374, 3376.)

Appellant also denied killing Tinajero. (19 RT 3374, 3386.) According to appellant, he told other inmates that Tinajero was testifying against him, and "they wanted things done to [Tinajero]." (19 RT 3341-3342.) Tinajero put his own life in danger by testifying. (19 RT 3368, 3376.) Appellant had no problem with the fact that Tinajero was testifying against him, "but [appellant] did have some feelings." (19 RT 3374.) He did not order or demand that Tinajero be regulated. (19 RT 3279.) Instead, he tried to dissuade them from harming Tinajero, telling them that he was his neighbor and friend. (19 RT 3341-3342.)

Appellant testified that, on the night before the murder, he received a kite from the gang module saying that people were going to Tinajero's cell to, at least, regulate him. The kite included the cell number. (19 RT 3278-3279, 3331-3332, 3340-3341, 3368.) He received the kite because he had revealed that Tinajero was testifying against him. That night, he decided to visit Tinajero. (19 RT 3341.)

Appellant testified that he received the message too late to make a call to keep Tinajero from being hurt, and telling a deputy about the situation would not have kept Tinajero from getting hurt. (19 RT 3333-3336.) He decided to go to Tinajero's cell to make sure nothing happened to him. (19 RT 3270-3271, 3279, 3331-3332, 3336-3337.) Appellant did not want Tinajero to be murdered, nor did he want to murder him. It would be worse for his case if Tinajero were harmed, and Tinajero was his friend. (19 RT 3270-3271, 3279, 3368.)

Sometime after hearing about what was going to happen to Tinajero, appellant wrote what he thought was his booking number in his phone book. He did that to keep track of him. Appellant did not remember the date he wrote down the booking number. (19 RT 3367-3368.)

On the day of the crime, appellant walked out of his cell around 5:00 a.m., when his cellmates went to court. He was able to exit the row because the deputies knew he was a trusty. (19 RT 3338-3339.) He went to the court line because he could not go straight to another floor. His wristband was scanned at the court line and he was placed in a cell, where he waited until he was scanned back out. (19 RT 3339-3340.) From there, he went to the laundry room in Module 2200. (19 RT 3342.) He never picked up anything from the laundry room floor. (19 RT 3344.) Appellant told a deputy that he wanted to go to Denver 13, i.e., Tinajero's cell, and he was allowed to do so. (19 RT 3343-3344.) Appellant already knew Sloan and Palacol, who were in the cell. (19 RT 3280, 3349.)

Tinajero was already under the bunk when appellant entered the cell. (19 RT 3271, 3354.) Appellant realized Tinajero was dead when he started talking to Tinajero's cellmates. (19 RT 3355.) When appellant asked why they had killed him, they said it had gotten out of hand. They did not tell him how they had killed Tinajero. (19 RT 3355.) Appellant was not there when they killed him, nor did he tie anything around his neck. (19 RT 3375.)

Appellant and Tinajero's cellmates had a discussion "as to what was to be said." (19 RT 3271.) They all agreed to say nothing. (19 RT 3344, 3349.) Before appellant left the cell, they told him to take and dispose of the blanket they had used to cover Tinajero. The blanket had blood on it. (19 RT 3271, 3354-3355.) Appellant surmised that Tinajero's DNA ended up on his pants because there was blood on the blanket, and that his own DNA ended up on the ligature when he removed the blanket. (19 RT 3365, 3375-3376.) He never cleaned up the cell, and suggested that his uniform would have been far dirtier and bloodier if he had. (19 RT 3375-3376,

3385-3386, 3388.)

Appellant denied telling Tinajero's cellmates the circumstances of the first murder, nor did he tell them that his first trial ended in a mistrial due to his attorney's illness. He did not know how Palacol and Good knew some of those circumstances. (19 RT 3362-3363.) Good knew Tinajero had twice testified against him because word "passes around." (19 RT 3362.) Sloan knew about the mistrial because he went to the same courthouse, and he knew about appellant's court date because he and two of the other cellmates had been in the gang module. (19 RT 3363-3364.)

Tinajero was supposed to be beaten up, not killed. (19 RT 3355-3356.) Because appellant felt that "people inside the jail" would hold him responsible for the unauthorized killing, appellant made calls from the cell, trying to find out what to do. (19 RT 3270-3272, 3281.) Appellant never said, "Touch down." (19 RT 3270, 3352, 3374.) He wrote the names and booking numbers of Tinajero's cellmates to protect himself from retaliation, as they could explain what had happened. (19 RT 3282.)

Appellant testified that, up until the day of Tinajero's murder, he was a trusty in "Module 38, 36." (19 RT 3278, 3280, 3283, 3338.) At one point, perhaps in February 2004, Tinajero was assigned to Module 3600 for about two days. (19 RT 3282-3283, 3328-3329.) During that time, they discussed what the detectives had told Tinajero to say. Tinajero told appellant that he had heard appellant's tape, and that he had been granted immunity. (19 RT 3329-3330.) He also told appellant that he was not going to testify, but appellant was worried that he would testify. (19 RT 3330-3331.)

Appellant agreed that snitching violates Sureno rules. He also agreed that when someone snitches on a Sureno, it must be "straightened

out." (19 RT 3369.) However, he denied that when someone snitches, he ends up getting killed. (19 RT 3296.) Moreover, being forced to talk is not considered snitching. (19 RT 3296-3297.)

Appellant testified that he "claimed" but was never officially "jumped into" the Wilmas street gang. He also denied that he was a Sureno member, explaining that the Surenos are a prison gang, not a jail gang. (19 RT 3277-3278, 3292-3295, 3356.) His father gave him the nickname Chingon, meaning "bad ass," when he was very young. Appellant did not consider himself a bad ass. (19 RT 3292, 3384.)

When appellant talked to Detectives Cain and Kenney on April 22nd, he did not tell the truth insofar as he did not implicate any of the people in the cell. (19 RT 3272, 3344.) Appellant acknowledged that he testified on direct examination that he had no injuries when the detectives interviewed him, but on cross-examination he explained that he did not remember whether he had any injuries at that time, adding that the prosecution's photographs showed that he had no injuries. (19 RT 3274, 3359-3361.)

Appellant told the detectives that he had never left his cell, and that he had not heard about what had happened, because he was sticking to the agreement he had made with Tinajero's cellmates. (19 RT 3344-3346, 3348-3349.) Appellant explained that "they [were] already blaming me for something that didn't happen, so I didn't want to tell the detective this and then they would twist it up and make it another thing." (19 RT 3349.) Similarly, appellant refused to tell the detectives who he had called on the day of the murder (19 RT 3340-3350) because "you tell them something and they word it their own way" (19 RT 3350). He acknowledged that he was lying when he told the detectives that he had not spoken with Tinajero in years (19 RT 3346-3347, 3351), saying, "Same answer I told you about

how they do things" (19 RT 3351).

Appellant told the detectives that Chingon was some other guy (19 RT 3356-3357) "because [he] didn't want them to know" (19 RT 3357). Appellant told the detectives that he was wearing a "clown suit," i.e., a blue and white jail suit. He did not say that because he knew Tinajero's DNA would be found on it. (19 RT 3387.) He "basically didn't cooperate with them." (19 RT 3387.)

Appellant testified that he had reviewed the two letters intercepted by Deputy Clift. (19 RT 3293.) When he wrote, "We ride for the Sur," he meant that in jail you have to "go along with what happens" – for example, whatever is required for dealing with a snitch. (19 RT 3295.) He did not mean that when someone snitches, it must be straightened out. (19 RT 3370.) By "One for all, all for one," he meant that if something happens to one person, they all helped him. If someone was snitching, anyone – "blacks, whites, everybody" – might take care of it. (19 RT 3297.)

When appellant wrote, "But that's going to be straightened out soon," he meant that "we were going to talk to the cops to leave [his friend, Grumpy] alone because they were beating him up." Appellant also denied that the letter indicated that he was a Sureno member or that he was willing to do their business. (19 RT 3373.)

According to appellant, he never asked Irma Limas to track down Tinajero, and never told her that he found Tinajero through a homie. (19 RT 3350-3351, 3353, 3377.) He never told her that he had stolen a wristband. (19 RT 3353.) He did tell her that they had taken some guy's car, and that the guy died. (19 RT 3353-3354.)

Appellant denied that he was very sophisticated about the jail system. He stated that every trusty knows the jail rules and how to get

around them. For instance, "that's like common sense, you put [on] somebody else's wristband, you just walk out." (19 RT 3365.)

Appellant agreed that he had attempted to escape from jail in December 2003, and that the testimony about that incident was "pretty much accurate." (19 RT 3276.) Appellant did not remember if he told inmate Montalban that he would be regulated if he did not give up his wristband. However, appellant did not take it by force; appellant asked for it, and Montalban gave it to him. (19 RT 3277, 3359.) He had his paperwork on Tinajero because he was taking all of his property. (19 RT 3357-3358.)

Everybody on the tier knew how to get out of the shower. The tray slot was big enough that he was able to slip through it without lathering up. (19 RT 3285-3286, 3289-3292.)

Testimony that his wristband was off and sitting on a table was correct. He did that just to aggravate the deputies. (19 RT 3285-3286.)

Appellant testified that he had the razor to sharpen his pencils, and never used it as a weapon. (19 RT 3286, 3289.) Although he knew how to obtain a shank, he never possessed one. He did have a syringe. He had the altered paper clip, but, because he was a pro per defendant, he had a lot of paper clips for his paperwork. (19 RT 3366.) He did threaten to stab a deputy. (19 RT 3289.)

Appellant testified that he never told Deputy Argueta about the first murder. The fact that Tinajero was his crimee had been reported in the newspaper. Even if the case did not appear in the newspaper until a significant amount of time after the murder, the deputies talked about it. (19 RT 3364.) Moreover, although he talked to Deputy Torres a couple of times, he never told him all those details. Torres made up his testimony.

(19 RT 3365, 3378.)

Sloan, Good and Palacol also lied about Tinajero's murder. (19 RT 3377.) He assumed their lives were in danger because they had testified against him. (19 RT 3378-3379.) He testified that "[w]e don't know" that they did not receive any deals in exchange for their testimony. (19 RT 3379.)

Appellant admitted that he been arrested in January 2000 for contracting – specifically, practicing carpentry – without a license; for petty theft, i.e., failure to return rental property; for driving on a suspended license in 2000, and again in 2001 and 2002; and, in connection with the Armenta incident, for not having a license and vehicular manslaughter with gross negligence. In 2001, he suffered a conviction for grand theft auto in connection with a car stripping, for which he served about a month or a month and a half in jail. He had never been to prison, and there had been no violence in his background prior to the Armenta incident. (19 RT 3248-3250, 3269, 3328.) Finally, he testified that he had tried to arrange to have nice clothes for his trial, and denied that he was trying to fool anyone. (19 RT 3270.)

B. Toxicology Evidence

Michael Lawrence Soldin, an officer with the Long Beach Police Department, testified that at about 2:15 or 2:20 a.m. on March 7, 2002, he responded to the scene where appellant and Tinajero were being detained. (18 RT 3202-3203, 3213.) Although appellant did "[f]airly well" on field sobriety tests, Soldin concluded he had probable cause to arrest him for driving under the influence. (18 RT 3204, 3208-3211, 3213.)

Appellant underwent additional tests, including a breathalyzer exam, at the Long Beach police station, and was determined to be under the

influence of a stimulant, cannabis, and alcohol. (18 RT 3204-3211, 3213-3216.) Soldin concluded that appellant was right at or below the legal blood-alcohol limit of .08 when he came in contact with him. (18 RT 3216.) Appellant reported that he had used methamphetamine and marijuana about two hours earlier. (18 RT 3206.)

After the prosecutor posed a hypothetical set of facts based on the circumstances of Armenta's murder, Soldin opined that the driver "knew what he was doing." (18 RT 3211-3212.) According to Soldin, his opinion was not inconsistent with his findings concerning the drugs found in appellant's system. (18 RT 3212.)

In March 2002, Gregory Gossage, a criminalist for the city of Long Beach, analyzed a sample of appellant's blood for alcohol content, and determined that it contained no alcohol. (18 RT 3218-3219.) Gossage's colleague, also a criminalist, analyzed a urine sample, which tested positive for alcohol, amphetamine, cannabis and cocaine. The urine sample indicated that appellant's blood-alcohol level was at the legal limit of .08. (18 RT 3219-3220.) However, without a second sample being tested, it was impossible to say whether that result was higher than the actual value. (18 RT 3221-3222, 3228-3229.)

According to Gossage, there was nothing inconsistent between the results of the breath and blood tests. Breath tests are not only more accurate, but the alcohol may have been eliminated from appellant's system by the time of the blood test. Marijuana metabolites, among other things, may have caused the alcohol in appellant's system to burn off at a faster than normal rate. (18 RT 3222-3223.)

Gossage acknowledged that he did not have expertise with respect to the effect of controlled substances and alcohol on a person's ability to think

and make decisions, but he would expect to see impairment in his or her driving ability. (18 RT 3223-3225.)

C. Rebuttal

On rebuttal, Officer Soldin testified that on March 7, 2002, he interviewed appellant in the field. (20 RT 3408, 3410.) Appellant told him that he taken a little bit of meth and a little bit of marijuana about two hours earlier. Appellant also said he had left a homie's house on Palmer Court, that he had been pulled over, and that he did not know why. (20 RT 3408.) He denied that he had been in an accident. (20 RT 3409.)

Another individual, who was training to be a drug expert, was also present. Both he and Soldin agreed that appellant could not safely drive a motor vehicle in his condition. (20 RT 3410-3411.)

III. Prosecution Case At the Penalty Phase

A. Victim Impact Evidence

The prosecutor introduced the testimony of Luis Eduardo Quevedo Velasquez,[31] Patricia Armenta, and Maria Guadalupe Armenta – Juan Armenta's friend, sister, and mother, respectively – regarding Armenta's character and the impact his death had had on them. Each of the witnesses testified that Armenta was a nice, helpful person. (24 RT 4103-4104, 4109, 4111-4113, 4128-4129.) He was very generous both to his family and strangers. (24 RT 4103-4104, 4112-4113, 4117-4118, 4120-4121, 4125.)

Maria Armenta also testified that she last saw her son on the day he died, when he said he was picking up some food. She started worrying the

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[31] At the guilt phase, he had identified himself as Jesus Eduardo Quevedo Velasquez, and testified that he usually went by the surname Quevedo. (10 RT 1645.) For the sake of clarity, appellant continues to refer to the witness as "Quevedo."

following morning, when he still had not returned. Her daughter, Patricia, said he had been at her (Patricia's) house, but had left. (24 RT 4121-4123.) Maria began searching for her son, assisted by Quevedo. (24 RT 4104-4107, 4122-4123.) She learned of her son's death on her birthday, March 11, 2006. (24 RT 4120.) After his body was found, she identified his body at the coroner's office. (24 RT 4123-4124.) A coroner showed her a photograph of her son; except for the eyes, the body looked nothing like him because the face was destroyed. (24 RT 4124-4125.)

Maria had visited the location where Armenta was killed. She could not describe how she felt the first time she went. She wanted to collect all the blood she observed at the scene. She sometimes thought she might see him there. (24 RT 4127.)

Maria testified that her life had ended with her son's death. (24 RT 4124-4125.) She never imagined that he would predecease her, and she did not know how she managed to plan his funeral. (24 RT 4126.) She kept his ashes and his belongings in a closet, and could not separate herself from him. (24 RT 4126.) His death had affected her nerves, and she was not taking care of herself. (24 RT 4128.) Her life no longer had meaning, and the person who killed her son did not know the damage he had caused her. (24 RT 4128.)

Quevedo testified that he had been friends with Armenta for about eight years, since junior high school. Armenta saw him as a big brother, and they were always together. (24 RT 4102-4103.) Quevedo felt guilty that Armenta had been killed, because he let him leave his house rather than take him home against his will. (24 RT 4107-4108.) Armenta's death had affected him. Although he had finally come to accept that Armenta was dead, when he was alone, he still felt that Armenta was right next to him.

Most of the time, Quevedo did not want to be alone. He tried to support Armenta's sister, Patricia, and felt that he could not cry when he was with her. It was "too much" to drive by the location where Armenta was killed. (24 RT 4108-4110.)

Patricia Armenta testified that, since her brother's death, she no longer felt like the same person. (24 RT 4116, 4118-4119.) Her two oldest children remembered him, but would not talk about his death with her. Her two youngest children used to ask for him, but no longer did. (24 RT 4118.) When she examined a photograph depicting an injured Armenta, she wanted to die and thought she was going to go crazy. She could only recognize his eyes. (24 RT 4114.) She found it hard to put aside her memory of her brother as he appeared in the photograph, and it made her feel bad to think of the way he died. (24 RT 4116.)

B. Evidence Introduced Pursuant to Penal Code Section 190.3, Factor (b)

The prosecution introduced evidence regarding the following incidents, pursuant to Penal Code section 190.3, factor (b): (1) a June 30, 2002, altercation involving "mutual combat"[32] (23 RT 3978-3988, 3991-3993); (2) a November 5, 2004, confrontation with Deputy Sheriffs Jason Argandona, David Florence and Asael Saucedo (23 RT 3997-4003, 4007-4014, 4020-4021, 4035-4060); (3) a December 7, 2004, confrontation with Deputy Argandona (23 RT 4003-4009, 4015-4017); (4) a June 7, 2005, confrontation with and threats against a fellow inmate, Benjamin Gonzalez (23 RT 4022-4031); (5) a letter appellant wrote to Della Rose Santos on

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[32] The evidence relating to the June 30, 2002, incident is described in further detail in Argument V, *post*. The evidence relating to the remaining incidents is described in further detail in Argument VI, *post*.

September 26, 2006, which contained a purported threat against another individual (23 RT 4075-4093); and, (6) appellant's letter to Ursula Gomez, which contained a purported threat of violence, and his attempt to smuggle letters out of the jail on January 4, 2007 (30 RT 4950-4997).

IV. Defense Case at the Penalty Phase

A. Testimony of Family Members and Friends

The defense presented the testimony of appellant's mother (Julia Pineda), sisters (Yadira, Aideet, Yanet), father (Santiago Pineda Diaz), uncle (Artemio Gutierrez Pineda), aunt (Luteria Gutierrez Pineda), and a family friend (Salvador Zepeda Hernandez), who provided the following personal and family history:[33]

When Julia Pineda was 14 years old, she began dating Santiago Pineda Diaz, known as "Chago," who was then 24 years old. (24 RT 4125-4126; 25 RT 4224; 26 RT 4493.) Julia was not allowed to marry Chago because of the age difference and because he was a heavy drinker. (24 RT 4217.) From the very beginning of their relationship, he had been an alcoholic. (24 RT 4196-4198, 4202; 25 RT 4217, 4226, 4231.) According to Chago, he had been an alcoholic since he was 16 years old. (26 RT 4494, 4499; 27 RT 4544.)

Julia "eloped" with Chago – that is, she left her home to live with him – at age 16. (24 RT 4213-4217.) They subsequently had three

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[33] For the sake of accuracy, appellant uses the correct spelling, i.e., "Yanet" (26 RT 4449), rather than the spelling which repeatedly appears in the reporter's transcript, "Janet." The trial court denied appellant's request that the erroneous spelling be corrected. (See 2 CT Supp. III 406, 408-410.) In addition, to avoid confusion arising from the similarity between appellant's name and his father's name, in this brief appellant refers to his father by his nickname, "Chago."

daughters, Yanet (born December 29, 1976), Aideet (born January 19, 1978), and Yadira (born May 26, 1979). (24 RT 4193-4194, 25 RT 4329; 26 RT 4421-4422, 4472.) There was no running water in the house, and they got water from their neighbor's well. They subsisted on soup, beans and tortillas. (24 RT 4194, 4199.)

Appellant was born on March 20, 1981, in Acapulco, Mexico. (24 RT 4187; 27 RT 4535, 4545 [Chago testified that appellant was born on March 20, 1980 or 1981].) Prior to his birth, Julia had repeatedly tried to harm herself in order to abort him, hoping to spare him from a life of poverty. (24 RT 4187-4192.) She knew that her actions were both illegal and contrary to Catholic teaching, and she had never before revealed what she had done. (24 RT 4189; 25 RT 4259, 4277.) Around the time appellant was born, Chago "would come home drunk, falling drunk by the time he came home around 6 o'clock in the evening." (25 RT 4225.)

When appellant was about one and a half or three years old, Julia paid a "coyote" to smuggle her and appellant into the United States. They arrived in the trunk of a car. (24 RT 4198-4200; 25 RT 4260-4261; 26 RT 4494.) They came to escape dire poverty. (24 RT 4199.) Appellant's sisters were left behind at that point. (24 RT 4201; 25 RT 4261.)

Julia and appellant moved into an apartment in Wilmington, where Chago was already living. (24 RT 4200; 26 RT 4497.) Although the apartment was crowded, conditions were much better than they had been in Mexico. They had running water and electricity, and Julia found a job. (24 RT 4201.) Sometime around 1983 or 1984, Julia paid someone to bring appellant's sisters, Yanet, Yadira and Aideet, into the United States. (25 RT 4328-4330-4334.) The entire family lived in another apartment in Wilmington, along with other relatives. (25 RT 4331-4334.)

When appellant was about three years old, he helped his father gather cardboard. (26 RT 4494-4495; 27 RT 4537.) Appellant was always with Chago, even when he was drinking with his friends. (27 RT 4537.) If Chago looked the other way, appellant would drink his beer. (26 RT 4504-4505.)

When appellant was as young as three to five years old, Chago began beating him. Chago did not hit his daughters, but he would beat appellant even when he was behaving the same as his sisters (e.g., going downstairs when they were supposed to be upstairs, or straying too far from home), or for no reason at all. (24 RT 4201-4202; 25 RT 4236, 4254, 4343-4345, 4355-4357; 26 RT 4403, 4437, 4476.) The beatings were constant, and Chago used whatever he had at hand to beat appellant, e.g., a water hose, belt, broom, stick, or shoe. He also verbally abused appellant. (25 RT 4228-4231, 4253, 4355, 4360; 26 RT 4409, 4437-4438; 26 RT 4505-4506.) Aideet recalled that "we had to stop my dad, basically stop doing it because he would just go continue and continue doing it, and now I remember . . . and it hurts me." (26 RT 4438.)

Nevertheless, appellant would remain a loving, loyal son to his father. He would smile even as he was being beaten because his father had taught him to be tough. Appellant never tried to hit his father, and never told his father to stop hitting him. (25 RT 4238, 4254-4255, 4344-4345; 26 RT 4438, 4465; 26 RT 4518.)

When appellant was about five years old, Chago assumed responsibility for raising him. (24 RT 4195-4196, 4198-4199; 25 RT 4225-4227; 26 RT 4436, 4438, 4493.) Chago wanted appellant to be a "chingon," a word which can mean different things – strong, competitive, able to get girls, able to stand up for oneself, a master carpenter. (25 RT

4231-4232, 4235, 4279, 4377; 26 RT 4498, 4513-4515; 26 RT 4506.) Chago taught his children to fight, encouraging them to do whatever it took to win. (25 RT 4339, 4341.)

For instance, when appellant was about four or five years old, his cousins were "bugging" him and Yadira; appellant had to go after them and do whatever it took to make them fear him. (25 RT 4340-4341.) On another occasion, appellant went home crying after an older African-American boy hit him; Chago was upset and called appellant something to the effect of "bitch," and persuaded him to fight the boy. They fought until the boy quit. Afterward, Chago kept laughing at the other boy and hugging appellant proudly, as if he "got a diploma, [as] if he was going to college." (25 RT 4379, 4398-4400; see also 25 RT 4517; 26 RT 4522.) That sort of behavior happened whenever appellant needed to defend himself. (25 RT 4380.)

Over time, Chago's drinking became increasingly heavy. (25 RT 4338-4339, 4353, 4355-4356.) Yadira recalled that, at first, he would stay home all day and drink. (25 RT 4356.) Later, he started staying out late, drinking with his friends rather than stay home with his family. (25 RT 4356-4357.) He got drunk almost every day, and every weekend. (25 RT 4341, 4357; 26 RT 4427.) According to Aideet, he would start drinking when he woke up, and continued until he fell asleep. Sometimes he urinated on himself. (26 RT 4427.) He drank even when he had the children in the car. (25 RT 4342.)

Around the time appellant started kindergarten, his family moved to Compton, where they lived for about six months. (25 RT 4345-4347; 26 4497.) His family constantly encountered problems with African-Americans, who Yadira estimated comprised about 90% of the community.

On one occasion, an African-American woman, trying to get her children onto a school bus before appellant and his siblings, pushed Julia and hit her in the stomach. Julia visited a doctor because she was in great pain, and learned not only that she had been pregnant, but that the blow had resulted in the loss of her unborn child. (25 RT 4347, 4350; see also 26 RT 4497.) On another occasion, someone threw a rock at Julia, who had to get stitches. (25 RT 4351-4352.) Sometimes, someone would take Chago's car and use it overnight. (25 RT 4352.) Yadira disliked going to school because African-American kids at school picked on her and her sisters. (25 RT 4348-4350.)

Because of the difficulties they had encountered living in Compton, appellant's family moved back to Wilmington. (25 RT 4351, 4354; 26 RT 4497.) Appellant's family, as well as his aunt, moved into an apartment; appellant and his family shared one bedroom, and his aunt lived in the other. (25 RT 4354.) At some point, the family moved to a fourth location, on Young Street in Wilmington, and then to another location across the street. (23 RT 4359.)

Sometime around 1986, Chago was put in jail.[34] After being stopped by the police, he hid his driver's license and gave a false name, worried that he would be deported. He was in custody for 20 days and did 10 days community service. (27 RT 4543-4544.)

At some point, Chago rented a location for his carpentry shop, which he had been running from his garage. He received more work and hired his

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[34] Chago also testified that appellant was about eight years old at the time he was put in jail (27 RT 4543), which would have been around 1989. However, in light of other evidence, particularly Chago's testimony that a friend helped him set up a business after he got out of jail (27 RT 4544), his jail stint probably did occur in or around 1986.

friends, who drank and used drugs. (25 RT 4243-4244, 4269; 27 RT 4544.) Chago would come home late at night, drunk. (25 RT 4245.) At first, both Julia and Chago handled their finances, and the business did well. (25 RT 4244, 4274.) Then he took control of the finances. Whenever he got an advance or a deposit, he spent it. (25 RT 4244, 4269, 4274; 26 RT 4463.) Julia did not know what he did with the money he made from his business advances and deposit. (25 RT 4244-4245.) They borrowed money from relatives to keep the shop going, but the loans were never repaid. (25 RT 4273-4274.)

When appellant was around five to eight years old, he began working in his father's cabinet shop after school – sometimes as late as 10:00 p.m. – and on weekends. (24 RT 4202; 25 RT 4222-4223, 4230, 4238, 4241, 4243, 4247, 4264, 4361; 26 RT 4408, 4424, 4458-4459, 4494-4495, 4497-4498, 4506.) Because of Chago's alcoholism, appellant became responsible for his family from a very young age. For instance, he gave his earnings to his mother to help buy groceries and pay the bills, and he bought shoes and clothes for his siblings. He never used the money for himself. Appellant was so busy that he did not take part in any activities other than work and school. Julia believed that appellant was deprived of his childhood. (25 RT 4240-4241, 4245-4246, 4255; 26 4425-4426, 4433-4434.)

Yanet recalled that when appellant was around eight or ten years old, Chago's beatings were "really constant." (26 RT 4462.) Chago beat appellant if he saw him laughing or playing around, or when appellant snuck out of the shop to play. (26 RT 4460-4462.) Chago kicked him and beat him with whatever he could grab hold of, e.g., an electrical cord, sticks, a broom, and an iron. (26 RT 4460-4461.) At the time, she wanted to jump on her father to make him stop, but she was not strong enough. (26

RT 4461.) Yanet still had a "a lot of pictures in [her] head" of appellant covering himself as Chago hit him (26 RT 4460), and it hurt her (26 RT 4463).

Appellant's uncle, Artemio Gutierrez Pineda ("Artemio"), testified that he regularly saw appellant when he was about 10 or 12 years old. Artemio usually saw him working at his father's shop, cutting wood and making furniture. Once, appellant was working at 8:00 a.m. or earlier, and on other occasions, he worked until 10:00 or midnight. This took place even on school days. Artemio thought it was unusual and perhaps wrong that appellant worked those hours, and several times he mentioned it to Chago. (27 RT 4588-4591, 4594.) Chago became very quiet and mad. (27 RT 4591.)

Between the time appellant was 8 and 11 or 12 years old, Chago continued to drink. (25 RT 4223.) During that period, he drank six to seven 46-ounce bottles of wine or beer daily. When he had consumed that amount, he staggered or stumbled. (25 RT 4225.) Loyal to his father, appellant did not report what was going on in the shop when Julia was not there. (25 RT 4269.) According to Chago, appellant did not go to bars with him at that point, but sometimes appellant was present when Chago was drinking with his friends in the apartment parking lot. (26 RT 4504.)

During the time Chago was running his business, and before becoming what he called a "chronic alcoholic," he would go into the bathroom before breakfast and have a couple of beers to get over a hangover. (29 RT 4501-4502.) Because he was an alcoholic, he had a hard time finding jobs, and it affected his ability to pay rent. (26 RT 4499.)

When appellant was about 11 or 12 years old, Chago tried to quit drinking on his own. He went into withdrawal, suffering convulsions and

injuring the side of his face. Appellant was present and helped Chago, who was taken away in an ambulance. That was the first of several such attacks. On several occasions, he was hospitalized or sent to rehab. (25 RT 4218-4223, 4229, 4237; 26 RT 4430.)

Following that attack, Chago stopped drinking for a few years.[35] (25 RT 4265, 4278; 25 RT 4364, 4381; 26 RT 4397, 4428-4429, 4433, 4468-4469.) Although Julia testified that Chago's abuse of appellant ceased following his first attack, appellant's sisters testified that the abuse continued. (25 RT 4229, 4363-4364, 4381; 25 RT 4372, 4429.) Even when he was not drinking, he continued to behave irresponsibly. (26 RT 4395, 4468.)

Yadira recalled that appellant never stayed still. (25 RT 4345, 4363.) He attended school regularly, but never received good grades and did not do his class work. (25 RT 4361-4362.) When he was in the fifth or sixth grade, a teacher "made [appellant's] mom take him for [a] checkup" because she knew he was hyperactive. Yadira testified that although he did not receive medication, "he did that have that sickness," apparently referring to hyperactivity. (25 RT 4362.)

Appellant began skipping school when he was around 12 or 13 years old, working for Chago instead. Chago claimed that appellant did not like school. Eventually, Chago took appellant out of school and had him work

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[35] Estimates as to how long Chago was sober varied. Julia and Yadira testified that he was sober for about seven or eight years (25 RT 4266, 4381, 4397), Chago himself testified that he was sober for seven years (27 RT 4519, 4531-4534, 4544-4545), Aideet recalled that he was sober for about five or six years (26 RT 4449), and both Yanet and Salvador Zepeda Hernandez recalled that it was about three years. (26 RT 4468-4469; 27 RT 4554, 4560-4561.)

full-time in order to keep him out of trouble. (26 RT 4507-4508, 4515; 27 RT 4530.)

Chago taught appellant to drive at an early age, trying to teach him to be a "chingon," or a man. Later, Chago had appellant drive him around, including to bars. (26 RT 4465-4466.)

Salvador Zepeda Hernandez, who worked in Chago's shop for two years, testified that he thought Chago was an alcoholic. (27 RT 4551-4552, 4554, 4560, 4564.) Chago drank at the shop daily, sometimes in appellant's presence. (27 RT 4572.) Sometimes he left work and came back smelling of alcohol. (27 RT 4554.) On several occasions, appellant complained to Hernandez about his father's alcoholism. (27 RT 4563.)

Even when Chago stopped drinking for some period of time, his behavior was the same. He did not like to hear the truth and was angered when anyone went against him. (27 RT 4554-4555-4556, 4560.) According to Hernandez, Chago still went to bars after attending A.A. meetings. On many occasions, he took appellant, who was about 15 or 16 years old, with him. (27 RT 4560-4562.)

On several occasions, appellant had to complete jobs his father had abandoned because of his alcoholism. According to Hernandez, on several occasions Chago failed to pay his workers; on those occasion, Hernandez was left without money for rent or food. Chago claimed he was using the money for materials, but his employees never saw the materials and could not complete the jobs. (27 RT 4558, 4566.) As far as Hernandez knew, Chago had lost two or three shops because of his alcoholism. (27 RT 4558, 4564.)

Appellant's aunt, Luteria Gutierrez Pineda ("Luteria"), testified that in 1998 she hired Chago to do some carpentry, in part because she wanted

to help his family by employing him. She recalled that he was having problems with alcohol at that time. (27 RT 4607-4609.) Chago failed to finish the job, and she assumed he was drinking. However, appellant assured her that he would help finish the project, and the results were excellent. Appellant was in charge of the project at that point.[36] (27 RT 4609-4610.) Appellant gave his earnings to his mother. (27 RT 4609.)

Luteria testified that she had known appellant most of his life. She recalled that he was very happy whenever he saw her family. He liked to play with her children. He hugged and kissed her. He always showed her whatever he was working on, proud of what he was doing. (27 RT 4608, 4611-4613.)

Chago had the cabinet shop for about 10 years. Every member of the family worked there at some point, but appellant did most of the hard work. (25 RT 4243, 4265, 4279; 26 RT 4404-4405, 4407, 4425, 4427-4428, 4464.) Chago never saved money, so Julia was unable to pay bills for either the family or the business. They did not have money and could not pay the rent, buy food, or pay the bills. Often, landlords would scream at and curse Julia, demanding rent; because he would not come home, she and the children would have to find Chago at a bar and ask him for money. At some point, they were evicted from their house and had to move into the shop, where they lived for about three or four months. They had seven or eight children at that time, including appellant. (25 RT 4241, 4244-4245, 4238, 4270-4272; 26 RT 4359-4360, 4396-4397, 4464, 4467-4468; 27 RT 4566, 4558-4559.) They all slept in one very small office, and there were

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[36] Although Chago initially denied that appellant had ever had to complete a project for him, he immediately went on to admit that appellant had done so. (26 RT 4508-4510.)

no beds. (26 RT 4396.) Ultimately, they had nine children. (25 RT 4239, 4527.)

Yadira testified that Chago spent the money on "girls, bars and you name it, for him[self]." (26 RT 4408.) The family received donations, and Julia borrowed money from relatives. (25 RT 4238, 4270-4271, 4273-4274; 26 RT 4408; 27 RT 4592.) Julia was pregnant at the time they were living in the shop. Her family "couldn't cope with that," so they took in Julia and her family. (25 RT 4245, 4268.)

When appellant was about 18 years old, Chago became a chronic alcoholic. (26 RT 4499, 4504.) If he did not have money to buy alcohol, he added rubbing alcohol to a soft drink to stop shaking. (29 RT 4502.) On two or three occasions he ended up in the hospital. (26 RT 4494-4495.)

When appellant was about 18 or 20 years old, Chago lost his business. Around the same time, appellant started using heroin, cocaine, and "acid." He told Yadira that he wanted help, but he continued to use drugs. (25 RT 4366, 4369-4372, 4424-4425.)

From the time appellant was about 18 years old until he was about 21, he was on his own. (25 RT 4240.) He earned money by making cabinets by himself. (26 RT 4431-4432.) Appellant had been getting into trouble, though Julia was not aware of that. (25 RT 4242-4243.)

In 2000, the family moved to Washington, where Yanet was already living, in search of a better life. (25 RT 4266-4267, 4279.)

In 2001, appellant's parents went to Mexico for about six to twelve months because Chago's mother fell ill. Sometime around the time she died, Chago started drinking again. (25 RT 4265-4266, 4279; 26 RT 4367, 4429, 4433.) During the time appellant's parents were in Mexico, appellant, Yanet and Yadira took care of their younger siblings. (25 RT

4239, 4267; 26 RT 4366-4368.) Appellant worked for their uncle, doing whatever he was asked to do to earn money. (26 RT 4369.) Their parents returned from Mexico because the Department of Social Services had threatened to take their children because they were unattended. (25 RT 4270; 26 RT 4368.)

When Julia and Chago returned from Mexico, appellant was working for various relatives. Sometimes Julia had to borrow money from her sisters, or appellant helped out. (25 RT 4240.) Aideet believed that when Chago went to Mexico, there was nobody to keep appellant close at hand. (26 RT 4434-4435.)

After returning from Mexico, Chago had a hard time finding a steady job. He earned money by collecting cans. (26 RT 4500.) He began living with appellant's sisters so that Julia would not have to take care of him. (26 RT 4468-4470, 4481.) At the time of appellant's trial, Chago had been living with Yanet for over a year. (26 RT 4456, 4458, 4493.) She supervised and controlled him as if he were another child. (26 RT 4485-4487, 4493.)

Chago was still an alcoholic. He got sick and could not eat or go to the bathroom because he needed alcohol. (26 RT 4456-4457.) He suffered liver problems related to his drinking. (26 RT 4430.) When he drank, he could become very aggressive, swear in front of Yanet's family, and take money out of her drawer without thinking that her family needed it. (26 RT 4458.) Aideet and Yanet took him to the hospital and detox clinic, where he was treated for seizure attacks. He was also on medication. (26 RT 4430, 4456-4457.) Aideet, Yanet and Salvador Zepeda Hernandez all testified that Chago had been drinking, or smelled of alcohol, that very morning. (26 RT 4431, 4457; 27 RT 4554.) Chago denied their claim. (26

RT 4494; 27 RT 4529.)

Appellant's sisters testified that Chago's parenting and his alcoholism had had a negative influence on their lives, particularly appellant's. He never taught them to have goals, e.g., to have a house, go to school, or be a teacher or lawyer. (25 RT 4375-4376, 4379, 4382; 26 RT 4434, 4439-4440, 4468, 4484.) He spent money he should have been saving. (26 RT 4401, 4463.) He did not read to his children or instruct them when they were doing something wrong. (25 RT 4382.) Whenever he did fun things with his children, it also involved drinking with his friends. (26 RT 4401-4402.) The only things he taught appellant were how to fight and be a good carpenter. (25 RT 4379; 26 RT 4478.) From the time appellant was young, Chago exposed him to drinking, taking him to bars and even letting him sip leftover drinks. He also encouraged appellant to be a "player," i.e., to be with different girls. (25 RT 4366, 4373-4375, 4379, 4382-4383.) When Yanet was younger, she used to cry, wishing she had a different father. (26 RT 4483.)

Hernandez testified that during the time he had known Chago, he (Chago) had never taken care of his family. He never provided guidance, and whenever it came time to pay a bill or buy food for the family, he found shelter in alcohol instead. Hernandez himself had helped appellant's family by providing them with food. (27 RT 4557-4559.) Hernandez also testified that Chago "lies a lot." (27 RT 4567.)

Yadira and Yanet testified that they did not want appellant to be executed, and that he deserved mercy because he was very loving towards and supportive of his family, he was a beloved member of the family, and he had been a productive member of society. (26 RT 4412-4414, 4470-4472, 4479-4480, 4482.) Yadira also testified that on many occasions she

had seen evidence that he had been beaten by deputies, and suggested that he had had to defend himself. (26 RT 4414-4418, 4422-4424.)

Chago admitted that alcoholism had affected him, his family, and his relationship with appellant, and kept him from being a good father. (26 RT 4495, 4519.) Although he claimed that he usually would not hit appellant when he was drunk, he admitted that alcoholism had affected his memory "a little bit" and that he could not remember how many times he had whipped appellant. (29 RT 4495, 4505.) Chago testified that he did not want appellant to be executed because he had never been a killer. (27 RT 4547.) He claimed that appellant was his life, and that he would be willing to give his own life for his. (27 RT 4541.)

B. Testimony of School Personnel

Rebecca Escobar, a teacher at Wilmington Park Elementary, testified that she had had contact with appellant approximately 15 or 16 years earlier. He was not her student, but he was sometimes sent to her classroom by his teachers, either because he had misbehaved or had not completed his assignments. (24 RT 4162-4163, 4166-4167, 4173, 4175-4176, 4183.) Escobar estimated that he was sent to her classroom perhaps six to twelve times over the course of his fourth and/or sixth grade years. (24 RT 4163, 4165-4166, 4171.)

Escobar had been concerned that appellant might be headed in the wrong direction, and that he would later become involved with gangs. (24 RT 4167-4169, 4177.) However, based on her observations, Escobar believed that appellant was not a bad kid. (24 RT 4179.) Appellant behaved well whenever he was in her classroom, and he was respectful to her, and he generally did the work he was supposed to do. She believed he wanted to please her. (24 RT 4164, 4167, 4172-4173, 4177, 4181.)

Escobar also observed appellant's behavior on the playground, recalling that he was playful but not malicious. In particular, she recalled that he ran around on the playground but probably did not line up correctly. He was respectful and friendly whenever he encountered her there. (24 RT 4164, 4169-4172, 4174, 4181.)

Escobar acknowledged that she was staunchly opposed to the death penalty, and had written a paper against it while in high school. (24 RT 4178.) She broke out into tears when she learned that appellant possibly was facing the death penalty, and was completely surprised that he was in that situation. (24 RT 4178-4179, 4182.) She denied that she was testifying or creating a story because of her position against the death penalty, pointing out that she did not contact the defense after learning of appellant's situation, and that she would not have testified had the defense investigator not contacted her. (24 RT 4181.)

Mary Christine Escamilla, appellant's third-grade teacher, also testified. (25 RT 4297-4298, 4300, 4310.) She explained that, before entering the third grade, appellant scored in the 23rd percentile in reading, and in the 38th percentile in math; at the end of the year, he scored in the 44th percentile in reading, and in the 25th percentile in math. That is, his score went up in reading, but down in math. (25 RT 4298-4299, 4301-4303.) He improved academically, but multiplication and division were difficult for him. (25 RT 4298, 4305-4306, 4308, 4311.) His overall performance in math was very much under the curve range. The tests were administered in Spanish, not English. (25 RT 4307.)

The only problem Escamilla had with appellant was getting his homework done. She recalled no behavioral issues. (25 RT 4298, 4305, 4309-4310.) She arranged for a mentor teacher to tutor him, but otherwise

there was no extra support available. She sometimes asked more experienced teachers, Rebecca Escobar and Juan Nierhake, to help her. (25 RT 4298, 4307-4308, 4310-4311; 27 RT 4597.)

Nierhake, a retired school teacher who had taught at Wilmington Park Elementary School, recalled having contact with appellant, who was then in the third grade. (27 RT 4597-4599, 4601.) Because Nierhake was known to be strict, other teachers relied on him to discipline their students. (27 RT 4600-4602.)

About once every week or two, Escamilla sent appellant to Nierhake's classroom to complete his homework assignments. (27 RT 4600-4605.) Otherwise, appellant was a normal, active student, and he did not appear to have any disciplinary problems. (27 RT 4601-4602, 4604-4605.) Nierhake would have remembered if he was one of the students teachers referred to as "hemorrhoids." (27 RT 4604.)

C. Testimony of Clinical Psychologist Adrienne Davis

Adrienne Davis, a clinical psychologist with specialties in psychological assessment and forensic psychology, testified that she had been asked to evaluate appellant's psychosocial history in order to identify factors that may have predisposed him to commit or contributed to his involvement in these crimes. (29 RT 4792-4801, 4831-4838.) Specifically, Davis identified the following factors: (1) a parent with a substance abuse problem; (2) poverty; (3) appellant's early exposure to drugs and alcohol; (4) parental rejection, particularly in that his mother had wanted to abort him and later turned over the task of raising him to his father; (5) child abuse; (6) the fact that his mother was a teenager when she started having children; (7) large family size; (8) a household marred by marital conflict and discord; (9) family instability; (10) attention deficit hyperactivity

disorder ("ADHD"); (11) learning disabilities; and, (12) growing up in a community that promotes or condones criminal conduct. (29 RT 4809-4811, 4819-4821, 4865-4869, 4872.) Davis also opined that the fact appellant was deprived of opportunities to engage in normal childhood activities was another important factor, as those activities play an important role in a person's socialization. (29 RT 4817-4818, 4852.)

Davis opined that these risk factors were both present and persistent, and there were no protective factors, such as intelligence or a relationship with a positive role model, to offset their impact. (29 RT 4812, 4881-4882.) According to Davis, when this many risk factors are involved, the chance that an individual would not have any contact with law enforcement is pretty remote. (29 RT 4821-4823, 4879.) Although she did not consider his background to be an excuse for the crimes, it provided an explanation or context in which to understand him. (29 RT 4818.) Davis explained that at times what seems like a choice is less so in light of the factors that have shaped a person. (29 RT 4845.)

In reaching her opinion, Davis reviewed some of appellant's personal records, including school records; interviewed his family members and teachers; reviewed the police reports; and, reviewed the interviews of other family members conducted by investigators in this case. She did not interview appellant because she believed that she had enough information from other sources, and that she could be more objective by relying on other sources, given that she did not have time to develop a relationship and rapport with him. (29 RT 4801-4805.)

Davis explained the significance of the risk factors as follows:

Chago's drinking problem created a number of problems for appellant's family, including a tense family environment, economic

hardship, and an unstable housing situation. (29 RT 4815.) Her opinion would not change even if Chago had been sober for a longer period than she had initially thought, because an alcoholic's personality does not change when he or she stops drinking. Rather, the alcoholism is a reflection of the difficulties in his or her personality. Moreover, Chago was drinking during the most critical stage of appellant's life, i.e., his first 12 years. (29 RT 4862-4864, 4879-48801, 4884.)

Appellant's relationship with his father was paradoxical, and contributed to his problems. While Chago taught appellant to be a good carpenter, he also modeled irresponsible and aggressive behavior. (29 RT 4813-4814, 4874, 4878.) Moreover, although Chago was abusive, appellant wanted to be around him. (29 RT 4814, 4829.) Davis explained that research shows that victims of abuse bond with their abusers, "kind of almost out of psychological survival." (29 RT 4814.) Davis further explained that "you can't really contrast" an "inappropriate level of discipline" intended to teach a lesson and "randomly [] whacking the child because you feel like it." What is important is the severity of the abuse. (29 RT 4853.)

Davis also pointed out that Chago's conduct was contrary to the positive life lessons he claimed to have taught appellant, e.g., never to kick a man when he is down, and that one should fight only to defend oneself. (29 RT 4846-4847.) In fact, appellant was taught several negative life lessons: it is unimportant to be able to control your behavior; violence or aggressiveness or violence towards another is an option; when you have trouble coping, you use substances; and, it is sometimes acceptable to disobey the law. (29 RT 4876-4877.)

Davis acknowledged that not all poor people become criminals, but

she explained that they are at greater risk. She also reiterated that risk factors should not be considered in isolation, but in combination. (29 RT 4869.)

Davis testified that she had indicated in her report that appellant had been told his mother had tried to abort him, but subsequently learned she (Davis) was wrong on that point. (29 RT 4867-4868.) However, Davis noted that appellant's mother acknowledged that she did not want him. She also explained that rejection need not be stated to the child, because a parent's "behavior can speak just as loud as words can." (29 RT 4867.) In that regard, Julia turned over the responsibility of raising appellant to Chago, and did little to protect him from Chago's abuse. (29 RT 4867-4869.)

Davis saw evidence that appellant's family was dysfunctional. (29 RT 4838-4839.) For instance, Julia related information about struggles she had with Chago even before appellant was born, and her struggles managing the household. (29 RT 4829.) Even if appellant's family was loving in some ways – e.g., he had a loving relationship with his mother – in some ways it was not, as shown by the intergenerational transmission of economic hardship, addiction and abuse. (29 RT 4838-4839.) As noted above, some of that dysfunction stemmed from Chago's drinking. (29 RT 4815, 4848-4839.) The dysfunction was also reflected in the lives of appellant's siblings: two of the younger boys started having difficulty with the law as teenagers; two of his older sisters became pregnant as teens, and had already been married and divorced by their mid-20s, and they indicated that the family's problems had to do with their desire to get away from the family. (29 RT 4816.)

Davis acknowledged that appellant's siblings did not end up in the

same situation as appellant, but explained that they were raised under different circumstances. For instance, appellant's older sisters were primarily raised by their mother, which was a protective factor. (29 RT 4851, 4861.)

Davis explained that appellant's school records showed that his academic difficulties were long-standing. He had had difficulty keeping up with his schoolwork. He had had difficulty with reading, especially when he had to transition from a primarily Spanish-speaking class to an English-language class. (29 RT 4806-4807.) Appellant was enrolled in special education classes for children with emotional difficulties. (29 RT 4807.)

The school records contained "a lot of comments about his behavior and difficulty interacting with his peers," and information that he had ADHD.[37] (29 RT 4806.) The records also contained indications he needed to be evaluated by a psychologist, and Davis saw nothing indicating that he was evaluated. The records contained information that school personnel had difficulty engaging appellant's family in his education, and one record indicated that "they weren't going to be able to continue trying to see him because there wasn't enough family involvement." (29 RT 4807.)

Appellant's school records and Davis's interviews with the teachers established that appellant had a lot of difficulties both academically and socially, and that the schools lacked the kinds of services he needed. Had those services been available, they perhaps could have prevented some of

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[37] Davis acknowledged that appellant was not diagnosed with ADHD. However, she explained that in his school records he was described as having poor attention, poor concentration, and impulsivity, and as being hyper, which constitute the diagnostic criteria for ADHD. (29 RT 4840-4841.)

the risk factors that developed later. (29 RT 4808, 4829-4830.)

Davis also explained that there were a lot of gangs and criminal behavior in appellant's community. A person does not necessarily have to be involved in such activity to be affected by what he or she sees. (29 RT 4872-4873, 4875.) Even if he or she does not "grow up to steal cars and then run people over with them," he or she might be involved in other forms of dysfunctional behavior. (29 RT 4875.)

The risk factors present in appellant's life affected his self-esteem. (29 RT 4827, 4849-4850.) Although an individual facing those factors may appear to be "on top of things or feeling good" in some situations, "deep down inside there is anger, there is rage, there's insecurity, there's a person who isn't really good at understanding or understanding their emotions, modulating his emotions." Such a person believes aggression or violence is an appropriate alternative, and develops or adopts attitudes that put him at odds with others. (29 RT 4827.) So it was with appellant, who displayed poor coping mechanisms, impulsivity and a failure to think through consequences. (29 RT 4828.)

In the period immediately before the first crime, appellant was using drugs and having a difficult time. Before his parents went to Mexico, appellant was helping to support his family and felt responsible for his father. But without his parents or the shop, there were no constraints on his behavior. (29 RT 4825-4826.)

Although it was not too late intervene, significant aspects of his personality were shaped long before he had an opportunity to learn to make different kinds of choices. (29 RT 4865.)

D. Testimony of Correctional Consultant James Esten

James Esten, a correctional consultant, testified about the operation

of correctional facilities. Prior to his 1992 retirement, Esten had worked for the California Department of Corrections ("CDC") for 19 years. For part of that time, he worked as a supervising correctional counselor and was a member of the Reception Center Classification Committee, which entailed determining where a particular inmate should be incarcerated. (28 RT 4674-4678, 4686, 4696-4700, 4734-4735, 4748-4751, 4776, 4779-4781.)

Esten opined that if appellant were sentenced to LWOP, he probably would be housed at a Level 4 institution, most likely in a security housing unit ("SHU") such as Pelican Bay. (28 RT 4684, 4687-4688, 4735, 4751-4752.) Esten also described the stringent security measures at Level 4 facilities, especially Pelican Bay, e.g., electric fences, chain link fences secured by concrete footings and topped by razor wire; non-contact visiting; controlled yard access; the use of waist restraints; and, cells housing one or two inmates. (28 RT 4685, 4688-4690, 4693-4696. 4724-4734, 4736-4739, 4760, 4771-4774, 4776, 4778.)

In reaching his opinion, Esten considered the following: the circumstances of the charged offenses; appellant's disciplinary history in the Men's Central Jail; his two-hour interview of appellant; his discussion of the case with Patton; his examination of the jail-cell replica; and, his discussions with employees of CDC's classification services, including acting chief Robert Feigan, as to where appellant would be placed if sentenced to LWOP.[38] (28 RT 4678-4681, 4684, 4686-4687, 4691-4693, 4735, 4739-4741, 4752-4756, 4777, 4779-4781.) Esten also testified that,

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[38] Esten acknowledged that at the time he formed his initial opinion, he believed that appellant had not committed any disciplinary violations since July 2005, and that he had since been made aware of incidents occurring as recently as December 29, 2006, and January 4, 2007. (28 RT 4741, 4766-4767.)

under Title 15 of the California Code of Regulations, defendants sentenced to LWOP must be sent to one of twelve Level 4 institutions. (28 RT 4684-4685, 4687-4688, 4765.)

V. Prosecution Rebuttal Evidence

The prosecution called Luis Puig, a classification staff representative for the California Department of Corrections and Rehabilitation ("CDCR"), to rebut aspects of defense expert Esten's testimony. (29 RT 4887-4888.) First, Puig disputed Esten's opinion that, if sentenced to LWOP, appellant would be sent to a SHU facility, explaining that SHU is used to house inmates who misbehave while in the prison system. However, Puig acknowledged that, if appellant had ongoing disciplinary problems, he could possibly be sent to SHU from the reception center. (29 RT 4890-4893.) Puig opined that, if appellant were sentenced to LWOP, he would be placed in a Level 4 facility, but in the general population, not SHU. (30 RT 4943-4948.)

Second, Puig disagreed with Esten's testimony that it would be very difficult for an inmate in SHU to use a paper clip as a handcuff key. An inmate could use it to uncuff the person being escorted in front of him, or he could fashion one for someone else to use. (29 RT 4897-4898.)

Puig also contrasted conditions of confinement for prisoners sentenced to LWOP and those for prisoners sentenced to death. (29 RT 4899-4907.) Among other things, he pointed out that a death row inmate cannot have a job assignment. On the other hand, he asserted, an inmate who receives LWOP for two murders, including one in jail, can get a job as a carpenter or in the kitchen, and therefore would have access to knives or other tools. At some point, an inmate like appellant possibly could be placed in a job assignment, such as carpentry, despite the charged offenses

and his disciplinary history. (29 RT 4899-4901; 30 RT 4934-4942.) Puig also testified about various types of contraband, including weapons, which have been found in Level 4 facilities. (29 RT 4908-4912.)

Deputy Sheriffs Joe Medina and Salvatore Picarella testified that on January 4, 2007, they were handcuffing and searching appellant for the court line and noticed that he had an envelope reading "legal mail." (30 RT 4951-4953, 4959.) They searched the envelope for contraband and found that it contained nine envelopes containing personal letters. The envelopes were sealed, contrary to jail policy. (30 RT 4953, 4955, 4960-4964; People's Exhibit 177A-I.) Medina acknowledged that appellant did not threaten him and that he had no trouble with him. (30 RT 4954-4955.)

Detective Javier Clift testified that he had been asked to review the letters recovered from appellant, and testified to his opinions regarding the contents of those letters. Among other things, he testified that the letters showed that appellant was a dedicated gang member; that he acted on his own in killing Tinajero; that he viewed the court proceedings as a joke; and, that he was willing to harm a snitch in another inmate's case.[39] (30 RT 4965-4966.)

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[39] The testimonies of Deputies Medina and Picarella and Detective Clift are described in greater detail in Argument VI, *post*.

ARGUMENTS

I

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF PROSPECTIVE JUROR JAMES WILIA REQUIRES REVERSAL OF APPELLANT'S DEATH JUDGMENT

A. Introduction

The trial court sustained the prosecutor's challenge for cause as to prospective juror James Wilia based on his ostensible views on the death penalty. Because the record does not support the trial court's ruling, its excusal of this qualified prospective juror violated appellant's rights to an impartial jury, a fair capital sentencing hearing, due process of law, and a reliable judgment of death under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Reversal of appellant's death judgment is required.

B. The Controlling Law

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to the determinations of both guilt and penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Turner v. Murray* (1986) 476 U.S. 28, 36, fn. 9.) This right also is protected by the California Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has mandated a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *Wainwright v. Witt* (1985) 469 U.S. 412, 421.) With respect to that process, the high court has made clear that a defendant cannot be

sentenced to death if the penalty jury was chosen by excluding prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. [Footnote omitted.]" (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 522.) Such an exclusion violates a defendant's rights to due process and a fair and impartial jury under the Sixth and Fourteenth Amendments, as it "subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.)

Under the federal Constitution, "a juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.*" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45, italics in original.) The high court has explained that "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"].) As the high court has explained,

> [t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in

> administering constitutional capital sentencing schemes by not following their oaths." To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law."

(*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659 (alterations in original) (citation omitted) (quoting *Wainwright v. Witt, supra,* 469 U.S. at p. 423 and *Witherspoon v. Illinois, supra,* 391 U.S. at p. 523.) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas, supra,* 448 U.S. at p. 45.) The same standard is applicable under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 955, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. [Citation omitted.]" (*Wainwright v. Witt, supra,* 469 U.S. at p. 423; accord, *Morgan v. Illinois, supra,* 504 U.S. at p. 733; *People v. Stewart* (2004) 33 Cal.4th 425, 445; see *Gray v. Mississippi, supra,* 481 U.S. at p. 652, fn. 3 ["A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve"].)

If a prospective juror equivocates as to whether he can fulfill his oath in a capital case, the trial court's determination of substantial impairment is

subject to deference on appeal, because the trial court takes into consideration a potential juror's demeanor. (*Uttecht v. Brown* (2007) 551 U.S. 1, 9.) But deference to the trial court "does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Id.* at p. 20.) Further, the Sixth Amendment requires that a trial court's resolution of the issue of juror bias be examined in "the context surrounding [the juror's] exclusion" in order to determine whether it is "fairly supported by the record." (*Darden v. Wainwright* (1986) 477 U.S. 168, 176; see also *Wainwright v. Witt*, *supra*, 469 U.S. at p. 434.) Excusal of a prospective juror cannot be upheld unless there is substantial evidence in the record supporting the trial court's ruling. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962, abrogated on another ground as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117; see *People v. Bramit* (2009) 46 Cal.4th 1221, 1234-1235 [recognizing that the trial court's decision is entitled to deference, and applying substantial evidence standard where juror gave conflicting answers in questionnaire and equivocal answers on voir dire].)

The erroneous exclusion of a juror for cause based on his death penalty views requires automatic reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at pp. 661, 668.) Reversal is required even if the prosecutor had remaining peremptory challenges and could have excused the prospective juror. (*People v. Tate* (2010) 49 Cal.4th 635, 666.) As will be shown below, the prosecution failed to carry its burden in this case and the trial court erred in excluding appellant because the record failed to show that his views on capital punishment would have substantially impaired the performance of his duties as a juror. Accordingly, appellant is entitled to reversal of his death sentence.

C. Excusal of Prospective Juror Wilia

1. The Voir Dire Procedure Utilized at Appellant's Trial

Pursuant to the trial court's ruling (3 RT 495-499), voir dire in this case was conducted in the following manner:

Prior to the commencement of voir dire, prospective jurors who were not excused for hardship were asked to fill out a 23-page questionnaire. (See, e.g., 8 CT 1978-2000 [juror questionnaire of James Wilia].) The questionnaire contained a section entitled "Attitudes Toward Capital Punishment," consisting of twenty-one questions. (See, e.g., 8 CT 1991-1996.)

Twelve prospective jurors were called to the box and the trial court conducted both general and death-qualification voir dire.[40] Each party was allowed a total of one hour to conduct follow-up questioning, and in a few instances the trial court permitted counsel to conduct voir dire without counting it against their allotted time. (3 RT 495-497.) After the court heard counsel's challenges for cause and peremptory challenges, a new group of jurors was called to fill the vacated seats. (3 RT 498-499.)

2. Juror Wilia's Questionnaire Responses

At the time of jury selection in this case, prospective juror James Wilia was a 68-year-old retired flight technician, formerly employed by JPL/NASA. (8 CT 1978; 7 RT 1158-1159.) Wilia completed all of the questions in the "Attitudes Toward Capital Punishment" section of his questionnaire. (8 CT 1991-1996.) He described his general feelings about

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[40] The trial court did not allow individual, sequestered, or "*Hovey*," voir dire. (3 RT 497-499; see *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80-81, superceded by statute as stated in *People v. Waidla* (2000) 22 Cal.4th 690, 713.)

the death penalty as "[a]n eye for an eye." (8 CT 1992.) He indicated that he was philosophically neutral with respect to the death penalty. He stated that he would refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true, no matter what the evidence showed, in order to keep the case from going to the penalty phase. He would not always vote guilty as to first degree murder or true as to the special circumstances, no matter what the evidence showed, in order to get the case to the penalty phase. (8 CT 1993.) He would not always vote for, or against, death, no matter what other evidence might be presented at the penalty phase. (8 CT 1994.)

Wilia indicated that he possibly could consider background information about the defendant's life if it were offered. He explained that "[t]he life of the defendant might make a differents [*sic*]." He opined that life in prison without the possibility of parole ("LWOP") is worse for a defendant than death, adding the explanatory comment: "No life." He also believed that the frequency with which death sentences were imposed was "[a]bout right," commenting as follows: "Hard to take a life." (8 CT 1994.)

Wilia indicated that, prior to coming to court, he had thought about whether he was for or against the death penalty. He did not belong to any organization that advocated for or against the death penalty. Asked to explain the view, if any, of his religious organization concerning the death penalty, Wilia responded, "Only God has the right." He explained that he felt obligated to accept that view. (8 CT 1995.)

Wilia affirmed that he would be able to follow an instruction by the court not to discuss or consider the question of the death penalty until the penalty phase was concluded. He could see himself, in the appropriate case,

rejecting the death penalty and choosing LWOP instead. (8 CT 1995.) He could not see himself, in the appropriate case, rejecting LWOP and choosing the death penalty instead. He would not automatically vote against the death penalty if one of the victims had been involved somehow in one murder, or if he knew the victim had been involved in criminal conduct unrelated to the murder charges. He affirmed that the status or type of murder victim would not affect his ability to vote for or against the death penalty. (8 CT 1996.)

Wilia strongly agreed with the statement, "Anyone who intentionally kills another person should always get the death penalty," adding the comment: "An eye for an eye." He strongly disagreed with the statement, "Anyone who intentionally kills another person should never get the death penalty," adding, "Same as above." (8 CT 1996.)

3. Voir Dire of Prospective Juror Wilia

The trial court commenced its death qualification voir dire of Wilia by asking him to explain his statement, "An eye for an eye," relating to his general feelings about the death penalty. (7 RT 1164-1165; see also 8 CT 1992.)[41] Wilia responded, "Well, you know, I thought about that question, and I had mixed emotions about it. And I wasn't sure whether I have the right to prosecute a person as an eye for an eye, and, you know, I really didn't know how to answer that question." The court then explained that "[u]nder the law and under our system of justice, not only you have the right but the obligation of citizenship to make a decision like that if you can do that." Wilia confirmed that if appellant were found guilty of murder in

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[41] Each prospective juror who was examined on voir dire was identified by his or her seat number. Accordingly, the court and counsel referred to Wilia as "Juror no. 12." (7 RT 1158; 8 CT 1978.)

the first degree, he would not automatically vote for the death penalty. (7 RT 1165.)

Wilia confirmed that, in his questionnaire, he had indicated he was neutral about the death penalty, explaining that he did so "[b]ecause I was undecided." (7 RT 1165.) The following exchange then took place:

> [Court]: Are you undecided now as to whether you believe in the death penalty or don't?
>
> [Wilia]: Well, in some of the cases I – I think a life sentence would be more – more to the liking on my side rather than the death penalty.
>
> [Court]: So you think instead of like an eye for an eye, you commit murder, you should be executed, you think the opposite? Even if you commit a murder, you should get life without parole?
>
> [Wilia]: Right.

(7 RT 1165-1166.) However, Wilia confirmed that he could make a fair decision either way, depending on the evidence. (7 RT 1166.)

The court then asked Wilia to elaborate on his statement that he was obligated to accept the view of his religious organization concerning the death penalty, to wit, "Only God has the right." (7 RT 1166.) Wilia explained, "Well, at the time I answered that question, I had my mind fixed, but as it turns out, if I were in the same predicament, I would want – I would want to be tried fairly so that, you know –" (7 RT 1166-1167.) Wilia continued, "Well, if I was facing the same predicament and there was someone in the jury, I would want him to judge me fairly." Asked to explain his response as it related to the choice between death and LWOP, Wilia stated as follows: "If it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, well, maybe I

wasn't totally within my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway." (7 RT 1167.)

During voir dire by defense counsel, Wilia stated that he could be open-minded at the penalty phase and consider both penalties. (7 RT 1170.) He reaffirmed that he could follow the court's instructions. He also assured defense counsel that he could have an open mind going into the penalty phase, and that he could honestly evaluate appellant's background. (7 RT 1171.)

After a long preface ostensibly summarizing Wilia's questionnaire responses regarding his religious views, the prosecutor subsequently asked, "Do you think, given all your views about God and not liking to sit in judgment of people, that you can be a juror in this case?" (7 RT 1175-1176.) Wilia replied, "Now that I think of it, yeah, I could. We'll all be judged some time, and we'll be judged." After the prosecutor asked that Wilia repeat his response, he stated,

> Okay. At some time in our life or after life, we'll all be judged, so if I make – if I make a mistake now, I would be judged for it, but I will be forgiven, okay?
>
> So now if I – if I said yes, I can abide by the death penalty and then again I could say yes parole without the or [*sic*] – I could honestly make an honest judgment at that time knowing that what I say I may be forgiven for, whether I make the wrong choice or not.

He further stated that he would not be worried that under his beliefs he had made the wrong decision. (7 RT 1176.)

Wilia confirmed that he had stated in his questionnaire that it would be hard to take a life, explaining that he meant it would be "personally" hard to do so. (7 RT 1176-1177.) The prosecutor responded, "And if you are selected to sit on this jury, you are going to be asking to decide if

somebody's life should be taken. You're not personally going to be the one doing this, but you're going to be assisting in getting to that stage." Wilia indicated that he understood. (7 RT 1177.) She then asked whether Wilia thought he really could vote for the death penalty, and he replied, "If all the circumstances – now that I think about it, with all the circumstances, if it pointed in that direction, yeah, I could." (7 RT 1177.)

Finally, the following exchange took place:

> [Prosecutor]: Okay. Well, if you're chosen for this jury and you go back there, at some point you're going to have to come back out here into open court. The defendant is going to be here, probably some of his family is going to be here, he may have little kids here that are part of his family, and they're all going to be looking here at this jury and hearing what they have to say.
>
> Are you going to be able to come out here, look at the defendant, look at his family and say you know what? Yes, I think that man deserves the death penalty for what he did?
>
> Are you going to be able to do that?
>
> [Wilia]: Yes, I think I could.

(7 RT 1177-1178.) At that point, defense counsel passed for cause and the prosecutor asked to approach the bench. (7 RT 1178.)

4. Trial Court's Grant of the Prosecutor's Challenge for Cause

At the bench, the prosecutor challenged Wilia for cause, arguing that

> I know what he said here[,] he thinks he could do it, he thinks he can do it, but throughout his paperwork he indicated there is no way he could do it, and I don't know that I've ever – I'd just ask [defense counsel] not to shake his head during what I'm saying just so he's not indicating concern.
>
> He indicated in his paperwork all over that he could

never do it. He also said here if he was the one being accused of the crime, he didn't actually use those words, but me having to sit here, I'd want it to be tried fair minded which –

The court interjected, "He never explained to me." (7 RT 1178.)

Taking the court's cue, the prosecutor continued,

> He never really explained.
>
> I feel like this juror, the way he's answering questions was trying to – trying to actually get on this jury and answer how he thought would keep him on.
>
> That's the impression that I got from this juror, and I'll submit.

(7 RT 1179.)

Defense counsel countered as follows:

> I don't think at this point that he said no way he could return a death verdict. In fact, he said just the opposite, and the district attorney asked him that question at least three or four times.
>
> In fact, I started to object as being asking the same question over and over again. He's indicated – he's indicated that he can be fair, he's indicated that he can return a death verdict, that he can look Mr. Pineda and his family in the face and return a verdict of death if he thinks it's appropriate.
>
> That's the D.A.'s questioning, he's answered it. A number of jurors in this case have changed their mind from the point where they initially filled out this questionnaire, and where there's been subsequent questioning, he has passed the test.
>
> He's indicated that he can return a death verdict, and I think that's the issue.

(7 RT 1179.)

The court then granted the prosecutor's challenge for cause, reasoning as follows:

> The problem is he lists in the wind. He's got in the questionnaire as far as the penalty is concerned "an eye for an eye," which would suggest you commit the crime of murder, you are to be executed.
>
> On the other side, he says only God can take a life. Then I've tried to clarify which it is, one extreme or the other, and he has not made it clear which one it is.
>
> His statement that he can be fair isn't the final conclusion.
>
> He also is so inexact in his answers. When he says to the question, "Can you set aside sympathy, bias or prejudice, you need to be honest," and I asked him what the heck that means, and he doesn't give a valid answer to any of these questions.[42]
>
> I think he's disqualified both on the general

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[42] In a section of the questionnaire relating to the evaluation of testimony, Wilia had indicated that he could not set aside any sympathy, bias, or prejudice he might feel toward any victim, witness or the defendant, explaining, "You need to be honest." (8 CT 1987-1989.) During voir dire, Wilia explained his response as follows:

> Oh, probably because of the circumstances as to how the trial is going to be run, whether, you know, if I try to set myself aside and say, okay, I think he's not guilty or he is guilty.
>
> I would have to have a little bit more information as far as what I need to say or what I need to do.

(7 RT 1160-1161.) After the court explained that jurors are required to set aside sympathy, bias and prejudice at the guilt phase, Wilia affirmed that he could do so. (7 RT 1161.)

circumstances of the answers that he's given and on his penalty phase answers, and I will allow the challenge.

(7 RT 1179-1180.)

D. Prospective Juror Wilia Was Not Substantially Impaired Within the Meaning of the *Adams-Witt* Standard

A fair reading of the record demonstrates that, by the end of voir dire, prospective juror Wilia's responses showed unequivocally that he would conscientiously consider both death and LWOP. (See *People v. Stewart*, *supra*, 33 Cal.4th at p. 441.) Contrary to the prosecutor's claim (7 RT 1178), Wilia did not indicate "throughout his paperwork [that] there is no way he could do it."[43] Three of Wilia's questionnaire responses indicated that he believed in the "eye for an eye" principle (8 CT 1992, 1996), while other responses suggested that he personally could not vote for the death penalty (8 CT 1993 [indicating that he would refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true, no matter what the evidence showed, in order to keep the case from going to the penalty phase], 1995 [indicating that he felt obligated to accept the view of his religious organization concerning the death penalty, i.e., "Only God has the right"]). On the whole, however, Wilia's questionnaire responses indicated that he would be a fair and impartial juror: he was philosophically neutral with respect to the death penalty; he would not always vote for, or against, death, no matter what other evidence might be presented at the penalty phase; he possibly could consider mitigating evidence; he believed that the frequency with which death sentences were imposed was "[a]bout right"; he would not automatically vote against the

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[43] By "do it," the prosecutor obviously meant vote for the death penalty.

death penalty if one of the victims was somehow involved in one murder, or if he knew the victim was involved in criminal conduct unrelated to the murder charges; and, he affirmed that the status or type of murder victim would not affect his ability to vote for or against the death penalty. (8 CT 1993-1994, 1996.)

Even if Wilia's questionnaire responses left the trial court in doubt as to whether he could vote for whichever penalty he believed was appropriate, he unequivocally made clear on voir dire that, after further reflection, he now realized he could do so. Thus, the trial court erred in finding that Wilia was disqualified on the basis of both "the *general circumstances* of [his] answers" and "on his penalty phase answers" (7 RT 1180), the latter finding apparently referring to the *content* of Wilia's responses.

First, contrary to the trial court's finding (7 RT 1179-1180), Wilia consistently made clear on voir dire that he could vote for death if he believed it to be the appropriate penalty. (7 RT 1166 [stating he could make a fair decision either way, depending on the evidence], 1170 [stating he could be open-minded at the penalty phase and consider both penalties], 1176 [stating, "Now that I think of it, yeah, I could" be a juror in this case, notwithstanding his religious beliefs], 1177 [stating, "If all the circumstances – now that I think about it, with all the circumstances, if it pointed in that direction, yeah, I could" vote for the death penalty], 1178 [stating, "Yes, I think I could" face appellant and his family, and say he deserved the death penalty].)

A fair reading of the record demonstrates that, whatever uncertainty about the death penalty Wilia may have had when he filled out the questionnaire, he had resolved it by the time of the voir dire, i.e., after

further considering his views on the matter, in some instances after the court explained the relevant law. For instance, Wilia was not unqualified to serve as a juror on account of his questionnaire response stating that he could not see himself, in the appropriate case, rejecting LWOP and choosing the death penalty instead. (8 CT 1996.) On voir dire Wilia stated that, at the time he filled out the questionnaire, he had had "mixed emotions" about the question concerning his general feelings about the death penalty. He explained that, because he was not sure whether he had "the right to prosecute a person as an eye for eye," he did not know how to answer the question. After the court explained that a juror is obligated to make a penalty decision if he or she can do so, Wilia assured the court that he would not automatically vote for death if appellant were found guilty of first degree murder. (7 RT 1165.)

Wilia went on to explain that he had written in his questionnaire that he was neutral about the death penalty because he had been undecided. The court asked Wilia whether he was still undecided as to whether he "believe[d] in the death penalty or [not]," he replied, "Well, in *some of the cases* . . . a life sentence would be more – more to [my] liking." (7 RT 1165-1166, italics added.) Nevertheless, he assured the court that he could consider any aggravating and mitigating evidence and make a fair decision.[44] (7 RT 1165-1166.) Contrary to the trial court's position (7 RT

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[44] During voir dire, Wilia was not asked to explain his questionnaire response stating that he would refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true, no matter what the evidence showed, in order to keep the case from going to the penalty phase. (8 CT 1993.) Nevertheless, his voir dire responses not only demonstrated that he could be impartial with respect to the penalty issue, but suggested that he no longer would refuse to vote for guilt, or refuse to find a special

(continued...)

1180), then, Wilia's responses did not demonstrate that he occupied "one extreme or the other," i.e., that he would automatically vote for LWOP or that he would automatically vote for death.

This Court has recognized that prospective jurors give their most meaningful answers at the conclusion of voir dire:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected.

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.) Indeed, it is often only after prospective jurors undergo a probing voir dire that they crystalize their views on the death penalty and their ability to follow the law as explained by the court.[45] The record shows clearly that this is what happened here,

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[44](...continued)
circumstance to be true, simply in order to avoid reaching a penalty phase.

[45] This Court frequently relies on prospective jurors' concluding answers in determining whether they were qualified to serve, whether in upholding the trial court's ruling denying for-cause challenges in the case of pro-death jurors who initially gave disqualifying answers but ultimately affirmed their ability to follow their oath and the law (see, e.g., *People v. Ervin* (2000) 22 Cal.4th 48, 72 [challenged jurors were not subject to exclusion as they "eventually affirmed their ability to follow the law and give defendant a fair trial"]; *People v. Mason* (1991) 52 Cal.3d 909, 953-954 [upholding denial of defense challenge to juror who initially stated she would automatically vote for death where murder took place in jail, but ultimately stated she would attempt to keep an open mind and consider mitigating evidence]; *People v. Kelly* (1990) 51 Cal.3d 931, 960 [upholding denial of defense challenge to jurors who first gave conflicting answers on their views concerning the death penalty, but eventually confirmed their intent to follow the court's instructions and to keep an open mind as to

(continued...)

and therefore the trial court incorrectly found that Wilia "lists in the wind" (7 RT 1179). (Cf., e.g., *People v. Duenas* (2012) 55 Cal.4th 1, 10-17 [holding that trial court properly excused for cause three prospective jurors, in part because their responses to death-qualification questions on voir dire were equivocal]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1328-1343 [holding that trial court properly excused for cause prospective jurors whose responses to death-qualification questions on voir dire were equivocal or indicated they would be able to impose the death penalty under circumstances not present in the case]; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1282-1286 [trial court properly excused prospective juror who gave conflicting and confusing responses both on her questionnaire and during voir dire].)

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[45](...continued)
LWOP as an alternative punishment]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 103 [same]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1224 [upholding denial of defense challenge to prospective jurors favoring the death penalty as each such juror ultimately declared an intent to follow the law and vote for LWOP if appropriate]), or conversely in upholding the excusal for cause of life-leaning jurors who initially appeared open-minded but eventually provided responses revealing that they would be substantially impaired as jurors (see, e.g., *People v. Mayfield* (1997) 14 Cal.4th 668, 728 [upholding excusal of prospective juror who initially expressed opposition to the death penalty in some cases, but eventually said she would automatically vote for LWOP in every case]; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1095 [upholding excusal of prospective juror who first said she would weigh all aggravating and mitigating factors, but later indicated she would only truly consider two mitigating factors]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1279 [upholding ruling that prospective juror was properly disqualified based on his replies to the trial court's final clarifying questions]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1061-1062 [trial court properly excluded challenged prospective juror who initially replied he would not feel compelled to vote for LWOP, but ultimately indicated he would never vote for a death sentence]).

People v. Clark (2011) 52 Cal.4th 856, 894-901 is instructive. In that case, this Court held that substantial evidence supported the excusal for cause of several prospective jurors. Among them was L.C., who, toward the end of voir dire, expressed more certainty in his ability to apply the death penalty in an appropriate case than he had earlier. However, the court found that his declaration that he could apply the law fairly and impartially was contradicted by his equivocal responses and his demeanor (e.g., it appeared to the court he "might lose emotional control over himself," he had difficulty swallowing, and he was "visibly upset and nervous"). (*Id.* at pp. 896-897.) Here, on the other hand, the trial court excused Wilia solely on the basis of "the general circumstances of the answers that he's given and on his penalty phase answers" (7 RT 1180), and did not indicate that Wilia was unqualified based on his demeanor. Significantly, the trial court did not point to any facts justifying its conclusion that Wilia's "statement that he can be fair isn't the final conclusion." (7 RT 1180.)

Second, and relatedly, Wilia explained that his religious beliefs would not prevent or substantially impair the performance of his duties as a juror. As noted above, Wilia stated, "Well, at the time I answered that question, I had my mind fixed, but as it turns out, if I were in the same predicament, I would want – I would want to be tried fairly, so that, you know –" (7 RT 1166-1167.) He continued, "Well, if I was facing the same predicament and there was someone in the jury, I would want him to treat me fairly." Wilia's explanation of these responses, while inartful, was comprehensible: "If it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, well, maybe I wasn't totally within my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway." (7 RT 1167.) Wilia apparently was

trying to convey his opinion that being tried fairly means that if he deserves the death penalty, he should be sentenced to death; if, on the other hand, he had committed the crime while not in full possession of his faculties, then he might deserve LWOP.

During voir dire by defense counsel, Wilia continued to affirm that he would be able to vote for either penalty. Defense counsel asked Wilia whether he would be open-minded as to both penalties, and Wilia assured him that he would be. (7 RT 1169.) Defense counsel subsequently asked a long series of questions asking whether he could be open-minded with respect to both penalties, follow the court's instructions, and consider mitigating evidence, and Wilia consistently stated that he could do so. (7 RT 1170-1171.)

Similarly, during voir dire by the prosecutor, Wilia repeatedly made clear that, after giving his religious views further thought, he now could be a juror in the case. (7 RT 1176-1177.) As noted above, the prosecutor asked, "Do you think, given all of your views about God and not liking to sit in judgment of people, that you can be a juror in this case?" Wilia responded, "*Now that I think of it*, yeah, I could. We'll all be judged some time, and we'll be judged." (7 RT 1176, italics added.) He assured her that his religious beliefs would not lead him to worry that he had made the wrong decision. (7 RT 1176.) He also stated that if all the circumstances pointed in favor of the death penalty, he could vote for death. (7 RT 1177.) Lastly, he stated that he thought he could look at appellant and his family and say that he believed appellant deserved the death penalty. (7 RT 1178.)

Wilia not only declared that he could vote for the death penalty despite his religious views, but he explained exactly *why* he could do so:

[I]f I said yes, I can abide by the death penalty and then again

> I could say yes parole without the or – I could honestly make an honest judgment at that time knowing that what I say I may be forgiven for, whether I make the wrong choice or not.

(7 RT 1176.) That is, he expressed his conviction that, although he would be judged someday, he would be forgiven if he made an honest but incorrect decision in this case. (7 RT 1176.)

Because Wilia's responses demonstrate that his religious beliefs would not prevent or substantially impair the performance of his duties as a juror, the instant case is distinguishable from cases in which prospective jurors were properly excused for cause based on their religious beliefs. For instance, in *People v. Cowan* (2010) 50 Cal.4th 401, 440-441, this Court held that substantial evidence supported the trial court's conclusion that a prospective juror's views regarding capital punishment, which views were based on her religious beliefs, would prevent or substantially impair the performance of her duties as a juror. In her questionnaire, the prospective juror repeatedly expressed her views opposing the death penalty. (*Id.* at p. 438.) Among other things, she wrote that, although she had never given the death penalty "deep thought" in the past, she now believed that "[l]ife and death should be left in God's hands not ours." (*Ibid.*) She also indicated that she could never vote to impose the death penalty in any case no matter what the facts and the circumstances of the case. (*Ibid.*) During voir dire, she agreed that she was not opposed to the death penalty, but indicated several times that she did not want to have to make that decision. (*Id.* at pp. 438-439.) After excusing the prospective juror for cause, the trial court explained its ruling as follows: "Toward the end of the questioning by [the prosecutor], [the prospective juror] was breaking down. She was crying. During the questioning [her] head would go back and forth from shoulder to

shoulder, she would cover her mouth when she answered questions by [the prosecutor], she was obviously – she's obviously given conflicting answers, she has been very candid that she is in conflict over this. [¶] She is going through some kind of personal change which is leading her toward a more religious view of her life, which it sounded to me that she's having real problems coming to terms with the responsibilities of a juror in a case such as this." (*Id.* at p. 440.)

In *People v. Thomas* (2011) 51 Cal.4th 449, 463, one of the prospective jurors was an ordained minister who held a master's degree in theology. In her questionnaire, she stated that she did not know whether she always would vote for LWOP regardless of the evidence. (*Id.* at p. 464.) During voir dire, she stated she did not know whether she would be "able to impose the death penalty in any case," and explained that while it was theoretically possible that she could vote for the death penalty, it was "[p]robably not realistic[ ]." (*Ibid.*) Consequently, this Court held that substantial evidence supported the trial court's finding that her views on capital punishment would substantially impair her ability to perform the duties of a juror. (*Ibid.*)

Moreover, this Court held that the trial court properly excused a second prospective juror, who stated in her questionnaire that she was strongly against the death penalty and that her religious beliefs would make it difficult for her to sentence someone to death. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 471.) She wrote twice that she was not sure she could vote for the death penalty and once more that it would be difficult for her to vote for the death penalty. (*Ibid.*) During voir dire, she repeated that she was not sure she could vote for the death penalty, indicating her reason was that she could not administer the lethal injection herself. (*Ibid.*) Although she

told defense counsel it was possible she could vote for the death penalty and promised that she could consider it, she then told the prosecutor she did not think she could actually do so and twice told the court she did not know whether she could vote for the death penalty. (*Ibid.*)

Like the prospective juror in *People v. Cowan*, *supra*, 50 Cal.4th at p. 438, Wilia initially expressed a belief that only God has the right to take a life. (8 CT 1995.) Unlike that juror, however, he later affirmed unequivocally that, after further reflection, he now believed he could vote for death. (7 RT 1166-1167, 1176-1178.) It should also be noted that Wilia did not state that he could only vote to impose the death penalty in cases involving extremely unlikely circumstances. (Cf. *People v. McKinzie*, *supra*, 54 Cal.4th at pp. 1337-1338 [substantial evidence supported trial court's determination that prospective juror was substantially impaired where: (1) she stated unambiguously in her questionnaire that she opposed the death penalty and would be unable to personally impose it based upon her religious views; and, (2) she asserted during voir dire that she could impose the penalty, but only in "extreme circumstances," citing the mass killing at Columbine High School as the sole example]; *People v. Jones* (1997) 15 Cal.4th 119, 164-165, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [prospective juror properly excused for cause where he initially indicated he could not impose the death penalty due to his religious beliefs but later stated he could impose the penalty "'in the case of Charles Manson' or 'Jimmie Jones'"]; see *People v. Cash* (2002) 28 Cal.4th 703, 719-720, quoting *People v. Ochoa* (2001) 26 Cal.4th 398, 431, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1318, quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003 [noting that "'[t]he 'real question' is whether the juror's views about capital punishment would

prevent or impair the juror's ability to return a verdict of life without parole *in the case before the juror*'" (italics in original)].)

Third, the trial court was incorrect in stating that Wilia never explained his statement that if he were facing the death penalty, he would want to be judged fairly. (7 RT 1178; see also 7 RT 1167.) Again, Wilia explained that "[i]f it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, well, maybe I wasn't totally within my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway." (7 RT 1167.) Wilia's response evinced a basic understanding of the weighing process that a juror must undertake at the penalty phase, and a willingness to take on that role.

Moreover, any uncertainty as to Wilia's views regarding the death penalty was due to the trial court's inadequate voir dire. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1084, rejected on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919 [trial court's voir dire was improper in part because it failed to follow up on meaningless or ambiguous answers].) As this Court has warned:

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath) (*Wainwright v.] Witt* [1985)] 469 U.S. 412, 424, 105 S. Ct. 844) """"in the case before the juror"""" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, 110 Cal.Rptr.2d 324, 28 P.3d 78 (italics omitted)).

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 445.)

For instance, after Wilia stated that "in some of the cases I – I think a

life sentence would be more – more to the liking on my side rather than the death penalty," the trial court did not ask that he specify the type of cases in which he preferred LWOP. (7 RT 1165-1166.) Thus, if Wilia failed to explain his position on this point, it was due to the trial court's failure to ask that he elaborate further. (See *People v. Bittaker*, *supra*, 48 Cal.3d at p. 1084.) Similarly, after the trial court asked Wilia to explain his comment that he would want to be tried fairly if he were in appellant's predicament, he stated, "If it's a death penalty, I deserve to have death penalty, but if there's some circumstances in there that says, well, maybe I wasn't totally within my own faculty, you know, when I did something, then I'm sorry I did it, but I did it anyway." (7 RT 1167.) The court did not indicate that Wilia's explanation was inadequate or unclear, but simply responded, "All right. Thank you," and turned the voir dire over to defense counsel. (7 RT 1167-1168.)

Third, the trial court was incorrect in stating that he was "so inexact in his answers." (7 RT 1180.) As noted above, the court complained that "[w]hen [Wilia] says to the question, "Can you set aside sympathy, bias or prejudice, you need to be honest," and I asked him what the heck that means, and he doesn't give a valid answer to any of these questions." (7 RT 1180.) Tellingly, the court identified no supposedly invalid answers other than Wilia's response to the question regarding sympathy, bias and prejudice. In any event, after Wilia stated that he needed a "a little bit more information as far as what I need to say or what I need to do" in order to answer the question, and the court explained that jurors are required to set aside sympathy, bias and prejudice at the guilt phase, Wilia affirmed that he could do so. (7 RT 1161.) There was nothing invalid about his response.

This Court has pointed out that,

> [t]he real question is "'"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror."'" ([*People v.*] *Bradford* [(1997) 15 Cal.4th 1229,] 1318-1319, quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003 [13 Cal.Rptr.2d 475, 839 P.2d 984].) A juror is subject to exclusion for cause if she "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances . . . ." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005 [30 Cal.Rptr.2d 818, 874 P.2d 248] (*Kirkpatrick*).)

(*People v. Ochoa* (2001) 26 Cal.4th 398, 431, abrogated on other grounds in *People v. Coombs* (2004) 34 Cal.4th 821, 860.) Here, Wilia's voir responses – which were informed both by his reconsideration of his views after filling out his juror questionnaire and the trial court's clarifications of the law – best reflected his thinking and provided the surest indicator of whether he was qualified to serve on a capital jury. (See *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-332 [reversing death sentence because trial court violated *Witherspoon/Witt* standard by removing for cause prospective juror who said his mind was undecided and not closed regarding imposing death penalty].) Although Wilia stated in his questionnaire that it would be personally difficult to take a life (8 CT 1994; see also 7 RT 1176), none of his responses on voir dire indicated that he would be substantially impaired. Consequently, the trial court did not have substantial evidence that Wilia was unqualified to serve as a juror in this case. Rather, the court's comment that Wilia had not given valid answers to its questions simply suggests that it was already predisposed to exclude him.

Indeed, this Court has held that prospective jurors with a similar mindset are not "substantially impaired" within the meaning of *Witt*:

> *[People v.] Kaurish* [(1990)] 52 Cal.3d 648, [citation], recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a *higher threshold* before concluding that the death penalty is appropriate or because such views would make it *very difficult* for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412, 105 S.Ct. 844.

(*People v. Stewart*, *supra*, 33 Cal.4th at p. 447, italics added.)

Finally, it is important to note that Wilia's excusal was not based on his demeanor. Therefore, deference to the trial court is not warranted on that basis. (Cf. *Uttecht v. Brown*, *supra*, 551 U.S. at p. 9; *People v. Cowan*, *supra*, 50 Cal.4th at p. 440.) In any event, as appellant notes above, deference to the trial court "does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 20.)

Thus, Wilia's responses at voir dire qualified him to serve on appellant's jury. (See *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 653-659 [holding that trial court erred in excusing for cause juror who initially equivocated but ultimately said she could vote for death sentence].)

E. Conclusion

As demonstrated above, the trial court erred in granting the prosecution's challenge for cause of prospective juror Wilia. The court incorrectly ruled that Wilia was disqualified because he "list[ed] in the wind" and was "so inexact in his answers," and it improperly excluded him without substantial evidence that Wilia's personal feelings about the death penalty would "prevent or substantially impair his performance of his duties as a juror in accordance with his instructions and his oath," the constitutional standard set forth in *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433. Because the trial court's finding that Wilia was unqualified to serve was not "fairly supported by the record" (*id.* at p. 435), appellant's death sentence must be reversed. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660; *People v. Heard* (2003) 31 Cal.4th 946, 966.)

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II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT BY PERMITTING THE PROSECUTION TO INTRODUCE IRRELEVANT, INFLAMMATORY EVIDENCE, FAILING TO GUIDE THE JURY'S CONSIDERATION OF THAT EVIDENCE, AND ALLOWING THE PROSECUTION TO URGE THE JURY TO DRAW IMPROPER INFERENCES FROM IT

At the guilt phase, the trial court erroneously admitted evidence of uncharged conduct by appellant, pursuant to Evidence Code section 1101, subdivision (b). That evidence was not relevant to knowledge, opportunity, identity, or any other of the matters set forth in that section, and, together with the prosecutor's argument and the trial court's instructions to the jury, allowed the jury to draw impermissible inferences when considering whether appellant was guilty of the offenses with which he was charged. Accordingly, appellant's convictions and death judgment should be vacated due to the erroneous admission of this irrelevant and unduly prejudicial evidence.

A. Factual and Procedural History

1. Prosecution's Requests for Admission of "Other Crimes/Acts" Evidence and Trial Court's Rulings

On October 18, 2006, the prosecution filed its "Points and Authorities in Support of Admissibility of Other Crimes/Acts Pursuant to Evidence Code § 1101(b)." (5 CT 1127-1135.) The prosecution sought to introduce evidence to show that: (1) on December 19, 2003, appellant attempted to escape from jail by robbing a fellow inmate, who had been selected to act as a trusty at the West Hollywood Sheriff's Station, of his wristband, i.e., identification bracelet; (2) he was found to be in possession

of contraband weapons, or "shanks," on March 13, 2003, and July 13, 2004 (the latter incident occurring after he had been placed on K-10, or high security, status);[46] (3) on October 13, 2004, he was caught without his wristband, lied to a deputy about it, and, when told that he would be written up, replied that he did not care; (4) on November 5, 2004, he was again caught without his wristband; (5) he was found to be in possession of jail-made liquor on November 5, 2004; (6) on June 17, 2005, he was found to be in possession of an altered paper clip "of a kind used as a handcuff lock pick"; and, (7) on July 30, 2005, he escaped from a locked shower. (5 CT 1128.)

In its points and authorities, the prosecution contended that the evidence it sought to introduce was relevant to show appellant had knowledge of the jail system, allowing him access to the victim, Raul Tinajero, and giving him the opportunity to commit the charged murder. (5 CT 1131.) According to the prosecution, the issue of opportunity was material because it is reasonable to expect that it would be contrary to the assumption of the average juror that an inmate at the Men's Central Jail could move around freely in a secured environment in order to kill another inmate housed in a different area of the jail. (5 CT 1131-1132.)

Addressing the specific items of evidence, the prosecution suggested the following, in relevant part: (1) that the evidence it sought to introduce showed that appellant was able to illicitly obtain weapons, even though he was housed alone, and was escorted everywhere in the jail facility by a

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[46] The prosecutor later explained that the contraband weapons were a "jailhouse syringe" and an altered razor blade. (4 RT 734, 737-738.) She acknowledged, however, that such syringes are used to inject controlled substances and to create tattoos. (4 RT 737-738.)

guard; (2) that appellant's threat to another inmate that he would get his homies to beat him up tended to show that appellant had jail ties,[47] which suggested a possible network of aid he could call upon to create opportunities to obtain both illicit contraband and illicit access to other inmates; (3) the fact that appellant was found with a lock pick, as well as the numerous incidents in which he had intentionally removed his identification bracelet, suggested his desire and ability to escape from or into locked areas; and, (4) appellant's attempted escape involving a stolen identification bracelet and his attempted escape from the shower area showed that he had both an advanced knowledge of how to obtain access into off-limits areas, as well as a clear willingness to put such knowledge into practice. (5 CT 1132.)

The prosecution further contended that the evidence was relevant to show the identity of appellant as the person who committed the charged murder. (5 CT 1132.) In this regard, the prosecution specifically mentioned evidence regarding appellant's telephone calls and letters to a witness;[48] according to the prosecution, the fact that appellant was in jail on charges of murder and attempted escape was extremely probative to establish the inference that the "Santi" who was calling and writing to the witness was in fact appellant, and that he was making efforts to locate Tinajero so that he could kill him. Moreover, the prosecutor suggested,

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[47] Appellant's alleged threat occurred in the course of his December 19, 2003, attempt to escape from the jail. (15 RT 2700, 2705.)

[48] That witness was Irma Limas, who later testified about those letters and telephone calls. (14 RT 2464-2488.) On cross-examination, appellant acknowledged that he had written the letters and that he had made telephone calls to Limas. (19 RT 3352-3353.)

evidence of appellant's attempt to escape would bolster the witness's credibility. (5 CT 1132-1133.)

Finally, the prosecution argued that the evidence was not inadmissible under Evidence Code section 352 for the following reasons:

(1) The evidence was material, in that it was necessary to show that appellant had the opportunity to commit the crime; the uncharged acts were highly probative on the issues of knowledge and opportunity because they showed both the extent of his knowledge of the jail and the resources at his disposal; and, there was no other policy consideration militating in favor of its exclusion (5 CT 1130-1131, 1133-1134, citing the test set forth in *People v. Tassell* (1984) 36 Cal.3d 77, 95-96, overruled on another ground by *People v. Ewoldt* (1994) 7 Cal.4th 380, 401-402);

(2) The uncharged conduct was not highly inflammatory, and for the most part involved simple infractions; the possibility of confusing the issues was minimal, in that appellant's acts were simple to explain and bore solely upon his ability to navigate his way through the jail; all of the conduct took place close in both time and proximity to the charged crime; and, introduction of the evidence would take minimal time (5 CT 1131, 1134, citing the test set forth in *People v. Harris* (1998) 60 Cal.App.4th 727, 737-741); and,

(3) There was no reason to believe that the evidence "sought to be introduced would be so prejudicial as to overwhelm *any* jurors' sensibilities and convince them to convict the defendant of a murder that they did not feel the evidence as a whole had shown him to be guilty of." (5 CT 1131, 1134-1135, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 405, emphasis in original.)

On October 30, 2006, defense counsel moved in limine for a protective order preventing the prosecution from referring to the uncharged acts. (5 CT 1148-1157, citing U.S. Const., 14th Amend., Cal. Const., art. 1, § 15, and Evid. Code, § 352.) Defense counsel argued that the conduct was inadmissible under Evidence Code section 1101, subdivision (b). First, intent was not an issue in this case, and therefore other crimes evidence would be cumulative on that point and therefore inadmissible. (5 CT 1153, citing *People v. Balcom* (1994) 7 Cal.4th 414.) Second, the evidence did not show a common design, plan or scheme, and therefore was inadmissible on that point as well. (5 CT 1154.) Third, the evidence was not admissible to show identity because the evidence lacked the requisite degree of similarity to the charged crime. (5 CT 1155, citing *People v. Ewoldt*, *supra*, 7 Cal.4th 380; *People v. Haston* (1968) 69 Cal.2d 233, 245-246.) Finally, defense counsel argued that the evidence should be excluded under Evidence Code section 352 because it was more prejudicial than probative. (5 CT 1156-1157.)

That same day, a hearing was held on the prosecution's motion. (4 RT 728-741.) Defense counsel argued that, under Evidence Code section 1101, subdivision (b), it is inappropriate to use uncharged acts which occur after the charged offense. (4 CT 731; see also 5 CT 1151.) Defense counsel further argued that evidence relating to the "home brew" had no possible relevance. Finally, defense counsel referred to the reasons set forth in their opposition. (4 RT 731.)

The prosecutor then reiterated that the uncharged acts were probative to show appellant's knowledge of and sophistication in the jail system, which was relevant to show how he was able to get to another part of the jail. (4 RT 732-735.) She also contended that, contrary to defense

counsel's position, the element of intent was an issue in the case because: (1) appellant had pled not guilty; and, (2) the prosecution had to prove that he intended to kill Tinajero, and that he had such intent because Tinajero was a witness.[49] (4 RT 734-735.) She further contended that appellant's escape attempt (whether it was viewed as "1101(b) evidence" or ordinary substantive evidence), coupled with the testimony of a witness (Limas), was relevant to the issue of identity.[50] (4 RT 735-737.) Finally, the prosecutor suggested that evidence relating to subsequent acts was admissible by observing that evidence of subsequent sex offenses is admissible under Evidence Code section 1108 to show propensity, adding that the evidence in this case was less prejudicial because it was not being offered for that purpose.[51] (4 RT 732.)

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[49] The prosecutor conceded that the common scheme or plan aspect of Evidence Code section 1101, subdivision (b), was inapplicable. (4 RT 735.)

[50] The prosecutor contended that "the defense points out in their moving paper that identity requires sort of that signature under 1101(b). I think his signature is on it based on the fact that the letters he writes to her links it all up." (4 RT 736.) It appears that the prosecutor incorrectly meant "signature" in a literal sense. (See, e.g., *People v. Barnwell* (2007) 41 Cal.4th 1038, 1056-1057 [defendant's previous possession of a weapon, even of a similar weapon, was not so distinctive on these facts as to serve as a signature or a fingerprint supporting a conclusion that because he had committed the earlier offense he must have committed the one for which he was on trial]; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [for identity to be established,"[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature."]

[51] Appellant is aware that evidence of subsequent conduct has been held admissible where there is sufficient similarity between the charged and uncharged offenses. (See, e.g., *People v. Griffin* (1967) 66 Cal.2d 459,

(continued...)

Defense counsel responded that evidence relating to appellant's wristbands was inadmissible because the prosecution did not contend that he had exchanged his wristband in order to get into Tinajero's cell (4 RT 738-739); evidence relating to the jailhouse shank was inadmissible because there was no evidence that appellant used a shank to commit the homicide (4 RT 738-739); evidence that appellant knew how to make "homemade brew" was inadmissible because the formula for making it was common knowledge in the jail and prison system, and the prosecution was simply using it to show that appellant was a person of bad character (4 RT 738-739); evidence relating to appellant's shower escape was inadmissible at the guilt phase because there was no indication that he "greased his body up and was able to sneak inside the cell" (4 RT 739); and, the uncharged acts would not support the prosecution theory to an extent that outweighed their prejudicial effect (4 RT 739).

The trial court then granted the prosecution's request to admit the uncharged acts, except as to the jailhouse liquor. (4 RT 739-741.) In so ruling, the court agreed with the prosecution that those acts would show appellant's "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder." (4 RT 740.) The court subsequently commented that "the lay person is going to think that if you're locked into a jail cell, that's the end of it, you don't get out of that cell, you don't get into someone else's cell that's

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[51](...continued)
464-465.)

locked down, just not a possibility. They have to explain how that could happen, and this does explain that." (4 RT 740-741.)

The court further agreed that even those acts which occurred after the date of the offense were "probative on the issue of his knowledge, his sophistication, the ability to move around the jail and to do what was necessary to elude the authorities there." (4 RT 740.) The court continued, "Whether it's 1101(b), we're still talking about the method, motive and opportunity to move around that jail freely, and he did that even after the homicide in the case, so it tends to suggest, though less persuasively, that it occurred before the homicide." (4 RT 741.)

2. "Other Acts" Evidence Presented to the Jury, and the Prosecution's Closing Argument

(a) December 19, 2003, Escape Attempt

Luis Montalban testified that, on December 19, 2003, he was an inmate in the Men's Central Jail. That morning, his name was called out because he was going to work as a trusty at a substation in West Hollywood. A short time later, appellant approached and demanded his wristband. While other inmates were nearby, appellant warned that if Montalban did not give him the wristband, he would be regulated, meaning that people in the dorm would beat him up. Montalban was afraid and gave him the wristband. When Montalban was called to leave the dorm, appellant left in his place.[52] (15 RT 2698-2701, 2703, 2705.)

Montalban further testified that he feared for his life because he was a witness, and that he had requested to be placed in protective custody.

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[52] Montalban acknowledged that he knew what "regulate" means because he was a Southsider (15 RT 2708), i.e., a member of a Hispanic jail gang (see 13 RT 2232; 14 RT 2500.)

Over defense counsel's objection on relevance and Evidence Code section 352 grounds, Montalban testified that he was also afraid for his family's safety. However, he acknowledged that he had been right behind appellant in the court line earlier that week, and that appellant had not threatened or said anything to him. (15 RT 2701-2702, 2704-2706.)

Deputy Sheriff Michael McCarty testified that on December 19, 2003, at approximately 11:00 a.m., he was assigned to a court line at the inmate reception center ("IRC"). Appellant was brought into the facility by a bus driver, and McCarty was told he was a trusty roll-up, meaning that he was being disciplined or brought back from a station. Appellant was wearing a light-green inmate jumpsuit, which designated him as a trusty, and which he had received at the station. (16 RT 2774-2776; see also 15 RT 2615.) Appellant had a county-issued green mesh bag with a black strap. (16 RT 2776.) When appellant began talking about his vehicular manslaughter case, McCarty realized that something was amiss because an inmate with such a charge would not be allowed to serve as a trusty. (16 RT 2776-2777.)

McCarty checked appellant's wristband, which bore the name "Louis Montalban."[53] When McCarty went through appellant's bag, he found items raising a doubt as to his identity: a police report relating to a vehicular manslaughter case, which contained the name Raul Tinajero; an attachment listing Santiago Pineda as a party; and, a picture depicting appellant and a sister or girlfriend, with the name Santiago handwritten on

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[53] McCarty did not recall whether appellant claimed to be Montalban. (16 RT 2782-2784.)

the back. Appellant also had a court pass and a green jail record card. (16 RT 2778-2780.)

At that point, McCarty asked appellant who he was, but appellant did not answer. McCarty and his partner ran the booking number on the wristband and discovered that both appellant and Montalban were housed in the same dorm. At that point, they determined appellant's actual identity. (16 RT 2781-2782.)

McCarty and his partner walked to the Men's Central Jail, where they contacted Montalban. Montalban, who was approximately 5'4" or 5'5", and 120 or 130 pounds, was not wearing a wristband. McCarty asked Montalban what had happened, and Montalban answered.[54] (16 RT 2782-2783.)

(b) March 13, 2003, Shank Possession

Deputy Sheriff Aaron Dominguez testified that on March 13, 2003, he participated in a routine search of a cell. During the search, he found a green canvas bag containing a shank, specifically, a piece of a metal bar, sharpened to a point at one end. Appellant was one of six or fewer inmates living in the cell. Dominguez attributed the bag to appellant because it contained his belongings and letters, and the bag was found where he bunked. According to Dominguez, inmates carry such bags when they go to court or other destinations, and if he had not discovered the shank, appellant would have had the weapon while walking through the jail. (15 RT 2636, 2641-2648.)

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[54] After defense counsel objected on hearsay grounds as to what Montalban told McCarty (16 RT RT 2782), the prosecutor asked, "Did he give you an answer?" McCarty responded, "Yes, he did." (16 RT 2783.) The prosecutor did not continue this line of questioning.

(c) July 13, 2004, Possession of Razor and Syringe

Deputy Sheriff Juan Rivera testified that the 1750 module, where appellant was housed, is the jail's high power module. Appellant had been classified as a K-10 and lived in a single-man cell. A cell in that module is searched before a new inmate is housed in that cell. (16 RT 2797, 2807, 2812, 2814-2815.)

On July 13, 2004, Deputies Rivera, Asael Saucedo and Wadie Musharbush conducted a random search of appellant's cell. (16 RT 2796-2797, 2826-2827.) Rivera found a syringe, similar to the kind diabetics use, on the floor under appellant's bunk. The syringe was approximately 2½" long, but the needle was little more than ½" in length. (16 RT 2797-2801, 2810-2811.) Over defense counsel's foundational objection, Rivera testified that such syringes are used to inject drugs or as weapons. (16 RT 2802-2805, 2811.) According to Rivera, there are many ways an inmate can have access to a needle, e.g., it may be secreted in a body cavity. (16 RT 2805.)

Musharbush recovered a razor blade, which had been removed from a standard razor. The blade, which was about 1¾" in length, was wrapped in toilet paper and sat on a table in plain view. Inmates are not supposed to possess razors in that form because they may be used as weapons. (16 RT 2802-2804, 2807-2808, 2810-2811, 2813, 2827-2830.) Rivera explained that when a razor is issued to an inmate, it is retrieved within four hours. If the inmate does not return the razor, a disciplinary report is written and his cell is searched. (16 RT 2807-2808.)

Rivera testified that it is not common for inmates in 1750 to use razors to sharpen their pencils, but he acknowledged that he had seen

inmates use them for that purpose. (16 RT 2808, 2812-2814, 2829-2830.) Musharbush did not recall locating any pencils during the search of appellant's cell, but he did not recall looking for them. He added that inmates are not truthful with him when he finds contraband in their possession. (16 RT 2831.)

(d) On October 13, 2004, Appellant Was Observed Without His Wristband

Deputy Sheriff James Milliner testified that on October 13, 2004, he worked in the "high power unit," the jail's highest security module. (15 RT 2583-2584, 2591-2592, 2594.) While assisting in the feeding of inmates who were going to court, Milliner asked appellant where his wristband was. Appellant replied that it was in the booth. After Milliner repeated the question, appellant said he had taken it off. (15 RT 2586-2587.) After Milliner said he was going to write him up, appellant replied that he did not care. (15 RT 2587, 2590.) At the time of the incident, Milliner was aware that appellant had similarly removed his wristband about a week earlier. On that earlier occasion, Milliner had told appellant not to take it off again, and gave him a new one. (15 RT 2588, 2593.)

Milliner explained that inmates are always supposed to wear their wristbands. If an inmate gets out of a locked area without his wristband, he cannot be identified by sight. (15 RT 2590; see also 16 RT 2788-2789 [testimony of Deputy Sheriff Asael Suacedo].)

(e) On November 5, 2004, Appellant Was Observed Without His Wristband

Deputy Sheriff Asael Saucedo testified that on November 5, 2004, he was about to handcuff appellant to take him to the shower, when he noticed that he was not wearing his wristband. After appellant was taken to the

shower, Saucedo searched his cell, where he found the wristband. (16 RT 2787-2789.)

(f) June 17, 2005, Possession of Altered Paper Clip

Deputy Sheriff David Florence testified that he had been the supervisor in module 1750, the high power unit, for approximately four years. (15 RT 2653.) According to Florence, the row is essentially solitary confinement, and is the most secure in the jail. (15 RT 2664.) Inmates on that row, who are classified as "K-10s," are escorted in handcuffs wherever they go within the jail. (15 RT 2664, 2677-2678.)

Florence testified that he had known appellant for a few years and came in contact with him daily. (15 RT 2657-2658, 2681.) Over defense counsel's foundational objection, the prosecutor elicited Florence's opinion that appellant was "extremely savvy" with respect to the jail system. (15 RT 2658-2659.)

On June 17, 2005, at about 2:10 p.m., Deputies Florence and Saucedo searched appellant's cell. In Saucedo's presence, Florence found a paper clip which had been cut or broken into a "U" shape. (15 RT 2654-2657; 16 RT 2790-2793.) According to both Florence and Saucedo, an altered paper clip can be used to undo handcuffs in a matter of seconds. (15 RT 2657; 16 RT 2790.) Florence later discarded the paper clip as contraband, and the matter was handled as an in-house disciplinary issue. (15 RT 2681.)

Florence testified that, consistent with standard practice, the cell had been searched for weapons and contraband before appellant was first placed there. (15 RT 2656.)

(g) July 30, 2005, Escape From Locked Shower

Deputy Florence testified that on July 30, 2005, he escorted appellant to a shower, locked him inside, then returned to the control booth where he was stationed. When it was time to escort appellant back to his cell, Florence looked at a digital screen used to monitor the row, and observed appellant running naked to his cell. When deputies reached appellant's cell, he was standing inside, covered in lather. Appellant claimed he was taking a "bird bath," i.e., using the sink in his cell to wash up. Appellant had a large red mark across his back, which he said had been caused by leaning against the bars in the shower. Appellant's cell was searched for contraband or weapons, but none were found. (15 RT 2664-2671, 2680.)

To determine how appellant had gotten out of the shower, deputies first checked the shower door to see if there was a malfunction or if it had been jammed open. After finding nothing wrong with the door, they asked a trusty, who was similar to appellant in height, weight and stature, to lather up in the shower and see if he could get out.[55] The trusty got out of the shower in seconds by lathering up and, pushing against a wall with his feet,

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[55] Defense counsel objected that the deputies did not see appellant get out of the shower, so evidence regarding their "experiment" was improper opinion evidence. The trial court overruled the objection on the ground that that it merely constituted evidence as to their observations, and it was for jury to draw its own conclusion. Defense counsel apparently accepted this rationale, saying "Oh, okay." (15 RT 2659-2663.)

squeezing headfirst through a portal.[56] The trusty had markings similar to those seen on appellant. (15 RT 2671-2676; 16 RT 2805-2809.) According to Deputy Rivera, it was not common knowledge that one could get out of the shower in that manner. (16 RT 2809.)

(h) Evidence Relating to Appellant's Telephone Calls and Letters To Irma Limas

Irma Limas testified about various telephone calls and letters she had received from a man who called himself "Santi" and "Chingon," and who indicated that he was in jail. (14 RT 2464-2480.) Among other things, Limas testified that Santi asked her to try to find out if a man named Raul was in the jail. (14 RT 2470, 2484-2485.) He explained that he needed to contact Raul, and that Raul was a clown who was testifying against him. (14 RT 2470-2471.) She never tried to locate Raul, and appellant later said that his homie had found the information. (14 RT 2485.) At some point, appellant mentioned that he got a wristband from an inmate in an attempt to escape.[57] (14 RT 2472.)

3. Prosecutor's Argument and Pertinent Jury Instructions

Shortly after the direct examination of Deputy Dominguez commenced, the prosecutor asked to approach the bench. There, she explained that, during a search of appellant's cell, Dominguez found a shank and "extra contraband," including large, water-filled plastic bags, and

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[56] According to Deputy Florence, the trusty got out of the shower in eight seconds. (15 RT 2673.) Deputy Rivera testified that the trusty got out in 30 seconds or less. (16 RT 2809.)

[57] Appellant also challenges the admission of his telephone calls and letters to Limas in Argument III, regarding the trial court's erroneous admission of gang-related evidence.

bottles of Ajax and bleach. (15 RT 2637.) The prosecutor stated that she intended to elicit Dominguez's testimony as to the nature and significance of the "extra contraband," contending that it was relevant to show appellant's knowledge of and familiarity with jail culture. (15 RT 2637-2638.)

Defense counsel requested that the court indicate that the evidence was being admitted for the limited purpose of showing appellant's "knowledge, et cetera" – i.e., "what the People have asked in their moving papers." (15 RT 2638.) However, defense counsel argued, the prosecutor "should be limited to the shank." (15 RT 2638.)

Defense counsel objected that evidence relating to the "extra contraband" was irrelevant and did not qualify for admission under Evidence Code section 1101, subdivision (b). (15 RT 2638-2640.) Moreover, defense counsel argued that even if the evidence was admissible, it should be excluded under Evidence Code section 352 (15 RT 2638-2640) because "the probative value of the evidence is slight and it tends to show that he's a bad person" (15 RT 2640).

The trial court overruled the objections but stated that it would indicate the evidence was introduced to show appellant's knowledge of the jail operations and the limitations placed on inmates. Accordingly, the court instructed the jury as follows:

> Before we get into this evidence, let me indicate that with this witness and with other witnesses talking about things that occur in the jail, they're offered only to show the defendant's knowledge of the operations of the jail and the limitations placed on inmates, not to show that he's a person of bad character.

(15 RT 2640.) The court further instructed the jury that this limitation also applied to the testimony of Deputy Milliner and the other witnesses "on this general subject." (15 RT 2640-2641.)

Following the testimony of Deputy Saucedo, the prosecutor stated that, "with regards to Deputy McCarty and Deputy Saucedo as well as Rivera and the next witness Musharbush, they would be the witnesses that the court needed to give the limiting instruction on of knowledge of the jail system." (16 RT 2794.) Accordingly, the trial court instructed the jury that "we're going through a number of incidents that don't relate specifically to the [charged offenses]. This goes to [appellant's] knowledge . . . of the jail rules and incidents involving the ability to circumvent those rules." (16 RT 2794-2795.)

In her closing argument, the prosecutor asserted that appellant's letters to Limas undercut his testimony that he did not kill Tinajero. (20 RT 3475, 3484.) She did not explicitly mention any of the other evidence admitted pursuant to Evidence Code section 1101, subdivision (b), but argued that appellant relied on his familiarity with the jail system to commit the crime. (20 RT 3457, 3463-3464.)

Pursuant to CALJIC No. 2.50, the jury was later instructed as follows:

> 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 defendant is a person of bad character or that he has a disposition to commit crimes. *It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them.* [¶] For the limited purpose for which you may 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.

(5 CT 1263, emphasis added.) The jury was also instructed that the prosecution had the burden of proving by a preponderance of the evidence that the defendant committed those crimes, that the jury must not consider such evidence for any purpose unless it found by a preponderance of the evidence that he committed those crimes, and that guilt of the charged crimes must be proven beyond a reasonable doubt. (5 CT 1263 [CALJIC No. 2.50.1]; see also 5 CT 1260-1261 [CALJIC No. 2.09, regarding evidence admitted for limited purpose], 1263 [CALJIC No. 2.50.2, defining "preponderance of the evidence"].)

B. The Trial Court Erred in Admitting The "Other-Acts" Evidence

1. Legal Principles

Only relevant evidence is admissible. (Evid. Code, § 350.) 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." The test of relevance is whether the evidence tends "'logically, naturally and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v. Heard* (2003) 31 Cal.4th 946, 973, citation omitted.) A trial court lacks discretion to admit irrelevant evidence. (*Ibid.*; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.)

Evidence Code section 1101, subdivision (a), provides that "[e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." As Witkin has explained:

> The reasons for exclusion are: '*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.]

(1 Witkin Evid. (4th ed. 2000) § 42, p. 375, italics original.)

However, Evidence Code section 1101, subdivision (b), permits the use of evidence of uncharged misconduct when "relevant to prove some fact (such as motive, opportunity, intent [. . .]) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) The critical inquiry in assessing the materiality of evidence concerning uncharged misconduct is the nature and degree of similarity between the uncharged misconduct and the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) This Court has explained that

> [t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . In order to be admissible to prove intent, the uncharged conduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt*[, *supra*, 7 Cal.4th at p. 402.] "A greater degree of similarity is required in order to prove the existence of a common design or plan.. . . [E]vidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations.'" (*Ibid.*) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. . . . [T]he uncharged misconduct and the charged offense must share common features that are sufficiently

> distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' [Citation.]" [*Id.* at p. 403.] "'The 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." [Citation.]'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003[].)

(*People v. Foster* (2010) 50 Cal.4th 1301, 1328.)

"[A]dmission of other crimes evidence cannot be justified merely by asserting an admissible purpose. Such evidence may only be admitted if it '(a) "tends logically, naturally and by reasonable inference" to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue.' [Citation.]" (*People v. Guerrero* (1976) 16 Cal.3d 719, 724, quoting *People v. Schader* (1969) 71 Cal.2d 761, 775.) "The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong.' [Footnote and citation omitted.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

This Court has recognized that evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, citing *People v. Smallwood* (1986) 42 Cal.3d 415, 428, overruled on another ground in *People v. Bean*

(1988) 46 Cal.3d 919, 939, fn. 8, and *People v. Thompson* (1988) 45 Cal.3d 86, 109.) The primary focus of this careful analysis, of course, is to ensure that the evidence is *not* offered to prove character or propensity *and* that its practical value outweighs the danger that the jury will nevertheless view it as evidence of criminal propensity. Therefore, even if character evidence is relevant within the meaning of Evidence Code section 1101, subdivision (b), such evidence may not be admitted if its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury," under Evidence Code section 352. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing *People v. Thompson*, *supra*, 45 Cal.3d at p. 109.)

This Court has enumerated five factors which a trial judge must consider in weighing evidence of uncharged misconduct under Evidence Code section 352: (1) the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) whether the uncharged misconduct is remote in time. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

"Thus, 'the admissibility of uncharged crimes depends upon three factors: (1) the materiality of the facts sought to be proved; (2) the tendency of the uncharged crimes to prove or disprove the material fact [i.e., probative value]; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence [i.e., prejudicial effect or other [Evidence

Code] section 352 concern].'" (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 238, citing *People v. Lindberg* (2008) 45 Cal.4th 1, 22.)

Trial court rulings on the admissibility of evidence under Evidence Code section 1101, subdivision (b), and on the admission or exclusion of evidence under Evidence Code section 352, are both reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101, subd. (a)]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117 [Evid. Code, § 352].)

Applying these principles to the record in this case, it is clear that the trial court erred in admitting the other-acts evidence.

2. The "Other-Acts" Evidence Was Irrelevant and Inadmissible Under Evidence Code Section 1101, Subdivisions (a) and (b)

As noted above, the other-acts evidence was admitted to show appellant's "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740), and the jury was instructed that it could consider the evidence "only for the purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them" (5 CT 1263). However, even if appellant's knowledge of these matters was *material* (see *People v. Thompson*, *supra*, 27 Cal.3d at p. 315 [in order to satisfy the requirement of materiality, the fact sought to be proved or disproved must be either an ultimate fact or an intermediate fact from which such ultimate fact may be inferred]), the other-acts evidence in this case had no *tendency* to prove that fact, and therefore it was irrelevant and

inadmissible under Evidence Code section 1101, subdivision (b). (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 409.)

Appellant has found only one appellate decision specifically addressing the nature of the inquiry governing the admissibility of evidence for the purpose of proving knowledge. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 241.) In *Hendrix*, the court stated that "[w]hether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*Ibid.*) The defendant in that case was charged with violating Penal Code section 69 in that, by use of force and violence, he knowingly resisted Luke Mosley, a Sacramento police officer, in the performance of his duty. (*Id.* at p. 221.) He asserted that, because he had been pepper-sprayed earlier, was intoxicated and the lighting was not good, he might have confused Officer Mosley for a security officer. (*Id.* at pp. 221-222.)

The prosecutor sought admission of evidence concerning five prior incidents involving his encounters with the police under Evidence Code section 1101, subdivision (b). (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 222-226.) The trial court admitted evidence regarding two of the incidents for the limited purpose of showing knowledge and to rebut mistake of fact. (*Id.* at p. 226.) The prosecution introduced the evidence for the purpose of establishing the defendant's knowledge that Officer Mosley was a police officer performing his duty, an ultimate fact, and to establish absence of mistake, an intermediate fact. (*Id.* at pp. 240, 242.) The Court of Appeal explained that, on the facts of the case, knowledge and mistake of fact were "very closely intertwined," and therefore an inference

that the defendant learned from his experiences and obtained information that established the requisite knowledge required that the previous experiences be similar to the circumstances presented in the charged case. (*Ibid.*) The court further concluded that the proffered evidence concerning the prior incidents lacked probative value given a lack of similarity. (*Id.* at pp. 242-244.)

As appellant demonstrates in the next section, under the court's analysis in *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244, any inferences that he had "knowledge of jail procedures and rules as well as methods to overcome them" (5 CT 1263) required that the other acts be similar to the circumstances surrounding the murder of Tinajero. Moreover, whatever level of similarity, if any, is required to establish such knowledge (see *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403), the other acts evidence in this case had no probative value, i.e., no tendency to prove such knowledge. (*People v. Catlin*, *supra*, 26 Cal.4th at pp. 145-146; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; Evid. Code, § 1101, subd. (b).)

In addition, the trial court erred to the extent it admitted any of the other acts evidence to prove motive, as opposed to knowledge. (4 RT 741 [trial court stated, "Whether it's 1101(b), we're still talking about the method, motive and opportunity to move around that jail freely, and he did that even after the homicide in the case, so it tends to suggest, though less persuasively, that it occurred before the homicide"].) This is especially so with respect to acts which occurred after the murder of Tinajero.

This Court has stated that "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus. [Citations.]" (*People v. Demetrulias* (2006) 39

Cal.4th 1, 15 [evidence of defendant's motives for committing uncharged assault and robbery of Clarence Wissel tended to show he had had the same motives earlier the same night when he stabbed victim Robert Miller, and thus acted with the intent to rob, not in self-defense].)

However, in *People v. Spector* (2011) 194 Cal.App.4th 1335, 1381, the court rejected the defendant's position that, in order to use other-crimes evidence to show motive, "controlling Supreme Court precedent . . . requires a direct nexus between the uncharged offense and the charged crime such that the former provides a clear reason to commit the latter." Instead, the court held that:

> [o]ther crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, "the uncharged act supplies the motive for the charged crime; the uncharged act is cause, the charged crime is effect." (1 Imwinkelried, Uncharged Misconduct Evidence [(1984)] § 3.18, p. 128.) "In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive . . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. Both crimes are explainable as a result of the same motive." (*Id.* at pp. 128–129, fns. omitted, italics added.)

(*Ibid.*) Applying this analysis, the court held that other-crimes evidence was admissible to show the defendant's motive for committing the charged murder. Specifically, there was evidence that, in prior incidents, the defendant was alone with a woman whom he had invited to his house or hotel, that he drank alcohol and exhibited romantic or sexual behavior, that he lost control when the woman attempted to leave, threatened her, pointed a gun at her, and blocked or locked the door to force her to stay against her will, and that he was extremely angry or enraged and manifested a significant mood swing, and there was evidence that some of the same

factors were present during his encounter with the murder victim. (*Id.* at pp. 1383-1384.)

Under either approach, other-acts evidence was inadmissible here to prove motive, as demonstrated below.

a. Evidence Relating to Appellant's December 19, 2003, Escape Attempt Had No Probative Value

Appellant's December 19, 2003, escape attempt bore little if any similarity to the circumstances surrounding the Tinajero murder. Appellant made his way to the inmate reception center ("IRC") in both instances (16 RT 2774-2776; 17 RT 3044-3045), but that is where any similarity ends. The 2003 escape attempt was a relatively uncomplicated matter: after Luis Montalban was called for trusty duty, appellant simply took his wristband and went in his place. (15 RT 2698-2708; 16 RT 2774-2784.) By contrast, the prosecution alleged that, among other things, appellant had a friend find out where Tinajero was housed (14 RT 2484-2485); obtained permission from someone higher up in the jail hierarchy to retaliate against Tinajero (17 RT 3043-3044; 18 RT 3161-3162); borrowed a "homie's" court pass and reported to the IRC (17 RT 3044-3045); made his way to an entirely different module, where Tinajero was being housed as a "keep-away," and passed a control booth manned by deputies (13 RT 2337, 2341-2345; 17 RT 2980-2988, 2990-3038); and, happened to encounter Tinajero's cellmate, Gregory Palacol, whom he accompanied into the cell (12 RT 2128-2129; 13 RT 2216, 2280-2281, 2290-2291; 14 RT 2389-2393).

Admission of appellant's escape attempt was not justified under Evidence Code section 1101, subdivision (b), to show appellant's "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure

area of the jail into another in order to commit the murder." (4 RT 740-741.) The circumstances of his escape attempt were so dissimilar to those surrounding the murder of Tinajero that it cannot be said that he acquired knowledge he needed to circumvent jail rules and make his way into Tinajero's cell in order to commit the murder. As such, evidence regarding appellant's escape attempt lacked probative value. (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244.)

Evidence regarding appellant's escape attempt was also inadmissible to prove motive. The escape attempt did not provide a motive for Tinajero's murder; for instance, there was no evidence that Tinajero alerted jail personnel that appellant had attempted to escape. (See *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.) Nor was there evidence that "[b]oth crimes are explainable as a result of the same motive. [Citation.]" (*Ibid.*) There is no "direct logical nexus" or shared motive between appellant's escape from the jail – an act obviously motivated by a desire to escape confinement altogether, and which gave him even less access to Tinajero than he had while in the jail – and the series of acts necessary to make his way into a locked cell in a separate, secure module, and to then commit a murder. (Cf. *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 5, 13, 15; *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.) This is especially so because the incident occurred before Tinajero had testified against him (see 11 RT 1792), and there is no evidence that appellant considered Tinajero to be a snitch at that time.

Thus, evidence relating to the escape attempt was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

b. Appellant's Possession of "Shank Weapons" and An Altered Paper Clip Had No Probative Value

Evidence regarding appellant's possession of contraband – namely, a shank, a syringe, a razor blade, and an altered paper clip (15 RT 2636, 2641-2648, 2654-2657; 16 RT 2790-2793, 2796-2805, 2807-2808, 2810-2811, 2813, 2826-2830) – was inadmissible because those incidents bore no similarities to the circumstances surrounding the murder of Tinajero. As defense counsel pointed out, there was no evidence that appellant used a shank to commit the homicide. (4 RT 738-739.) Indeed, there was no evidence that appellant used any of those items for an illicit purpose, let alone to commit the murder.

Moreover, there is nothing to suggest that, because appellant possessed these items, he gained any knowledge as to how to gain access to Tinajero and commit the charged offense. For instance, the prosecution claimed that appellant's "opportunity to get around jail rules, regulations and security is highlighted by his ability to obtain weapons even when housed as a K-10 high security inmate." (5 CT 1132.) Yet the prosecutor failed to explain how appellant's ability to obtain weapons furthered his ability to make his way from his cell to Tinajero's cell, located in a keep-away module on a different floor. Similarly, the prosecution claimed that appellant's possession of the altered paper clip "suggest[ed] his desire and ability to escape from or into locked areas." (5 CT 1132.) However, there was no evidence that appellant used, or even could have used, the paper clip to escape from or into a locked area.

Under these circumstances, evidence regarding appellant's possession of the contraband lacked probative value to show "knowledge of the inner workings of the jail and that he possessed the opportunity,

contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740-741). (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244.)

Evidence regarding appellant's possession of the so-called "shank weapons" and the altered paper clip was also inadmissible to prove motive. Appellant's possession of those items did not provide a motive for Tinajero's murder; for instance, there was no evidence that Tinajero alerted jail personnel that appellant possessed or used them. (See *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.)

Nor is there a "direct logical nexus" between appellant's possession of contraband and the murder of Tinajero. This is especially so because appellant's March 13, 2003, possession of a shank occurred before Tinajero had testified against him (see 11 RT 1792), and there is no evidence that appellant considered Tinajero to be a snitch at that time. Similarly, the other incidents of contraband possession occurred after Tinajero's death; appellant's possession of the contraband obviously was not probative of a motive to kill Tinajero. (Cf. *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 5, 13, 15, and cases cited therein.)

Thus, evidence relating to the contraband was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

c. Evidence That Appellant Was Found Without His Identification Bracelet Lacked Probative Value

Evidence that on at least two occasions appellant was found without his wristband (15 RT 2586-2587; 16 RT 2787-2789) was inadmissible

because those incidents bore no similarities to the circumstances surrounding the murder of Tinajero. According to the prosecution, "the numerous incidents where he has intentionally removed his identification bracelet [] suggests his desire and ability to escape from or into locked areas." (5 CT 1132.) Yet the prosecution's own evidence established that appellant was wearing his wristband on the date of Tinajero's murder. (13 RT 2350; 15 RT 2616-2624.) Moreover, as defense counsel observed, the prosecution did not contend that appellant exchanged his wristband in order to get into Tinajero's cell. (4 RT 738-739.)

In addition, there is nothing in the record showing that, because appellant had committed infractions relating to his wristbands, he somehow gained knowledge as to how to circumvent jail rules in order to commit the murder of Tinajero. In each instance, appellant was in his own module at the time he was found without a wristband. (15 RT 2583-2584, 2586-2587, 2591-2592, 2594.) There was no evidence that appellant tried to exit his module by removing his wristband.[58]

Under these circumstances, evidence that appellant removed his wristband lacked probative value to show "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740-741). (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244.)

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[58] When appellant was found to be without a wristband on October 13, 2004, he was among inmates who were going to court. (15 RT 2586-2587.) However, there was no evidence that he was not scheduled to go to court, or that he took off his wristband in order to sneak out of his module.

Nor is there a "direct logical nexus" between appellant's removal of his wristband and the murder of Tinajero. Each of the incidents post-dated the murder of Tinajero. Therefore, the murder and appellant's removal of his wristbands obviously did not stem from the same motive. (Cf. *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 5, 13, 15, and cases cited therein; *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.) Moreover, the wristband incidents obviously could not have supplied the motive for the prior murder of Tinajero. (See *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.)

Thus, evidence relating to the wristbands was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

d. Appellant's July 30, 2005, Escape From a Locked Shower Lacked Probative Value

Evidence regarding appellant's July 30, 2005, escape from a locked shower (15 RT 2664-2676, 2680; 16 RT 2805-2809) was inadmissible because it bore no similarity to the circumstances surrounding the murder of Tinajero. To escape from the shower, appellant merely lathered himself up and squeezed through a gap between a wall and the shower door. (15 RT 2671-2676; 16 RT 2805-2809.) As defense counsel pointed out, there was no evidence that appellant "greased his body up and was able to sneak inside [Tinajero's] cell." (4 RT 739.) Moreover, appellant simply returned to his cell, which was on the same row (15 RT 2668-2670); he did not go to an entirely different module.

In addition, evidence that appellant was able to leave the shower did not tend to show that he gained knowledge as to how to circumvent jail

rules in order to commit the murder of Tinajero. In particular, there was no evidence that appellant did or could exit his cell and his module, or enter Tinajero's module and cell, in the manner in which he escaped from the shower. Therefore, the prosecution was incorrect in contending that the escape showed that appellant had "an advanced knowledge of how to obtain access into off limits areas." (5 CT 1132.)

Under these circumstances, evidence regarding appellant's escape from the shower lacked probative value to show "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740-741). (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244.)

Evidence regarding appellant's escape from a locked shower was also inadmissible to prove motive because there was no "direct logical nexus" between appellant's escape from a shower into his own cell on the same row, and a murder carried out by making one's way into a locked cell in a separate, secure module. (Cf. *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 5, 13, 15, and cases cited therein.) Moreover, appellant's escape from the shower obviously could not have supplied the motive for the prior murder of Tinajero. (See *People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.)

Thus, evidence relating to the shower escape was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

e. Appellant's Letters and Telephone Calls to Irma Limas Lacked Probative Value

The prosecutor sought to introduce evidence regarding appellant's letters and telephone calls to Irma Limas on the ground that they were relevant to show the identity of appellant as the person who committed the murder of Tinajero. In so arguing, the prosecution contended that the fact appellant was in jail on charges of murder and attempted escape was extremely probative to establish the inference that appellant was the person who was writing to and calling Limas, and that he was making efforts to locate Tinajero so that he could kill him. (5 CT 1132-1133.) She similarly argued to the jury that Limas's testimony showed that appellant was looking for Tinajero. (20 RT 3487.)

However, the trial court admitted the evidence not to show identity, but appellant's knowledge of jail procedures and rules as well as methods to overcome them. (5 CT 1263; 4 RT 740-741.) The record makes clear that the trial court did not assess whether the evidence met the high standard governing the admission of other-acts evidence to prove identity. (See *People v. Foster*, *supra*, 50 Cal.4th at p. 1328 [greatest degree of similarity required for evidence to be relevant on issue of identity].)

Moreover, the evidence regarding appellant's communications with Limas was not probative to show "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder" (4 RT 740-741). (*People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 242-244.) Even if this evidence suggested that appellant was trying to locate Tinajero, the evidence did not tend to show that he

knew how to exit his own module, make his way into Tinajero's module, and enter Tinajero's cell.

Evidence regarding appellant's calls and letters to Limas was also inadmissible to prove motive because there was no "direct logical nexus" between appellant's communications with Limas and the murder of Tinajero; at most, Limas's testimony showed that appellant was trying to contact Tinajero (14 RT 2469-2471). (Cf. *People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 5, 13, 15, and cases cited therein.)

Thus, evidence relating to Santi's communications with Limas was irrelevant to prove any fact other than appellant's criminal disposition. (See Evid. Code, § 1101, subd. (b); *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 393; *People v. Hendrix*, *supra*, 214 Cal.App.4th at p. 244.)

4. The Trial Court Abused Its Discretion In Failing To Exclude the Other-Acts Evidence Under Evidence Code Section 352

Evidence Code section 352, subdivision (b), provides that the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues or misleading the jury. "Evidence is probative if it is material, relevant and necessary. '[H]ow much probative value proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20; citation omitted.) "Prejudice for purpose of section 352 means evidence that tends to evoke an emotional bias against the defendant . . ." (*People v. Crew* (2003) 31 Cal.4th 822, 842) or that may be misused

by the jury (*People v. Filson* (1994) 22 Cal.App. 4th 1841, 1851, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 448-450). A court's failure to exclude evidence under this section is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

As this Court has acknowledged, other acts-evidence is inherently prejudicial:

> Our conclusion that section 1101 does not require exclusion of the evidence of defendant's uncharged misconduct, because that evidence is relevant to prove a relevant fact other than defendant's criminal disposition, does not end our inquiry. Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis." [Citations.] Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value."

(*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, quoting *People v. Smallwood* (1986) 42 Cal.3d 415, 428, and *People v. Thompson, supra*, 27 Cal.3d at p. 318, italics and alterations in original.) "'The natural and inevitable tendency of the [jury] . . . is to give excessive weight to the vicious record of the crime thus exhibited, and either allow it to bear too strongly on the present charge, or take the proof of it as justifying a condemnation irrespective of the guilt of the present charge.'" (*People v. Guerrero, supra*, 16 Cal.3d at p. 724, quoting *People v. Baskett* (1965) 237 Cal.App.2d 712, 716; see also *Michaelson v. United States* (1948) 335 U.S. 469, 476 [character evidence has tendency to "overpersuade [jury] as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"].)

As demonstrated above, the trial court admitted the other acts evidence based on an erroneous finding that it would show appellant's "knowledge of the inner workings of the jail and that he possessed the opportunity, contrary to lay intuition, to escape from one supposedly secure area of the jail into another in order to commit the murder." (4 RT 740-741.) However, even if this Court should find that the other-acts evidence was relevant to prove such knowledge, the trial court's failure to exclude it pursuant to Evidence Code section 352 was an abuse of discretion.

In particular, as defense counsel argued, the other-acts evidence should have been excluded under Evidence Code section 352 because it was more prejudicial than probative. (5 CT 1156-1157; 15 RT 2639-2640.)

First, even if evidence of appellant's December 19, 2003, escape attempt (see Sections A.2.a and B.2.a, *ante*) and his escape from a locked shower (see Sections A.2.g and B.2.d, *ante*) was relevant to show how appellant could have gotten into Tinajero's cell, it is likely that the jurors' fear that he would again escape from jail or prison interfered with their assessment of the guilt-phase evidence. (See, e.g., *People v. Pride* (1992) 3 Cal.4th 195, 268 [stating that, "[t]he average juror undoubtedly worries that a dangerous inmate might escape"].) In addition, the evidence regarding appellant's conduct with respect to Montalban likely inflamed the jurors. (Cf. *People v. Carrasco* (2014) ___ P.3d ___, 2014 WL 3805476, *26 [in upholding evidence of defendant's escape to show his consciousness of guilt, this Court noted that the escape "involved no threats, acts of violence, or other inflammatory features"].)

Second, even if evidence of appellant's possession of "shank weapons" and an altered paper clip (see Sections A.2.b-c and f, and B.2.b, *ante*) was relevant to show how appellant could have gotten into Tinajero's

cell, it is likely that the jurors' fear or speculation that he had used those items for some violent or other illicit purpose (including escape) not before them, or that he would do so in the future, interfered with their assessment of the guilt-phase evidence. Similarly, even if evidence regarding occasions on which appellant was found without his identification wristband (see Sections A.2.d-e, and B.2.c, *ante*) was relevant to show how appellant could have gotten into Tinajero's cell, it is likely that the jurors' fear or speculation that he had removed his wristband in order to carry out illicit acts not before them interfered with their assessment of the guilt-phase evidence.

Third, even if evidence regarding appellant's letters and telephone calls to Irma Limas were otherwise admissible (see Sections A.2.h, and B.2.e, *ante*), it is likely that the jurors' fear or condemnation of gang members may have prevented them from fairly and impartially evaluating the guilt-phase evidence. (See Argument III, *post*, incorporated by reference as if fully set forth herein.)

Therefore, the trial court's failure to exclude the other-acts evidence pursuant to section 352 was an abuse of discretion.

C. The Erroneous Admission of the Evidence Was Highly Prejudicial and Deprived Appellant of His Fourteenth Amendment Right to Due Process and a Fair Trial, and His Eighth Amendment Right to a Reliable Determination of Guilt

Evidence of other crimes is inherently, and extremely, prejudicial (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318), and may violate federal due process (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385; see also *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, rev'd on other grounds in *Woodford v.*

Garceau (2003) 538 U.S. 202). The Ninth Circuit has held that the admission of irrelevant "other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence . . . was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381-1382, 1385-1386.) As shown, the evidence discussed in the preceding sections constituted irrelevant character evidence. Moreover, under *Garceau* and *McKinney*, its admission violated appellant's Fourteenth Amendment right to due process.

As spelled out above, prior crimes evidence is inherently prejudicial because it tempts "the tribunal . . . to give excessive weight to the vicious record of crime thus exhibited, and either 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. Alcala* (1984) 36 Cal.3d 604, 631, superceded by statute on another ground as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) Therefore, such evidence should only be admitted if its probative value is substantial and outweighs the prejudice to the defendant its admission would engender. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

Appellant has demonstrated that the other-acts evidence lacked relevance to prove any fact in issue, particularly his knowledge of jail rules and regulations and of methods to circumvent them. Thus, it had no relevance to prove any fact other than criminal disposition. (Evid. Code, § 1101, subd. (a).)

Additionally, admission of the other-acts evidence was so prejudicial that it undermined the fairness of appellant's trial. First, the other acts evidence in this case was prejudicial for precisely the reasons such evidence historically has been disapproved. In particular, it necessarily operated "to distract the trier of fact from the main question of what actually happened on the particular occasion and permit[ted] the trier of fact to . . . punish" appellant based on his character. (1 Witkin Evid. (4th ed. 2000) § 42, p. 375; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *People v. Alcala*, *supra*, 36 Cal.3d at pp. 630-631.) For instance, the jurors may have reached a guilt verdict as to the Tinajero murder, even if they were not convinced that the prosecution had proven his guilt beyond a reasonable doubt, to punish him based on their speculation that he had, or would, committed other acts of misconduct. Similarly, the guilt verdict may have reflected a fear of or contempt for gang members. In short, the evidence likely led the jurors to punish appellant because they believed he was a bad man, not because they believed the prosecution had proven him guilty beyond a reasonable doubt.

Tellingly, in her closing argument the prosecutor did not mention any of the other-acts evidence other than appellant's letters to Limas. Appellant submits that the prosecutor did not explain how the other acts evidence demonstrated his knowledge of jail rules and how to circumvent them because there was no logical explanation to be made. (20 RT 3457, 3463-3464.) Instead, the fact that she introduced the other acts evidence but failed to explain their significance suggests that it was actually introduced for its tendency to show propensity to commit criminal acts.

Second, absent the other acts evidence, the jury may have been more likely to credit the defense theory that Tinajero's cellmates, not appellant,

killed him.[59] (20 RT 3526-3554.) Especially in light of appellant's acknowledgment that he was in Tinajero's cell (19 RT 3271, 3354), it was critical that the jury's ability to fairly and impartially consider the guilt issue not be undermined by the admission of inflammatory evidence.

Third, to the extent that the jury considered the other-acts evidence as showing appellant's criminal propensity, that evidence necessarily affected their verdict with respect to the murder of Armenta as well. Again, the evidence permitted the jury to punish appellant based on his character.

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[59] During closing argument, defense counsel argued, among other things, that: appellant had no history of violence (20 RT 3527-3528; see also 19 RT 3248-3250, 3328); every inmate connected to the Southsiders had a motive to kill Tinajero, including his cellmates (20 RT 3552; see also 18 RT 3136-3137, 3153-3154, 3173, 3177); Tinajero's cellmates agreed that discipline is administered through the gang module (20 RT 3536; see also 13 RT 2204, 2319 [testimony of Sloan and Good]); Sloan, Good and Davies had been trusties in the gang module but had been transferred out of that module for fighting (20 RT 3536; see also 13 RT 2204, 2307-2309); Tinajero's cellmates were bigger and stronger than appellant (20 RT 3538; see also 19 RT 3248; 13 RT 2206-2207, 2322; 14 RT 2455); there were discrepancies in the cellmates' testimonies as to how the murder occurred, and some of the forensic evidence was inconsistent with those testimonies (20 RT 3530-3534, 3542-3549, 3551; see also, e.g., 12 RT 2128-2134; 13 RT 2284, 2324; 14 RT 2395-2400, 2444-2447); according to Good, he and his cellmates discussed what they would say about the incident (20 RT 3536-3537, 3541; see also 13 RT 2294-2295, 2322-2323, 2332); Palacol could name only one person, i.e., his son's mother, who would say he was honest, and Good could not name anyone who could say he was honest (20 RT 3539, 3542; see also 13 RT 2321-2322, 2328; 14 RT 2443); by talking to the authorities, Sloan received a more favorable disposition in his kidnaping case (20 RT 3534-3535, 3538; see also 13 RT 2125, 2195, 2200, 2224-2225, 2234-2235); an inmate would not kill another in front of witnesses, as it would be disrespectful (20 RT 3553; see also 18 RT 3150-3151); and, appellant's best chance for a favorable outcome would be to have Tinajero, who was his friend, on the stand (20 RT 3553).

(1 Witkin Evid. (4th ed. 2000) § 42, p. 375; see also *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913; *People v. Alcala*, *supra*, 36 Cal.3d at pp. 630-631.) In addition, it is likely that the other-acts led the jury to improperly reject out of hand appellant's testimony that he ran over Armenta accidentally. (19 RT 3245, 3247, 3267-3268, 3318-3319, 3374, 3376.)

The trial court's jury instructions, CALJIC No. 2.50 in particular, were similarly unenlightening. CALJIC No. 2.50 told the jury that it could consider other acts evidence to determine if it tended to show knowledge of jail procedures and rules as well as methods to overcome them, but did not explain how it was to determine whether the evidence did in fact show such knowledge. (5 CT 1263; emphasis added.) Under these circumstances, the jury could not have understood or followed the limiting language of the instruction. (See *People v. Hendrix*, *supra*, 214 Cal.App.4th at pp. 248 [it could not be assumed that jury understood or followed modified version of CALCRIM No. 3.75, which explained that in evaluating the other crimes evidence, the jury should consider the similarity or lack of similarity between the uncharged offenses and the charged offense, but did not explain how similarity should be considered or what consideration, if any, should be given to evidence found to be dissimilar].) Here, the instructions did not even contain language regarding similarity or lack thereof.

By allowing the prosecution to introduce irrelevant, but nevertheless highly inflammatory evidence, and then compounding the error and resulting prejudice by failing in its instructions to guide the jury's consideration of the evidence, the trial court in this case violated appellant's right to a fair trial, as guaranteed by the due process clause of the Fourteenth Amendment. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [important element of a fair trial is that jury consider only

relevant and competent evidence bearing on issue of guilt or innocence]; *People v. Castro* (1985) 38 Cal.3d 301, 313 [due process demands that inferences be based on rational connection between fact proved and fact to be inferred].) The jurors' consideration of inadmissible, highly inflammatory evidence unfairly swayed them in their guilt determination, and thus denied appellant "a fair opportunity to defend against [the] particular charge[s] against him." (*Michaelson v. United States*, *supra*, 335 U.S. at p. 476.)

The trial court's errors also deprived appellant of his Eighth Amendment right to reliable guilt and penalty determinations. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604 [greater reliability required when death sentence imposed]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [extending Eighth Amendment reliability requirement to guilt determination in capital cases].)

Under federal standards, reversal of the guilt verdicts and special circumstance finding is required unless the erroneous admission of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state law, reversal of the guilt verdict is required if there is a reasonable probability appellant would have achieved a more favorable result but for the erroneous admission of this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Reversal is required in this case under either of those standards.

Even assuming, arguendo, that the erroneous admission of the "uncharged misconduct" evidence does not require reversal of the convictions and special circumstance findings, reversal of the penalty phase is required.

A death verdict must be a reasoned moral response, not one based on emotional, inflammatory speculation. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493 [under the Eighth Amendment, the death penalty must be reasoned moral response rather than emotional one].) The speculation engendered by this evidence violated appellant's substantive due process rights to a fundamentally fair trial and a fair and impartial jury, and to a reliable penalty verdict, in contravention of his rights under the Eighth and Fourteenth Amendments.

Pursuant to CALJIC No. 8.85, the trial court instructed the jury as to the factors it was to consider in determining the penalty to be imposed. Those factors included Penal Code section 190.3, factor (a), i.e., the circumstances of the crime. (6 CT 1425-1426.) Further, the jury was instructed that it must determine what the facts are from the evidence received during the entire trial unless . . . instructed otherwise." (6 CT 1422 [CALJIC No. 8.84.1].) Finally, pursuant to Penal Code section 190.3, factor (b), the jury was instructed that it could consider in aggravation "criminal acts which involved the express or implied use of force or violence or the threat of force or violence." Among things, the jury was instructed that it could consider "an attempted escape by violence, [and] refus[al] to comply with guard's orders were [*sic*] compliance would reduce danger to the guards." (6 CT 1427 [CALJIC No. 8.87].)

Because the trial court erred in admitting the other-acts evidence, the jury improperly was permitted to consider it at the penalty phase under factor (a). Moreover, during her penalty phase argument, the prosecutor identified some of these acts as factor (b) evidence: (1) appellant's December 19, 2003, attempted escape; (2) his possession of a shank on March 13, 2003; (3) his possession of an altered razor blade and syringe on

July 13, 2004; and, (4) his possession of an altered paper clip on June 17, 2005. (31 RT 5073-5077.) The use of any of these acts as factor (b) evidence would be improper unless the jury found beyond a reasonable doubt that the act occurred *and* that it involved force, violence or threat. (See Arguments VI and VII, *post*, incorporated by reference as if fully set forth herein.)

Under these circumstances, admission of the evidence deprived appellant of his due process right to a fundamentally fair trial *Pulley v. Harris* (1984) 465 U.S. 37; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1386) and a fair and impartial jury (*Turner v. State of Louisiana* (1965) 379 U.S. 466, 471-472), and the trial court's error in admitting the evidence over appellant's objections had the legal consequence of violating his right to due process (*People v. Partida* (2005) 37 Cal.4th 428, 433-439). The evidence also violated his right to a fair and impartial jury and a reliable penalty verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Under federal standards, reversal of the death judgment is required unless the state has shown that the erroneous admission of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Under state law, reversal of the penalty verdict is required if a "reasonable *possibility*" exists that the jury would have returned a life sentence absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447, italics added.) Reversal is required in this case under either of those standards.

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III

THE TRIAL COURT PREJUDICIALLY ERRED IN ADMITTING EVIDENCE OF APPELLANT'S GANG MEMBERSHIP

The prosecution in this case did not allege any gang enhancements (see, e.g., Pen. Code, §§ 186.22, 186.26), and acknowledged that "this is not a gang case in the typical sense of the word" (3 RT 487). Nevertheless, the trial court allowed the prosecutor to introduce evidence of appellant's gang membership, as well as expert testimony regarding gang culture and activity in the Los Angeles County Jail. As appellant demonstrates below, that evidence was irrelevant and profoundly prejudicial, and the trial court's error in admitting it requires reversal of the entire judgement.

A. Factual Background

1. Evidence Relating to Communications Between Appellant and Irma Limas

During a pretrial discussion regarding discovery, the prosecutor apparently contested a defense request for copies of any "gang field identification cards," stating that "there is no gang allegation in this case, there is no information that I'm aware of that this was any sort of gang-related, [that] either of the killings were gang-related, and I don't know of any field identification cards that pertain to this case." (2 RT 151; see also 3 CT 507-510 [felony complaint].) However, during a conference regarding preparation of the jury questionnaire, the prosecutor contended that, "while this is not a gang case in the typical sense of the word, there would be . . . some gang evidence that would come in" on the issue of the perpetrator's identity. (3 RT 487; see also 3 RT 488-491.)

Defense counsel objected on the ground that references to gangs would be very prejudicial, and requested that the prosecutor make an offer

of proof as to how gang evidence was relevant. (3 RT 488-489.) The prosecutor responded that "the issue of gang involvement or gangs has to do with identification in this case." (3 RT 488.) She stated that a witness (i.e., Irma Limas (see 14 RT 2464)) would testify to the following: she had received calls from someone in jail who called himself "Chingon" and "Santee"; the caller said he was from West Side Wilmas; she had received letters bearing appellant's name and booking number, and which were signed "Chingon" and "Santee." The prosecutor also asserted that "Chingon" and "West Side Wilmas" were written on appellant's phone book, and that the defense had provided discovery indicating that appellant was known as "Chingon." The prosecutor contended that the evidence was therefore relevant, especially because the defense intended to call an expert on the issue of identity.[60] (3 RT 489-490.) Defense counsel requested both that the questionnaire not refer to gang evidence, and that a hearing be held pursuant to Evidence Code section 402 before the prosecution witness was called to the stand.[61] (3 RT 490-491.)

During the guilt phase, Limas testified about various telephone calls and letters she had received from a man who called himself "Santi" and "Chingon," and who indicated that he was in jail.[62] (14 RT 2464-2480.) Asking about one of appellant's letters, the prosecutor noted that it read in part, "From the big bad ass ES Wilmas." (14 RT 2480; People's Exhibit

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[60] In fact, the defense called no such expert.

[61] The questionnaires ultimately distributed to the prospective jurors did not refer to gangs or gang-related evidence.

[62] As noted in footnote 48, *ante*, appellant subsequently acknowledged that he had written the letters and had made telephone calls to Limas. (19 RT 3352-3353.)

96D.) Defense counsel objected that the letter spoke for itself, but the trial court overruled the objection, reasoning that documents may be read in court so that what is being referenced is understood. (14 RT 2480.) Limas then confirmed that the phrase referred to the East Side Wilmas Ghost Town Locos. (14 RT 2480-2481.) After the prosecutor asked Limas to explain who the East Side Wilmas were, defense counsel objected on foundational grounds. The trial court overruled the objection, but not before Limas explained that "[i]t's a gang." Limas further testified that, based on her understanding and conversation with Santi/Chingon, that was the area he "claimed." (14 RT 2481.)

2. Evidence Relating To Appellant's Gang Affiliation, and to Gang Culture and Activity In The County Jail

Later in the guilt phase, defense counsel requested that there be a hearing before the prosecution called a witness to testify regarding gang activity and the relationship between appellant and one of the victims, Raul Tinajero. (17 RT 2974.) Accordingly, the court and counsel discussed the permissible scope of the testimony to be offered by the prosecution's gang expert, Detective Javier Clift. The prosecutor contended that Clift's testimony was relevant to rebut the defense's suggestion that Tinajero's cellmates committed the homicide. (18 RT 3104-3106, 3109-3111.) Again the prosecutor acknowledged that "[t]his isn't a case involving gang activity specifically." (18 RT 3105.)

Clift subsequently testified that, with a few exceptions, Hispanic street gangs follow "Sureno thinking" and work together in the jails; that he was familiar with appellant and with some of the facts relating to the murder of Tinajero; and, that he was aware that three white inmates and one Filipino inmate were also in the cell at the time of the murder. (18 RT

3111-3113.) Over a defense objection on foundational grounds, the prosecutor elicited Clift's opinion that the white inmates were not involved in the murder.[63] (18 RT 3113-3114.)

A hearing was then held pursuant to Evidence Code section 402, during which the trial court ruled that it would permit the prosecution to elicit testimony as to why gang associations ordinarily are such that whites would not carry out contracts on behalf of Hispanic gangs. (18 RT 3123-3127.) Defense counsel argued that the prosecutor was trying to introduce indirectly what she could not get in directly, and that she had created a gang issue where none had existed. (18 RT 3133-3134.) After the prosecutor countered that the defense had opened the door to such evidence by trying to elicit testimony that gang "hits" come through the gang module, the trial court overruled the objection. (18 RT 3134.)

Among other things, Clift testified about the history of, and connection between, the Mexican Mafia prison gang and the Surenos, an umbrella group comprised of Hispanic street gang members. (18 RT 3111, 3138-3139.) Clift also described gang politics and activities within the jail. For instance, Clift testified, gang members who belong to the Surenos tend to cooperate with one another, even if they have been enemies outside the jail. (18 RT 3111-3112.) Moreover, Sureno gang members "actually run a lot of situations in the jail," and their "business" includes taxing other inmates for money or items from the jail commissary, sending "kites" (i.e.,

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[63] Defense counsel moved for a mistrial on the ground that Clift was testifying as an expert as to appellant's guilt, denying his right to jury trial. The trial court denied the motion but granted a motion to strike the answer. (18 RT 3114-3117.)

written messages) to other inmates, conducting criminal activity over jail telephones, and killing snitches. (18 RT 3136-3137.)

According to Clift, individuals subject to gang retaliation or discipline are placed on "green light" lists. (18 RT 3153-3154, 3169.) Green light lists are issued by a "shot caller" (i.e., the inmate in charge of a module), not by the inmate or inmates seeking retaliation. (18 RT 3148-3149, 3178.) Under Sureno rules, a snitch is automatically subject to being killed. (18 RT 3173.)

Clift opined that a Sureno member must carry out a Sureno order, and if he fails to do so, or if he exceeds the scope of the order, then he himself is subject to discipline. (18 RT 3171-3172.) If a matter is personal to a Sureno member, he may take care of it himself. (18 RT 3154-3155.) However, Clift also opined that, given the hierarchy of jail inmates, it would not be unusual for someone to seek a shot caller's permission to enter his module and carry out a hit; this is because the shot caller would want to be prepared for repercussions arising from the hit. (18 RT 3148-3150.)

Clift further testified that a non-gang member would not carry out a hit on someone living in his own cell, and that trusties in the gang module do not get involved in gang politics or gang business. (18 RT 3136.) According to Clift, inmates who do not belong to the Surenos, such as the white trusties in this case, might do certain favors for them, such as providing extra supplies or sending kites.[64] (18 RT 3174-3177.) However, they would not be ordered to carry out a hit for the Surenos because they

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[64] Sloan, Good and Davies had been trusties in a gang module prior to being placed in the 2200 module, where Tinajero's cell was located. (12 RT 2125, 2127; 13 RT 2204-2205, 2280, 2307.)

cannot be trusted to keep quiet or to complete the task. (18 RT 3143-3144, 3174-3175.)

Moreover, in the absence of a personal rift, an inmate is unlikely to commit a murder in his own cell, lest everyone in the cell be implicated as a witness or a suspect. (18 RT 3145-3148, 3150-3151.) Clift opined that inmates might watch an attack without acting to stop it because (1) they had been intimidated prior to the attack, or (2) they do not know whether the attack had been sanctioned, and fear that, if they intervened, they or their families could be subject to retaliation. (18 RT 3161-3162.)

So far as Clift was aware, there had not been a green light on Tinajero. (18 RT 3154, 3177.) After the prosecutor summarized the manner in which Tinajero was killed, Clift opined that the person who killed him was both sending a message to the witnesses – namely, that if they were to "rat" on him, the same thing would happen to them – and trying to project an image. (18 RT 3173-3174.) With respect to the latter point, Clift testified that appellant's moniker, "Chingon," "means bad guy, bad ass, tough guy, and so he's trying to project that image." (18 RT 3174.)

Finally, the prosecutor showed two letters to Clift and, over defense objection, asked whether they contained any information indicating that appellant was a Sureno. (18 RT 3140.) Clift testified that he intercepted one of the letters, People's Exhibit 157, when appellant attempted to send it from his cell. (18 RT 3142-3143.) According to Clift, the letter was signed "Chingon"; it contained the word "Sur"; three dots and two lines appeared beneath the word "Sur," indicating allegiance to the Mexican Mafia and belief in the Sureno cause; and, it contained the letters "GT" and "E.S.W.," meaning that he belonged to the Ghost Town clique of East Side Wilmas. (18 RT 3141, 3143.) Clift testified that the second letter, People's

Exhibit 96D, read, "Mr. Chingon from Bad Ass ES Wilmas, Ghost Town Locos," and was signed by "Santiago Pineda Hernandez Chingon." (18 RT 3142.)

During Clift's testimony, defense counsel moved for a mistrial on the ground that the prosecution "did indirectly what the court had prohibited them from doing directly, and I think the – the relevancy of this testimony is very[,] very remote and it should be stricken under [Evidence Code section] 352 at least." (18 RT 3159-3160.) The trial court denied the motion, finding that the prosecution had stayed within the parameters it had set. The court also reasoned that the issue of gang activity was peripherally involved in the case, and that the prosecution had to explain that appellant needed to get permission from the shot caller. (18 RT 3159-3160.)

Deputy Sheriff Charles Warren testified that, on April 20, 2004, he was dispatched to appellant's cell. (15 RT 2683-2684.) Warren recovered a phone book from appellant's pants pocket. The phrases "El Chingon" and "Wilmas" were written on the phone book. Appellant indicated that he was Chingon. Warren took the phone book to a detective. (15 RT 2687.)

Deputy Sheriff Dan Deville testified that on April 20, 2004, he was assigned to Operations Safe Jail (O.S.J.), the gang unit at the Men's County Jail. (16 RT 2755, 2761, 2767.) On that date, Deville searched appellant's cell and recovered transcripts of Tinajero's testimony and, he believed, a Long Beach Police Department report regarding appellant's arrest. (16 RT 2759-2761.)

According to Deville, he was familiar with the inner workings of jail culture. (16 RT 2761-2762.) He testified that "paperwork" refers to proof used by gang members to take action against an individual, e.g., to verify that he is a "snitch." (16 RT 2761-2763.) Deville also explained that,

among Hispanic inmates, the "green light list" is a written list of inmates who are in disfavor for some reason, such as snitching. (16 RT 2763, 2766-2767, 2770-2771.) Once an inmate is on the list, he is subject to attack by any Hispanic gang member. (16 RT 2764, 2768.)

3. Evidence Used to Impeach Appellant's Denial That He Was a Sureno Member

Prior to her cross-examination of appellant, the prosecutor informed the trial court and defense counsel that she intended to ask appellant about a statement he had made in a letter – specifically "I ride for the Sur, one for all" – in light of his denial that he belonged to that gang. (19 RT 3287-3288; 5 CT 1289-1298 [prosecution motion to admit evidence of violent criminal activity pursuant to Penal Code section 190.3, factor (b)].)[65] Defense counsel objected, saying, "*Obviously we oppose that line of questioning on the letter itself*, but it would appear to me that the other matters can be,[66] but the letter, I don't believe that was mentioned in direct." The court overruled his objection, finding that the letter was relevant to impeach appellant's testimony. (19 RT 3288, italics added.)

After appellant denied belonging to the Surenos, the prosecutor read a letter written to his friend Della Rose Santos but intercepted by Detective Clift:

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[65] The court had previously ruled that the letter was admissible, if at all, under Penal Code section 190.3, factor (b), not Evidence Code section 1101. (18 RT 3089, 3091-3092; see also 5 CT 1241-1246 [defense motion in limine].)

[66] Defense counsel apparently was agreeing that the prosecutor was entitled to cross-examine appellant about an alleged threat to stab a deputy. (19 RT 3287-3288.)

> Grumpy told me about the guera that turned over the dime. They're treating him bad, but that will be straightened out soon. We ride for the Sur. Tu sabes babe. One for all, all for one.

(19 RT 3293; see also People's Exhibit 158.) Appellant explained that,

> [w]ell, if you read the sentence, it says, "We ride for the Surenos," it doesn't say I'm a Sureno. When you're in jail, you can only go – you have certain choices who to run with, and that's the Southside, so a Southside[r] runs with the Surenos, but the Surenos is only a prison gang, not an L.A. County jail gang.

(19 RT 3293-3294.) Appellant subsequently acknowledged that he "claimed" membership in the Ghost Town Locos clique of the East Side Wilmas street gang. (19 RT 3294-3295.)

The prosecutor then asked appellant to explain the phrase, "We ride for the Sur," eliciting his testimony that "since there's different people you run with in jail, you have to go along with what happens." Appellant further acknowledged that a Sureno member must go along with whatever is required to deal with a snitch. (19 RT 3295.) However, he denied that snitches are necessarily dealt with by being killed. (19 RT 3296-3297.)

Asked to explain the phrase, "One for all, all for one," appellant testified that, "we're a group. If something happens to one, then we all help him." The prosecutor followed up by asking, "So if, for example, somebody was being tried for murder and somebody was snitching on him, somebody might take care of that?" Appellant replied, "Not just that rule, but it could be blacks, whites, everybody." (19 RT 3297.) Still later, appellant acknowledged that when someone snitches on a Sureno, it must be straightened out. (19 RT 3369-3370.)

Finally, the prosecutor again asked about the contents of the letter, eliciting appellant's testimony that: "Grumpy" was incarcerated on a murder charge; "guera" was a term used to suggest that someone was "like a white girl"; and, the phrase "turned over the dime" meant "tattled." (19 RT 3372.) Appellant denied that his letter meant that he was a member of Sureno or that he was willing to do their business. He also testified that "[w]hen I say 'straightened out,' . . . we were going to talk to the cops to leave [Grumpy] alone because they were beating him up." (19 RT 3373.)

B. Legal Authority

Gang membership evidence is well-recognized as being extraordinarily prejudicial and inflammatory. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cox* (1991) 53 Cal.3d 618, 660, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-194; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 344.) As one court has observed: "[I]t is fair to say that when the word 'gang' is used in Los Angeles County, one does not have visions of the characters from 'Our Little Gang' series. The word 'gang' . . . connotes opprobrious implications. . . . [T]he word 'gang' takes on a sinister meaning when it is associated with activities." (*People v. Perez* (1981) 114 Cal.App.3d 470, 479; see also *People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) Indeed, the United States Supreme Court has determined that the submission of gang affiliation evidence in a criminal proceeding may be constitutional error when such evidence is irrelevant to the issues at hand. (See *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [defendant's First Amendment rights were violated by the admission of

gang evidence in sentencing proceedings where the evidence proved nothing more than his abstract beliefs].)

Like evidence of uncharged crimes, gang membership carries a grave risk "that the jury [will] view[] appellant as more likely to have committed the violent offenses charged against him because of his membership in the [] gang." (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 906; accord, *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 194; *People v. Bojorquez*, *supra*, 104 Cal.App.4th at p. 344.) It breeds an equal tendency to condemn, not because the defendant is guilty of the present charge, but because the jury fears he will commit a similar crime in the *future* or, conversely, because it believes that the gang-member defendant likely committed previous crimes for which he has escaped unpunished. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 163 [evidence relating to defendant's future criminality is irrelevant and inadmissible in trial on guilt or innocence because "jury is not free to convict a defendant simply because he poses a future danger" and is not "likely [to be] relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt"]; *People v. Thompson* (1980) 27 Cal.3d 303, 317 [prior criminality breeds a tendency to condemn, not because the defendant is believed guilty of the charged offense, but because he has previously escaped punishment]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230 [despite absence of "formal convictions," it is "reasonable to infer" prior criminality from gang membership]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 [association with gang members is the first step to involvement in gang activity].)

Gang evidence is character evidence, and its admissibility is subject to the same restrictive rules that govern the admission of character evidence

generally. (See Evid. Code, § 1101, subd. (a).)[67] As the Court in *People v. Avitia* stated, "gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial then probative, and is not cumulative." (*People v. Avitia, supra,* 127 Cal.App.4th at p. 192.)

Given the highly inflammatory impact of gang testimony, this Court has condemned the introduction of such evidence if it is only *tangentially* relevant to the charged offenses. (*People v. Cox, supra,* 53 Cal.3d at p. 660.) In cases not involving gang enhancements, this Court has held that evidence of gang membership should not be admitted if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) The trial court must "carefully scrutinize such evidence before admitting it." (*People v. Williams, supra,* 16 Cal.4th at p. 193; accord, *People v. Kennedy* (2005) 36 Cal.4th 595, 624; *People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Gurule* (2002) 28 Cal.4th 557, 653; *People v. Cardenas, supra,* 31 Cal.3d at pp. 904-905; see also *People v. Thompson, supra,* 27 Cal.3d at p. 314 [admissibility of other crimes or misconduct under Evidence Code section 1101 must be "scrutinized with great care"].)

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[67] Evidence Code section 1101, subdivision (a), prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove his or her conduct on a specific occasion. Section 1101, subdivision (b), provides an exception to this rule for evidence which is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

In carefully scrutinizing the admissibility of such evidence over objection, the court must first determine that it is actually relevant to an issue in dispute. (See, e.g., *People v. Thompson*, *supra*, 27 Cal.3d at p. 316, & fn. 15 [in determining whether other acts of misconduct are admissible under section 1101, court must first determine if they are relevant to prove disputed issue]; *People v. Stanley* (1967) 67 Cal.2d 812, 818 ["[t]he court should not permit the admission of other crimes until it has ascertained that the evidence" is relevant "to prove the issue upon which it is offered"]; see also *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [constitutional guarantee to fair trial requires "that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"]; Evid. Code, § 350 [only relevant evidence admissible].) The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts, such as identity, intent, or motive. (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) The mere fact of gang membership, without more, does not tend to prove any of the issues identified in Evidence Code section 1101, including identity. (See, e.g., *People v. Avitia*, *supra*, 127 Cal.App.4th at pp. 193-195; *People v. Perez*, *supra*, 114 Cal.App.3d at p. 477; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79.)

Under Evidence Code section 352, a trial court must exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the

issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

In doubtful cases, the exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant, because in comparing prejudicial impact with probative value, the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; see also *People v. Murphy* (1963) 59 Cal.2d 818, 829.)

C. Evidence Regarding Hispanic Gangs and Appellant's Gang Membership Was Irrelevant and Inadmissible for Any Legitimate Purpose

As noted above, the prosecution in this case did not allege any gang enhancements (see, e.g., Pen. Code, §§ 186.22, 186.26), and acknowledged that "this is not a gang case in the typical sense of the word" (3 RT 487). Indeed, a review of the record makes clear that the gang evidence had no relevance to any disputed issue in the case, including the identity of Tinajero's killer, and that it was inadmissible.

As a preliminary matter, the gang evidence was inadmissible under Evidence Code section 1101, subdivision (a). Although defense counsel did not expressly invoke section 1101, his objections that gang evidence was irrelevant and prejudicial (3 RT 488-489; 18 RT 3133-3134, 3159-3160; see also 19 RT 3288) necessarily implicated that statute. Given his argument that the prosecution had "tried to create an issue of gangs where it [did] not exist" (18 RT 3133) and had "invented this [gang] issue" (18 RT

3134), it follows that his point was that gang evidence was prejudicial in this case precisely because it constituted inflammatory character evidence. Therefore, the objection "fairly inform[ed] the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence [could] respond appropriately and the court [could] make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435; compare *People v. Valdez* (2012) 55 Cal.4th 82, 130 [notwithstanding ambiguities in the record as to whether the defendant objected with sufficient specificity, if at all, with respect to the majority of the gang evidence in his case, the objections he did interpose, including that it was irrelevant, cumulative, lacking in foundation, or prejudicial, were insufficient to preserve for appeal his claim that the evidence was inadmissible under Evid. Code, § 1101, subd. (a)].)

In addition, the gang evidence was irrelevant and inadmissible for the following reasons. First, to the extent that the prosecutor claimed that gang evidence was necessary because the defense intended to call an expert on the issue of identification (3 RT 490), that rationale was obviated by the fact defense counsel called no such expert.

Second, much of the gang expert's testimony related to criminal activities on the part of Surenos and Mexican Mafia members. That is, the criminal conduct he described was not only general (i.e., he did not recount any *specific* incidents), but, more important, was unrelated to the charges in this case. For instance, Clift testified that Sureno gang members engage in criminal "business" such as taxing other inmates, sending "kites," using jail telephones to conduct criminal activity, and killing snitches. (18 RT 3136-3137.) As discussed further below, the jurors likely were intimidated, even

frightened, by testimony regarding the culture and politics of the Surenos and the Mexican Mafia. (18 RT 3111-3113, 3138-3139.) As such, it had no relevance to the issue of identity. (See *People v. Hernandez, supra*, 33 Cal.4th at p. 1053 [some of the gang evidence was irrelevant and could not be considered for any purpose, e.g., evidence that other members of gang had been convicted of driving a vehicle without owner's consent was irrelevant to defendants' guilt of the charged offense, though it was relevant to establish gang enhancement]; *People v. Albarran, supra*, 149 Cal.App.4th at pp. 230-231 [even if some gang evidence was relevant as to defendant's motive and intent, trial court prejudicially erred in admitting other inflammatory gang evidence that had no connection to his crimes, including a deputy's lengthy testimony about the identity of other gang members and crimes they committed, threats the gang had made against police, and references to the "Mexican Mafia"].)

Third, the prosecutor's ostensible rationale for introducing the expert testimony – that the defense had opened the door to such evidence by trying to elicit testimony that gang "hits" come through the gang module (18 RT 3131-3134) – was disingenuous. As defense counsel pointed out, the defense had not introduced any testimony to show that the case involved a "gang hit."[68] (18 RT 3133-3134.) In fact, the *prosecutor* introduced the notion that Tinajero's murder was a hit ordered from within the gang

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[68] Appellant acknowledges that defense counsel, in his opening statement, said, "I think the evidence will show Mr. Tinajero was placed in a cell with what, four other convicted felons . . . . He wasn't a keep away, at least from the other four convicted felons, and he ends up dead in the cell. That's not that strange when you are a rat or a snitch in jail." (9 RT 1509.) Nevertheless, a review of defense counsel's opening argument shows that he did not suggest that a gang hit was involved. (9 RT 1508-1510.)

module, if only to rebut that theory. (13 RT 2231-2232 [on redirect examination, prosecutor elicited Antony Sloan's denial that he was involved in the murder]; see also 13 RT 2307-2309 [on direct examination, prosecutor elicited Matthew Good's testimony that, as a white trusty, he was not required to follow orders from the Surenos]; 14 RT 2506 [on redirect examination, prosecutor elicited Gregory Palacol's denial that he was involved in the murder].) Defense counsel covered the topic, but only on recross-examination. (13 RT 2232-2233 [defense counsel asked Sloan whether he was associated with the "Southsiders," a prison gang]; see also 14 RT 2508-2509 [Palacol denied that he had ever received, or that he would follow, an order issued by the Southsiders].)

Under these circumstances, gang evidence was irrelevant to any issue in the case, including identity. (See, e.g., *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 193 [holding that trial court abused its discretion by admitting testimony that gang graffiti was observed in defendant's bedroom where crimes were not alleged to be gang related, no gang enhancement was alleged, and there was no evidentiary link between the gang graffiti and the issue for which it was admitted]; *People v. Bojorquez*, *supra,* 104 Cal.App.4th at p. 343 [certain aspects of gang expert's testimony – i.e., his testimony that (1) gangs in Long Beach were predominantly Hispanic; (2) gangs engaged in tagging; (2) they were involved in and motivated by profitable criminal activity, including robbery; (3) gang members protected each other by killing witnesses against them; (4) gang members did not testify against one another (as illustrated by an example involving an Asian gang), or faced being killed or beaten up; and, (5) that appellant's gang was a Hispanic gang involved in criminal activity – was irrelevant to any disputed issues or facts in the case].) Moreover, because gang evidence

was irrelevant in this case, it was improper to use appellant's letter to Santos to impeach him. (See, e.g., *People v. Lavergne* (1971) 4 Cal.3d 735, 744 [it is improper to elicit irrelevant testimony on cross-examination merely for the purpose of contradicting it]; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 327 [same].)

Even if this Court were to find that the gang evidence was somehow relevant to the charged offenses, the trial court erred under Evidence Code section 352 by admitting the evidence over appellant's objection that there should be no references to gangs, and that "gang[] [evidence] is only prejudicial." (3 RT 488.) The primary evil in the admission of gang membership evidence lies in its portrayal of the defendant as a violent and dangerous man who has likely committed crimes in the past, will likely commit them in the future, and is more likely than not to have committed any and all of the violent crimes with which he is charged. Gang evidence is precisely the kind of evidence about the defendant that jurors cannot disregard, and the emotional bias thereby evoked against the defendant himself, affecting all charges against him, is precisely the kind of prejudice that section 352 is designed to avoid. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 134 [the prejudice referred to in Evidence Code section 352 is evidence that uniquely tends to evoke an emotional bias against a party as an individual].) Therefore, this Court has repeatedly cautioned that gang evidence is, by its nature, highly inflammatory and must never be admitted where its probative value is minimal or merely cumulative of other evidence. (*People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-907; *People v. Cox*, *supra*, 53 Cal.3d at p. 660.) Improperly admitted evidence about gangs can be "catastrophically prejudicial." (*In re Wing Y.*, *supra*, 67 Cal.App.3d at p. 76.)

Here, the inflammatory and prejudicial effect of the gang evidence was substantial in several respects. First, the evidence made it likely, if not inevitable, that the jury would find appellant guilty because commission of the charged crimes was consistent with his character. Second, the testimony made it likely the jury would find the appellant guilty to punish him for other crimes for which he was not on trial, and to prevent him from committing future crimes.

Moreover, the prejudicial effect of the gang evidence presented in this case was extremely disproportionate to its, at best, minimal probative value. For instance, assuming arguendo that Limas's testimony regarding her communications with appellant was relevant to identity, the prosecutor could have elicited that testimony without reference to gangs. Similarly, the prosecutor could have introduced evidence, without referring expressly to gangs, that jail protocol rendered it unlikely that an inmate would commit a homicide in his own cell. Instead, much of the gang evidence introduced by the prosecution had absolutely nothing to do with appellant, but likely operated to frighten the jury and to insinuate that appellant was guilty by virtue of his gang associations.

Third, admission of the gang evidence may have led jurors to vote for death not because they believed it to be the appropriate sentence in this case, but out of fear and hatred of gangs generally. This is especially so in light of testimony regarding gang culture and activity unrelated to this case. Similarly, the jury may have sentenced appellant to death because they believed that, as a gang member, he must have committed previous crimes for which he had gone unpunished, or to punish him preemptively for crimes they believed he inevitably would commit in the future.

Under these circumstances, the gang evidence struck the type of "reverberating clang" disapproved of by the court in *United States v. Merriweather* (6th Cir. 1996) 78 F.3d 1070, 1077. The prejudicial value of the testimony far outweighed its minimal probative value, and the evidence should not have been admitted. The court abused its discretion in admitting it.

D. The Prejudice of the Gang Evidence Was Not Cured By a Proper Limiting Instruction

As the United States Supreme Court has recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Bruton v. United States*, *supra*, 391 U.S. at p. 135.) Given the powerfully damning nature of the gang evidence introduced at trial, it is unlikely that the jurors could have properly limited their consideration of that evidence and not used it to conclude that appellant was a violent, bad man who probably did whatever he was accused of. (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 299-300 [likelihood that jurors will improperly consider other crimes evidence may be so great that even a limiting instruction will not protect the accused against impermissible inferences of criminal disposition]; *People v. Gibson* (1976) 56 Cal.App.3d 119, 130 [same].) But even if the magnitude of the risk that the jurors would use the gang evidence for an improper purpose could have been reduced by a proper limiting instruction, no such instruction was given in this case.[69]

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[69] A review of the record shows that the trial court withdrew (continued...)

Here, the trial court orally instructed the jury that it could consider evidence concerning "things that occur in the jail" only to show appellant's knowledge of jail operations and of the limitations placed on jail inmates, not to show that he was a person of bad character. (15 RT 2640.) Significantly, the court did not give any such oral instruction with respect to gang evidence. Moreover, none of the pertinent written jury instructions – in particular, CALJIC Nos. 2.09[70] and 2.50[71] – referred to gang evidence, let

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[69](...continued)
CALJIC No. 17.24.3 [evidence of gang activity – limiting instruction], apparently on its own motion. (5 CT 1283.)

[70] CALJIC No. 2.09, as given in this case, reads as follows:

> Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted.

(5 CT 1260-1261.)

[71] CALJIC No. 2.50, as given in this case, reads as follows:

> 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 defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them. [¶] For the limited purpose for which you may consider such evidence, you must weight it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider

(continued...)

alone explained the precise purpose for which it was admitted. Indeed, the jury surely believed that CALJIC No. 2.50 did not apply to gang evidence, as it referred to "crimes," not gang membership or association. Therefore, it is virtually certain that the jurors improperly considered the gang evidence for purposes other than those for which it was admitted, e.g., as evidence that appellant was a violent, dangerous man. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 134; *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-907; *People v. Cox*, *supra*, 53 Cal.3d at p. 660; *In re Wing Y.*, *supra*, 67 Cal.App.3d at p. 76.)

E. The Erroneous Admission of the Gang Evidence was Prejudicial, Violated Appellant's Due Process Right to a Fair Trial, and Requires That the Judgment Be Reversed

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.)

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[71](...continued)
such evidence for any other purpose.

(5 CT 1263, italics added; see also *ibid.* [CALJIC Nos. 2.50.1 (prosecution's burden to prove other crimes by a preponderance of the evidence) and 2.50.2 ("preponderance of the evidence" defined)].)

Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385-1386 [admission of irrelevant propensity evidence rendered trial fundamentally unfair]; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [if there are no permissible inferences the jury may draw from the other misconduct evidence, its admission can violate due process]; *People v. Partida*, *supra*, 37 Cal.4th 428, 436-438, citing *Estelle v. McGuire*, *supra*, 502 U.S. at p. 70 [erroneous admission of gang evidence may render trial fundamentally unfair in violation of due process]; *Bruton v. United States*, *supra*, 391 U.S. at p. 131, fn. 6 [constitutional guarantee to fair trial requires that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence]; *Brinegar v. United States* (1949) 338 U.S. 160, 174 [rule against propensity evidence is historically grounded in fairness and one consistent with proof beyond reasonable doubt].)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. By ignoring well-established state law which prevents the state from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

The trial court's error in admitting gang-related evidence was also prejudicial at the penalty phase. Because the court did admit it, the jury likely considered it at the penalty phase pursuant to Evidence Code section 190.3, factor (a). (See 6 CT 1427 [CALJIC No. 8.87]; see also 6 CT 1422

[CALJIC No. 8.84.1, instructing the jury that it must determine what the facts are from the evidence received during the entire trial "unless . . . instructed otherwise"].) Had the court not erred in admitting the gang evidence at the guilt phase, it likely would not have been before the jury at the penalty phase. Specifically, the evidence would have been inadmissible under either Penal Code section 190.3, factor (a) [circumstances of the offense] or factor (b) [evidence of criminal acts involving force, violence or threat].) (See Argument II, *ante*, and Argument VI, *post*, incorporated by reference as if fully set forth herein.)

A death verdict must be a reasoned moral response, not one based on emotional, inflammatory speculation. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493 [under the Eighth Amendment, the death penalty must be reasoned moral response rather than emotional one].) Here, appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304; *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama* (1980) 447 U.S. 625, 638.) The speculation engendered by this evidence violated appellant's substantive due process rights to a fundamentally fair trial and a fair and impartial jury, and to a reliable penalty verdict, in contravention of his rights under the Eighth and Fourteenth Amendments.

Under these circumstances, reversal is required because the People cannot establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) At a minimum, reversal is required because it is reasonably probable that the outcome would have been more favorable if the gang evidence had not been presented to the jury. (*People v. Partida, supra*, 37 Cal.4th at p. 439, citing *People v.*

Watson (1956) 46 Cal.2d 818, 836; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.)

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IV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ELICIT IRRELEVANT, PREJUDICIAL HEARSAY THAT APPELLANT HAD POSSESSED "SHANKS"

A. Introduction

Prosecution witness Gregory Palacol testified that, during an interview in the hours following the murder of Raul Tinajero, he identified as Tinajero's killer a person depicted in a photograph shown to him by a deputy sheriff. (14 RT 2417-2418, 2420-2421; see also 14 RT 2454.) The prosecutor asked him to describe "the circumstances of you being shown that photograph." Defense counsel objected "as to what the deputy said," and the prosecutor countered that Palacol's testimony was not being offered for the truth "at this time." (14 RT 2422.)

At the bench, defense counsel explained, "Your Honor, I anticipate [that Palacol would testify] that the deputy said this is the person I've been having a problem with, we're catching him with a bunch of shanks or a lot of shanks in the jail." Defense counsel argued that the anticipated testimony was highly prejudicial, and more prejudicial than probative. He further argued that if the testimony was not being offered for the truth of the matter asserted, then it was irrelevant. (14 RT 2422.)

The prosecutor claimed that she was trying to elicit Palacol's testimony regarding "the circumstances of why he was shown the photograph and then how he makes the identification of [appellant] as the one in the murder." She confirmed that Palacol would testify that the deputy said he was having problems with appellant obtaining shanks. She also acknowledged that the testimony might be prejudicial, but added that the trial court had already deemed admissible the fact that appellant had

possessed shanks in the jail.[72] The trial court then overruled the defense objection with no further comment. (14 RT 2423.)

The prosecutor subsequently asked Palacol to describe what the deputy said in explaining why he was showing the photograph to him. Palacol testified that "[h]e said he was having trouble with this person[,] finding shanks and stuff on him[,] and asked me if that was the guy that was in his cell that [committed the murder]." Palacol continued, "I told him yes." (14 RT 2424.)

The trial court did not issue any limiting instruction with respect to this testimony. For instance, the trial court could have but did not instruct the jury that it could consider the statement solely for the purpose of evaluating the circumstances surrounding Palacol's identification of appellant. Nor did the prosecutor explain the limited purpose of the testimony.

The prosecutor's purpose in eliciting the statement was to place before the jury evidence that appellant had possessed contraband weapons while in the jail. This evidence was inherently prejudicial and its introduction was unnecessary, and therefore it should have been excluded. At a minimum, the trial court should have required that the prosecutor not elicit testimony referring to appellant's possession of shanks. In the absence of a limiting instruction, however, the jury was free to consider

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[72] As appellant has demonstrated in Argument II, *ante*, the trial court erred in admitting evidence that he had been found in possession of shanks and other contraband, as that evidence constituted inadmissible propensity evidence under Evidence Code section 1101.

Palacol's testimony for the truth of matter, and the evidence constituted hearsay evidence. (Evid. Code, § 1200, subd. (a).)[73]

As appellant demonstrates below, the trial court's failure to exclude evidence regarding the deputy sheriff's statement to Palacol was an abuse of discretion, and requires reversal of the entire judgment.

B. Testimony Regarding the Deputy Sheriff's Out-of-Court Statement to Gregory Palacol Constituted Irrelevant, Inherently Prejudicial and Inadmissible Hearsay Evidence

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Heard* (2003) 31 Cal.4th 946, 972.) Relevant evidence is defined as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The test of relevance is whether the evidence tends "'logically, naturally and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v. Heard, supra*, 31 Cal.4th at p. 973, citation omitted.) A trial court lacks discretion to admit irrelevant evidence. (*Ibid.*)

Out-of-court statements not offered for the truth, but for some other purpose, are not hearsay, but they are only admissible if "the nonhearsay

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[73] Evidence Code section 1200 provides as follows:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
>
> (b) Except as provided by law, hearsay evidence is inadmissible.
>
> (c) This section shall be known and may be cited as the hearsay rule.

purpose is relevant to an issue in dispute." (*People v. Davis* (2005) 36 Cal.4th 510, 535-536.) As this Court has explained, "'[a] hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.' [Citation.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 714.)

Here, defense counsel clearly objected on hearsay (i.e., "what the deputy said"), relevance and Evidence Code section 352 ("that statement is highly prejudicial . . . more prejudicial than probative") grounds.[74] (14 RT 2422.) The trial court apparently accepted the prosecutor's contention that the deputy sheriff's out-of-court statement to witness Gregory Palacol was admissible because it was being offered not for the truth of the matter asserted, but to explain "the circumstances of why he was shown the photograph and then how he makes the identification of [appellant] as the one in the murder." (14 RT 2423.) However, the statement did not relate to any issue actually in dispute.

The only possible explanation for use of the statement for a nonhearsay purpose was because it was necessary to show the deputy sheriff's state of mind when he showed the photograph, or to explain his subsequent conduct, i.e., showing of the photograph to Palacol. But the deputy's state of mind was not at issue and why he showed the picture was not relevant, and therefore his statement was inadmissible hearsay. (See

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[74] Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

People v. Livingston (2012) 53 Cal.4th 1145, 1162 [to be admissible as nonhearsay, out-of-court statement must be relevant to issue in dispute].)

Moreover, there was no issue of fact as to how Palacol identified appellant. Defense counsel objected to Palacol's testimony regarding the deputy sheriff's statement, not the circumstances surrounding Palacol's identification of appellant. (14 RT 2418-2424.) To the extent *identity* was the issue in dispute, appellant's possession of shanks had no possible tendency to establish that he was the person who killed Tinajero. For instance, there was no evidence that appellant used a shank to commit the murder. Nor could the jury reasonably infer that appellant's acquisition or possession of shanks demonstrated that he had the knowledge or opportunity necessary to make his way to Tinajero's cell and kill him. (See Argument II, *ante*, incorporated by reference as if fully set forth herein.) Accordingly, the trial court's ostensible reason for admitting the evidence did not justify its ruling.

People v. Scalzi (1981) 126 Cal.App.3d, 901 is instructive. There, a police officer, who entered an apartment to serve arrest and search warrants relating to suspected drug trafficking, answered a call to the apartment's telephone. He testified that a woman asked to speak to "John" (the defendant's first name). He told her that John was not there. The caller then asked if John had "gotten it bagged up," meaning packaging narcotics for sale. Over objection, the trial court admitted this evidence as nonhearsay evidence of the police officer's state of mind, i.e., his reason for arresting the defendant. (*Id.* at pp. 903-907.)

The Court of Appeal held that the content of the telephone call was irrelevant because the officer's state of mind did not tend to prove or disprove any issue in the case. (*People v. Scalzi, supra*, 126 Cal.App.3d at

p. 907.) The court contrasted other situations in which a police officer's reaction to or actions based upon an extrajudicial statement was relevant to a contested issue: "[I]n [*People v. Duran* (1976) 16 Cal.3d 282, 295], it served to explain why he fled the crime scene; in [*People v. Roberson* (1959) 167 Cal.App.2d 429, 431], it served to bolster his contention that he did not sell to a known narcotic agent; and in [*People v. King* (1956) 140 Cal.App.2d 1, 9], it served to show that the officer had probable cause to search." (*Id.* at p. 906.)

Even assuming Palacol's testimony somehow was admissible over hearsay and relevance objections, the trial court's failure to exclude the evidence under Evidence Code section 352 was an abuse of discretion. The probative value of testimony showing the circumstances surrounding why and how the deputy showed appellant's photograph to Palacol was slight at best. However, the probative value of that evidence was substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues or misleading the jury. For instance, the jurors may have speculated that appellant had used shanks, or would use them in the future. As a result, the jury may have voted to find appellant guilty on the ground that he was a bad, violent man even if they did not find that the prosecution had proven his guilt of the charged offenses beyond a reasonable doubt. (See Argument II, *ante.*)

Under these circumstances, the trial court abused its discretion in admitting the deputy sheriff's out-of-court statement to Palacol. (See *People v. Griffin* (2004) 33 Cal.4th 536, 577, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32 [abuse of discretion standard governs the admissibility of evidence].)

Even assuming that the jury applied CALJIC 2.50, the limiting instruction concerning other acts evidence,[75] that instruction would not have cured the error. Not only did CALJIC No. 2.50 relate to a different purpose than that for which Palacol's testimony was intended (5 CT 1263), but it could not have dispelled the risk that the jury found appellant guilty because they believed he deserved punishment because he was a bad man, not because they believed he was guilty of the charged offenses beyond a reasonable doubt. (See Argument II.) This Court has recognized that some statements may be so inflammatory that a limiting instruction will not suffice to offset that prejudice. (See, e.g., *People v. Coleman* (1985) 38 Cal.3d 69, 93, disapproved on another ground by *People v. Riccardi, supra,* 54 Cal.4th at p. 824, fn. 32; see also *Bruton v. United States* (1968) 391 U.S. 123, 126, 128, 129 [quoting Justice Jackson's concurring opinion in *Krulewich v. United States* (1949) 336 U.S. 440, 453: "The naive

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[75] Pursuant to CALJIC No. 2.50, the jury was instructed as follows:

> 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 defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show knowledge of jail procedures and rules as well as methods to overcome them. [¶] For the limited purpose for which you may 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.

(5 CT 1263.)

assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."].)

C. The Trial Court's Error Requires Reversal of the Judgment

In addition to violating state law, the error violated appellant's federal constitutional rights in a number of ways.

State law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment to the federal Constitution. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 67-68; *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737.) A denial of fundamental fairness occurs when improperly admitted evidence "is material in the sense of a crucial, critical, highly significant factor." (*Snowden v. Singletary, supra*, 135 F.3d at p. 737 [admission of testimony by an expert witness that 99% of children tell the truth about sexual abuse denied the defendant a fair trial by usurping the jury's fact-finding role, because it went to the heart of the case, and because there was no adequate means to counter the testimony].) Moreover, the error undermined the reliability of the guilt phase verdict as a proper basis for the imposition of the death penalty, in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) Appellant has addressed the prejudice arising from evidence regarding contraband weapons in Argument II, and need not repeat it here.

The entire judgment must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if this Court views the error as one of state law only, the judgment must be reversed because it is

reasonably probable that the error contributed to the verdict. (*People v. Watson* (1956) 46 Cal.2d 818.)

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V

THE COURT ERRED IN ADMITTING, AS FACTOR (B) EVIDENCE, THE HIGHLY INCRIMINATING HEARSAY TESTIMONY OF DEPUTY THOMAS MOREAN REGARDING AN INCIDENT INVOLVING MUTUAL COMBAT, THEREBY VIOLATING APPELLANT'S RIGHT TO CONFRONTATION AND PREVENTING HIM FROM RECEIVING A FAIR TRIAL AND DUE PROCESS OF LAW IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

A. Procedural and Factual Background

During the guilt phase proceedings of December 7, 2006, the prosecutor stated that should there be a penalty phase she wished to introduce in aggravation evidence that appellant engaged in a fight in a day room at the Los Angeles County Jail. The prosecutor took the position that, although the fight involved mutual combat, it amounted to a violation of Penal Code section 242.[76] (22 RT 3822.) The prosecutor further argued that mutual combat may be admissible under Penal Code section 190.3, factor (b), citing *People v. Lucky* (1988) 45 Cal.3d 259, 287. (22 RT 3830-3831.)

On December 14, 2006, the matter was argued further. Defense counsel argued that the incident did not constitute a crime within the meaning of *People v. Phillips* (1985) 41 Cal.3d 29, and therefore the proffered evidence should not be admitted.[77] (22 RT 3907.) The prosecutor

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[76] Penal Code section 242 provides that "[a] battery is any willful and unlawful use of force or violence upon the person of another." Penal Code section 240 provides that "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

[77] In *Phillips*, this Court held that evidence of other criminal activity (continued...)

responded that a report indicated that it was mutual combat. (22 RT 3908.) She then stated that the report indicated that the deputies had information that appellant had started it, but she acknowledged that it was primarily based on hearsay. (22 RT 3908-3909.) Neither the prosecutor nor the trial court invoked any exception to the hearsay rule to suggest that the information contained in the report was admissible.

The prosecutor further contended that it was sufficient to present evidence that he was involved in mutual combat, engaged in fighting and violence, and that the prosecution did not have to show lack of self-defense on the other combatant's part. The court said it would "double check with the case" (22 RT 3908-3909), referring to the *Lucky* decision. (*People v. Lucky*, *supra*, 45 Cal.3d at p. 291 ["No case suggests that the People must invariably produce evidence negating self-defense in order to reach the jury on an assault charge"]; see also 22 RT 3909 [prosecutor notes that the prosecution was not obligated to produce evidence negating the crime of battery]; 23 RT 3969 [court referred to *Lucky* in granting the prosecution's request to introduce evidence relating to the fight].)

During the penalty phase proceedings of January 2, 2007, defense counsel objected under *Phillips* to the admission of prior acts which did not constitute crimes or attempted crimes, specifically including the fight in the

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[77](...continued)
introduced in the penalty phase under section 190.3, factor (b), must demonstrate "the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72.) Moreover, this Court admonished that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under factor (b). (*Id.* at p. 72, fn. 25.)

day room. (23 RT 3947-3950.) The trial court subsequently admitted evidence concerning the fight, "based on the *Lucky* case, the fight, especially given the circumstances that you've related here about the mutual combat in the day room." (23 RT 3969.)

Evidence concerning the fight was introduced solely through the testimony of Deputy Thomas Morean. Morean testified to the following: on June 30, 2002, he was alerted that a fight had occurred in a "day room" at the Los Angeles County Jail. (23 RT 3978-3979.) By the time he arrived, other deputies had separated and interviewed the inmates involved, one of whom was appellant. (23 RT 3980, 3984.) Morean obtained information as to who had started the fight.[78] (23 RT 3981.) He noticed redness on the left and right knuckles of appellant's hands and scratches on his back. (23 RT 3981, 3983.)

Based on the information Morean received, he wrote a disciplinary report regarding appellant. (23 RT 3982, 3984.) Morean had no specific recollection of the incident, and only knew what he had written in the report. (23 RT 3982-3983.) By "mutual combat," he meant that the parties in the day room were fighting with each other. (23 RT 3983.) He did not know whether any of the other combatants were written up. (23 RT 3985-3986, 3988.) He characterized the altercation as involving mutual combat because his report does not state who struck first. (23 RT 3983, 3985-3986.) Morean escorted appellant to the "pre-hole," where inmates are taken after being written up. (23 RT 3986-3987; see also 23 RT 3993.) He

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[78] Although Morean testified that he obtained information as to who had started the fight (23 RT 3981), he did not identify the instigator.

did not know whether appellant was disciplined as a result of the incident.[79] (23 RT 3987.)

After the prosecutor asked Morean whether he had information that appellant was not the victim, defense counsel objected on hearsay grounds. (23 RT 3988-3989.) At the bench, defense counsel moved to strike Morean's testimony in its entirety on the grounds that (1) he had neither firsthand knowledge nor any specific recollection of the incident, and (2) the prosecution was trying to "bootleg hearsay evidence [into] evidence through this officer." (23 RT 3989-3990.) The court denied the motion, adding that Morean had observed appellant's injuries. Acknowledging that Morean did not have firsthand information that appellant started the altercation, the court sustained the defense objection to the prosecutor's question as to whether Morean had knowledge that appellant was not the victim. (23 RT 3990.) Again, neither the prosecutor nor the trial court invoked any exception to the hearsay rule.

Morean then testified that if he had had information that appellant was the victim, he would not have written a disciplinary report against him. (23 RT 3991.) He believed that appellant was in violation of disciplinary rules at the jail. (23 RT 3992.) Morean acknowledged that all of the information he had, other than the injuries he observed on appellant's knuckles and back, he had heard from someone else. (23 RT 3992-3993.) Defense counsel stated that "there would be a motion." The trial court apparently understood defense counsel to mean that he was in fact bringing a motion challenging the admission of Morean's testimony, and denied that motion. (23 RT 3993.)

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[79] Morean's report was not introduced into evidence.

Although evidence that a defendant engaged in mutual combat may be admissible under factor (b), at least where the evidence does not suggest that the defendant may have been acting in self-defense, and the defendant presents no evidence in mitigation (*People v. Moore* (2011) 51 Cal.4th 1104, 1136; *People v. Lucky*, *supra*, 45 Cal.3d at pp. 290-291), in this case evidence regarding appellant's fight constituted inadmissible hearsay and violated his right to confrontation under the Sixth and Fourteenth Amendments to the United States Constitution and the analogous provision of the state Constitution. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15.)

B. The Trial Judge Committed Reversible Error In Admitting Morean's Testimony Regarding the Fight in the Jail Day Room, Which Was Based Almost Entirely Upon Inadmissible Hearsay

1. Applicable Legal Principles

Evidence Code section 1200 provides in pertinent part that:

> (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
> (b) Except as provided by law, hearsay evidence is inadmissible.

"The chief reasons for the general rule of inadmissibility [of hearsay] are that the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements. [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 610; see also *Williamson v. United States* (1994) 512 U.S. 594, 598-599 [discussing similar rationale underlying federal hearsay rule].) The "lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported

is today accepted as the main justification for the exclusion of hearsay." (2 McCormick, Evidence (5th ed. 1999) Hearsay, § 245, p. 94.) Multiple hearsay is admissible if each level of hearsay meets the requirements of an exception to the hearsay rule. (Evid. Code, § 1201.)

2. The Trial Court Erred in Admitting Morean's Testimony

The prosecution offered Morean's testimony, which was based entirely upon a disciplinary report he prepared, which in turn was based almost entirely upon information collected from other, unidentified individuals. (23 RT 3982-3983, 3992.) As the prosecution itself conceded (22 RT 3908-3909), Morean's testimony was hearsay. (Evid. Code, § 1200, subd. (a).) Accordingly, it was admissible only if it fell within a recognized exception to the hearsay rule (Evid. Code, § 1200, subd. (b)), *and* was relevant to the charges or issues involved in the case (Evid. Code, § 350). As the proponent of Morean's testimony, the prosecution had the burden to establish that it came within an exception to the hearsay rule. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1177; *People v. Livaditis* (1992) 2 Cal.4th 759, 779.)

The trial court has broad discretion in determining whether a party has established the foundational requirements of these exceptions to the hearsay rule. (*People v. Martinez* (2000) 22 Cal.4th 106, 120; *County of Sonoma v. Grant W.* (1986) 187 Cal.App.3d 1439, 1450.) On appeal, the trial court's determination is reviewed for abuse of discretion. (*People v. Parker* (1992) 8 Cal.App.4th 110, 116; *County of Sonoma v. Grant W., supra*, 187 Cal.App.3d at p. 1450.)

a. Morean's Testimony Was Not Admissible Under Any Exception to the Hearsay Rule

Morean's testimony was based almost entirely upon inadmissible hearsay. First, Morean's testimony constituted inadmissible hearsay because he was merely reading from his report rather than testifying based on his recollection. Significantly, he did not testify that the report refreshed his recollection, nor does the record suggest that it did. Rather, Morean acknowledged that he had no specific recollection of the incident, and knew only what he had written in his report. (23 RT 3982-3983.)

Second, Morean had no independent knowledge of the incident other than his observations of redness on appellant's knuckles and scratches on his back. (23 RT 3981, 3983.) Instead, he relied upon his report, which was not authenticated under any exception to the hearsay rule, to present hearsay and, almost certainly, double-hearsay.[80] For instance, there was an inadequate showing that it was necessary to use the report to refresh Morean's recollection. Although a witness may refer to hearsay to refresh his recollection, he must first testify that he cannot remember the fact sought to be elicited. (See, e.g., *People v. Lee* (1990) 219 Cal.App.3d 829, 840.) Here, Morean did not testify that he had no specific recollection about the incident until he had already testified that: a fight occurred in the day room; appellant was one of the inmates involved in the fight; deputies had separated and interviewed the inmates involved; Morean noticed redness on the appellant's knuckles and scratches on his back; and, based

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[80] Morean failed to clearly identify the sources of the information he received and testified to, but it appears that at least some of his testimony was based on double-hearsay, i.e., statements of other deputies, which in turn were based upon their interviews of other inmates involved in the fight. (23 RT 3980, 3984.)

on the information he received, Morean wrote a disciplinary report on the defendant. (23 RT 3979-3982.)

Appellant is aware that the admission of hearsay without requiring a proper showing of foundation for an exception is not reversible if the record demonstrates the showing could have been made had the proper procedure been followed. (*People v. Dennis* (1998) 17 Cal.4th 468, 531; *People v. Parks* (1971) 4 Cal.3d 955, 961.) However, no such exceptions applied. In particular, the hearsay was not admissible under either the business records exception (Evid. Code, § 1271) or the official records exception (Evid. Code, § 1280) to the hearsay rule.[81] "[T]he business records exception has

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[81] Evidence Code section 1271 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evidence Code section 1280 provides as follows:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
> (a) The writing was made by and within the scope of duty of a public employee.
> (b) The writing was made at or near the time of the act, condition, or event.

(continued...)

been held inapplicable to admit police reports into evidence for the sheer reason such are or might be based upon the observations of victims and witnesses who have no official duty to observe and report the relevant facts [citations]." (*People v. Hernandez* (1997) 55 Cal.App.4th 225, 240.) Similar to the business records exception, the "[t]he trustworthiness requirement for [the official records] exception to the hearsay rule is established by a showing that the written report is based upon the observations of public employees who have a *duty* to observe the facts and report and record them correctly.' [Citation.]" (*People v. Parker*, *supra*, 8 Cal.App.4th at p. 116, italics in original.)

Here, the record does not demonstrate that a proper showing could have been made had the prosecutor followed the proper procedure. Morean did not explain to what extent, if any, his testimony was based on the personal observations of other deputies. On the other hand, it is clear that at least some of the information Morean conveyed had been gathered from inmates involved in the altercation (23 RT 3980, 3984), who had no official duty to observe and report the relevant facts. (*People v. Hernandez*, *supra*, 55 Cal.App.4th at p. 240; *People v. Parker*, *supra*, 8 Cal.App.4th at p. 116.)

Thus, Morean's testimony was inconsistent with the basic principle underlying the business records exception, that "[t]he guarantee of *trustworthiness* lies in the habit or practice of accurate and systematic bookkeeping by trained persons." (1 Witkin Evid. (4th ed. 2000) Hearsay, § 226, p. 943.)

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[81](...continued)
(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

b. The Admission of Morean's Hearsay-Based Testimony Violated Appellant's Right to Confrontation

The Sixth and Fourteenth Amendments to the federal Constitution guarantee an accused the right to be confronted with the witnesses against him. (U.S. Const., 6th and 14th Amends.; *Michigan v. Bryant* (2011) ___ U.S. ___, 131 S.Ct. 1143, 1152; *Pointer v. Texas* (1965) 380 U.S. 400, 401.) Prior to the United States Supreme Court decision in *Crawford v. Washington* (2004) 541 U.S. 36, hearsay was admissible against an accused if it fell under a "firmly rooted exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.)

In *Crawford*, the United States Supreme Court rejected this doctrine and held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) The decision in *Crawford* held that the Sixth Amendment Confrontation Clause applied only to hearsay that was "testimonial."[82] (*Ibid.*)

Subsequent decisions have clarified the meaning of "testimonial." For instance, in the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (2006) 547 U.S. 813 (hereafter, "*Davis*"), a decision deciding two separate domestic violence cases, the United States Supreme Court further illuminated the difference between testimonial and non-testimonial hearsay statements. The statements in the *Davis* case came

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[82] This Court has assumed without deciding that the Sixth Amendment right to confrontation applies to evidence introduced at the penalty phase of a capital trial. (*People v. Fuiava* (2012) 53 Cal.4th 622, 720.)

from the victim (Davis's former girlfriend), who made a 911 call and told the operator that Davis had been hitting her with his fists and had just run out the door. (*Id.* at pp. 817-818.) The operator asked the victim some questions and obtained some information about Davis. (*Ibid.*) After the victim described the assault, the operator told her the police were on the way. (*Id.* at p. 818.) Over Davis's objection, the 911 recording was admitted at his trial. (*Id.* at p. 819.)

In *Hammon v. Indiana*, police responding to a report of domestic violence spoke to Hammon's wife, who appeared frightened but told the police nothing was wrong. (*Davis v. Washington, supra*, 547 U.S. at p. 819.) When police entered the house with her consent, they saw a gas heating unit with pieces of glass in front of it and flames coming out of the partial glass front. (*Ibid.*) Hammon told the officers that he and his wife had argued, but everything was fine. (*Ibid.*) An officer then spoke separately with Hammon's wife, who reported that, during an argument, Hammon had pushed her to the ground, punched her, and shoved her head into the broken glass of the heater. (*Id.* at pp. 820-821.) The officer then had her fill out and sign an affidavit describing the assault. (*Id.* at p. 820.) Over Hammon's objection, the trial court admitted, under the hearsay exception for "excited utterances," the officer's testimony concerning the statement and affidavit of Hammon's wife. (*Id.* at p. 821.)

The United States Supeme Court explained that

> [s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary

> purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis v. Washington*, *supra*, 547 U.S. 813 at p. 822.)

Applying these principles, the Court concluded that the statements in the 911 call in *Davis* were not testimonial. (*Davis v. Washington*, *supra*, 547 U.S. at pp. 826-828.) In reaching this conclusion, the Court compared the statements at issue in *Crawford* to the 911 call in *Davis*: in the former case, interrogation took place long after the events described, whereas in *Davis* the caller was speaking about events "*as they were actually happening*." (*Id.* at p. 827, italics in original.) Thus, in *Davis* a reasonable listener would have recognized that the 911 caller was "facing an ongoing emergency." (*Ibid.*) Moreover, the caller's statements were necessary to resolve the present emergency; for example, the operator's questions and the statements elicited were necessary to assist the dispatched officers in determining "whether they would be encountering a violent felon." (*Ibid.*) Finally, the "frantic" answers of the caller in *Davis* were made in an environment that was not tranquil, or even safe. (*Ibid.*)

In *Hammon*, by contrast, the United States Supreme Court held that it was "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct. . . ." (*Davis v. Washington*, *supra*, 547 U.S. at p. 829.) There was no emergency in progress. As the Court observed, "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime. . . ." (*Ibid.*) Because the witness's statements in *Hammon* "were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at

an alleged crime scene and were 'initial inquiries' is immaterial." (*Id.* at p. 832.)

In *Michigan v. Bryant, supra*, 131 S.Ct. 1143, the high court elaborated on the meaning of "testimonial" by addressing the "ongoing emergency" circumstance addressed in *Davis*. The police had responded to a 911 call for a man with a gunshot wound found in a gas station parking lot. (*Michigan v. Bryant, supra*, 131 S.Ct. at p. 1150.) In response to police questioning, the victim stated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant's house; when he turned to leave, he was shot through the door and then drove to the gas station where the police found him; and, "Rick" had shot him.[83] (*Ibid.*) The victim died of his wounds several hours later. (*Ibid.*)

The *Bryant* opinion made clear that making a determination of whether an emergency situation occurred involves an objective evaluation of the circumstances under which the hearsay statements were made and is a "highly contextual-dependent inquiry." (*Michigan v. Bryant, supra*, 131 S.Ct. at pp. 1156, 1158.) In determining whether the statements were made during an ongoing emergency, the court should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, both of whom may have mixed motives, in light of the circumstances in which the interrogation occurs. (*Id.* at p. 1161.) Even when responding to an emergency, the officer remains an investigator and, thus, is not indifferent to the gathering of

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[83] Bryant's first name was Richard. (*Michigan v. Bryant, supra*, 131 S.Ct. at p. 1150.)

evidence. Similarly, victims and other declarants may or may not want to see a perpetrator ultimately prosecuted. (*Ibid.*)

The *Bryant* decision recognizes that factors other than whether there had been an ongoing emergency must be considered in determining whether the hearsay was testimonial. These factors include: the type of weapon used, whether an armed assailant remained at large and could be an ongoing threat to public safety, and the declarant's medical condition. (*Michigan v. Bryant, supra*, 131 S.Ct. at pp. 1157-1160.) The Court found that the statements of the victim in *Bryant* were not testimonial because there was an "ongoing emergency" and there was a potential threat to the responding police and the public from an armed suspect at large. (*Id.* at pp. 1162-1166; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 815-817 [witness's statements to police officer and neighbor about the shootings of her daughter and grandson were not testimonial under the 6th Amendment, since witness's and officer's primary purpose was to determine whereabouts of and threats posed by defendant, who remained at large and presumably armed].)

Applying these principles to the facts of this case, it is clear that the hearsay upon which Morean's testimony was based was "testimonial" within the meaning of *Crawford v. Washington, supra*, 541 U.S. at p. 68.[84]

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[84] See *People v. Morris* (2008) 166 Cal.App.4th 363, 373, fn. 12 [Court of Appeal "recognize[s] that some information in a business or official record might indeed potentially be testimonial, such as a statement by a victim or witness contained in a police report. Indeed, such hearsay declarants do not have a duty to accurately report information and their statements are not encompassed in the portion of a police report that would be admissible under the business or official records exception to the hearsay rule."].

Morean did not gather the information to resolve an emergency or imminent danger; the fight was over by the time he arrived. (23 RT 3980, 3984.) Instead, Morean compiled information about the fight specifically to prepare a disciplinary report. (23 RT 3980, 3982-3984, 3986-3987, 3991-3992.) Neither the prosecutor nor the trial court suggested that the testimony was admissible for a non-hearsay purpose. (Cf. *People v. Livingston* (2012) 53 Cal.4th 1145, 1163-1164 [noting that "there are no confrontation clause restrictions on the introduction of out-of-court statements for nonhearsay purposes"].) Absent the statements of nontestifying witnesses, there was virtually no evidence from which to infer that there had been a confrontation, or that appellant had been involved, or as to his role in such confrontation. (*O'Campo v. Vail* (9th Cir. 2011) 649 F.3d 1098, 1111 [detectives' testimony concerning declarant's out-of-court statements, which had confirmed defendant's presence at the scene of the crime and that defendant was the shooter, constituted the introduction of testimonial statements against defendant in violation of the confrontation clause].)

Given these factors, Morean's report, and his testimony based upon that report, were testimonial in nature and thus should not have been admitted at appellant's trial because they violated his right to confront witnesses against him as provided in the Sixth Amendment to the United States Constitution. (See *Davis v. Washington*, *supra*, 547 U.S. at pp. 829, 832.)

C. The Admission of Morean's Testimony Was Unduly Prejudicial

During her penalty phase argument, the prosecutor asserted that the factor (b) evidence was "where the defendant has earned his death sentence,

because he has proven it over and over and over again that even locked up, he is not safe. Even locked up, he can get around the rules." (31 RT 5072.) She further argued that "if the defendant is allowed to live, others['] lives are in danger. Anybody who crosses this defendant's path or the paths of his friends, for that matter, is in danger if this defendant is given the gift of life." In so arguing, she referred to the fight in the day room. (31 RT 5073.)

Although the prosecutor referred only to circumstances Morean had personally observed,[85] it is unlikely she would have called him to testify at all had the trial court correctly analyzed his testimony. Unless it were placed in context by the use of inadmissible hearsay evidence, the admissible evidence – namely, Morean's testimony that he observed redness on the left and right knuckles of appellant's hands and scratches on his back (23 RT 3981, 3983) – would have had no evidentiary value; the jury would be able to infer that appellant had engaged in an act involving force or violence only by indulging in speculation. This hearsay evidence was particularly prejudicial because it unfairly strengthened the prosecutor's argument that appellant would continue to be a danger in prison, undermining appellant's case in mitigation.

Thus, the erroneous admission of this evidence violated appellant's Sixth Amendment right to confront the witnesses against him. (*Crawford v. Washington, supra*, 541 U.S. at p. 68.) Moreover, the jury's weighing of aggravating and mitigating factors in determining death or life

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[85] Specifically, the prosecutor argued that "[w]e know [appellant was involved in the fight] because he had the redness of his knuckles, and you don't get redness on your knuckles unless you're hitting somebody else." (31 RT 5073; see also 23 RT 3981, 3983.)

imprisonment is subject to Eighth Amendment scrutiny. (See, e.g., *Sochor v. Florida* (1992) 504 U.S. 527 [Eighth Amendment violation occurred where sentencer weighed invalid aggravating factor].) Similarly, jury consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process" (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885), undermine the heightened need for reliability in the penalty phase sentencing determination (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585). Here, the improper admission of Morean's testimony allowed the jury to consider an invalid aggravating factor in its sentencing determination, in violation of the Eighth Amendment.[86]

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[86] Defense counsel's objections sufficed to preserve the instant argument for appeal, notwithstanding his failure to cite constitutional provisions, because the objection sufficiently alerted the trial court to the nature of the claim. (See *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17 [a defendant's new constitutional arguments are not forfeited on appeal where "(1) the appellate claim is of a kind (e.g., failure to instruct sua sponte; erroneous instruction affecting defendant's substantial rights) that required no trial court action by the defendant to preserve it, or (2) the new arguments do not invoke facts or legal standards different from those the trial court itself was asked to apply, but merely assert that the trial court's act or omission, insofar as wrong for the reasons actually presented to that court, had the additional legal consequence of violating the Constitution"]; see also *People v. Partida* (2005) 37 Cal.4th 428, 433-439.) The trial court and prosecutor knew or should have known that defense counsel's objections – i.e., that Morean's testimony was not based on firsthand knowledge, and that the prosecution was trying to "bootleg hearsay evidence in to evidence through this officer" (23 RT 3989-3990) – was based on the confrontation clause. (See *People v. Holmes* (2012) 212 Cal.App.4th 431, 436, citing *People v. Gutierrez* (2009) 45 Cal.4th 789, 809-813.) At a minimum, appellant's hearsay objections fully apprised the trial court of the Eighth Amendment reliability grounds of his claim. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6.)

Because this error involved the violation of appellant's Sixth, Eighth and Fourteenth Amendment rights, reversal is required unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In this case, the state cannot meet that burden to establish that, absent Morean's testimony about the fight in the day room, the jury would not have returned a sentence of life without the possibility of parole rather than a death sentence. Even if the error involves state law, there exists a reasonable possibility that appellant would not have been sentenced to death if the trial court had not erred. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

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VI

THE TRIAL COURT'S ADMISSION OF IMPROPER FACTOR (B) EVIDENCE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY, EQUAL PROTECTION, A RELIABLE PENALTY VERDICT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. Introduction

At the penalty phase, the prosecution presented evidence relating to the following incidents, pursuant to Penal Code section 190.3, factor (b):[87] (1) appellant's fight with another inmate on June 30, 2002 (23 RT 3978-3993);[88] (2) a November 5, 2004, confrontation with Deputy Jason Argandona, Deputy David Florence and Deputy Asael Saucedo (23 RT 3997-4003, 4007-4014, 4020-4021, 4035-4060); (3) a December 7, 2004, confrontation with Deputy Argandona (23 RT 4003-4009, 4015-4017); (4) a June 7, 2005, confrontation with and threats against a fellow inmate, Benjamin Gonzalez (23 RT 4022-4031); (5) a letter appellant wrote on September 26, 2006, which contained a purported threat against another individual (23 RT 4075-4093); and, (6) appellant's attempt to smuggle letters out of the jail on January 4, 2007 (30 RT 4950-4997).

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[87] Penal Code section 190.3 provides in pertinent part that, in determining penalty in a capital case, the trier of fact shall take into account "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."

[88] Appellant addresses the trial court's error in admitting evidence relating to this incident in Argument V, *ante*.

During her argument, the prosecutor again referred to those incidents, as well as the following ones, pursuant to factor (b): (1) appellant's possession of a shank on March 13, 2003; (2) a December 19, 2003, attempted escape; (3) his possession of an altered razor blade and syringe on July 13, 2004; (4) his possession of an altered paper clip on June 17, 2005; and, (4) a December 29, 2006, incident in which appellant hid contraband in his legal file.[89] (31 RT 5072-5079, 5084-5085; 6 CT 1427 [CALJIC No. 8.87].)

Several of these incidents did not constitute crimes within the meaning of section 190.3, factor (b), and therefore should not have been admitted in aggravation. The trial court abused its discretion in admitting evidence of those incidents, as the prosecution's showings were wholly insufficient to justify their admission. Moreover, the evidence constituted improper, nonstatutory aggravation. The improper admission of this evidence violated appellant's state and federal constitutional rights to due process, a fair trial by an impartial jury, equal protection, and a reliable capital penalty determination, as well as the prohibitions against cruel and unusual punishment, requiring that the death judgment be reversed. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art I, §§ 7, 15, 16 and 17.)

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[89] Pursuant to Evidence Code section 1101, subdivision (b), the prosecution had presented evidence regarding some of these incidents during the guilt phase: (1) appellant's possession of a shank in his cell on March 13, 2003 (15 RT 2636-2648); (2) his December 19, 2003, escape attempt (15 RT 2698-2708; 16 RT 2774-2784); (3) his possession of an altered razor blade and syringe on July 13, 2004 (16 RT 2796-2805, 2807-2808, 2810-2815, 2826-2831); and, (4) his possession of an altered paper clip on June 17, 2005 (15 RT 2653-2659, 2681-2682). (See Argument II, *ante*.)

B. Relevant Procedural History

On November 10, 2004, defense counsel filed a "Motion for Order to Have District Attorney Give 'Notice of Aggravation.'" (4 CT 901-903.) In support of his motion, defense counsel cited Penal Code section 190.3, which provides in pertinent part that "no evidence shall be admitted regarding other criminal activity which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (4 CT 902.)

On December 17, 2004, the prosecution filed a notice of evidence to be introduced in aggravation pursuant to Penal Code Section 190.3 [hereafter, "190.3 notice"]. The prosecution stated that it would present evidence with respect to, among other things, prior violent conduct or threats of violence [hereafter, "factor (b) evidence"], indicating that the defense had been provided with reports of appellant's possession of a weapon in jail, threats made to deputies, physical altercations with other inmates, and possession of weapons in jail. (4 CT 922-924.)

On January 21, 2005, the prosecution filed a supplemental 190.3 notice, indicating that it would introduce evidence of appellant's December 19, 2003, attempted escape from jail. (4 CT 931-932.)

On May 8, 2006, the prosecution filed a second supplemental 190.3 notice, indicating that they would introduce evidence relating to incidents involving weapons possession, fights with other inmates, threats to sheriff's personnel, and combative behavior. The prosecutor indicated that the defense had been provided with disciplinary reports from June 13, 2002,

through July 30, 2005, regarding these incidents.[90] (5 CT 1075-1076.) Appellant, who was representing himself at that point, acknowledged that he had received the supplemental notice.[91] (3 RT 374-375.)

On October 18, 2006, the prosecution filed a third supplemental 190.3 notice, indicating that they intended to introduce evidence that appellant caused a disturbance by yelling insults and profanities at another inmate, including calling him a "rat." (5 CT 1136-1137.)

Jury selection for appellant's trial began on October 23, 2006. (5 CT 1138-1139; 4 RT 542.)

On October 30, 2006, the court and counsel discussed the original and three supplemental notices of evidence to be introduced in aggravation. (4 RT 688-697, 728, 750-751, 754-763.) Defense counsel said he planned to argue, among other things, that the conduct must constitute a crime. (4 RT 695.) The court responded that an incident introduced pursuant to factor (b) must "be connected with a crime," citing *People v. Phillips* (1985) 41 Cal.3d 29, and *People v. Garceau* (1993) 6 Cal.4th 140, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118. (4 RT 696-697.) Defense counsel subsequently objected that some of the incidents listed in the disciplinary reports provided by the prosecutor in support of the 190.3 notices, such as appellant's possession of a paper clip, did not amount to crimes or threats of force within the meaning of *Phillips*. (4 RT 757-758.)

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[90] The incident and disciplinary reports on which the prosecution relied are not part of the record on appeal.

[91] Charles Patton was present at that hearing as advisory/standby counsel, and he was reinstated as counsel on May 23, 2006. (3 RT 399.)

On November 27, 2006, the prosecution filed a fourth supplemental 190.3 notice, indicating that they intended to introduce evidence regarding a letter from appellant, dated September 26, 2006, which implicitly threatened another inmate "who provide [*sic*] police information to help catch a murderer." According to the prosecution, the letter and the gang expert's report on the letter had been provided to the defense. (5 CT 1222-1223; see also 16 RT 2733-2735 [court and counsel discussed when the prosecution provided the defense with a copy of the letter and the expert's report].) On December 7, 2006, two days after the jury commenced guilt-phase deliberations, the prosecution filed a motion to admit evidence of violent criminal activity pursuant to section 190.3, factor (b), apparently referring to the same letter. (5 CT 1285, 1289-1298.)

On December 11, 2006, the jury returned guilt verdicts as to both counts. (6 CT 1304-1307, 1314-1318.) On January 2, 2007, the penalty phase of appellant's trial commenced. (6 CT 1329-1331.) Shortly thereafter, defense counsel renewed his objection under *Phillips* to prior acts which did not constitute crimes or attempts, noting that the trial court had made tentative rulings as to some but not all of those acts. (23 RT 3947-3948.)

On January 8, 2007, the prosecutor informed the court that appellant had tried to smuggle letters from court on Thursday [i.e., January 4, 2007], and that she intended to introduce in rebuttal expert testimony that they contained implied threats of violence. According to the prosecutor, she had provided copies to defense counsel on Friday. The court found that because it was factor (b) evidence, the notice was sufficient. (26 RT 4392-4393.)

The following day, as discussed in greater detail in Section H, *post*, the court and counsel discussed the prosecutor's intention to introduce still

other evidence, i.e., letters appellant allegedly tried to smuggle out as legal mail. (27 RT 4582-4584, 4615-4637.)

Shortly before the prosecutor's penalty argument, defense counsel renewed their request that all prior acts be stricken on the ground that they did not constitute crimes under *Phillips*.[92] (31 RT 5013.)

C. Applicable Legal Principles

Penal Code section 190.3, factor (b), allows the trier of fact at the penalty phase of a capital case to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." This Court has held that "evidence irrelevant to a listed factor [in section 190.3] is inadmissible." (*People v. Boyd* (1985) 38 Cal.3d 762, 775.) Further, "[t]he aggravating circumstances [of section 190.3] do *not* include future dangerousness." (*People v. Taylor* (1990) 52 Cal.3d 719, 752 (conc. opn. of Mosk, J., italics in original); see *People v. Murtishaw* (1981) 29 Cal.3d 733, 772, superseded by statute on other grounds as noted in *People v. Boyd* (1985) 38 Cal.3d 762, 773-774.)

This Court has uniformly held "that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72; accord, *People v. Thompson* (1988) 45 Cal.3d 86, 127.) In deciding whether such evidence is admissible, the trial court should, outside the presence of the jury,

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[92] Defense counsel withdrew his request for jury instructions setting forth the elements of the crimes introduced pursuant to factor (b). (31 RT 5012-5013, 5016-5017, 5046-5047.)

"conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of the other criminal activity." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25; see Evid. Code, § 402.)

D. The Trial Court Erred in Admitting Evidence Regarding Appellant's Encounter With Deputy Argandona

1. Factual and Procedural Background

As noted above, the trial court admitted, over defense objection (4 RT 695, 757-758; see also 31 RT 5013), evidence regarding a December 7, 2004, confrontation with Deputy Argandona. (23 RT 4003-4009, 4015-4017.) Specifically, Argandona testified that on December 7, 2004, he was escorting appellant back to his cell from the court line when he noticed that appellant had something in his hands and that he attempted to hide the object in his waistband. Appellant's hands were in front of him, in handcuffs, and the handcuffs were cuffed to a chain around his waist. Argandona asked appellant to show what he had in his hands, but appellant grasped the object, ducked down and turned away. Appellant assumed what Argandona considered to be a defensive, or possibly an offensive, stance. (23 RT 4003-4005, 4015-4016.)

Argandona, aware that appellant previously had been found in possession of weapons, believed he might be trying to grab a weapon. Argandona took hold of appellant and placed him against a wall, then removed the object – a bag of chips – from his waistband. Appellant called Argandona something to the effect of "fag" or "pussy." He was then escorted back to his cell without further incident. (23 RT 4004-4007, 4015-4017.)

Argandona explained that appellant had lost his privileges, including his right to have chips, prior to the incident. He also claimed he believed appellant could get out of his handcuffs and chains. Finally, Argandona stated that he had known an inmate to attack another individual while having his hands cuffed in front of him. (23 RT 4005-4007, 4015, 4017.)

2. The Evidence Relating to Appellant's Encounter With Deputy Argandona Did Not Demonstrate the Commission of a Criminal Act Within the Meaning of Penal Code Section 190.3, Factor (b)

In order to be a valid factor (b) aggravator, an unadjudicated act "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72.) In the instant case, the prosecution indicated that the factor (b) evidence would include evidence relating to threats to sheriff's personnel and combative behavior (5 CT 1075-1076), but did not identify any specific penal statute putatively violated by appellant's encounter with Deputy Argandona. However, as demonstrated in the previous section, the incident did not involve force, violence or an express threat to use force or violence. Thus, the question becomes whether the evidence showed criminal activity involving an *implied* threat to use force or violence. It did not.

Appellant was in handcuffs and chains, which necessarily restricted his ability to move. He was holding a bag of chips, not a weapon or potential weapon. Appellant tried to *move away* from Argandona, not place himself in position to harm him; his reason for doing so is obvious – he was not supposed to have the bag of chips. Appellant insulted Argandona, calling him something along the lines of "fag" or "pussy," but made no statements suggesting that he intended to commit any act of violence

against him. (See *People v. Lowery* (2011) 52 Cal.4th 419, 422, quoting *Virginia v. Black* (2003) 538 U.S. 343, 359 [explaining that a "true threat" must manifest a "serious expression of an intent to commit an act of unlawful violence"].) Finally, Argandona's testimony that an inmate had attacked another individual while having his hands cuffed in front of him (23 RT 4017) carries little weight in the absence of evidence that such inmate was restrained in the same manner as appellant, that is, with both handcuffs and chains. Similarly, although Argandona claimed he feared appellant could somehow free himself from the handcuffs and chains, he failed to state any facts suggesting his fear was at all reasonable here.

People v. Quiroga (1993) 16 Cal.App.4th 961 is similar to the instant case in critical respects. There, the defendant was charged with resisting a peace officer (Pen. Code, § 148).[93] (*Id.* at p. 964.) The evidence showed that the defendant initially refused an officer's lawful command to sit down on a couch, an order issued "[m]ostly for safety reasons." (*Ibid.*) While arguing with the officer, the defendant made furtive gestures, reaching into his pocket as if there were something inside. Even after eventually sitting down on the couch, the defendant continued to make furtive gestures, as if grabbing something between the couch cushions, and continued to yell at the officer. The officer, feeling uncomfortable, ordered the defendant to

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[93] Penal Code section 148 provides in pertinent part that "[e]very person who willfully resists, delays, or obstructs any public officer, peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment." (Pen. Code, § 148, subd. (a)(1).)

stand up. The defendant repeatedly refused to do so and the officer finally "pulled on his arm" to get him to comply. (*Ibid.*)

Nevertheless, the Court of Appeal found nothing in the defendant's conduct justifying a charge of violating Penal Code section 148. (*People v. Quiroga, supra*, 16 Cal.App.4th at p. 966.) In so holding, the court acknowledged that the defendant complied slowly with the officer's orders, but recognized that "it surely cannot be supposed that Penal Code section 148 criminalizes a person's failure to respond with alacrity to police orders." (*Ibid.*) The court also recognized that "[w]hile the police may resent having abusive language 'directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.'" (*Ibid.*, quoting *Duran v. City of Douglas, Ariz.* (9th Cir. 1990) 904 F.2d 1372, 1378.)

Appellant's conduct was far less obstreperous than that of the defendant in *Quiroga*. Unlike Quiroga, he did not continuously argue with the officer. Appellant did not repeatedly make furtive reaching gestures, as Quiroga did, but simply turned away from the officer. Appellant, unlike Quiroga, was in restraints. Although appellant assumed what Argandona considered to be a possibly offensive stance, there is no evidence that appellant offered any resistance when Argandona took hold of him. Nor did appellant offer any resistance when he was being escorted back to his cell.

People v. Lightsey (2012) 54 Cal.4th 668, 727, on the other hand, provides an instructive contrast. There, the trial court admitted, pursuant to Penal Code section 190.3, factor (b), testimony concerning an incident in the Kern County Jail. Specifically, the prosecution presented evidence that,

after finding contraband in Lightsey's cell, an officer tried to search the cell for other improper items, ordering him to move from his bed. (*Id.* at pp. 727-728.) Lightsey complied only reluctantly, then assumed a threatening stance, which the officer viewed as combative; that is, Lightsey "squared up" to the officer by facing him with his fists clenched at his sides. As a result, the officer could not complete the search of the cell at that time, but instead determined it was necessary to restrain Lightsey and remove him from the cell before the incident escalated. (*Ibid.*) Consequently, this Court concluded that the jury could find the incident constituted obstructing the officer during his lawful duties, and that Lightsey's actions carried an implied threat of violence. (*Id.* at p. 728.) In contrast to the instant case, Lightsey's conduct – i.e., "squar[ing] up" to the officer with his fists clenched, within the confines of a cell – was clearly combative and threatening, particularly in light of the fact that he had not yet been placed in handcuffs.

Accordingly, appellant's failure to "respond with alacrity" (*People v. Quiroga, supra*, 16 Cal.App.4th at p. 966) did not amount to a violation of a penal statute, and therefore his confrontation with Argandona did not qualify as factor (b) evidence. Even assuming appellant's acts could somehow be construed as an implied threat of violence, which they cannot, "a threat of violence which is not in itself a violation of a penal statute is not admissible under factor (b)." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1259.)

As appellant discusses in Section I, *post*, the admission of this evidence was unduly prejudicial and requires reversal of the death judgment.

E. The Trial Court Erroneously Admitted Evidence That Appellant Threatened a Witness In An Unrelated Case

As noted above, the prosecution sought to introduce evidence that appellant had written a letter in which he purportedly threatened a witness in an unrelated case, as well as the testimony of a gang expert explaining the contents of that letter. The trial court abused its discretion in admitting this evidence, as the prosecution's showing was entirely insufficient to justify its admission. Nor did the quality of the evidence presented at the penalty trial improve, as it was essentially a rehash of what the court had considered in admitting evidence relating to the purported threat.

1. Procedural Background

a. In Limine Proceedings

During the guilt-phase proceedings of November 28, 2006, the court and counsel discussed the admissibility at the penalty phase of a letter appellant wrote to Della Rose Santos (17 RT 3072-3076, 3079-3086), which read in part as follows:

> Oh, yeah, Grumpy told me this about that guera that turned over the dime. They're treating him bad, but that will be straightened out soon. We ride for the Sur, tu sabes babe, one for all, all for one.

(17 RT 3072.)

According to the prosecutor, a gang expert would testify that appellant's letter showed his willingness to take care of a snitch, and that it was admissible as factor (b) evidence (see Pen. Code, § 190.3, factor (b)) relevant to show future dangerousness. (17 RT 3071-3076.) Defense counsel argued that the letter did not constitute a crime as required by

People v. Phillips, *supra*, 41 Cal.3d 29.[94] (17 RT 3079; see also 17 RT 3086.)

Pursuant to Evidence Code section 402, Detective Javier Clift of the Los Angeles County Sheriff's Department testified that he intercepted appellant's letter, which included the passage quoted above. (17 RT 3080, 3082.) Clift interpreted the letter in the following manner: appellant was referring to someone as a "guera" – meaning sissy, punk or woman – because he was a snitch; appellant believed that Grumpy was being mistreated, or that Grumpy did not like the way he was being treated by jail staff; Sureno gang members are allies, and they were trying to "get to" the snitch; and, appellant was going to assist in getting the snitch, either by doing it himself or by making sure that other Sureno members had this information. (17 RT 3083-3085.) According to Clift, when a Sureno gang member receives an order, he must carry it out, lest he be "in the same shoes as this other defendant who they're calling as guera. He will be considered no good, may be considered a snitch, somebody that's weak." (17 RT 3085.)

Defense counsel again asserted that the letter was not evidence of a crime within the meaning of *People v. Phillips*, *supra*, 41 Cal.3d 29. The court, however, suggested it might constitute evidence of a conditional

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[94] Defense counsel also argued that he believed evidence of future dangerousness was no longer admissible in California. (17 RT 3075.) Appellant acknowledges that, although *expert testimony* may not be elicited on the subject of the defendant's future dangerousness, a prosecutor may argue the subject based on evidence in the case. (See *People v. Danielson* (1992) 3 Cal.4th 691, 720, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

threat. (17 RT 3086, citing *People v. Bolin* (1998) 18 Cal.4th 297, 336-340.)

The following day, the court tentatively ruled that the letter was inadmissible because the purported threat was never communicated to the victim. (18 RT 3091-3092.) The prosecutor answered that threatening a witness in violation of Penal Code section 140[95] does not require that the threat be communicated to the victim, citing *People v. McLaughlin* (1996) 46 Cal.App.4th 836.[96] (18 RT 3093-3096.)

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[95] Penal Code section 140 provides in pertinent part that

> (a) Except as provided in Section 139, every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

Penal Code section 139 provides in pertinent part that "[e]xcept as provided in Sections 71 and 136.1, *any person who has been convicted of any felony offense specified in Chapter 3* (commencing with Section 29900) of Division 9 of Title 4 of Part 6 who willfully and maliciously *communicates* to a witness to, or a victim of, the crime for which the person was convicted, a credible threat to use force or violence upon that person or that person's immediate family, shall be punished by imprisonment in the county jail . . . ." (Italics added.)

[96] The prosecutor also argued that the letter was admissible as an attempted criminal threat in violation of Penal Code sections 664 and 422, a position the trial court expressly rejected; as the court noted, section 422

(continued...)

Defense counsel again observed that factor (b) evidence must constitute evidence of an actual crime. Defense counsel further argued that admission of the evidence violated appellant's First Amendment right to free speech.[97] (18 RT 3096-3097, 3101-3102.) The court said that it would give both sides an opportunity to explore this matter further. (18 RT 3099-3103.)

On December 7, 2006, still during the guilt phase, the prosecutor reiterated that she wanted to use the letter, as well as the testimony of Detective Clift to explain its meaning, as factor (b) evidence. (22 RT 3812.) Defense counsel argued that *Phillips* controlled, and that the issue was whether this incident, as well as others the prosecution sought to introduce under factor (b), constituted crimes. Defense counsel further argued that the prosecution's offer of proof was insufficient to establish a

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[96](...continued)
requires that a threat be communicated to the victim. (18 RT 3092-3093, 3098.) Moreover, apparently conceding that the elements of section 422 had not been met, the prosecutor argued that the letter was not only a threat within the meaning of section 140, but promoted gang activity in violation of Penal Code section 186.22, subdivision (a). (18 RT 3098-3101.) As discussed below, the trial court ultimately admitted the evidence on the ground that it demonstrated a violation of section 140; significantly, the court did not mention, and apparently implicitly rejected, the prosecutor's contention that appellant's letter was admissible as a violation of section 186.22. (22 RT 3821-3822.)

[97] In so arguing, defense counsel pointed out that Penal Code section 140 had not been tested under state and federal constitutional free speech guarantees, and expressed his doubt as to the constitutionality of the statute. (18 RT 3097-3098.) Appellant acknowledges that this Court has since rejected a claim that section 140 violates the First Amendment because it lacks any requirement that the threat to harm a crime witness or victim is to be carried out immediately or that the defendant have the apparent ability to carry it out. (*People v. Lowery* (2011) 52 Cal.4th 419, 428.)

crime, and that the evidence was very prejudicial. (22 RT 3814; see also 31 RT 5013 [defense counsel renewed motion].)

The trial court responded that the letter itself did not have to be a crime, but had to be *related* to a crime. (22 RT 3813.) Moreover, the court reasoned that:

> The law makes it clear that if the surrounding circumstances are admissible, that if it is connected with a crime, the surrounding circumstances are admissible to show the context, even though they involve other crimes. [¶] So it has to be connected with a crime. It doesn't have to by itself be a crime, but it has to be connected to a crime, and that's what the nature of the People's argument is.

(22 RT 3814, citing *People v. Phillips*, *supra*, 41 Cal.3d at p. 72, and *People v. Garceau* (1993) 6 Cal.4th 140, 203, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.)

The prosecutor argued that the elements of section 140 had been met because there was an implied threat to use force or violence against a witness, that is, against someone who had provided information about Grumpy to law enforcement officials. The fact that the letter had been intercepted was immaterial. (22 RT 3815-3820, citing *People v. McLaughlin*, *supra*, 46 Cal.App.4th at p. 842, and CALCRIM No. 2624.) Relying on *McLaughlin*, the court found that the clear language of section 140 was applicable, and permitted the prosecutor to introduce the evidence. (22 RT 3821-3822.)

b. Evidence Presented at the Penalty Trial

During the penalty phase, Detective Clift testified that he was an expert in gang culture. (23 RT 4075-4077.) He claimed that, according to Sureno rules, someone who snitches, particularly about a murder, generally

is punished by death, rather than assault or intimidation. Moreover, Surenos are obligated to take care of snitches. (23 RT 4086-4087.)

Clift testified that, on September 26, 2006, he intercepted a letter written by appellant and bearing his moniker, Chingon. (23 RT 4075, 4078-4079; People's Exhibit 158.) A portion of the letter read, "[O]h, yeah. Grumpy told me about the guera that turned over the dime. They're treating him bad, but that will be straighten [*sic*] out soon. We ride for the Sur. Tu sabes babe. One for all, all for one." (23 RT 4079.)

Next to appellant's name were three dots and two lines, Aztec symbols representing the number 13. (23 RT 4079.) According to Clift, the number 13 represents the thirteenth letter of the alphabet ("M"), which in turn represents the Mexican Mafia. A Sureno member who believes in the Mexican Mafia's philosophy identifies his gang by the number 13, signifying that he is a soldier of the Mexican Mafia. (23 RT 4080.)

In his testimony, Clift set forth his interpretation of appellant's letter. (23 RT 4080-4084.) According to Clift, Grumpy was in jail for murder, and somebody had told the police that he was involved.[98] (23 RT 4081.) Grumpy's crime partner, "the guera," had "snitched him off." (23 RT 4080.) "Guera" means "sissy" or "bitch." (23 RT 4080-4081.) It might be better for Grumpy's case if the snitch were killed because the witness would be gone. (23 RT 4082.) Grumpy had been locked down and felt that he was being mistreated, but the guera would soon be taken care of – that is, he would be killed or assaulted. (23 RT 4081.) Grumpy had told appellant about his situation, and appellant, who was in jail on two

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[98] The trial court sustained defense counsel's objection to evidence that Grumpy had murdered a deputy sheriff. (23 RT 4062-4068, 4070-4071.)

counts of murder, and facing a capital trial, was offering to assist in committing the murder, either by doing it himself or by passing the word on to other people. (23 RT 4082-4084.) Appellant was telling somebody else that he was going to help solve the problem. (23 RT 4082.)

Clift acknowledged that appellant did not specifically state that he would help kill someone. However, Clift opined, someone who offers to harm another generally would not state that he is going to do so, but would instead write in code. (23 RT 4083, 4086.) Rather, Clift was giving his interpretation of what the letter meant. (23 RT 4083.) Clift claimed that the letter was easy to interpret, but admitted that he never consulted with another gang expert to get an independent opinion. (23 RT 4090-4093.)

Clift also acknowledged that if appellant were locked in a one-man cell, it would be impossible for him to get to the informant. (23 RT 4084-4085, 4087.) However, even if he were placed in a one-man cell, he still might have the ability to orchestrate a killing from his cell. Clift also testified that inmates, while being escorted, have been able to slip from their handcuffs and attack other inmates. (23 RT 4087-4090.)

2. The Trial Court Erroneously Admitted Evidence That Appellant Threatened a Witness In an Unrelated Case

In this case, the required hearing outside the presence of the jury resulted in the erroneous admission of aggravating evidence, because there was no evidence from which the court could find that appellant's letter involved an express or implied threat to use force or violence as required by Penal Code section 190.3, factor (b). Thus, appellant's letter to Santos, and testimony relating to that letter, were erroneously admitted at the penalty phase.

a. The Trial Court's In Limine Ruling Permitting the Prosecutor to Present Evidence Relating to the Purported Threat Was Erroneous Because of the Inadequacy of the Prosecutor's Showing

"The issues material to punishment under the 1978 death penalty law include, in the words of Penal Code section 190.3, 'the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence.'" (*People v. Clair* (1992) 2 Cal.4th 629, 672.) Thus, "[e]vidence of other criminal activity involving force or violence may be admitted in aggravation only if it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." (*Id.* at pp. 672-673.) Not only is that proposition "established as to the elements of the underlying crime" (see *People v. Boyd* (1985) 38 Cal.3d 762, 778), but also "as to the pertinent circumstances beyond the elements themselves." (*People v. Clair*, *supra*, 2 Cal.4th at p. 673, citing *People v. Kauresh* (1990) 52 Cal.3d 648, 707, as the source of the rule; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 984-985, abrogated on another ground as stated in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

This Court evaluates for abuse of discretion the propriety of the trial court's in limine ruling admitting evidence relating to appellant's purported threat. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.) In that regard, a trial court does not abuse its discretion if, "[v]iewing the totality of the evidence presented, a rational jury could conclude" that the defendant's criminal conduct involved an express or implied threat to use force or

violence. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1168 [setting forth standard of review].)

Applying that standard to the prosecutor's proffer at the in limine hearing in this case, it is evident that no rational jury could have found that appellant's letter constituted a threat. Clift's testimony at that hearing established that Sureno gang members are allies, and that a Sureno gang member who receives an order must carry it out, lest he too be subject to retaliation. (17 RT 3083, 3085.) Therefore, a fair reading of appellant's letter makes clear that it was not a "serious expression of an intent to commit an act of unlawful violence," as required to prove a violation of Penal Code section 140 (*People v. Lowery, supra*, 52 Cal.4th at p. 422, quoting *Virginia v. Black* (2003) 538 U.S. 343, 359), but an accurate comment on the "guera's" predicament: he had snitched, and for that reason he was now in danger at the hands of virtually any Sureno member with whom he came in contact.

Moreover, the court appeared to apply an erroneous, overly permissive standard with respect to the admissibility of factor (b) evidence: "if it is connected with a crime, the surrounding circumstances are admissible to show the context, even though they involve other crimes . . . It doesn't have to by itself be a crime, but it has to be connected to a crime."[99] (22 RT 3814.) Under the court's formulation, factor (b) evidence

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[99] Appellant suspects that the trial court's remarks were based on a misreading of *People v. Montiel* (1993) 5 Cal.4th 877. There, this Court rejected the defendant's claim that menacing statements he had made to arresting officers were not "actual crimes" because there was no showing he spoke with intent to prevent his arrest and with the apparent ability to carry out his threats. (*Id.* at p. 916.) This Court reasoned that, even if the

(continued...)

is admissible so long as it is "connected to" or "relate[s]" somehow to a crime, even if it does not demonstrate the commission of an actual crime. (22 RT 3813-3814.)

The court's reliance on *People v. Phillips*, *supra*, 41 Cal.3d at p. 72, was misplaced. (22 RT 3814.) In *Phillips*, this Court held that the prosecutor properly relied on a letter written by the defendant in which he solicited the murder of prospective witnesses against him in violation of Penal Code section 653f, subdivision (d), because the requirement that solicitation be proved by the testimony of one witness and corroborating circumstances was met. (*People v. Phillips*, *supra*, 41 Cal.3d at pp. 75-79.) On the other hand, this Court held, the trial court erroneously admitted the following evidence:

(1) Evidence of a plan whereby a former friend of defendant, Richard Graybill, acting in cooperation with law enforcement, attempted to lure the defendant back to California by a scheme wherein the defendant was planning to murder someone. Because Graybill was a feigned accomplice, the defendant's agreement to come and commit the murder did not constitute a crime;

(2) Graybill's testimony that the defendant had told him that, upon his release from prison he would use a truckload of stolen goods as collateral for a loan and then kill the people

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[99](...continued)
defendant's threats were not themselves crimes, they occurred in the course of a violent, criminal resistance to arrest, conduct amounting to an assault; because an "actual" violent crime admissible under factor (b) may be shown in full context (*People v. Melton* (1988) 44 Cal.3d 713, 757), the defendant's threats were admissible under factor (b) to demonstrate the aggravated nature of his unlawful conduct. (*People v. Montiel*, *supra*, 5 Cal.4th at pp. 916-917.)

who had lent him the money, as it failed to demonstrate the commission of a crime;

(3) Graybill's testimony concerning a conversation in which the defendant indicated that during a proposed burglary he would remove the potential danger of a security guard by killing him, as it was insufficient to prove the commission of the crime of criminal solicitation (Pen. Code, § 653f), and was therefore improperly considered by the jury as evidence of other criminal activity; and,

(4) A letter written by the defendant soliciting the extortion of an accountant was improperly admitted because it did not comply with the requirement that criminal solicitation be proved by one witness and corroborating circumstances.

(*Id.* at pp. 73-75, 81-82.) This Court's treatment of the evidence at issue in *Phillips* demonstrates that, contrary to the position of the trial court in this case, factor (b) evidence must demonstrate the commission of – and not merely be connected or related to – an actual crime.

The trial court's reliance on *People v. Garceau*, *supra*, 6 Cal.4th at p. 203, was similarly misplaced. In *Garceau*, this Court held that the trial court properly admitted evidence of two prior incidents involving the discovery by police of weapons in the defendant's residence. In so holding, this Court noted that the defendant's possession of those items was not only illegal under several criminal statutes (Pen. Code, §§ 12021, subd. (a), 12220, subd. (a), and 12520), but it "clearly involved" an implied threat to use force or violence within the meaning of section 190.3, factor (b). (*People v. Garceau*, 6 Cal.4th at pp. 203-204.) This Court's analysis of the evidence makes clear that, for evidence to be admissible under factor (b), it is not enough that it merely be connected or related to a crime; rather, it must demonstrate the commission of an actual crime, and that crime must

involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

Under these circumstances, the court abused its discretion in allowing the jury to hear this evidence.

b. The Evidence Relating to Appellant's Purported Threat Did Not Demonstrate That a Criminal Act Had Been Committed

Even assuming, arguendo, that the court did not abuse its discretion in making its in limine ruling, the state of the evidence at the conclusion of the prosecutor's penalty-phase case was such that no rational juror could have been convinced beyond a reasonable doubt that appellant's letter constituted a threat. First, it bears mentioning that a "sufficiency-of-evidence" review at the penalty phase is appropriate even though there is no way of knowing definitively from the record on appeal whether any juror made such a determination; it must be presumed that at least one juror considered the evidence as having been proven beyond a reasonable doubt, "[o]therwise, [this Court] would run an unacceptable risk of rejecting a potentially meritorious claim by gratuitously denying the existence of its factual predicate." (*People v. Clair*, *supra*, 2 Cal.4th at p. 680.)

As this Court reasoned in *Clair* with respect to a burglary, "[e]ven viewing the evidence, as we must, in the light most favorable to the People, we do not believe that a rational trier of fact could have determined beyond a reasonable doubt" that the defendant's violation of Penal Code section 459 involved force or violence, as "the facts are too slight to support an inference that he [committed a crime within the meaning of section 190.3, subdivision (b)] beyond a reasonable doubt." (*People v. Clair*, *supra*, 2 Cal.4th at p. 680.) The facts were similarly slight in this case. Detective

Clift acknowledged that appellant's letter did not specifically state that he would help kill someone, and that he was merely giving his interpretation of the letter. (23 RT 4083.) He also admitted that he never consulted with another gang expert to get an independent opinion. (23 RT 4090-4093.) Perhaps most important, the prosecution itself presented ample evidence that under the gang culture prevailing in the jail, an inmate known to be a snitch was subject to being attacked, even killed, by virtually any Hispanic gang member. (16 RT 2761-2762, 2766-2768; 18 RT 3137, 3146-3149, 3171-3174; 23 RT 4026.) Therefore, appellant's letter reasonably must be read not as a threat, but a simple description of the "guera's" predicament: he had snitched, and for that reason he was now in danger. Clearly, this meager showing cannot be considered "substantial" evidence from which a rational jury could have found beyond a reasonable doubt that appellant's letter was a "serious expression of an intent to commit an act of unlawful violence," as required to prove a violation of Penal Code section 140. (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422, quoting *Virginia v. Black*, *supra*, 538 U.S. at p. 359.) The trial court thus erred in allowing the prosecution to use evidence regarding appellant's letters as factor (b) evidence.

As appellant demonstrates in Section I, *post*, the penalty judgment must therefore be reversed.

F. The Trial Court Erroneously Admitted Evidence Regarding Appellant's June 7, 2005, Confrontation With a Fellow Inmate

1. Factual and Procedural Background

As noted above, on October 18, 2006, the prosecution filed a supplemental 190.3 notice indicating that they intended to introduce

evidence that appellant caused a disturbance by yelling insults and profanities at another inmate, including calling him a "rat." (5 CT 1136-1137.) During proceedings of December 7, 2006, the prosecutor argued that: "Especially within the jail culture, advising others that an inmate is a rat or a snitch is basically it's intimidation of a witness. It's the 136, the one crime that that would fall under."[100] (22 RT 3822.) The court tentatively ruled that the incident was admissible, but noted that the defense had not yet argued the matter. (22 RT 3823-3824.)

During the penalty phase, Deputy Andrew Cruz testified that on June 7, 2005, he went to the jail's "high power unit" to handcuff appellant, who was going to court. (23 RT 4022-4023.) When Cruz arrived on the row, appellant was yelling at another inmate, Benjamin Gonzalez, "Fuck you, Benji, you're a rat." (23 RT 4023-4025.) Cruz told appellant to stop, but appellant continued to yell. Other inmates chimed in, and even after appellant was escorted off the row, inmates continued to yell, "Benji is a rat." (23 RT 4027.)

Gonzalez had provided information to other deputies, but not to Cruz himself. (23 RT 4024-4025, 4028-4030.) As far as Cruz was aware, Gonzalez had provided information about violations of jail rules, such as possession of narcotics or alcohol, but not about actual crimes. (23 RT 4024-4025.)

According to Cruz, "rat" is a jailhouse term for snitch. (23 RT 4024.) Based on his training, Cruz opined that when someone is labeled a

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[100] Penal Code section 136 does not proscribe witness intimidation, but instead defines terms (specifically, "malice," "witness" and "victim") used in subsequent statutes. Penal Code section 136.1, later invoked by the prosecutor (23 RT 4033), *does* proscribe witness intimidation.

rat or snitch, his safety is placed in danger. (23 RT 4027.) That is, when other inmates find out he is a rat, usually he will be assaulted. (23 RT 4026.) By labeling Gonzalez a "rat," appellant put him in great danger, regardless of what Gonzalez may have told the deputies. (23 RT 4027, 4031.)

Defense counsel requested that the court instruct the jury to ignore Cruz's testimony because the Gonzalez incident did not constitute a crime under *People v. Phillips*, *supra*, 41 Cal.3d 29. (23 RT 4032-4033.) The prosecutor argued that appellant had engaged in intimidating a witness, invoking Penal Code sections 136.1, 137, 139 and 140. (23 RT 4033-4034.) The trial court overruled the objection, concluding as follows: "It doesn't have to be true, [he] may not have said anything, but any inmate who hears that is likely to attack the person in custody in a situation where he can't defend himself." (23 RT 4034.)

As appellant demonstrates below, the trial court erred in admitting the evidence.

2. The Trial Court Erroneously Admitted Evidence Relating to Appellant's Confrontation with Benjamin Gonzalez Because The Evidence Did Not Demonstrate the Commission of Any Actual Crimes

As noted above, the prosecutor contended that evidence relating to appellant's confrontation with Benjamin Gonzalez was admissible as factor (b) evidence under Penal Code sections 136.1, 137, 139 and 140. (23 RT 4033-4034.) However, as defense counsel objected (23 RT 4032-4033), the incident did not constitute a crime within the meaning of *People v. Phillips*, *supra*, 41 Cal.3d 29. Even if "snitches" are sometime subjected to assaults (23 RT 4026), appellant's statements did not violate any penal statute and therefore did not constitute proper factor (b) evidence.

Penal Code section 136.1 provides in pertinent part as follows:

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

* * * * * * * * *

(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense . . .
(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.

(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony . . .

(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person.

(2) Where the act is in furtherance of a conspiracy.

(3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section.

* * * * * * * * *

(d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.

Penal Code section 137 provides in pertinent part as follows:

(b) Every person who attempts by force or threat of force or by the use of fraud to induce any person to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or withhold true material information pertaining to a crime from, a law enforcement official is guilty of a felony, punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

As used in this subdivision, "threat of force" means a credible threat of unlawful injury to any person or damage to the property of another which is communicated to a person for the purpose of inducing him to give false testimony or withhold true testimony or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official.

> (c) Every person who knowingly induces another person to give false testimony or withhold true testimony not privileged by law or to give false material information pertaining to a crime to, or to withhold true material information pertaining to a crime from, a law enforcement official is guilty of a misdemeanor.

As the court explained in *People v. Womack* (1995) 40 Cal.App.4th 926, 929, the offense requires that the force or threat of force be used with the specific intent of inducing a witness to give false or withhold *true* testimony (Pen. Code, § 137, subd. (b)).

A review of the record makes clear that there was no violation of either section 136.1 or section 137. Although Gonzalez had provided deputies with information in the past (23 RT 4024-4025), there was no evidence that there were any pending proceedings connected with that information (Pen. Code, §§ 136.1, subd. (a), & 137, subd. (b)), or that he was contemplating reporting a crime or assisting in an arrest or prosecution (Pen. Code, §§ 136.1, subd. (b), & 137, subd. (c)). There was no evidence that appellant, or anyone else, assaulted or attempted to assault Gonzalez. (Pen. Code, §§ 136.1, subd. (c), & 137.) In short, there was not substantial evidence that appellant intimidated or attempted to intimidate Gonzalez within the meaning of either section 136.1 or section 137. (Cf. *People v. Navarro* (2013) 212 Cal.App.4th 1336, 1349 [upholding appellant's conviction for section 136.1 where the evidence established that the defendant grabbed the phone from the victim's hand while she was talking to the Sheriff's Department, hung it up, removed the batteries, and separated the phone from the batteries; and, after firing a bullet through the laundry room door in the direction where he had last seen the victim, he called her on her cell and told her to tell the police that "everything is fine"]; *People v.*

Foster (2007) 155 Cal.App.4th 331, 334-335 [evidence showed that, following defendant's assault on the victim, his girlfriend, he intended to prevent her from testifying against him by telling a friend to tell her about the consequences she would suffer if she testified]; *People v. McElroy* (2005) 126 Cal.App.4th 874, 881-882 [in case involving domestic violence, after victim dialed 911 and told defendant she was calling the police, defendant took the phone and hung it up, thereby knowingly and maliciously preventing her from reporting her victimization].)

Nor was there sufficient evidence to sustain a conviction under Penal Code section 139, which provides in pertinent part that:

> (a) Except as provided in Sections 71 and 136.1, any person who has been convicted of any felony offense specified in Chapter 3 (commencing with Section 29900) of Division 9 of Title 4 of Part 6 who willfully and maliciously communicates to a witness to, or a victim of, the crime for which the person was convicted, a credible threat to use force or violence upon that person or that person's immediate family, shall be punished by imprisonment . . . .
>
> * * * * * * * * *
>
> (c) As used in this section, "a credible threat" is a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

Appellant's statement that "Benji is a rat" did not constitute a threat under section 139. Appellant was not convicted of any felony to which Gonzalez was a witness. (Pen. Code, § 139, subd. (a).) As such, the statute is completely inapplicable.

In any event, appellant's statement to Gonzalez, on its very face, must be read as nothing more than an expression of scorn or contempt,

particularly in the absence of information that Gonzalez had provided jail personnel with information about appellant. (Cf. *People v. Dollar* (1991) 228 Cal.App.3d 1335, 1338 [the defendant, who had previously been convicted of committing a lewd and lascivious act upon the victim, was thereafter convicted of threatening her after he had unsuccessfully attempted to grab her and, as she was running away, yelled, "I'll get you soon, bitch."].)

Finally, there was not sufficient evidence that appellant's statement to Gonzalez violated Penal Code section 140, which provides in pertinent part that:

> (a) Except as provided in Section 139, every person who willfully uses force or threatens to use force or violence upon the person of a witness to, or a victim of, a crime or any other person, or to take, damage, or destroy any property of any witness, victim, or any other person, because the witness, victim, or other person has provided any assistance or information to a law enforcement officer, or to a public prosecutor in a criminal proceeding or juvenile court proceeding, shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

On its face, appellant's statement that "Benji is a rat" did not express a "serious expression of an intent to commit an act of unlawful violence," as required to prove a violation of section 140. (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422.) At most, the statement expressed scorn or contempt for snitches. Indeed, the statement evinces no intent to *do* anything whatsoever. This is especially true of any statements appellant made after he was handcuffed (23 RT 4022-4023), when he obviously knew he could not commit any acts of violence against Gonzalez.

As appellant demonstrates in Section I, *post*, the penalty judgment must therefore be reversed.

G. The Trial Court Erred in Admitting Evidence That Appellant Possessed An Altered Paper Clip

1. Pertinent Factual and Legal Background

As noted above, defense counsel argued that some of the incidents listed in a disciplinary report provided by the prosecutor in support of her 190.3 notice did not amount to crimes or threats of force, such as appellant's possession of a paper clip. (4 RT 757-758.) The court replied that evidence regarding a jailhouse-made handcuff key is admissible, so long as the prosecution calls an expert witness to testify that it can be used to manipulate handcuffs. (4 RT 758-759.) According to the court, "I can't find it in my manual, but we've used it in prior cases where it's fairly common that some item is used to create the ability to unlock the handcuff keys." (4 RT 759.)

During the guilt phase, the prosecution presented evidence that, during a June 17, 2005, search of appellant's cell, Deputy David Florence recovered an altered paper clip.[101] (15 RT 2654-2657; 16 RT 2790-2793.) According to both Florence and Deputy Saucedo, an altered paper clip can be used to undo handcuffs in a matter of seconds. (15 RT 2657; 16 RT 2790.) Florence later discarded the paper clip as contraband, and the matter was handled as an in-house disciplinary issue.[102] (15 RT 2681.) On cross-

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[101] The evidence relating to this incident is described in greater detail in Argument II, *ante*.

[102] Deputy Saucedo testified that the paper clip found in appellant's cell was similar to a paper clip marked for identification as Defense Exhibit B. (16 RT 2792; 20 RT 3406-3407.)

examination, appellant admitted that he kept the altered paper clip, but explained that, as a pro per defendant, he had a lot of paper clips because he kept paperwork in his cell. (19 RT 3366.)

During her penalty-phase cross-examination of defense expert James Esten, the prosecutor elicited his testimony that paper clips have been used as handcuff keys. (28 RT 4774.) According to Esten, an inmate who is skilled at using a paper clip can free himself from his cuffs in a matter of seconds "or less." (28 RT 4775.) However, an inmate assigned to a secured housing unit ("SHU") is placed in waist restraints as well as cuffs, and therefore lacks the range of movement necessary to unlock himself. (28 RT 4774.)

Prosecution expert Luis Puig disagreed with Esten's testimony that it would be very difficult for an inmate assigned to SHU to have a paper clip and use it as a handcuff key. (29 RT 4896-4899.) According to Puig, an inmate could use a paper clip to uncuff the inmate being escorted in front of him, or he could fashion one for someone else to use. (29 RT 4896-4897.)

2. The Trial Court Erroneously Admitted Evidence Relating to Appellant's Possession of the Paper Clip For Lack of Proof That It Was a Handcuff Key or That It Carried An Implied Threat of Violence

As indicated by defense counsel's objection that appellant's possession of the paper clip was not a crime within the meaning of *People v. Phillips*, *supra*, 41 Cal.3d 29, the prosecution lacked sufficient proof as to two critical factual issues: (1) whether the paper clip was intended to function as a handcuff key; and, (2) even assuming the paper clip had been altered to serve as a handcuff key, whether it carried an implied threat of violence. The prosecution had the burden of proof beyond a reasonable

doubt as to both of these issues. (*People v. Phillips*, *supra*, 41 Cal.3d at p. 65; CALJIC No. 8.87.)

Indeed, in a case involving facts remarkably similar to those present here, this Court held that mere possession of handcuff keys does not involve any "express or implied threat to use force or violence" under factor (b). (*People v. Lancaster* (2007) 41 Cal.4th 50, 92-93.) In that case, the trial court ruled that evidence that the defendant possessed handcuff keys was admissible, reasoning that the circumstances under which jail inmates are handcuffed are such that any resulting escape would be forceful or violent. (*Id.* at p. 91.) A sheriff's deputy described the handcuff keys as small, slim pieces of metal, usually box staples; inmates straightened them, sharpened one end and formed a hook at the other. Inmates had used such keys to escape from their handcuffs "several times." (*Id.* at pp. 91-92.) The deputy had found three such keys in the defendant's cell. His written report did not include the location of the keys, which had been "disposed of." The deputy did not have with him the records showing how long it had been since another inmate occupied the cell. However, the cell would have been thoroughly searched before defendant was housed in it. (*Id.* at p. 92.)

On appeal, this Court held that mere possession of handcuff keys does not rise even to the level of an attempted escape, and thus cannot be said to involve any "express or implied threat to use force or violence" under Penal Code section 190.3, factor (b). (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 92-93.) This Court went on to explain that "[f]or evidence of handcuff key possession to be admissible in connection with an attempted escape, the prosecution must show that the defendant made such an attempt." (*Id.* at p. 94.) Whereas attempted escape requires a "direct, unequivocal act to effect that purpose" (*ibid.*, citing *People v. Gallegos*

(1974) 39 Cal.App.3d 512, 517), the presence of handcuff keys in the defendant's cell showed, at most, mere preparation. (*Ibid.*) Accordingly, the trial court abused its discretion by admitting the evidence of handcuff key possession.[103] (*Ibid.*)

As in *Lancaster*, the physical evidence in this case was not an actual handcuff key, but an object supposedly altered to function as one (15 RT 2657; 16 RT 2790; see also 28 RT 4774-4775; 29 RT 4896-4899); it had been discarded before the trial (15 RT 2681); and, more important, the prosecutor failed to present any evidence that appellant's possession of the paper clip was connected to an attempted escape. In contrast to *Lancaster*, however, the trial court did not suggest a theory as to why the evidence was admissible; rather, the court merely recalled that in prior cases it had admitted evidence regarding the possession of handcuff keys. (4 RT 759.)

Appellant acknowledges that CALJIC No. 8.87, which addressed the factor (b) evidence in this case, did not expressly refer to appellant's possession of the paper clip. Moreover, it instructed the jury not to consider any evidence of any other criminal acts as an aggravating circumstance. (6 CT 1427.) However, the prosecutor specifically referred to appellant's possession of the paper clip in her summary of the factor (b) evidence. (31 RT 5076-5077.) Therefore, it is likely the jurors simply assumed that it fell within one or more of the categories listed in the instruction, particularly "attempted escape by violence" or "refusing to comply with guard's orders were [sic] compliance would reduce danger to the guards." (6 CT 1427.)

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[103] Appellant requests that this Court take judicial notice of the fact that Judge William Pounders, who presided over the instant case, also presided over *People v. Lancaster*, *supra*, 41 Cal.4th 50. (Evid. Code, §§ 451 & 452.)

For the reasons set forth in Section I, *post*, the trial court's erroneous admission of this evidence requires reversal of the penalty judgment.

H. The Trial Court Erred in Admitting Evidence Regarding Appellant's Letter to Ursula Gomez and His Attempt to Smuggle Letters As Legal Mail

On January 9, 2007, the trial court and counsel discussed the prosecution's request to introduce additional letters written by appellant. (27 RT 4582-4584; see also 27 RT 4615 [prosecutor advised the trial court that she intended to call witnesses to testify about the recovery of appellant's letters, and that Detective Javier Clift would explain their meaning].) Defense counsel objected that they did not "fall[] within the *Phillips* guideline." (27 RT 4583.) As appellant demonstrates below, the trial court erred in admitting that evidence, as it did not demonstrate the commission of any actual crimes.

1. Procedural and Factual Background

a. Appellant's Letter to Ursula Gomez

The prosecutor contended that appellant's letter to Ursula Gomez was admissible because it contained implied threats of violence or future violence. (27 RT 4616, 4620-4623.) The prosecutor first quoted the following portion of appellant's letter:

> The D.A. is a joke. I was laughing throughout my trial. All them compliments from her and the judge, serio. Both kept saying I'm a smart mother fucker, and that's why I should get death to stop anything in the future they assume I'll do up state. Again all lies. I'm just a little guy trying to survive.

(27 RT 4616-4617.) In contending that the passage indicated a threat, she noted that, elsewhere on the letter, appellant had drawn a picture of a person winking. (27 RT 4617, 4621.) According to the prosecutor, "when [appellant] draws that little smirky face on the picture, it's basically saying

I'm just going to be a good little boy, ha ha . . . ." (27 RT 4617.) Similarly, she later argued that appellant was really saying, "I'm going to be a good boy, hah, not[.]" (27 RT 4621-4622.)

The prosecutor next sought to introduce the following portion of the letter:

> I'm a dedicated Sureno to the fullest and death and throughout my lifestyle I stood for mines. When I got torcido [i.e., arrested] I cut old boy loose and put on the zapatos [i.e., shoes] to fight it myself. But el destino had plans for him. You know the rest.

(27 RT 4617.) The prosecutor contended that "[s]o there he's talking about the murder of Raul Tinajero, that when he got arrested, he cut him loose and stood up for himself, but we know destiny had plans for him." (27 RT 4617.) The trial court later indicated that it had admitted the paragraph, but did not explain the rationale for its ruling. (27 RT 4642.) The prosecutor also argued that another portion of the letter – in which appellant had written, "We true eses. We're taught morals and ethics in life . . ." (27 RT 4617) – was relevant to rebut defense testimony to the effect that he had not been taught ethics by his family, and the trial court admitted it partly on that basis. (27 RT 4618, 4621.)

The prosecutor next contended that another portion of the letter, which concerned having his uncle or cousin come down from the penitentiary, was relevant to show how Surenos convey messages and threats. (27 RT 4618, 4622-4625.) The court, however, sustained the defense objection as to that passage. (27 RT 4625.)

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The prosecutor also sought to introduce the following passage as a threat or implied threat of violence:

> Listen, if I run into Cris, I will advise him to do right, and I won't mention we talked about it. I'm also going to talk to a senor and see his response.

(27 RT 4619; see also 27 RT 4625-4627.) The prosecutor explained that Cris Morones was Gomez's co-defendant in a murder case, and asserted that a "senor is a higher-up in the Sureno culture." She then noted that appellant also had written, "That your co-defendant, he should have stood up like I did and taken the rap for the whole thing and let you get cut loose. That's what he should have done, and I can understand why you're mad that he didn't do that." (*Ibid.*) According to the prosecutor, an expert would explain that appellant meant that he was going to find out from the "senor" what he could to Cris to make sure that he took the rap for the entire murder. (27 RT 4619-4620, 4626-4627.)

The prosecutor next sought to introduce evidence that appellant placed Sureno symbols – i.e., the word "Kanpol" over three dots and two lines – next to his signature, indicating that he considered himself a Sureno soldier. (27 RT 4620, 4627.)

Defense counsel argued that neither the letter nor the specific portions discussed by the prosecutor constituted an attempt to commit any crime within the meaning of *People v. Phillips*, *supra*, 41 Cal.3d 29.[104] (27 RT 4621-4622, 4626.) With respect to the passage relating to "Cris,"

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[104] The defense also objected to the prosecution's request that the trial court admit evidence relating to appellant's letter to a fellow inmate, Robert Delacruz. (27 RT 4628-4635; People's Exhibit 177B.) However, the parties later stipulated to the introduction of that letter in its entirety. (30 RT 4994.)

defense counsel suggested that appellant's statement that he was going to ask for advice did not represent a threat to do violence. (27 RT 4626-4627.) However, the trial court admitted the portions of the letter discussed above.[105] (27 RT 4622, 4627.)

b. Evidence That Appellant Had Attempted to Smuggle The Letters Through the Legal Mail

The prosecutor further argued that the fact appellant tried to smuggle the letters out during his penalty phase was telling, in that he was continuing to make threats. (27 RT 4620, 4633-4635.) According to the prosecutor, evidence that he tried to smuggle the letters was relevant to explain the danger "he's placing other people in because he's going around the system to make good or to handle his business." (27 RT 4633.) The court ruled that the evidence was admissible on that point. (27 RT 4635.)

c. Rebuttal Evidence Introduced At Trial

On January 4, 2007, Deputy Sheriffs Joe Medina and Salvatore Picarella were handcuffing and searching appellant for the court line and noticed that he had an envelope reading "legal mail." (30 RT 4951-4953, 4959.) They searched the envelope for contraband and found that it contained nine envelopes containing personal letters. The envelopes were sealed, contrary to jail policy. (30 RT 4953, 4955, 4960-4964; People's Exhibit 177A-I.) Medina acknowledged that appellant did not threaten him and that he had no trouble with him. (30 RT 4954-4955.)

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[105] The prosecutor contended that a portion of the letter relating to potential defense witness Emiliano Lopez was also evidence of a threat or implied threat, as it showed how Surenos convey messages and threats. (27 RT 4618-4619, 4622-4623.) However, the court sustained the defense objection as to that passage, doubtful that it expressed a threat. (27 RT 4623-4625.)

Detective Javier Clift testified that he had been asked to review the letters recovered from appellant. (30 RT 4965-4966.) With respect to one of the letters (i.e., People's Exhibit 177B), Clift testified that: "the person mailing the letters reads Yolanda Mentira, M-e-n-t-i-r-a" and that "mentira" means "lie" in Spanish; the address on the envelope was 1211 East Wilmas, G Town, C, 90774; and, East Wilmas was the gang area where appellant lived and G Town was Ghost Town, the clique to which he belonged. (30 RT 4966.)

Clift opined that People's Exhibit 177A appeared to be written by appellant and addressed to Ursula Gomez, a female inmate in custody for a violent crime. (30 RT 4963, 4967-4968, 4973, 4993; see also People's Exhibit 179 [blow-up of appellant's signature on People's Exhibit 177A].) The letter was signed "Chingon." It also referred to East Side Wilmas GTL. According to Clift, East Side Wilmas was appellant's gang, and "GTL" referred to Ghost Town Locos, his clique. (30 RT 4967-4968.) One portion of the letter read as follows:

> However, newspapers have been making me a celebrity. Not that I don't like it, I love publicity. Choww, I'll be handing out autographs si no mas pide si gustas ya que las estrellas te doy a ti, mija, ha-ha.[106]

(30 RT 4968.) Appellant's letter continued, "I'm a lifer, wacha, and still feel like a million bucks." (*Ibid.*)

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[106] According to Clift, "Choww" is an expression of happiness or excitement. He translated the phrase "si no mas pide si gustas ya que asta las estrellas te doy a ti mija" to mean, "You don't have to ask me anymore, the stars are yours, I'll give you the stars, I'll give you the world." (30 RT 4968.)

Clift then testified about the passage beginning "I'm a dedicated Sureno to the fullest" (30 RT 4968-4969), opining that appellant was saying he was a dedicated gang member, and that he would be until he dies; and, that he took action on his own, killing the victim.[107] (30 RT 4968-4969.) Clift also quoted the paragraph beginning, "The D.A. is a joke" and referred to the "little cartoon face," opining that appellant meant that "[t]hat it's all a joke" and that he can handle it. (30 RT 4969-4971.) Clift next testified that in a portion of his letter appellant asked Gomez whether she knew how to get to other yards and housing locations, and about using canteen supplies to make pruno. (30 RT 4971-4972.)

Addressing the passage relating to Gomez's co-defendant Cris, Clift opined that appellant was saying he was going to ask a Mexican Mafia member if Cris should be killed, beat up or taxed. Clift further opined that appellant was willing to harm Cris if he did not take the rap. (30 RT 4974-4976.)

Clift testified that next to his signature, "Chingon," appellant placed the word "Kanpol" over three dots and two lines. According to Clift, "Kanpol" is a Sureno word meaning "Sureno" or "Southerner," and together with the dots and lines under the word, the symbol indicates "soldiers for the Mexican Mafia." (30 RT 4976-4977.)

Finally, Clift testified that, based on the return addresses, People's Exhibits 177E, 177F, 177G through 177I appeared to be written by Roberto Ramirez, an inmate housed two cells down from appellant; he did not know how appellant had obtained People's Exhibit 177H, a letter apparently

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[107] Clift testified that "torcido" means "arrested." (30 RT 4969.)

written by one Michael Ruiz; and, appellant apparently wrote People's Exhibits 177D and 177E. (30 RT 4963-4964.)

2. The Trial Court Erroneously Failed to Exclude Evidence Relating to Appellant's Letters Because It Did Not Demonstrate Actual Crimes

Again, this Court has uniformly held "that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72.) Moreover, a "true threat," as defined by the United States Supreme Court, must manifest a "serious expression of an intent to commit an act of unlawful violence." (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422, quoting *Virginia v. Black*, *supra*, 538 U.S. at p. 359.) Here, as defense counsel objected (27 RT 4621-4622, 4626; 31 RT 5013), evidence regarding appellant's letters did not demonstrate the commission of any crimes within the meaning of *People v. Phillips*. Tellingly, neither the prosecutor nor the trial court indicated what penal provision these acts purportedly violated.

In any event, a fair reading of the record shows that neither appellant's letter to Gomez nor his alleged attempt to smuggle letters through legal mail showed any "serious expression of an intent to commit an act of unlawful violence." First, contrary to the prosecutor's claims (27 RT 4617, 4621-4622), the section of appellant's letter beginning "The D.A. is a joke" (30 RT 4968-4971) did not contain any threat or implicit threat of violence. Appellant did not state, even implicitly, that he intended to commit any unlawful act. He did not refer to any sort of violent act, even implicitly. He did not refer to any potential or intended victim. At most,

appellant was expressing sardonic amusement that the prosecutor had depicted him as a "smart mother fucker," and a determination not to be defeated by his dire circumstances.

Second, it is clear that the paragraph regarding Tinajero (30 RT 4974-4976 ["I'm a dedicated Sureno to the fullest . . ."]), even assuming it was admitted as "factor (b)" evidence,[108] did not contain any threat or implicit threat of violence. If anything, appellant was expressing some measure of pride that he had "cut [Tinajero] loose" and chosen to fight the case himself. In any event, he was referring to the instant case – and to the death of Tinajero in particular – not issuing any threat of future violence.

Similarly, the paragraph referring to Cris Morones (30 RT 4974-4976) contained no threat or implicit threat of violence, but simply expressed appellant's intention to *advise* Cris to do the right thing and face the charges alone, as appellant himself did. The prosecutor contended that appellant's intention to speak with a Sureno higher-up to find out what he could do to make sure that Morones took the rap constituted a threat or implied threat of violence (27 RT 4619-4620, 4626-4627); that position amounted to pure speculation.

People v. Hamilton (2009) 45 Cal.4th 863, 934-938, provides an illustrative contrast. There, this Court held that the trial court properly admitted a letter written by the defendant which included a threat to kill several individuals connected to his case (namely, Deputy District Attorneys Frank Sexton and Frank McArdle, defense attorney Patrick

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[108] As explained above, the trial court did not explain why it was admitting this portion of the letter. (27 RT 4642.)

O'Connor, San Diego County Sheriff's Department Criminalist, Brandon Armstrong, and members of their families), to wit:

> By the way, today I got news from Quack. He says he knows I am innocent but also knows how I will get railroaded. So if I loose [*sic*] this case, they will take out O'Connor, Sexton, McCarno [*sic*] and Armstrong, or at least one member of their family [*sic*]. I don't like the idea of violence, since I have never been a violent person and the proposal seeks my agreement. I haven't sent an answer as of yet because I have to consider a lot of things before I do. I don't like the idea . . . but I also don't like sitting on someone else's murder charge! So that gives me a lot to think about.

(*Id.* at p. 935.)

This Court held that the letter was admissible as factor (b) evidence because the threat contained therein violated Penal Code section 69. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 937.) In so holding, this Court noted that the fact that the defendant wrote the letter at the start of the capital proceedings against him and in it threatened to kill the prosecutors, Sexton, McArdle, Armstrong, his own defense counsel, and their families should he lose at trial was sufficient evidence to find the letter contained threats against executive officers. (*Id.* at p. 936.) This Court also held that, despite the fact the letter was addressed to one of his friends, there was sufficient evidence to find that he knew the threats would be delivered to the district attorney's office. (*Id.* at pp. 878, 936.)

On the other hand, in *People v. Bolin*, *supra*, 18 Cal.4th at pp. 311, 340, this Court apparently agreed that the trial court erroneously admitted a threatening letter the defendant wrote to one Jerry Halfacre. Specifically, the letter read as follows:

"Jerry 6/25/90 "Well I finally heard from Paula [defendant's daughter and mother of Halfacre's child] and what I heard from her I'm not to[o] pleased with. I heard her side of things w[h]ich are real different from what you had to say. I'm only going to say this one time so you better make sure you understand. If you ever[] touch my daughter again, I'll have you permanently removed from the face of this Earth. You better thank your lucky stars you['re] Ashley's father or you[']d already have your fucking legs broke. "I found out what happen[e]d to most of the money from the van, and I also found out you got 1500 for the truck not 1300 like you said. I'm still going to find out how much you got for the Buick and if it's 1¢ over 1000 you can kiss your ass good by[e]. I also found out it was running like a top and the burnt valves was a bunch of bull shit, just like I thought in the first place. You sounded a little shak[]y over the phone and gave yourself away. "I told you a long time ago don't play fucking games with me. You're playing with the wrong person asshole. I've made a couple of phone calls to San Pedro to some friends of mine and the[y're] not to[o] happy with your fucking game playing with other people's money and especially you hitting Paula. "What I want done and it better be done. Everything that's mine or hers tools, clothes, books, gun, TV, VCR, I don't fucking care if it's a bobby pin, you better give it to Paula. I want all my shit given to her and I mean every fucking thing. You have a week to do it or I make another phone call. I hope you get the fucking message. Your game playing is eventually going to get you in more than a poo butt game player can handle. "1 week asshole. "And keep playing your game with [my granddaughter] and see what happens."

(*Id.* at p. 336, fn. 11.)

Appellant acknowledges that this Court concluded it need not definitively resolve the defendant's contentions with respect to his letter. (*People v. Bolin*, *supra*, 18 Cal.4th at p. 340.) However, it recognized that although some of the language in the letter was menacing, it also reflected

the defendant's concern for his daughter's and granddaughter's well-being. Moreover, the nature and circumstances of the threats would not necessarily provoke serious concern, especially considering that the defendant was incarcerated and would at the least have to make outside arrangements to effect them. Finally, Halfacre waited four months before giving the letter to his probation officer, during which time apparently nothing had happened. (*Ibid.*)

This Court's contrasting conclusions in *Hamilton* and *Bolin* plainly reflect the principle that a punishable true threat must express an intention of being carried out. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 339, citing *United States v. Kelner* (2d Cir. 1976) 534 F.2d 1020, 1026.) Nothing in appellant's letter manifested the sort of "serious expression of an intent to commit an act of unlawful violence" (*People v. Lowery*, *supra*, 52 Cal.4th at p. 422) present in Hamilton's letter, e.g., "So if I loose [*sic*] this case, they will take out O'Connor, Sexton, McCarno [*sic*] and Armstrong, or at least one member of their family [*sic*]." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 935.) Even Bolin's letter demonstrated a level of intent not present in appellant's letter: "If you ever[] touch my daughter again, I'll have you permanently removed from the face of this Earth"; "I've made a couple of phone calls to San Pedro to some friends of mine and the[y're] not to[o] happy with your fucking game playing with other people's money and especially you hitting Paula"; and, "Your game playing is eventually going to get you in more than a poo butt game player can handle. '1 week asshole." (*Id.* at p. 336, fn. 11.)

Finally, evidence that appellant attempted to smuggle personal letters through his legal mail did not constitute a threat or implied threat of violence. As noted above, the content of the letters did not constitute

threats. In addition, the act of carrying the letters, in and of itself, does not represent a threat or implied threat of violence. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589 [testimony of California Youth Authority counselor about "contraband" of a "gang-related" nature was inadmissible because there was no evidence defendant's possession of these unspecified items was criminal or involved any threat of violence]; cf., e.g., *People v. Martinez* (2003) 31 Cal.4th 673, 697 ["mere possession of a potentially dangerous weapon in custody involves an implied threat of violence"]; *People v. Harris* (1981) 28 Cal.3d 935, 963 [possession of a wire garrote and a prison-made knife while in jail "clearly involved an implied threat to use force or violence"].)

As demonstrated in Section I, *post*, the court's errors require that the death judgment be reversed.

I. The Trial Court's Error in Admitting the Evidence Was Unduly Prejudicial and Requires Reversal of the Death Judgment

The prosecutor's penalty phase case relied heavily on factor (b) evidence, as her penalty phase argument makes clear. (31 RT 5072-5080, 5084-5085, 5092 [prosecutor's argument to the jury regarding factor (b) evidence].) Indeed, after acknowledging that appellant's prior felony conviction for grand theft auto was "insignificant in this case" (31 RT 5072), the prosecutor argued as follows:

> But then we turn to factor (b), the presence or absence of criminal activity involving violence. This is where you get to the heavy stuff, ladies and gentlemen. This is where the defendant has earned his death sentence, because he has proven it over and over and over again that even locked up, he is not safe. Even locked up, he can get around the rules. Any rule you throw at him, he finds a way to circumvent it.

> Let's take a look. This evidence, ladies and gentlemen, of the defendant's conduct while in custody proves to us that if the defendant is allowed to live, others[']lives are in danger. Anybody who crosses this defendant's path or the paths of his friends, for that matter, is in danger if this defendant is given the gift of life.

(31 RT 5072-5073.)

Again stressing the importance of the factor (b) evidence, the prosecutor subsequently argued as follows:

> Look at the things he is willing to do despite all of this, despite being, excuse me, facing two counts of murder, and then ask yourself does this man deserve the gift of leniency at the expense of everybody else who is in that prison population?
>
> Because remember, ladies and gentlemen, even though the defendant is being taken out of the community, he is being placed right into another, and if he is given the gift of life, the lives of countless others are at risk. He has proven it over and over and over again.
>
> And this evidence, this factor (b) evidence, ladies and gentlemen, is enough to tip that scale in favor of a death verdict.

(31 RT 5084-5085.) Finally, the prosecutor argued that:

> He's evil. He doesn't care. Life is meaningless to him, and that's what makes him so dangerous. You look at everything he did under factor (b), you look at the fact that while in custody, facing murder charges, he actually killed another human being. While in jail he killed another human being.

(31 RT 5092; see also 31 RT 5076-5077 [prosecutor's argument with respect to appellant's possession of a paper clip and his letter to Santos].)

Even assuming some of the factor (b) evidence was properly admitted – namely, evidence relating to appellant's fight with another

inmate on June 30, 2002; his November 5, 2004, confrontation with Deputies Argandona, Florence and Saucedo; his possession of a shank on March 13, 2003; his December 19, 2003, attempted escape; and, his possession of a razor blade and syringe on July 13, 2004 – the introduction of the improper factor (b) evidence discussed in the preceding sections significantly, but unfairly, bolstered the prosecution's case in aggravation. In particular, the prosecutor was able to use the evidence to argue that, unless sentenced to death, appellant would continue to be a menace to those around him. For this reason, the trial court's error in admitting evidence regarding those acts, both alone and in combination, was unduly prejudicial.

The prejudicial effect of the erroneously-admitted factor (b) evidence was exacerbated by the prosecutor in her discussion of the specific acts. For instance, the prosecutor described appellant's December 7, 2004, encounter with Deputy Argandona as follows:[109]

> This is the incident where the defendant is coming back from court line, and he has his hands hidden sort of in his waistband and the deputy tells him remove your hands, and he doesn't. He gets in that fighting stance. He's ready to take this deputy on, and what does he have? He has chips.
>
> Now, fortunately for the deputy, but with a history like the defendant's, who will ever know? And if he's willing to get in that fighting stance over a bag of chips, what else might he be willing to fight over?

(31 RT 5076.) In so arguing, the prosecutor invited the jurors to engage in baseless, inflammatory speculation, both as to what appellant might have done to Argandona ("with a history like the defendant's, who will ever

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[109] The prosecutor mistakenly stated that the incident took place on December 17, 2004. (31 RT 5076; but see 23 RT 4003, 4009.)

know?") and as to crimes he might commit in the future ("if he's willing to get in that fighting stance over a bag of chips, what else might he be willing to fight over?"). Had the trial court excluded the evidence, as it should have, the prosecutor would have been unable to make such an argument.

Similarly, the prejudicial effect of the evidence relating to the June 7, 2005, incident involving Benji Gonzalez was exacerbated by a significant misstatement of fact.[110] Specifically, the prosecutor argued as follows:

> Because Benji would tell on everybody in the module to the deputies and Pineda doesn't like that. *He doesn't like people that tell on him*, and so he shouts it out for everybody to hear, "Benji, you fucking rat," inciting all of the other inmates to start yelling as well, putting the safety of Benji Gonzalez in jeopardy, because now he has been labeled a rat for all to hear.

(31 RT 5076; italics added.) However, there was no evidence that Gonzalez had "[told] on him." The prosecutor's misstatement invited the jurors to speculate that appellant had engaged in criminal activity not introduced at trial, especially since Gonzalez was not mentioned in connection with any of the other factor (b) evidence. Again, had the evidence been excluded, the prosecutor could not have made this argument.

Finally, the prejudicial effect of the trial court's errors was reinforced by the prosecutor's inclusion of non-factor (b) evidence – i.e., evidence that appellant possessed contraband (namely, pornographic material) on December 29, 2006 – in her summary of the factor (b)

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[110] The prosecutor mistakenly stated that the incident took place on June 17, 2004. (31 RT 5076; but see 23 RT 4022.)

evidence.[111] (31 RT 5078.) Specifically, the prosecutor, referring to a time line listing the incidents introduced under factor (b) (see 31 RT 5040), argued as follows:

> Up here, down here, excuse me, he hides contraband in his legal mail, in his legal file, excuse me. Should say legal file.
>
> Once again showing he can get around the rules, he's willing to get around the rules, he doesn't care about the rules, and he will invent new ways each time to get around those rules.
>
> Now, then we have January 3rd, 2007, and the People rest in the penalty phase, and that's not him being violent, that's just for context. I rested my case on January 3, 2007, at 12 o'clock in the afternoon. Then the defense started at 1:30 in the afternoon and they began putting on witnesses in mitigation for the defense.

(31 RT 5078.)

Although the incident did not involve the use or attempted use of force or violence, or the express or implied threat to use force or violence, the jury likely believed otherwise because the prosecutor explicitly listed it as factor (b) evidence. Moreover, although the incident was not specifically listed in CALJIC No. 8.87, the instruction explaining the use of the factor

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[111] The trial court ruled that appellant's possession of the pornographic material was not admissible as aggravating evidence (23 RT 3969-3970; 28 RT 4746; see also 27 RT 4634 [prosecutor told court that deputies had found hardcore pornography in what was supposed to be appellant's legal mail]), but could be used to rebut a defense expert's testimony that appellant had been discipline-free since July, 2005 (28 RT 4742-4747; see also 30 RT 4950-4951, 4958-4959 [testimony]).

(b) evidence in this case,[112] the jurors likely assumed or speculated that the contraband consisted either of weapons or threatening letters, which were specifically listed in the instruction.[113] (6 CT 1427.) Finally, it is likely that

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[112] CALJIC No. 8.87, as given to the jury in this case, reads as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence: physical assaults and threats against guards, possession of weapons, an attempted escape by violence, refusing to comply with guard's orders were [*sic*] compliance would reduce danger to the guards, a fight with another inmate, creating a disturbance which endangered another inmate, and sending threatening letters. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(6 CT 1427; 31 RT 5157-5159.)

[113] Similarly, even if this Court were to conclude that evidence relating to appellant's possession of an altered paper clip was not admitted pursuant to section 190.3, subdivision (b) (see Section G, *ante*), the prosecutor specifically referred to the matter in her summary of the factor (b) evidence. (31 RT 5076-5077.) It is likely the jurors assumed it fell within one or more of the categories listed in the instruction, particularly "attempted escape by violence" or "refusing to comply with guard's orders

(continued...)

the jurors either ignored or were confused by the prosecutor's statement that "that's not him being violent, that's just for context"; it is unlikely they related the comment to the contraband evidence, given that the prosecutor had already begun to discuss the incident of January 3, 2007.

Under these circumstances, it cannot be assumed that it would have made no difference if this evidence "had been removed from death's side of the scale' . . . ." (See *Richmond v. Lewis* (1992) 506 U.S. 40, 48.) To the extent that the evidence was admitted for another purpose, namely, rebuttal (see Section H, *ante*), the prejudicial effect, as explained above, was so substantial that the trial court should have excluded it pursuant to Evidence Code section 352. As such, there is a reasonable possibility that consideration of the improper factor (b) evidence discussed above, alone and in combination, affected the penalty verdict (*People v. Brown* (1988) 46 Cal.3d 432, 447), and it cannot be considered harmless beyond a reasonable doubt in that it cannot be held that "it did not contribute to the [sentence] obtained." (*Sochor v. Florida* (1992) 504 U.S. 527, 540, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, the judgment of death must be set aside.

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[113](...continued)
were [sic] compliance would reduce danger to the guards." (6 CT 1427.)

VII

THE TRIAL COURT'S DETERMINATION OF THE ULTIMATE FACTUAL QUESTION WHETHER THE ACTS INTRODUCED PURSUANT TO PENAL CODE SECTION 190.3, FACTOR (B), INVOLVED FORCE OR VIOLENCE OR THE EXPRESS OR IMPLIED THREAT OF FORCE OR VIOLENCE IMPERMISSIBLY INVADED THE EXCLUSIVE FACTFINDING PROVINCE OF THE JURY AND REQUIRES REVERSAL UNDER BOTH THE FEDERAL CONSTITUTION AND STATE LAW

A. Introduction

Over appellant's objection, the trial court admitted, as factor (b) evidence of other crimes involving violence or the threat thereof, testimony regarding the following incidents: (1) appellant's fight with another inmate on June 30, 2002 (23 RT 3978-3993); (2) a November 5, 2004, confrontation with Deputy Jason Argandona, Deputy David Florence and Deputy Asael Saucedo (23 RT 3997-4003, 4007-4014, 4020-4021, 4035-4060); (3) a December 7, 2004, confrontation with Deputy Argandona (23 RT 4003-4009, 4015-4017); (4) a June 7, 2005, confrontation with and threats against a fellow inmate, Benjamin Gonzalez (23 RT 4022-4031); (5) a letter appellant wrote on September 26, 2006, which contained a purported threat against another individual (23 RT 4075-4093); and, (6) appellant's attempt to smuggle letters out of the jail on January 4, 2007, one of which contained a purported threat against another inmate (30 RT 4950-4997). The following incidents were also used as factor (b) evidence: (1) appellant's possession of a shank on March 13, 2003; (2) a December 19, 2003, attempted escape by use of force or violence; and, (3) his possession

of an altered razor blade and syringe on July 13, 2004.[114] (31 RT 5072-5079, 5084-5085 [prosecutor's argument]; 6 CT 1427 [CALJIC No. 8.87].)[115]

The only issue submitted to the jury was whether appellant did in fact commit the criminal acts, not whether those acts involved an implied threat of force or violence. (6 CT 1427.) Appellant argues in this section

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[114] As noted in footnote 89, *ante*, evidence relating to this second set of incidents had been introduced at the guilt phase, pursuant to Evidence Code section 1101, subdivision (b).

[115] CALJIC No. 8.87, as given to the jury in this case, reads as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts which involved the express or implied use of force or violence or the threat of force or violence: physical assaults and threats against guards, possession of weapons, an attempted escape by violence, refusing to comply with guard's orders were [*sic*] compliance would reduce danger to the guards, a fight with another inmate, creating a disturbance which endangered another inmate, and sending threatening letters. Before a juror may consider any criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(6 CT 1427; 31 RT 5157-5159.)

that the trial court erred in appropriating to itself the issue of whether the acts were ones of force or violence when, under applicable constitutional and statutory law, it was a factual question to be determined by the jury.

Penal Code section 190.3 states that, in determining the penalty, the "trier of fact" shall take into account specified aggravating, as well as all mitigating, circumstances. Section 190.3, factors (a) through (c), list the three statutory aggravating factors: factor (a), the circumstances of the crime; factor (b), criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence (hereinafter "force, violence or threat"); and factor (c), any prior felony conviction. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 509 [suggesting that, on request, a trial court instruct the jury that it may not consider in aggravation anything other than the statutory aggravating factors].) Although the ultimate penalty determination is, as this Court has long stressed, moral and normative, not factual, the aggravating circumstances are necessarily grounded in factfinding by the jury. Nevertheless, for no logically discernible reason – the practice has arisen that only some of the facts determinative of factor (b) are decided by the jury. The most critical factual determination – whether the crime *involved* the use or threatened use of force or violence – is made by the court. Not only is this disparate treatment of factor (b) anomalous within the structure of the state's capital sentencing scheme, but it offends the basic precepts of the Sixth and Eighth Amendments and due process held applicable to the penalty decision.

In many, if not most, factor (b) cases, the asserted erroneous allocation of factfinding to the judge is not consequential because the alleged uncharged crime has force, violence or threat thereof as an element

which the jury is instructed to find beyond a reasonable doubt.[116] However, in this case, the trial court did not instruct the jury with respect to the elements of the acts introduced pursuant to factor (b). Appellant submits that whether appellant committed a crime involving force, violence or threat is a factual question which should ultimately have been decided by the jury, and the jury should have been instructed accordingly.

Here, by taking the element of force, violence or threat – the gravamen of aggravation – away from the jury, the court exceeded its proper, limited gatekeeper role and denied appellant his statutory and constitutional rights to a jury determination of all aggravating facts. Further, because the crime and appellant's conduct were not inherently violent – that is, the jury could have reached a different conclusion than the court with respect to one or more of the acts introduced pursuant to factor (b) – the court's error was prejudicial and requires that the death judgment be set aside.[117]

B. The Instant Argument Is Cognizable on Appeal

The error discussed in this argument is cognizable on appeal even though defense counsel proposed a jury instruction which was similar to the version of CALJIC No. 8.87 given in this case, and ultimately acceded to

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[116] Defense counsel withdrew his request for jury instructions setting forth the elements of the crimes introduced pursuant to factor (b). (31 RT 5012-5013, 5016-5017, 5046-5047.) Nevertheless, this argument is cognizable on appeal. (See Section B, *post.*)

[117] The procedural history relating to the admission of the factor (b) evidence is set forth in Arguments V and VI, *ante.*

the use of that instruction.[118] Nevertheless, appellant's argument that the trial court erred in appropriating to itself the issue of force or violence is cognizable on appeal.

This Court has explained that "'if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find "invited error"; only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction, do we deem it to nullify the trial court's obligation to instruct in the cause.' [Citation omitted.]" (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; see also *People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20 [merely acceding to an erroneous instruction does not constitute invited error; nor

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[118] Defense counsel's Proposed Jury Instruction No. 23, relating to the jury's consideration of factor (b) evidence, read as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: _____, which involved [the expressed or implied use of force or violence] [or] [the threat of force or violence].
>
> In determining whether the defendant committed the foregoing alleged criminal acts, you are instructed that the defendant is presumed to b [*sic*] innocent. Before you may consider any of such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the criminal act[s] occurred and that the defendant did in fact commit such criminal act[s]. You may not consider any evidence of any other criminal act[s] as an aggravating circumstance.

(6 CT 1401.)

must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty].) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham, supra*, 32 Cal.3d at pp. 332-335; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

First, the record demonstrates that the trial court intended to give the standard version of CALJIC No. 8.87, not that it was induced to do so by the defense. (See 30 RT 5002 [trial court explained that it generally gave standard CALJIC instructions unless persuaded that the language of a proposed instruction was better]; see also 27 RT 4580 [court stated that it had drafts of the jury instructions for counsel].) Second, defense counsel expressed no tactical purpose for failing to request that the trial court instruct the jury that it could not consider a criminal act as an aggravating factor without first finding that such act involved force, violence or threat.

Moreover, instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, §§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) In Sections C and D, *post*, appellant demonstrates that the court's error did indeed affect his substantial rights, and therefore his claim is properly before this Court.

C. Whether a Crime Involves Force, Violence or Threat is a Factual Question for the Jury, Not a Legal Question for the Court

The Sixth Amendment guarantees that all factfinding necessary to support a death verdict must be conducted by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 609 [recognizing that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."].) The Eighth Amendment uniquely imposes on a capital jury the responsibility to "express the conscience of the community on the ultimate question of life or death," in addition to its traditional role as factfinder. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519; see also *Ring v. Arizona* (2002) 536 U.S. 584, 615-616, 619 (conc. opn. of Breyer, J.) [concluding that the Eighth Amendment's procedural safeguards require that only a jury may determine whether society's ultimate punishment is justified in a particular case].)

In keeping with these constitutional mandates, the state's capital sentencing scheme reserves for the jury all the factfinding and moral weighing necessary to impose the death penalty. (Pen. Code, §§ 190.2 & 190.3.) Thus, absent a valid jury waiver, the trial court has no factfinding or normative authority at the penalty hearing beyond that granted by the Legislature.

With respect to the weighing process, the court's role is specified in Penal Code section 190.4 and comes into play only after the jury has rendered a death verdict. (Pen. Code, § 190.4, subd. (e) [providing that in every case in which the jury returns a death verdict, the trial judge shall review the evidence and make a determination whether the jury's findings and verdict are contrary to law or the evidence presented].)

As for factfinding at the penalty phase, the court's authority is no greater than that at the guilt phase. This Court has often stated that the generally applicable rules of evidence have equal application to noncapital and capital trials and to both the guilt and penalty phases of the latter. (See, e.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1033.) Evidence Code sections 310 and 312 delineate the respective provinces of judge and jury at trial. Evidence Code section 310 specifies that all questions of law, but only issues of fact that are foundational or preliminary to the admission of evidence, are to be decided by the court. Evidence Code section 160 states that "law," hence a question of law, refers to constitutional, statutory, decisional law and the like. Evidence Code section 312 states that where there is trial by jury, all questions of fact are to be decided by the jury.

The definition of a "preliminary fact" and the scope of the court's factfinding authority under section 310 are specified in Evidence Code sections 401 to 405. In particular, section 405 provides that if a preliminary fact is also a fact in issue in the action, the jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact. (Evid. Code, § 405, subd. (b)(1).) Moreover, the jury's determination of the fact may differ from the court's determination. (Evid. Code, § 405, subd. (b)(2).)

In *People v. Nakahara* (2003) 30 Cal.4th 705, 720, this Court stated that "[t]he question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court." (Italics in original.) This analysis is demonstrably wrong.

Juries are constantly called upon to characterize facts and draw precisely the types of historical and circumstantial inferences this Court has mistakenly allocated to the trial court. Indeed, under the Court's rationale, it would be fair to say that, absent a direct statement of a defendant's intent or mental state, all such findings are characterizations of the defendant's acts and thus would be legal questions for the court.

However, in evaluating factor (b) evidence the jury should be required to make findings not only as to (1) whether the defendant committed the criminal activity, but (2) whether the activity involved force, violence or threat, regardless of who committed it. Obviously, whether a defendant expressly used force or violence or expressly threatened force or violence are observable acts which require no characterization and, thus, even under *Nakahara*, would necessarily go to the jury. Whether force and violence were impliedly involved or threatened is similarly a common jury question which, like intent or other mental elements, is determined by reasonable inferences from circumstantial evidence. Indeed, in the cases where this Court has found an implied threat of force or violence, it has considered precisely the same circumstantial facts that a jury would look at in making this determination. (*People v. Elliott* (2012) 53 Cal.4th 535, 587 ["[t]he factual circumstances surrounding the possession [of a firearm] may indicate an implied threat of violence"]; see, e.g., *People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127 [possession of weapon while subject to parole searches sufficient for implied threat of violence]; *People v. Michaels* (2002) 28 Cal.4th 486, 535-536 [possession of weapons sufficient to find implied threat to use force or violence]; *People v. Quartermain* (1997) 16 Cal.4th 600, 631 [possession of sawed-off firearms and silencers sufficient for implied threat of violence]; *People v. Ramirez* (1990) 50 Cal.3d 1158,

1186-1187 [possession of knife in custodial setting sufficient for implied threat of violence].)

It follows that the question of whether an alleged crime involved force, violence or threat is not within the scope of either preliminary facts or of legal issues within the meaning of Evidence Code section 310. By contrast, whether a crime is a "crime of violence" or a "violent felony" is clearly a legal question since it is, in most instances, a matter of statutory interpretation, but in no instance a case-specific determination of fact. In California, a "violent felony" is limited to the crimes specified in Penal Code section 667.5, subdivision (c). (Cf. *Stinson v. United States* (1993) 508 U.S. 36, 47 [holding that unlawful possession of a firearm by a felon is not a "crime of violence" because the commentary to the Sentencing Guidelines is binding on the federal courts].) Consequently, no matter how violent the circumstances surrounding the commission of the crime, it is not a "violent felony" unless it is enumerated in section 667.5, subdivision (c). None of the acts at issue here – "physical assaults and threats against guards," "possession of weapons," "an attempted escape by violence," "refusing to comply with guard's orders were [*sic*] compliance would reduce danger to the guards," "a fight with another inmate," "creating a disturbance which endangered another inmate," and "sending threatening letters" – is one of the enumerated violent crimes, at least on its face.[119]

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[119] By contrast, the enumerated crimes include assault with the intent to commit a specified felony, in violation of Penal Code section 220 (Pen. Code, § 667.5, subd. (c)(15)), and threats to victims or witnesses, as defined in Penal Code section 136.1 (Pen. Code, § 667.5, subd. (c)(20)), neither of which is at issue in this case.

Nor is the factfinding approved by this Court within the scope of the trial court's proper gatekeeping function. Indeed, this judicial appropriation offends the most basic safeguard applicable to factor (b) evidence – namely, that this factor should be proved beyond a reasonable doubt to the jury. (*People v. Stanworth* (1969) 71 Cal.2d 820, 840-841 [holding that trial court has sua sponte duty to instruct the jury that it may consider only those crimes found beyond a reasonable doubt]; *People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8, overruled on another ground in *People v. Laino* (2004) 32 Cal.4th 878, 893 ["in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established"].) It should be noted that in the guilt trial, the court engages in no dispositive factfinding with respect to other crimes evidence. Rather, the only preliminary screening function performed by the court is to weigh the probative value of the proffered evidence against its prejudicial effect under Evidence Code section 352. (*People v. Rogers* (2013) 57 Cal.4th 296, 331.) If the evidence is allowed, the issue is duly submitted to the jury. (See, e.g., CALJIC No. 2.50.)

In the penalty phase, the trial court may exercise an additional gatekeeping role. In *People v. Phillips* (1985) 41 Cal.3d 29, this Court recommended that, where factor (b) evidence is proffered, it may be advisable for the trial court to conduct a preliminary inquiry to determine whether there is sufficient substantive evidence to prove the elements of the other criminal activity. (*Id.* at p. 73, fn. 25.) This Court did not also recommend that the trial court determine whether the crime involves force or threat of force or violence. Thus, the screening hearing recommended in *Phillips* bears no resemblance and lends no support to the ultimate factfinding approved in *Nakahara*. Whether the proffered factor (b)

conduct amounts to a crime is an appropriate preliminary question for the court under either Evidence Code section 402 or section 352. If the evidence is excluded, that is the end of it. But, if the evidence is admitted, the issue goes to the jury to be decided under the beyond a reasonable doubt standard.

Similarly, whether the proffered conduct is a crime involving force, violence or threat is an issue for the jury irrespective of any preliminary factfinding by the court. (See Evid. Code, § 405, subd. (b)(1).) Appellant recognizes that this Court has upheld the practice of taking this question away from the jury in the face of a Sixth Amendment challenge under *Apprendi v. New Jersey* (2000) 530 U.S. 466. (See, e.g., *People v. Ochoa* (2001) 26 Cal.4th 398, 452-453, abrogated on another ground as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) That is not appellant's argument.

In *People v. Ochoa, supra*, 26 Cal.4th at pp. 452-453, the defendant appealed the trial court's denial of his request for a special jury instruction which required a juror determination whether the crime involved force, violence or threat. The requested instruction, a modification of CALJIC No. 8.87, read: "You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by the Defendant unless you first determine beyond a reasonable doubt that (1) the Defendant committed the acts; [and] (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (*People v. Ochoa, supra*, 26 Cal.4th at pp. 452-453.) The defendant argued that *Apprendi*'s holding that the Sixth Amendment jury guarantee applies to sentencing factors mandated that the jury determine for itself whether the acts involved the use, attempted use or threatened use of force or violence.

(*Id.* at p. 453.) This Court rejected the argument on the ground that *Apprendi* and the Sixth Amendment do not require a jury to find beyond a reasonable doubt the sentencing factors specified in section 190.3 because the defendant's eligibility for the death sentence has already been determined by the jury in compliance with Sixth Amendment standards. (*Id.* at p. 454.)

To be clear, for purposes of this argument, appellant has no quarrel with *Ochoa* because his claim does not invoke the jury mandate of *Apprendi*. Rather, he bases his argument on the historical and statutory division of authority between judge and jury which is fundamental to our justice system. Consequently, appellant's argument does not conflict with *Ochoa*, but cannot be reconciled with the distinction between facts and characterization of facts that this Court posited in *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720.

In *People v. Nakahara*, *supra*, 30 Cal.4th at p. 720, this Court again rejected the argument that CALJIC No. 8.87 was invalid for failing to submit to the jury the issue whether the defendant's acts involved force, violence or the threat thereof. However, in that case, in contrast to *Ochoa*, the stated rationale for removing the issue from the jury was that the presence or absence of force, violence or threat was a question of law, not a question of fact. As noted above, this is an untenable distinction. Whether an act involves force, violence or threat is not a definitional or categorical question; rather, it is always a question of fact. Further, while the question whether the proffered facts amount to a crime may be subject to preliminary judicial screening, both that and the presence or absence of violence are ultimately and indisputably issues for the jury, not the court. (Cf. *People v. Phillips*, *supra*, 41 Cal.3d at p. 73, fn. 25 [after the trial court has

determined at a hearing under Evidence Code section 402 what evidence is admissible as other criminal activity, the issue is submitted to the jury].) Accordingly, this Court is respectfully urged to reconsider its reasoning in *Nakahara*, endorsing the allocation of ultimate factfinding to the trial court when the jury is the exclusive trier of all facts at the penalty phase.

D. The Error in Failing to Submit the Factual Question Whether Appellant's Acts Involved Force, Violence or Threat Was Prejudicial and Requires Reversal of the Death Verdict

It has long been recognized that evidence of other crimes "'may have a particularly damaging impact on the jury's determination whether the defendant should be executed'" (*People v. Robertson* (1982) 33 Cal.3d 21, 54, quoting *People v. Polk* (1965) 63 Cal.2d 443, 450) – hence the requirement that the jury must be instructed that it is not to consider such evidence as aggravating circumstances unless it has first found that these crimes have been proven beyond a reasonable doubt. (See, e.g., *People v. Robertson, supra,* 33 Cal.3d at p. 54; *People v. McClellan* (1969) 71 Cal.2d 793, 804-805.) That the defendant committed another crime, even one which may have been relatively minor, invokes the heightened standard of proof required by this Court because it raises the inference of propensity or readiness to commit violent acts, the basis for the admission of the proffered factor (b) evidence here, that is so damaging – i.e., aggravating – that it necessitates the utmost scrutiny by the jury. (*People v. Robertson, supra*, 33 Cal.3d at p. 54.)

That the trial court makes the finding whether an act introduced under factor (b) involves force, violence or threat – that is, makes a conclusive determination on an essential issue – violates due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [recognizing that when state

law creates for a defendant a liberty interest in having the jury make particular findings, judicial findings will not suffice to protect that entitlement for due process purposes].) Moreover, in delegating all factfinding to the jury at the penalty phase, the Legislature and this Court have implicitly invoked, most particularly with regard to unadjudicated crimes evidence, the reliability and normative principles that are at the core of the Sixth and Eighth Amendments. (See, e.g., *People v. Albertson* (1944) 23 Cal.2d 550, 579-580 [requiring a heightened standard of proof for other crimes evidence at penalty trial, i.e., the beyond-a-reasonable-doubt standard, instead of the preponderance standard applicable in the guilt trial].) Accordingly, the trial court's error in depriving appellant of essential factfinding by the jury is constitutional error subject to the *Chapman* prejudice standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].) Moreover, even if the error is deemed to be state-law error, the "reasonable possibility" standard applies. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1092, citing *People v. Brown* (1988) 46 Cal.3d 432, 448 [explaining that the reasonable-possibility standard of prejudice first articulated in *Brown* is the "same in substance and effect" as the beyond-a-reasonable-doubt standard of prejudice articulated in *Chapman*].)

The relevant question in the present case may also be stated as whether, absent the error, there is a reasonable likelihood that "at least one juror would have struck a different balance" between life and death. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537.) That standard is readily met here where it is certainly conceivable that at least one juror would have found that one or more of the acts introduced pursuant to factor (b) did not

involve force, violence or threat thereof, and as a result, would have concluded that the appropriate punishment was life without parole, not death. (See Arguments II, V and VI, *ante*, hereby incorporated by reference as if fully set forth herein.) For instance:

(1) One or more of the jurors could have found that the evidence regarding appellant's fight with another inmate on June 30, 2002, was not sufficient to establish an assault or battery, but instead suggested that he may have been acting in self-defense. As appellant has pointed out, evidence regarding the incident came in solely through the testimony of a deputy sheriff who was not present during the incident, and whose information was largely second- and third-hand. (See Argument V, *ante*.)

(2) One or more of the jurors could have found that appellant's December 7, 2004, confrontation with Deputy Argandona did not involve force, violence or threat. This is especially so in light of evidence suggesting that appellant did not attempt to assault Argandona. In particular, the evidence showed that appellant's hands were in front of him, in handcuffs, and the handcuffs were cuffed to a chain around his waist. When Argandona asked appellant to show what he had in his hands, appellant did not move toward him; rather, appellant ducked down and turned *away* from him. Finally, appellant was holding a bag of potato chips, not a weapon. (See Argument VI, Section D, *ante*.)

(3) One or more of the jurors could have found that one or more of the letters written by appellant and allegedly containing threats did not in fact contain any express or implied threats to use force or violence. For instance, as appellant has noted, appellant's letter to Della Rose Santos did not show an express or implied threat to use force or violence, but, at most, amounted to appellant's observation that another inmate was in a serious

predicament because he had snitched in an unrelated case. Similarly, appellant's letter to Ursula Gomez did not show an express or implied threat to use force or violence, but reflected appellant's intention to advise another inmate to do the right thing and face his criminal charges alone, as appellant himself had done. (See Argument II, Section B.3.f, and Argument VI, Sections E and H, *ante*.) Also, the trial court expressly admitted appellant's letter to Santos on the ground that it established a threat under Penal Code section 140 (22 RT 3821-3822), and therefore that letter did not constitute a "violent felony" enumerated in Penal Code section 667.5, subdivision (c). (Cf. Pen. Code, § 667.5, subd. (15) [listing threats to victims or witnesses, as defined in Penal Code section 136.1].)

(4) One or more of the jurors could have found that appellant's June 7, 2005, confrontation with fellow inmate Benjamin Gonzalez did not involve force, violence or threat. There was no evidence that appellant had any physical contact, but was simply yelling that Gonzalez was a "rat." As such, the evidence showed nothing more than appellant's scorn for Gonzalez, particularly in the absence of evidence that Gonzalez had provided law enforcement officials any information relating to him. (See Argument VI, Section F, *ante*.)

(5) One or more of the jurors could have found that appellant's possession of an altered paper clip involved no express or implied threat to use force or violence, particularly in the absence of any evidence that he used the paper clip to effect an escape. (See Argument VI, Section G, *ante*.)

(6) One or more of the jurors could have found that appellant's possession of a razor and syringe on July 13, 2004, did not involve force, violence or threat, especially in light of testimony that such syringes may be

used to inject drugs and that the needle was little more than half an inch long (16 RT 2797-2798, 2800, 2802, 2805, 2807-2808, 2810-2815), as well as testimony that razors are sometimes used by inmates to sharpen their pencils (16 RT 2812-2814).

Appellant submits that the error was not cured by the fact that the characterization of the criminal acts set forth in CALJIC No. 8.87 – in particular, "physical assaults and threats against guards, "an attempted escape by violence," "refusing to comply with guard's orders were [*sic*] compliance would reduce danger to the guards," "a fight with another inmate," "creating a disturbance which endangered another inmate," and "sending threatening letters" – refer to force, violence or threat. Those descriptions simply expressed the findings already made by the trial court, findings which were properly within the province of the jury. As noted above, the instruction did not instruct the jurors that they must find beyond a reasonable doubt that the acts involved force, violence or threat, but simply whether the acts occurred and, if so, whether appellant committed them.

The prosecutor made very damaging use of the evidence in her penalty phase closing argument. Indeed, the prosecutor stressed that the factor (b) evidence "is where you get to the heavy stuff, ladies and gentlemen. This is where the defendant has earned his death sentence, because he has proven it over and over and over again that even locked up, he is not safe." (31 RT 5072-5073.) She relied heavily and extensively on that evidence in arguing that death was the appropriate verdict, e.g., because unless he were sentenced to death, appellant would continue to be a menace to those around him. (Argument VI, Section I, *ante*.) As such, it is reasonably possible that taking the issue of force, violence and threat away

from the jury contributed to the death verdict. Therefore, the death judgment must be reversed.

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VIII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the second offense charged against appellant, Penal Code section 190.2 contained twenty-one special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 6 CT 1425; 31 RT 5152.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior

criminality. (CALJIC Nos. 8.85, 8.85A, 8.85B, 8.86 & 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].)[120] In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (6 CT 1425-1427; 31 RT 5152-5159.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona, supra*, 536 U.S. at p. 604, and *Apprendi v. New Jersey, supra*, 530 U.S. at p. 478 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. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 6 CT 1428; 31 RT 5162-5165.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring*, and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus

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[120] CALJIC No. 8.85A concerned the jury's consideration of victim impact evidence. (6 CT 1426; 31 RT 5156.) CALJIC No. 8.85B instructed that, in determining the penalty issue, the jury was not to consider the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of execution or of maintaining a prisoner for life without the possibility of parole. (6 CT 1426; 31 RT 5156-5157.)

failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Blakely*, *Ring* and *Apprendi*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (6 CT 1425-1426, 1428; 31 RT 5152-5155, 5162-5165), failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*, 536 U.S. 584. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury, nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was

instructed that unanimity was not required. (CALJIC No. 8.87; 6 CT 1427; 31 RT 5157-5159.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant (see Arguments V and VI, *ante*) and the jury was instructed that each juror could decide for him or herself whether appellant had committed the alleged crime. (CALJIC No. 8.87; 6 CT 1427; 31 RT 5157-5159.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 6 CT 1428; 31 RT 5164.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal

Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP (life without the possibility of parole) verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

6. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the

consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. (CALJIC Nos. 8.74 & 8.80.1; 5 CT 1271.) In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

7. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; 6 CT 1425-1426; 31 RT 5153 [Pen. Code, § 190.3, factors (d) and (g)]) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Some of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., factors (e) [whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act] and (f) [whether the defendant reasonably believed the circumstances morally justified or extenuated his conduct]; 6 CT 1425-1426; 31 RT 5153.) The trial court failed to omit those factors from the jury instructions, likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 (6 CT 1425-1426; 31 RT 5152-5155) were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's 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. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.)

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges this Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short of International Norms

This Court has repeatedly 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" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; see also *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the court to reconsider its previous decisions.

IX

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

Assuming, arguendo, that the errors asserted in Arguments I-VIII, taken separately, do not require reversal, the effect of these errors should be evaluated cumulatively because together they undermine confidence in the fairness of the trial and the reliability of the resulting death judgment. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 15; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect the trial with unfairness that the resulting verdict is a denial of due process]; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 ["The Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Here, appellant was denied his constitutional rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process under the Sixth, Eighth and Fourteenth Amendments to the United States

Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution, because the trial court erroneously excused a prospective juror for cause.

In addition, each of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282; *Chapman v. California, supra*, 386 U.S. at p. 24.) The trial court's erroneous admission of irrelevant, inflammatory "other acts" evidence, gang evidence, and hearsay evidence regarding appellant's possession of "shanks" effectively foreclosed any defense to both counts. For instance, as previously noted, absent these errors the jury may have been more likely to credit the defense theory that Raul Tinajero's cellmates, not appellant, killed him; in turn, the jurors may have been more likely to credit appellant's testimony that Armenta's death was accidental. As a result, these errors, viewed separately or in combination, deprived appellant of his state and federal constitutional rights to a fair trial, due process and a reliable determination of guilt. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *People v. Brown* (1988) 46 Cal.3d 432, 448.) Appellant's convictions and the special circumstance findings must therefore be reversed. (*People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital-murder conviction for cumulative error].)

In addition, the death judgment must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court

considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may not affect the guilt determination can have a prejudicial impact on the penalty trial. (*People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase]; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase].)

In the present case, there is at least a reasonable possibility that the guilt and penalty phase errors, singly and in combination, had a prejudicial effect upon the jury's consideration of the evidence presented at the penalty phase, as well as the jury's ultimate decision to return a death sentence. Penalty phase errors – namely, the erroneous admission of non-violent, non-criminal factor (b) evidence, as well as factor (b) evidence admitted in violation of the confrontation clause and the hearsay rule, errors which were exacerbated by the trial court's error in improperly appropriating the determination of the factual question whether the acts introduced pursuant to factor (b) involved force, violence or threat – compounded the already substantial prejudicial effect of guilt phase error on the penalty determination.

Reversal of the death judgment is therefore mandated here because it cannot be shown by the People that the penalty errors, individually,

collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Brown*, *supra*, 46 Cal.3d at p. 466.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, special circumstance findings, and death sentence.

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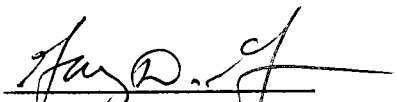
CONCLUSION

For all the reasons stated above, appellant's convictions and the judgment of death must be reversed.

Dated: August 21, 2014

Respectfully submitted,

MICHAEL HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2)

I, Gary Garcia, am the Senior Deputy State Public Defender assigned to represent appellant SANTIAGO PINEDA in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 93,182 words in length.

DATED: August 21, 2014

GARY D. GARCIA

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Santiago Pineda**
Case Number: **Supreme Court Crim. No. S150509**
Los Angeles County Superior Court No. NA051943-01 c/w NA061271-01

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

by enclosing it in envelopes and

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

The envelopes were addressed and mailed on **August 21, 2014,** as follows:

Santiago Pineda CSP-SQ F-63366 San Quentin, CA 94974	Office of the Attorney General Scott A. Taryle Supervising Deputy Attorney General 300 South Spring St., Ste. 1702 Los Angeles, CA 90013
Honorable William R. Pounders Los Angeles Superior Court Capital Appeals Unit 210 West Temple Street., M-3 Los Angeles, CA 90012	California Appellate Project 101 Second Street., Suite 600 San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on August 21, 2014, at Oakland, California.

NEVA WANDERSEE