IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	No S163643
Plaintiff/Respondent	Los Angeles County
vs.	NA071779
FRANK C. GONZALEZ	
Defendant/Appellant	

APPELLANT'S OPENING BRIEF

TO THE HONORABLE CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

On Automatic Appeal from the Judgment of the Los Angeles County Superior Court, Honorable Joan Comparet-Cassani

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TABLE OF CONTENTS

PENALTY PHASE ISSUES

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

STATE CONSTITUTION

STATUTORY AUTHORITY

Evidence Code

Penal Code

USC

CASE AUTHORITY

United States Supreme Court

Other Case Authority

OTHER AUTHORITIES

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STATEMENT OF THE CASE

On April 4, 2007, an Information was filed charging appellant, Frank Gonzalez, and co-defendant Justin Flint with two counts of criminal activity. The charged counts were as follows:

Count 1 charged Gonzalez and Flint with the first degree murder of Maria Rosa, on or about March 28, 2006, in violation of Penal Code section 187 (a). A special circumstance was also alleged, charging that during the commission of the crime set forth in Count I, Gonzalez and Flint

were engaged in the commission of an attempted robbery, within the meaning of Penal Code section 190.2 (a) (17). It was further alleged that Gonzalez and Flint personally and intentionally discharged a firearm, a handgun, which proximately caused great bodily injury and death to Maria Rosa within the meaning of Penal Code section 12022.53 (d); Gonzalez and Flint personally discharged a firearm, a handgun, within the meaning of Penal Code section 12022.53(c); and that Gonzalez and Flint personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b).

Count 2 charged Gonzalez and Flint with attempted second degree robbery against the person of Maria Rosa, on or about March 28, 2006, in violation of Penal Code sections 211 and 664. It was further alleged that Gonzalez and Flint personally and intentionally discharged a firearm, a handgun, which proximately caused great bodily injury and death to Maria Rosa within the meaning of Penal Code section 12022.53 (d); and that Gonzalez and Flint personally discharged a firearm, a handgun, within the meaning of Penal Code section 12022.53(c); and that Gonzalez and Flint personally used a firearm, a handgun, within the meaning of Penal Code section 12022.53(b).

Jury selection began on March 19, 2008 (IV CT 799) and the jury was empaneled on April 7, 2008. (IV CT 821.) The prosecution's case

commenced on April 9, 2008 (IV CT 832), and it rested on April 15, 2008. (IV CT 843.) Appellant rested on the same day without presenting any witnesses. (*Ibid.*) The jury was instructed on April 17, 2008. (IV CT 845.) On April 22, 2008, the jury returned a guilty verdict on all counts and true findings on all allegations. (IV CT 953 et seq.)

The penalty phase of the trial began April 25, 2008. (IV CT 956.) The prosecution rested on May 1, 2008. (IV CT 966.) Appellant presented his case on May 2, 2008, and rested the same day. (IV CT 968 et seq.) The jury was instructed and began deliberations on May 5, 2008. (IV CT 974.) On May 8, 2008, the jury returned a verdict of death. (IV CT 1017.)

On May 12, 2008, appellant waived a Motion for New Trial. Appellant's Automatic Motion for Modification of Sentence was denied by the trial court and a judgment of death was imposed. (XLII CT 10728-10730.)

This appeal is automatic. Counsel was appointed on December 27, 2011.

STATEMENT OF FACTS

GUILT PHASE

Very early in the morning of March 28, 2006, Genaro Huizar, a resident of Eucalyptus Street, in Long Beach, was driving home from work. Upon getting out of his car, he observed two males on bicycles riding past

him. One of the bicycles was a ten-speed bike and the other a BMX, a smaller bicycle. (9 RT 1828-1830.) The person on the ten-speed was taller and skinnier than the person on the BMX, who was "chubby," with dark skin. (9 RT 1831.) Mr. Huizar exchanged glances with these people as they passed him, but they kept riding. (*Ibid.*) After Mr. Huizar went into his house he heard three to five gun shots. (*Ibid.*) Mr. Huizar later viewed Gonzalez and Flint in a live lineup but was unable to identify either of them. (9 RT1834 et seq; 10 RT 2084 et seq.)

At about 5:45 on the same morning, Jose Burgos was delivering newspapers on Eucalyptus Street when he came upon a fully dressed woman lying on a concrete walkway leading to a house. (9 RT 1787, 1813-1814.) Mr. Burgos attempted to provide CPR but was not able to revive the woman. (9 RT 1815.)

About the same time, James Knapp, who lived on Eucalyptus Street, was leaving his house for work. As he drove up the street, he noticed Mr. Burgos standing near the woman. (9 RT 1785.) He got out of his car and checked the woman for a pulse but felt none. (9 RT 1786.) He noticed that the woman had been shot in the side, just under the rib cage. (9 RT 1788.) Mr. Knapp also attempted CPR to no avail, and then reported the incident to a 911 operator. (9 RT 1786-1787.)

Jenny Martin was Maria Rosa's domestic partner for eight and one-half years. (9 RT 1794.) Ms. Rosa had been a Los Angeles County Deputy Sheriff for the past six and one-half years and Ms. Martin a detective with the same department for thirteen years. (9 RT 1793-1794.) Ms. Rosa spent the night of March 27 at Ms. Rosa's home, at 2951 Eucalyptus Street. (9 RT 1795-1796.) On the morning of March 28, Ms. Martin was awakened by her nephew who told her that Ms. Rosa was lying outside the house of the Martin residence at 2951 Eucalyptus Street. (*Ibid.*)

Ms. Martin looked out her front door and observed Ms. Rosa lying on the ground. (9 RT 1797.) Ms. Martin testified at Gonzalez's trial that Ms. Rosa carried a duty gun, a Heckler and Koch 9 mm which she would often wear in a waist holster or in a large purse. She also owned an off-duty Beretta handgun. (9 RT 1797-1798.)

The first officer at the scene, Robert Davenport, arrived within minutes of the 911 call. (9 RT 1868) He cordoned off the crime scene and secured a red BMX bicycle found near the body. (9 RT 1871.) He also noticed a car with its trunk open in the driveway of 2951 Eucalyptus Street. (9 RT 1873.) Officer Davenport secured the car and its contents until further investigation by detectives. (9 RT 1873-1874.)

Upon arrival at the scene, Detective Patricia O'Dowd, looked into the trunk and saw a large black gym bag with a Converse shoe on top of it.

Just to the right of the bag was a gun. (9 RT 1891.) A woman's purse was in the truck, next to a makeup bag. Also in the trunk were a closed badge on top of a brown plastic bag and a partially concealed off-duty holster. (10 RT 2055.) Detective Dowd found another gun was located in the right side of the trunk. (10 RT 2058.)

The keys to the car were found in the key hole of the trunk and a woman's wallet was also found in the trunk. (10 RT 2064-2065.) After photographing the contents of the trunk, Detective O'Dowd removed all of the items for processing. (9 RT 1893.)

Long Beach Police Officer Bryan McMahon gave testimony on the condition of the Deputy Rosa's nine millimeter Heckler and Koch handgun which was found in the trunk of her car. (11 RT 2305.) When the gun was found, there was a live round jammed into it that obstructed the chamber and other indicia showed the weapon had not been recently fired. (10 RT 2060-2062; 2099-2101.) It appeared to Officer McMahon that at some point Ms. Rosa had attempted to rack a round into the chamber but the gun misfired and a round was "stovepiped" in the ejection port. This generally occurs when such a gun fails to fire and the operator tries to eject the round but the round only partially ejects. (10 RT 2100-2101; 11 RT 2352.)

This type of hand gun has a lever cocking device that must be completely activated for the gun to discharge. This activation is done by

gripping the hand grip tightly. (11 RT 2309.) In the police laboratory, Office McMahon and two other officers were able to reproduce the conditions that caused the "stovepiping," using dummy rounds. (*Ibid.*) They found that if the slide apparatus was pulled only part of the way back and let go the round would not totally eject causing the stove piping. (11 RT 2310; 11 RT 2344-2347.) No casings from Deputy Rosa's gun were found at the crime scene. (11 RT 2311-2312.) The only rounds recovered were found during the autopsy. (11 RT 2313.) These rounds were from .22 caliber ammunition. (11 RT 2313-2314; 2340-2344.)

Detective O'Dowd sent the BMX bicycle to the sheriff's laboratory to be analyzed. Soon thereafter, he disseminated a flier indicating a $150,000.00 reward for the capture of the person or person's responsible for the death of Deputy Rosa. (10 RT 2070.)

Dr. Paul Glinecki performed the autopsy the day after the shooting. (9 RT 1841-1843.) His examination revealed two gunshot wounds, one to the upper right shoulder and the fatal wound to the left side of the abdomen. (9 RT 1843.) The bullet from the fatal wound was recovered. (*Ibid.*) The cause of death was internal bleeding. In the doctor's opinion, Ms. Rosa survived for approximately 5 minutes after the shooting. (9 RT 1845.) The doctor could not accurately determine how far Ms. Rosa was from the shooter when the fatal shot was fired. (9 RT 1852.)

Deputy Mark Lillienfeld, of the Los Angeles County Sheriff's Department joined the investigation team a day after the shooting. (11 RT 2163-2164.) At some point, the investigation began to focus upon Gonzalez and Flint. (11 RT 2164.) In June 2006, a plan was developed to elicit incriminating statements from the two suspects. (11 RT 2164; 2173; 2192.)

At this time, both Gonzalez and Flint were in state prisons for unrelated charges. In conjunction with the Long Beach Police Department, an arrangement was made to insert five undercover officers posing as inmates in Wasco State Prison, where Gonzalez was incarcerated, and five such officers in North Kern State Prison, where Flint was incarcerated. (11 RT 2165.) Once this was done, these officers and the two suspects would be transported to Los Angeles County Jail where they were to be booked into the reception center. Both the transportation bus and the holding cell at the jail were "bugged" with audio and video equipment that would pick up anything the suspects said either to each other or to the undercover officers. (11 RT 2166.)

The operation began at midnight on August, 16, 2006. (11 RT 2169.) The transportation bus stopped at Wasco and then Kern Prison. From there, the suspects and the undercover officers proceeded to the Los Angeles County Jail. (11 RT 2175-2177.) At the jail, the suspects and the undercover officers were taken off the bus and put in the "bugged" holding

cells so that all conversations could be audio-visually recorded. (11 RT 2177.) The undercover officers were rotated in and out of the cells to give the impression that they were being processed by the system. (11 RT 2185.)

At Gonzalez' trial, the prosecutor played a series of "clips" extracted from the many hours of recording that took place on the bus and in the holding cells during the undercover operation. The undercover officers present when the recordings made testified to their content while they were being shown (11 RT 2181) and also to statements made to them by Gonzalez during the operation.

Undercover detective Javier Clift initiated a conversation with Gonzalez about why Gonzalez was in jail, saying in must be something serious and whether Gonzalez "left anything behind," meaning any trace evidence at any crime scene. (11 RT 2193-2194.) Without indicating what he had done, Gonzalez responded "No, I cleaned and wiped and everything. It's just going to be he say she say. (sic)" (11 RT 2194.) Detective Clift interpreted this to mean that Gonzalez believed there were no witnesses to his actions. (11 RT 2198.)

Gonzalez also asked Detective Clift that if Gonzalez was being charged with murder, why his classification wrist band didn't so indicate. (11 RT 2198-2199.) Detective Clift also warned Gonzalez to make sure that he and Flint had their stories straight. (11 RT 2202.) During the course of

additional conversation, Detective Cliff questioned appellant about the weapon he used in his crime. Gonzalez said the gun was "swimmin" (sic). 11 RT 2205.)

The conversation turned to Flint, whom Gonzalez referred to as a "tonto," meaning a "dumb motherfucker." (11 RT 2206.) Gonzalez then stated "I shot him the heat," meaning that Gonzalez gave him the gun used in the killing of Deputy Rosa, and Flint took it because he was so stupid. (*Ibid.*) Gonzalez then inquired of Detective Clift whether getting rid of the gun used would "be a plus" as now there was no evidence. (11 RT 2206-2207.)

The conversation continued with Detective Clift asking whether Gonzlaez left any foot prints behind. Gonzalez responded by stating that he was on concrete the entire time. (11 RT 2202.) Gonzalez then spoke about a carjacking telling Detective Clift then he left no evidence behind in the car so he didn't believe he was brought to Los Angeles to answer to this carjacking. (11 RT 2202-2209.) Gonzalez later stated that if the police knew why he was transported to Los Angeles, he would have been beaten up. (11 RT 2210.) Gonzalez said that he did something "cappa," which Detective Clift interpreted to mean a very dangerous crime for which you "get the gas chamber." (11 RT 2213.) Detective Clift also stated that use of

the Spanish word "palabra" meant that Gonzalez thought someone was snitching on him. (11 RT 2214.)

Without specifically mentioning the crime to which he was referring, Gonzalez also stated that he would somehow disfigure his face so witnesses could not identify him. (11 RT 2280. In regard to any such a lineup. Gonzalez stated that there were no victims that could identify him. (11 RT 2221-2222.) Gonzalez also stated he was going to get "special privileges" with the county inmates due to his crime, which Detective Clift interpreted to mean that Gonzalez realized he killed a police officer. (11 RT 2237-2238.)

Officer Miguel Beltran was also assigned to the uncover operation at the jail, posing as a detainee. He also engaged Gonzalez in conversations. (11 RT 2241.) As the result of Detective Beltran's inquiry as to a murder supposedly committed by Gonzalez, Gonzalez stated "it was a hooda," "hooda" being the slang term for police officer. (11 RT 2242.) Gonzalez also stated that the officer in question was a female. (11 RT 2244.) Gonzalez also mentioned a bike he left behind at a crime scene. (11 RT 2248-2249.) Detective Beltran and Gonzalez also discussed the possibility that appellant left fingerprints on the grips of the bike. (11 RT 2251.)

Detective Leopoldo Noyola also was involved in the operation as an undercover officer. He was on the bus and handcuffed to Gonzalez when it

pulled up to Delano Prison. (11 RT 2275.) When Gonzalez saw Justin Flint brought out to the bus, he almost lost control of his emotions and when Flint boarded on the bus, there was something murmured between the suspects. (11 RT 2276.) During the bus ride, Detective Noyola heard the two speculate that they have taken from prison to county jail "because of the bicycle shit." (11 RT 2276.)

The detective also heard Gonzalez and Flint discussing whether any witnesses against them would have to be killed before they could testify. (11 RT 2279.) Flint said that Ms. Rosa was a "bitch," and had she given up her wallet she wouldn't have been killed. (*Ibid.*) Gonzalez responded by stating "[w]ell, I bet they don't have anything in this case." (11 RT 2279-2280.)

Gonzalez told Detective Noyola that he had shot a female officer, after she showed him her badge. (11 RT 2284; 2288-2289.) According to the detective when Gonzalez and Flint were in the cell together, it appeared Gonzalez did whatever he could to keep Flint from talking. (11 RT 2289-2290.) Noyala heard Gonzalez tell Flint "just not to talk to anybody because we're going to ride this all the way out." (11 RT 2292.)

Both during the bus rude and the initial period in the holding cell, Gonzalez and Flint were overheard wondering aloud why they were being

transported to Los Angeles, and speculating it may have something to do with a carjacking. (11 RT 2182-2184.)

Gonzalez and Flint were arrested not long after the completion of the "sting" operation and charged with the murder of Maria Rosa.

Jessica Rowan, Gonzalez's girlfriend and Celina Gonzalez, his sister, were arrested and charged with conspiracy to obstruct justice after police intercepted telephone calls between them in which they discussed creating a false alibi for Gonzalez for the time of the murder. Pursuant to plea bargains, Rowan and Celina Gonzalez testified for the prosecution at Gonzalez's trial.

Rowan testified that she met Gonzalez in 1996 and had been his girlfriend for twelve years. (10 RT 1929.) In March of 2006 she was living in the Watts section of Los Angeles, and Gonzalez lived with her on a part-time basis. (10 RT 1930.) Sometime during the last few days of March, 2006, Gonzalez and Ms. Rowan were in bed at her apartment when he told her that he had "done something" in Long Beach and had to leave that city. (10 RT 1931.) Gonzalez told her while he and a friend were attempting to rob a woman, a gun discharged. (10 RT 1932-1935.)

Rowan testified that Gonzalez told her the victim was by her car when the shooting occurred. He had ordered her to give him money but when she grabbed at her purse she "came up with a gun." (10 RT 1935.)

She also stated appellant told her that the victim had a badge in her hand which, during the struggle, wound up in the back seat of the car. (10 RT 1936.) After the gun went off, Gonzalez fled. (*Ibid.*)

According to Ms. Rowan, Gonzalez and his sister, Celina Gonzalez, arrived at her residence in Celina's car between 8:00 a.m. and 9:00 a.m. on the day of the murder. (10 RT 1938.) Ms. Rowan testified that she had found it odd that Celina was bringing her brother to her apartment since Gonzalez always arrived on a bike. (*Ibid.*)

A day or two after the murder, Gonzalez and Ms. Rowan went to Celina's house in Downey to help her move. At some point, Gonzalez began to act strangely, telling the two women that he wanted to go to Long Beach, immediately. (10 RT 1938-1939.) Gonzalez became angry and stormed out of the house returning soon afterward with a newspaper. He threw the paper at Ms. Rowan and Ms. Gonzalez, saying "I told you I did something in Long Beach. You believe me now?" (10 RT 1939-1940.) Ms. Rowan remembered that there was a photo of a police officer on the cover of the paper. (10 RT 1940.) Gonzalez then borrowed Ms. Rowan's car, returning it four hours later. (10 RT 1941.)

A day or two later, Ms. Rowan spoke with Gonzalez on the phone. Gonzalez told her he used the car to dump the weapon involved in the shooting into the ocean. (10 RT 1943-1944.)

Under a barrage of leading questions, Ms. Rowan admitted to lying to the police when she was first interviewed on September 10, 2006, when she told the police that Gonzalez was with her at the time of the murder, a story she confabulated with him. (10 RT 1945-1946.) She also stated that Celina Gonzalez was part of the conspiracy to create a false alibi for Gonzalez. (10 RT 1947.)

Ms. Rowan then testified she had visited Frank while he was in jail on other charges and surreptitiously wrote him a message telling him the police were looking for the gun used in the shooting. (10 RT 1950.) Gonzalez's reaction was to say "oh, fuck." (10 RT 1951.)

Ms. Rowan was arrested for obstructing justice on September 27, 2006, and remained in jail until she entered a plea to the charges several months later. (10 RT 1952.) The plea was open, which meant a court would determine whether or not she had "told the truth" in Gonzalez's trial and based her sentence upon its determination thereof. (*Ibid.*)

Ms. Rowan testified that Gonzalez told her his crime partner in the instant case was a "white boy" named Justin Flint. (10 RT 1953-1955.) Ms. Rowan also testified that Gonzalez had spoken to her several times about the shooting because she refused to give him money for drugs. (10 RT 1956.) She testified Gonzalez had called her after he was arrested for the shooting and told her to call a person he referred to as "Psycho" and tell

him what had happened. Ms. Rowan denied knowing the reason why appellant wanted her to call this person. (10 RT 1958.)

After a lengthy side-bar conference that resulted in the trial court ordering Ms. Rowan's counsel to speak with her about "telling the truth" pursuant to her plea bargain (10 RT 1958-1963), Ms. Rowan responded to this by testifying Gonzalez told her to call "Psycho" to deal with any possible "snitches" by killing them. (10 RT 1964.)

On cross-examination by defense counsel, Ms. Rowan testified that when the police arrested her on September 27, 2006 they told her they possessed tapes her and Celina talking about constructing an alibi for Gonzalez and that they were going to take Ms. Rowan's children from her. (10 RT 1982.) It was at this point that Ms. Rowan first told the police that Gonzalez told her that he had gotten into Ms. Rosa's car and there was a struggle. (*Ibid.*) Ms. Rowan told the police that at first she did not believe appellant because he was always making up stories. (10 RT 1983.)

Ms. Rowan next told the police Gonzalez told her that during the struggle he heard a gun discharge. (10 RT 1984.) She also believed she told the detectives that appellant told her he sanded down the gun that was used in the shooting.

Just prior to the plea bargain of January 2007, Ms. Rowan gave another statement to the authorities. (10 RT 1990.) She told them Gonzalez

told her that he was sitting in a car with the "lady" and told her to "give me what you got." (10 RT 1991.) Gonzalez said he heard a gun "go off" before he fled. (*Ibid*) Further, and that Flint was with him at the time. (10 RT 1992.)

Ms. Rowan testified at trial that Gonzalez never really told her that he was in the car with the victim and this testimony was based on what she saw "in her mind" and putting the pieces together from what Gonzalez told her. (10 RT 2008-2010.) She stated what Gonzalez really told her was the crime occurred when the woman was walking out to the car. (10 RT 2009-2010.)

Celina Gonzalez testified that at some point at the end of March, Gonzalez and Ms. Rowan arrived at her apartment in Downey, California to help her move. (10 RT 2020-2021.) Gonzalez began nervously walking around and kicked her microwave, breaking it. (10 RT 2021.) Gonzalez went outside and soon returned with a newspaper with a photo of Deputy Rosa on the front page. He set the paper down and repeated "that's her" and stated that "it was a robbery gone wrong." (10 RT 2022.)

Ms. Gonzalez pled guilty to conspiracy to obstruct justice for conspiring with Jessica Rowan to construct an alibi for Gonzalez. According to her agreement with Ms. Rowan, Ms. Gonzalez was supposed to say that Ms. Rowan and Gonzalez were living with her at the time of the

crime and that on the morning of the shooting she saw them in bed. (10 RT 2024-2025.)

The police intercepted phone calls between Ms. Gonzalez and Ms. Rowan in which they discussed the false alibi. (10 RT 2025.) The first time Ms. Gonzalez spoke to the police, she provided the false alibi to them, not knowing they had tapes of her phone conversations with Ms. Rowan. (*Ibid.*)

After Ms. Gonzalez was arrested on September 27, 2006, she told the police Gonzalez told her the crime was a robbery that went wrong and that he thought that he shot a police officer. (10 RT 2027.) After being admonished repeatedly by the court for not being completely truthful , Ms. Gonzalez testified appellant told her he committed the crime because he needed money to get high. (10 RT 2035-2036.) He told Ms. Gonzalez he was on his bike when he saw Ms. Rosa leave a house and he decided to rob her with the gun he was carrying. (10 RT 2036; 2049.)

Juli Watkins was a Senior Criminologist with the Los Angeles County Sheriff Office working in laboratory identifying bodily fluids in evidence. (10 RT 2114). She processed the BMX bicycle to test for the presence of any latent bodily fluids. (10 RT 2115-2117.) She also received reference samples from Maria Rosa and Gonzalez. (10 RT 2117.)

Ms. Watkins explained the steps of the DNA amplification and typing process she used in an attempt to match any DNA found on the bike

to the reference samples. (10 RT 2118.) The first DNA test results were unusable because some of the reagent used was discovered in the test blank, which made any test results invalid. (10 RT 2119.) As Ms. Watkins had a scheduling conflict and could not perform a second round of testing, Kari Yoshida, a second Senior Criminalist, performed it. (*Ibid.*)

Over appellant's objection, Ms. Watkins testified as to the qualifications of Ms. Yoshida and the testing she did on the bicycle. (10 RT 2122-2123.) Ms. Watkins stated that Ms. Yoshida re-sampled both handlebar grips and other parts of the BMX. (10 RT 2125.) Watkins testified that Ms. Yoshida obtained a result from the handgrip which was a mixture of a major and minor contributor and that Gonzalez could not be ruled out as a possible contributor for the major portion, although not all his alleles were present in the mixture. (10 RT 2131-2132.) She further testified that Ms. Yoshida found that there was approximately a one in a billion chance that a random person with alleles matching those from Gonzalez found in the mixture would be included as a possible major contributor. (*Ibid.*)

Four partial latent fingerprints were lifted from the BMX. Print analysis revealed that none of these partials belonged to Gonzalez. (11 RT 2328.)

PENALTY PHASE

Prosecutor's Case

1994 Robberies

In February of 1994, Sylvia Guzman was having dinner with Hector Badavides in the La Concha Restaurant in Long Beach. (13 RT 2565.) Ms. Guzman noticed an individual at the cash register. (*Ibid.*) She also saw a young Hispanic male with a gun. Mr. Badavides began speaking to this young man, trying to calm him down and giving him his wallet. (13 RT 2565- 2566.) Ms. Guzman was unable to identify Gonzalez as either the man at the cash register or the man with the gun. (13 RT 2568.)

In the same month, in a different location, Eloy Baraja was taking a work break from his job as a dishwasher with four other people. (13 RT 2571.) He and his companions were approached by three armed individuals; two with handguns, and the third with what appeared to be a shotgun. (13 RT 2572-2573.) The individual with the shotgun ordered Mr. Barajas and his companions to give up their money, which they did without further incident. (13 RT 2574-2575.) A month later, Mr. Barajas was shown some photographs. He stated that he could not remember whether he identified anyone but knows that he told the police the truth at the time of the showing. (13 RT 2575.)

In February, 1994, three young men entered Kang An's liquor store on 4th Street in Long Beach. One of the men was carrying a sawed-off shotgun, which he trained on Mr. An. (13 RT 2579.) Mr. An turned and ran to the back of his store, while his brother threw a bottle at the man with the shotgun. (13 RT 2580-2581.)The robbers ran from the store and Mr. An chased them. While he did not see anyone shoot at him, he did see a flame and the sound of a discharge of a weapon. (13 RT 2581-2582.) The young men appeared to be middle school age and money was later found missing. (13 RT 2582-2584.) Mr. An's brother, Sam, confirmed his testimony. (13 RT 2586-2588.)

In the early morning hours of February 17, 1994, Patrick Park was in Long Beach, waiting in a car while his friend Ed Duncan attempted to use an ATM machine. (13 RT 2634-2635.) Three armed men, one of whom was carrying a sawed-off shotgun, approached Mr. Park and robbed him of approximately fifty dollars and a stereo tape from his car. (13 RT 2635-2636.)

On February 24, 1994, Richard Lillis and Maria Sima were working in a Baskin Robbins store in Long Beach when three armed men entered the store, one whom was carrying what appeared to be a shotgun. (13 RT 2624-2626.) One of the individuals ordered Maria to "give us all the money or we'll kill you" or something of a similar effect. (13 RT 2626-

2628.) She gave him approximately $750.00. (3 RT 2627.) Maria Sima identified Gonzalez in court as an individual who had the appearance of one of the robbers. (13 RT 2643-2644.)

In 1994, Thomas Brown was a Long Beach Police officer assigned to the investigation of a string of robberies. (13 RT 2651-2652.) Officer Brown spoke to several of the victims of these robberies, including the An brothers and Maria Sima. (13 RT 2652.) He also reviewed video tapes from the An liquor store robbery and saw several Hispanic males involved. (13 RT 2653-2654.) Office Brown also reviewed a surveillance video from a week or two before the liquor store robbery. He identified one of the persons in that video as Gonzalez. (13 RT 2655.)

Officer Brown placed a photo of Gonzalez in a six person photo lineup and showed it to Maria Sima. Ms. Sima was able to identify Gonzalez as one of the armed men but not necessarily the one with the shotgun. (13 RT 2656.) On March 10, 1994, Long Beach Police Officer Kenneth Sutton showed Eloy Barajas a six pack photo lineup. Mr. Barajas identified appellant as one of the people who robbed him. (13 RT 2661-2662.)

On February 25, 1994, Long Beach Police Officer Darren Davenport questioned Gonzalez about a series of robberies. Gonzlaez admitted to being involved in five robberies because he needed money to "buy stuff."

(13 RT 2665.) Gonzalez stated that he was the person who usually held the shotgun during robberies, and in three of the five robberies, the perpetrators were the same. (13 RT 2666.)

On February 26, 1994, Orange County District Attorney's Investigator Anthony Lembi interviewed Gonzalez about a robbery at a donut shop. Gonzalez stated in used a plastic gun to obtain $20.00. (14 RT 2681-2684.) Gonzalez also admitted to a robbery in a bank parking lot "at Anaheim and Obispo," in which he similarly used a silver plastic gun to obtain $300.00. (14 RT 2684-2685.)

In addition, Gonzalez admitted to participating in a robbery with others at a restaurant in which he was armed with a shotgun. Approximately $600.00 was taken from the victims. (14 RT 2685-2686.) He also stated he was involved in a robbery of Corner Store liquor store, in which he was again armed with a shotgun. (14 RT 2686.) Gonzalez stated that as he was running away from the scene, the shotgun accidentally discharged leading him to believe that the liquor store clerks were firing at him. (*Ibid.*)

Gonzalez also confessed to involvement in robbing a Baskin-Robbins store in which he and his crime companions were able to obtain $600.00, which was split four ways. (14 RT 2687-2689.)

2006 Crimes

Approximately at 10:00 a.m. on February 5, 2006, Earl Strode was driving past Chris's Burger on Telegraph Road in Downey, California. (14 RT 2695.) A person came out of a driveway firing six to seven shots in the direction of an eastbound vehicle. (14 RT 2695-2696.) The shooter ran into an apartment approximately one quarter of a mile from the shooting scene. (14 RT 2697.) He was approximately 5 feet, 8 inches in height. (14 RT 2698.)

At that time, Jessica Rowan had been dating Jose Magallanes for a few months. (14 RT 2733-2734.) Earlier that morning, Gonzalez came to Ms. Rowan's place of work because he needed some money. (14 RT 2734.) Gonzalez made her leave work and get into a car with him. The two proceeded to Celina Gonzalez's residence where Gonzalez struck Ms. Rowan several times. (14 RT 2735-2736.)

Gonzalez told Mr. Rowan to call Jose because he wanted to "beat him up" as well. (14 RT 2736.) She made the call, telling Jose that she had been beaten up and needed a ride to the hospital, instructing Mr. Magallenes to pick her near Chris's Burgers. She proceeded to Chris's with Gonzalez, Celina and Celina's boyfriend. (14 RT 2737-2739.)

Ms. Rowan was fairly certain Gonzalez was inside the burger shop when Jose first drove by but went outside when he saw Mr. Magallenes'

car. Ms. Rowan heard gun shots but didn't see the shots being fired. (14 RT 2742.)

Jose Magallenes, an inmate in the California State Prison system, testified that on February 5, 2006, he received a call from Jessica Rowan asking him to give her a ride. (14 RT 2712-2714.) He remembered being in a car near a burger stand in Downey when a pedestrian began shooting at him, wounding him twice in the arm. (14 RT 2714-2715.) However, the witness identified the shooter a being a white boy with blond hair. (14 RT 2720.)

The casings from Downey were booked under laboratory reference number DR 0624544. (13 RT 2611.)

At approximately 10:00 p.m. on February 23, 2006, Darnell Connors was "hanging out" with some friends in front of 2216 Locust Street in Long Beach, when two Hispanic men came around the corner. One of them shot him. (14 RT 2890-2842.) Before the shots were fired, Mr. Connors heard someone say "hey motherfucker, this is BP." (14 RT 2842.) Mr. Connors was shot five times, both in the chest and arms. (14 RT 2843.)

Hector Gutierrez was a Long Beach Police Detective who had been assigned to the gang unit for 15 years, having testified as an expert close to 100 times. (14 RT 2917-2918.) He described to the jury the composition of the Barrio Pobre gang, stating he knew there were at least 400 members in

Long Beach but there might be twice as many. (14 RT 2918.) Detective Gutierrez proceeded to explain the internal hierarchy of the gang organization. He also stated that to move up in the hierarchy, a member must totally give himself up to the gang, which included doing violent crimes, especially killing a police office. (14 RT 2919-2920, 2924.) Detective Gutierrez recognized Gonzalez as a member of the Barrio Pobre gang, whose gang name was "Grumpy." (14 RT 2926.)

Detective Gutierrez investigated the shooting that occurred at 2216 Locust Street in Long Beach. He stated this part of Locust Street is the neighborhood of the Insane Crips gang and that at the time of the shooting there was a gang war was going on between Barrio Pobre and the Insane Crips. (14 RT 2927-2930.)

Police Officer Jose Rios was one of the officers that investigated the crime scene at Locust St. He recovered seven shell casings from a 38 caliber Super semi-automatic handgun. The casings were booked under identification number DR 06-15836. (14 RT 2856-2857, 2860.)

On March 1, 2006, Long Beach Police Department gang suppression officer Eduardo Urquiza arrived at the scene of a reported shooting and discovered an Hispanic male who had been shot in the back and hand, lying in an alley next to a garage. (14 RT 2862-2863.) Three shell casings were

recovered from the scene and entered into evidence as DR 06-17523. (14 RT 2866-2868.)

Troy Ward was a criminalist from the Long Beach Police Department. (13 RT 2607.) The trial court accepted a stipulation by counsel that he was an expert in firearms examination. (*Ibid.*) Mr. Ward was in charge of the identification of the shell casings recovered in the above three crimes. (13 RT 2608; 2614.)

Mr. Ward explained that a casing is what remains of a round of information after the projectile has been fired. (*Ibid.*) If the gun fired was a semi-automatic weapon, the casings will be automatically ejected from the weapon. (*Ibid.*) The casing that remains after the discharge of such a weapon will bear a signature mark from the firing pin of the gun as well as a breach face impression from where the casing came into contact with the firearm. These markings are used to identify whether a casing was ejected from a particular gun. (13 RT 2608-2609.)

Mr. Ward stated he was asked by Detective McMahon to examine eight casings from the Chris's Burger crime scene in Downey and enter them into the laboratory computer data base to determine if the gun used to eject these cartridges matched up to any other casings found at any of the other crime scenes referenced herein. (13 RT 2610.) Based upon the results of the computerized search, two Long Beach cases were discovered where

casings were recovered that might have come from the same gun discharged in the Downey case. (13 RT 2611.) As a result of this, Mr. Ward did a physical comparison of the casings recovered in Downey and those found in Long Beach. (13 RT 2611.)

Mr. Ward determined that all the casings recovered in Downey, case DR 06245, had been ejected from the same gun. (13 RT 2612.) Mr. Ward concluded that the seven casings in the Long Beach case assigned case DR 06-15836 and DR 06-17523 had been fired by the same gun used in the Downey case. (13 RT 2614-2615.) Ward concluded that all the casings recovered were ejected from .38 super automatic cartridges made by Winchester. These casings contained a fairly large round and were designed to be loaded into a Super .38, a semi-automatic handgun. (13 RT 2616.)

On March 8, 2006, Shawn Ouzounian was driving his mother's silver Lexus in Long Beach. He was with a man named Eric and they stopped to visit Justin White. (14 RT 2764-2766.) While sitting in the White residence, Mr. Ouzounian became uncomfortable with the people coming in and out and the attention being paid to him. (14 RT 2767.) At some point someone told him to give up his keys and he was forced into his car at gunpoint and told to put his head between his knees. (14 RT 2768.) He was driven around for about 20 minutes and then released after being ordered to take all of his possessions out of the trunk and take the rims off

of the car. (14 RT 2771.) Mr. Ouzounian identified Gonzalez as the man who originally pointed a gun at him and took the keys. (14 RT 2774-2776; 2780-2784.)

Jessica Rowan testified that Gonzalez told her he had committed a carjacking of a white Lexus. She had seen him drive the car which he kept at Celina's apartment in Downey. (14 RT 2753-2754.) He told Ms. Rowan that when he took the car, he made the owner sit in the passenger seat with his head between his legs so the victim could not see Gonzalez's's face. (14 RT 2754-2755.)

Ms. Rowan stated that she did not tell the police any of the above until after she had been arrested and was facing charges of her own. (14 RT 2757.) Ms. Rowan had been dating Gonzalez for about 11 years and had two children with him, a girl, Sunny, in 2002, and a boy, Frankie, in 2005. (14 RT 2758.) Ms. Rowan also has six-year-old daughter from another man. Gonzalez treated this child has his own. (14 RT 2758-2759.)

2007 Jail Incidents

On August 28, 2007, Deputy Gregory Campbell was assigned to supervising the most dangerous detainees at the Los Angeles County Jail. At approximately, 7:00 a.m., he was doing strip searches of certain detainees in preparation for their court appearances. (14 RT 2878-2880.) Gonzalez's cell door was mistakenly left open and Gonzalez left his cell to

attack Deputy Campbell. (14 RT 2880-2881.) Deputy Campbell, who suffered cuts and bruises, managed to subdue Gonzalez. (14 RT 2882.)

On September 21, 2007, Deputy Sheriff Adrian Cruz had an incident at the Men's Central Jail with appellant and some other inmates. (14 RT 2892-2893.) Gonzalez was in a group of several detainees yelling things out to a new prisoner. (14 RT 2896-2898.) The new detainee mentioned to Gonzalez that he heard that there was a real "asshole worker"[1] in the jail unit and that he would like to throw excrement and urine at him. Gonzalez responded by stating he would love to join in to "put another notch in my belt." (14 RT 2909-2911.)

Victim Impact

Deputy Sheriff Rebecca Vaughn was a close friend of Maria Rosa, whom she called Ceci. Deputy Vaughn stated that Ceci was a great partner at the jail and would back her up "in a heartbeat." (15 RT 2952.) Ceci was very proud to be a deputy. She had a great heart and would do anything to help a friend. (15 RT 2953.)

Letty Pimentel was also a close friend of Ms. Rosa. She met her in 1998 and became close friends with her almost immediately. (15 RT 2955-2956.) As Ms. Rosa grew up without a mother or father, she became part of Ms. Pimentel's family. Ms. Rosa was like a sister to Ms. Pimentel, a person

[1] From the context of the transcript, this reference was being made about a corrections officer.

who would help her through the rough patches of life. Ms. Rosa was kind to everyone, she had a beautiful smile and a love for life. Not a day goes by that Ms. Pimentel does not think of her. (15 RT 2956-2959.)

Deputy Marlena Martinez also worked with Ms. Rosa at the jail. They eventually became friends. Ms. Rosa took care of Ms. Martinez after an accident. Ms. Rosa was a wonderful friend who was always willing to help, even complete strangers. (15 RT 2962-2965.) Marnie Salecke, a jail civilian employee, testified as to Ms. Rosa's dedication to her job and her co-workers, stating that she always could be trusted. She would light up a room with her smile and always showed respect to everyone. The news of her death came as a great loss to all her co-workers, civilian and deputies alike. (15 RT 2966-2974.)

Jenny Martin was Ms. Rosa's girlfriend. They met in a dance club in 1998, when Ms. Rosa was a dental assistant. From the beginning of their relationship, the two were great friends, and Ms. Martin felt very lucky to have found her. (15 RT 2976-2977.) They talked about having a family by adopting a child. (15 RT 2978.)

Ms. Rosa grew up in Mexico. Her mother died when she was 12 years old. Her father died a few years later but Ms. Rosa never had a real relationship with him. (15 RT 2978-2979.) Ms. Rosa came to the United States and lived with her older sister, Sandra. (15 RT 2979.)

Ms. Martin and Ms. Rosa had been together for about two years when Ms. Rosa mentioned she wanted to become a police officer. Being a deputy herself, Ms. Martin described how difficult it was to graduate from the Police Academy and how Ms. Rosa succeeded despite physical set-backs. (15 RT 2979-2981.) At the time Ms. Rosa was killed, she was working on her college degree. (15 RT 2983.)

Ms. Martin misses everything about her friend. She felt that nothing could go wrong when Ms. Rosa was around. When Ms. Rosa died, Ms. Martin died as well. She wears Ms. Rosa's badge every day. (15 RT 2984-2987.)

Sandra Sanchez was Ms. Rosa's older sister by eight years. Ms. Rosa was born in 1975 in Sonora, Mexico, to a different father. (15 RT 3003.) Ms. Rosa came to live with Sandra in the United States when Ms. Rosa was ten years old because her mother was very sick with cancer. Ms. Rosa did not speak English at the time. (15 RT 3003-3005.)

The two sisters were very close. (15 RT 3004.) Ms. Rosa learned to speak English and eventually graduated high school in Gilroy, California. Ms. Rosa got her first job at a video store when she was thirteen. She was a normally shy teenage girl who enjoyed dancing and being with friends. (15 RT 3011-3012.) Sandra eventually discovered that Ms. Rosa was gay but

this did not have a long term negative effect on their relationship. Ms. Rosa continued to be her confidante and best friend. (15 RT 3012.)

For about eighteen months, Jenny Martin and Ms. Rosa took care of Sandra's two children for Ms. Sanchez so the kids could have a better life. (15 RT 3014.) The two sisters remained very close until Ms. Rosa's death. Sandra misses her very much. (15 RT 3015-3018.)

Sandra produced an autobiography written by Deputy Rosa. (15 RT 3019.) In that autobiography she revealed how things never came easy for her and how she had to work very hard for what she achieved. (15 RT 3020.) She also stated that the most influential person in her life was Sandra who inspired her. (15 RT 3025-3026.) She also wrote that she looked forward to having a husband and children one day. (15 RT 3027.)

In addition, the prosecutor played for the jury a videotape, expressly created for the penalty phase of this case. (People's Exhibit 3030.) The tape consisted of many tributes to Ms. Rosa from her friends, family, and co-workers. (15 RT 3030.)

Appellant's Case

Lillian Gonzalez was Gonzalez's aunt. (13 RT 2590.) She testified her brother and Gonzalez's father, Frank, Sr., was born in 1950. She also has an older brother, Charles (Carlos) and two deceased brothers,

Benjamin, and Phillip, who both died in prison in 1997. She also had one sister, Kathy. (13 RT 2591-2592.)

Ms. Gonzalez testified that Frank, Sr. went to prison when Gonzalez was just a baby and has been there since. He is currently in prison for murder. (13 RT 2593.) Gonzalez is currently 27 years old. (13 RT 2594.)

Ms. Gonzalez testified Gonzalez's mother, Susan Garcia, was living in Long Beach when Frank was born. Ms. Gonzalez saw Susan and Frank about once a week from the time he was born until he was six years old. Frank seemed to be a good child. (13 RT 2594-2596.) Ms. Gonzalez testified that her brother Carlos was a gang member and when Frank was a child, Carlos would visit Frank while in gang attire. (13 RT 2597.) When Carlos was released from prison he lived with Susan and Frank for about a year. (13 RT 2599.) Frank, who was about six years old at this time, would ask about the whereabouts of his father. (13 RT 2599-2600.)

At some point during Frank's childhood, Ms. Garcia began a close relationship with a man who introduced her to heroin, to which she became addicted. (13 RT 2597.)

Ms. Gonzalez stated she did not know the name of Ms. Garcia's drug suppler. However, she did testify with the incarceration of Frank's father and later his uncle Carlos, this man became Frank's male role model because he was around Ms. Garcia quite a bit. (13 RT 2597-2598.) Ms.

Gonzalez maintained that even after Susan Garcia became addicted, she was a good mother. (13 RT 2598.) Referring to Frank, Ms. Gonzalez stated "[h]e's my blood and I love him, and it's been 20 years since I've seen him and he's a good kid." (13 RT 2600.) She added that Gonzalez should not be executed because nobody deserves to die in such a way. (13 RT 2601.) Ms. Gonzalez stated that Gonzalez has three children and showed a photo of them to the jury. (13 RT 2603.)

Carlos Gonzalez, Gonzalez's uncle, testified that he went to prison as an accessory to a murder that Gonzalez's father committed. (15 RT 3035-3036.) Carlos was released from prison in 1987 but Frank is still in prison for that murder. Carlos had three other brothers, two of whom served prison terms for violent crimes. (15 RT 3036-3038.)

Several members of the Gonzalez family, including Carlos, were engaged in gang activities for many years. (15 RT 3039.) Carlos has other relatives in prison for murder in other states. (15 RT 3040.)

Carlos described Gonzalez's mother, Susan, as a "good girl."(15 RT 3040.) He first met Susan in the 1980's and was in her and Gonzalez's company for a few years before he and Gonzalez's were taken to prison. (15 RT 3041-3042.) By the time Carlos was released from prison, Gonzalez was 12 or 13 years old and in the California Youth Authority. While Gonzalez was in the Youth Authority, Carlos lost touch with him.

(15 RT 3042-3043.) Carlos also testified he personally observed Gonzalez being recruited for gang membership and was unable to stop this. (15 RT 3043.)

Carlos testified that as a result of his many talks with Susan, he got the impression that Susan seemed uninterested that Gonzalez spent his childhood on the street. (15 RT 3048-3049.) When he was approximately 12 years old, Gonzalez asked Carlos where Frank, Sr. was. Carlos told him. (15 RT 3049-3050.) Carlos testified that Susan had a drinking problem but he was not aware she had a drug problem. Carlos stated that he had turned his life around and now has a job, a wife, and children. (15 RT 3050.) Carlos opined that Gonzalez was wrong to kill but it would also be wrong to kill appellant. Carlos believed Gonzalez never had a positive role model in life. (15 RT 3051-3052.)

Katherine Monforte was Carlos's sister and Gonzalez's aunt. She has known Gonzalez since he was a baby and felt very close to Susan, whom she called a "wonderful girl," very quiet, sweet and innocent. (15 RT 3055-3056.) She thought that Frank, Sr. was a good father to Gonzalez. Frank, Sr. never stopped loving his children and had a heart of gold despite his drug problem. (15 RT 3058-3059.) This problem eventually led Frank, Sr. to prison when Gonzalez was three years old. (15 RT 3060.)

After Frank, Sr. went to prison there was a big change in Susan. She started spending her time with a man named Oscar who turned her into a heavy heroin user. Gonzalez was about 4 ½ years old at the time. Ms. Monforte would often go to Susan's place to check on Gonzalez and his sister, Celina. (15 RT 3061.) When Gonzalez was about nine years old, he came to live with Ms. Monforte for about eight months to establish some structure in his life. During this period, she saw marked improvement in Gonzalez. His was a great kid, he played sports and his grades were up. He also received guidance from Ms. Monforte's husband. (15 RT 3064-3065.)

However, this was not to last. Susan moved out and despite Ms. Monforte's urgings to the contrary, took Gonzalez and Celina with her. There were gangs in Susan's roach infested apartment building and she would use her welfare money to buy heroin. Gonzalez was sentenced to the CYA a few years after he moved from Ms. Monforte's care. He would remain there until he was twenty-one. (15 RT 3065-3068.) She believed that Gonzalez's mother and sister visited him in CYA but she never did. (15 RT 3068-3069.) She did not want him put to death stating "I love him to death...he's a part of me." (15 RT 3069-3070.) He seemed to be a good kid growing up and murder does not "compute" with the Frank Gonzalez she knew. (15 RT 3070.)

Consuela Gonzalez was Gonzalez's half-sister, having the same father but different mother. She testified that she had never met Gonzalez as they had grown up in a different environment and her family made an effort to keep her away from him. (15 RT 3078-3080.) She expressed sorrow that they never had a chance to meet and knowing that he was going to die affected her. (15 RT 3081.)

Susan Felix (formerly known as Susan Garcia), Gonzalez's mother, stated that her daughter, Celina, was five years older than her brother Frank, Jr. Frank, Sr. was twenty-nine years old then and would visit his son and appeared to love him. She knew that Frank, Sr. had a drug problem, and soon thereafter she realized she had a drug problem, herself. (15 RT 3084-3086.)

After Frank, Sr. went to prison, a man named "Oscar" moved in with Susan and her children. Frank, Jr. was only seven when Susan and Oscar began using heroin regularly. Oscar never participated in Frank Jr.'s upbringing other than to get Susan high. (15 RT 3088-3089.)

Frank did well in elementary school (15 RT 3090) but began to get in trouble as a young teenager, becoming an active Barrio Pobre gang member at the age of twelve or thirteen. Susan stated that she tried to keep Frank, Jr. from the gangs, but failed. (15 RT 3094.)

She stated that she does not want to see her son executed and that she loved him very much. When he was not in jail he was a great son. In addition, he was a good father, showing a lot of interest in his children and step-child. (15 RT 3099-3100.)

Jessica Rowan testified that she has known Gonzalez for 11 years. Their first child, Sunny, was born in 2002, and their second, Frankie, in 2005. She also had another child, Yvette, from a different relationship. (15 RT 3113-3114.) She stated Gonzalez always treated the children well. (15 RT 3113.) Gonzalez had a substance abuse problem and supported it by committing crimes as well as working at legitimate jobs. (15 RT 3114-3115.) She also stated when Gonzalez was released from the Youth Authority he was very unprepared for life and did not know how to get a job or travel on his own. (15 RT 3117.)

On cross-examination, Jessica admitted that Gonzalez was often violent to her and that he made his living stealing purses. (15 RT 3121-3124.)

Gonzalez's father, Frank Gonzalez, Sr., testified that he had not seen his son since he was committed to prison for a murder in 1983, when Gonzalez was three years old. He and Gonzalez have communicated by mail sporadically since then. (15 RT 3132-3133.) Frank, Sr, also was committed to the Youth Authority for an armed robbery when he was

seventeen years old. He also had drug problems as a young man and was involved, to some extent, in gangs. (15 RT 3134.) He also stated that he was never in a position to give Gonzalez fatherly guidance. (15 RT 3135.)

I. THERE WAS INSUFFICIENT EVIDENCE FOR CONVICTION AS TO COUNT 2 (ATTEMPTED SECOND DEGREE ROBBERY OF MARIA ROSA), HENCE, APPELLANT'S CONVICTION ON THIS COUNT VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW A FAIR TRIAL, AND A RELIABLE DETERMINATION OF GUILT, DEATH ELEGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEETH AMENDMENTS TO THE UNITED STATES CONSTITITON AND ANALOGOUS STATE LAW

A. Introduction

As stated by this Court in *People v. Alvarez* (2002) 27 Cal.4th 1161, 1164-1165, "To convict an accused of a criminal offense, the prosecution must prove that (1) a crime actually occurred, and (2) the accused was the perpetrator." The first of these requirements is known as proof of the *corpus delicti*, or "body of the crime." As further stated by this Court

> Though no statute or constitutional principle requires it, California, like most American jurisdictions, has historically adhered to the rule that the first of these components-the *corpus delicti* or body of the crime-cannot be proved by *exclusive* reliance on the defendant's extrajudicial statements. (*Id.* at p. 1165.)

Therefore, on appeal, a defendant may make a direct claim that there was insufficient evidence, aside from his own statements, of the *corpus delicti*. (*Ibid.*)

It is appellant's contention that without the use of his own extra-judicial statements, the prosecutor did not present sufficient evidence to prove the *corpus delicti* of an attempted robbery. In short, except for appellant's extrajudicial statements, there was no evidence that appellant attempted to rob Ms. Rosa on the morning of the crime.

B. Procedural History

On October 2, 2007, appellant filed a pre-trial Motion to Set Aside Count 2 (Attempted Robbery) of the Information pursuant to Penal Code section 995. (2 CT 371 et seq.) The motion was made on the ground that appellant had been committed without probable cause, in that the *corpus delicti* was not shown as to Count 2. Appellant essentially claimed that the only evidence presented to prove the charge of attempted robbery (Count 2) were extrajudicial statements of defendant. (2 CT 373) (2 RT 291-292.) Therefore, it was argued that Count 2 "cannot stand because the prosecution failed to prove the *corpus delicti* independent of defendant's out-of-court statements." (2 CT 373) The trial court denied the motion (2 RT 293-296

C. Legal Argument

"In every criminal trial, the prosecutor must prove the *corpus delicti*, or the body of the crime itself- i.e., the fact of injury, loss or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez, supra,* 27 Cal.4th at p. 1168.) This requirement is above and apart from the requirement that defendant committed the crime. (*Ibid.*) This Court has further held that the "prosecutor cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (*People v. Ochoa* (1998) 19 Cal.4th 353, 404; *People v. Jennings* (1991) 53 Cal.3d 334, 364; *People v. Beagle* (1972) 6 Cal.3d 441, 455.)

While the rule is not expressly enshrined in the United States Constitution, it is deeply rooted in common law and represents the law in the great majority of jurisdictions, including California. (*People v. Alvarez, supra,* 27 Cal.4th 1169.) Further, as this Court stated,

> In requiring independent evidence of the *corpus delicti*, California has not distinguished between actual confessions or admissions on the one hand and pre-offense statements of intent on the other. Thus, the rule in California has been that one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or a purpose to commit it. (*People v. Alvarez, supra,* 27 Cal.4th 1170-1171; *People v. Beagle, supra,* 6 Cal.3d 441, 455, fn. 5.)

As stated in *People v. Powers-Mochello* (2010) 189 Cal.App. 4th 400, 406 citing to *Cruetz v. Superior Court* (1996) 49 Cal.App.4th 822, 830,

> The *corpus delicti* rule was established by the courts to protect a defendant from the possibility of fabricated testimony out of which might be wrongfully established both the crime and its perpetrator...The *corpus delicti* rule arose from a judicial concern that false confessions would lead to unjust convictions...Today's judicial retention of the rule reflects the continued fear that confessions may be the result of either improper police activity or the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically.

The current state of procedure to use in the trial and appeal application of the *corpus delicti* law is set forth in *Alvarez*. "If otherwise admissible, the defendant's extrajudicial utterances may be introduced in his or her trial without regard to whether the prosecution has already provided, or promises to provide, independent prima facie proof that a criminal act was committed. (*Alvarez, supra,* 27 Cal.4th at p. 1180 ; *People v. Powers-Mochello, supra,* 189 Cal.App.4th at p. 408." However, it is also true that no person maybe convicted of any crime absent evidence of the crime in question that is independent of his out of court utterances. (*Ibid.*)

Therefore, the analysis of an insufficiency of evidence claim involving a *corpus delicti* component involves considering both the admission of all of appellant's extra-judicial statements and the necessity of

proof of the body of the crime standing apart from these statements.

(*People v. Powers-Mochello, supra,* 189 Cal.App. 4th at p. 407.)

The *Alvarez* Court set forth the quantum of evidence needed to fulfill the requirement of proof of the *corpus delicti.*

> The modicum of necessary independent evidence of the *corpus delicti*, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be 'a slight or prima facie showing permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues.' (*People v. Alvarez, supra,* 27 Cal.4th at p. 1181; see *People v. Herrera* (2006) 136 Cal. App. 4th 1191, 1205.)

However, such inferences cannot be based upon speculation or guesswork. "A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact established. (Citation.) It is axiomatic that an inference may not be based upon suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guesswork." (*People v. Stein* (1979) 94 Cal.App. 3d 235, 239.)

D. General Law of Sufficiency of Evidence

Having discussed the need for additional evidence other than defendant's statements to prove the corpus of the crime, the general law of sufficiency of evidence to sustain a conviction must now be addressed. A criminal defendant's state and federal rights to due process of law, a fair

trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama* (1980) 447 U.S. 625, 636; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule follows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.)

Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319. Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable than not." (*Id.* at p. 320.)

Under California law, when the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the

defendant is guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758.) In support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence but excluding inferences based upon speculation and conjecture, is presumed. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771.)

The reviewing court similarly inquires whether "a reasonable trier of fact could have found the prosecutor sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Memro* (1985) 38 Cal.3d 658, 694-695 [quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576].) The evidence supporting the conviction must be substantial in that it "reasonably inspires confidence" (*People v. Basset* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall, supra,* 15 Cal.4th at p 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.) "Evidence which merely raises a strong suspicion of defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not...limit its review to the evidence

favorable to the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577 [internal quotations omitted].) Instead, it must resolve the issue in light of the entire record- i.e., the entire picture of the defendant put before the jury- and may not limit[its] appraisal to isolated bits of evidence selected by the respondent. (*Ibid*; see *Jackson v. Virginia, supra,*443 U.S. p. 319.)

Finally, the rules governing the review of the sufficiency of evidence apply to challenges against a special circumstance finding. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497; *People v. Green, supra,* 27 Cal.3d at p. 55.)

When the reviewing court determines that no reasonable trier of fact could have found the defendant guilty, it must afford him relief. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1127.)

E. Law of Attempted Robbery

As a general proposition, the inchoate crime of attempt has two elements; the intent to commit a crime and a direct but ineffectual act toward its commission. (*People v. Carpenter* (1997) 15 Cal.4th 312, 387.) Stated otherwise, the act "must not be mere preparation but must be a direct movement after the preparation that would have accompanied the crime if not frustrated by extraneous circumstances." (*Ibid.* citing *People v. Memro, supra,* 38 Cal.3d at p. 698.) This ineffectual act must "reach far enough toward the accomplishment of the desired result to amount to the

commencement of the consummation." (*People v. Miller* (1935) 2 Cal.2d 527, 530.) Therefore, to be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward its commission. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) This ineffectual act need not include the "last proximate act for the completion of the crime." (*People v. Vizcarra* (1980) 100 Cal.App.3d 858, 863)

F. According to the Above Law, There Was Insufficient Evidence to Sustain a Conviction of Attempted Robbery

In the instant case, excluding appellant's own statements there was insufficient evidence to either prove directly or to create the necessary inference that appellant attempted to rob Ms. Rosa. As stated in the Statement of Facts, Ms. Rosa's body was found lying in a walkway adjacent to Deputy Martin's residence. She had been shot. Her car was in the driveway of the residence, with its trunk open. Nothing appeared to be missing from the trunk, which contained, among other things, Ms. Rosa's purse and two handguns. No eyewitnesses saw the shooting or anyone with Ms. Rosa. One of the witnesses saw two otherwise unidentified people on bicycles near the scene of the crime before the shots were fired (AOB at p. 4.) but none of these witnesses were able to provide any evidence as to what these bicyclists were doing. (AOB at pp. 3-4.)

Further, the officers at the scene did not testify in such a way so as to indicate that anything had been taken from Ms. Rosa. (AOB at p. 6.) While there was evidence that Ms. Rosa may have attempted to fire her weapon (AOB at p. 6-7), there was no evidence that her actions were in response to an attempted to rob her. Without reliance on appellant's statements, there was a complete lack of evidence that appellant attempted to commit the crime of robbery.

According to the above law, not only was there no direct evidence or inference that would lead to the conclusion that there was an ineffectual act beyond mere planning to commit the robbery, there was no evidence of the planning or even an *intent* to rob. As stated above, evidence which merely raises a "strong suspicion of defendant's guilt is not sufficient to support a conviction." (*People v. Kunkin, supra,* 9 Cal.3d at p. 250.) In the instant case, there was not even enough evidence to sustain such a suspicion.

In fact, without the improper reliance on appellant's statements, there are any number of things that could have precipitated the shooting, other than a botched robbery. Appellant had a long history of crimes in the Long Beach area. Ms. Rosa was a peace officer. It may well have been that she saw appellant and Mr. Flint walking the street in the very early hours of the morning and decided to approach him as to what he was doing. Such a scenario is equally likely to have caused Ms. Rosa's jammed gun and her

death as the speculation that there was an attempted robbery perpetrated by appellant.

This is not a close case. It is not a situation in which the reviewing court must engage in a lengthy and complex analysis to determine the fine line between acts of planning and an act directed toward the completion of the crime. There wasn't even any sort of evidence of planning or intent. Outside of appellant's statements there was no evidence of an attempted robbery. Therefore, according to the above law, the conviction on Count 2 must be vacated.

II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION UNDER THE ONLY THEORY OF MURDER ADVANCED BY THE PROSECUTION, HENCE, APPELLANT'S CONVICTION ON THE MURDER COUNT VIOLATED HIS RIGHT TO DUE PROCESS, A FAIR TRIAL, A RELIABLE DETERMINATION OF GUILT, DEATH ELEGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEETH AMENDMENTS TO THE UNITED STATES CONSTITITON AND ANALOGOUS STATE LAW

A. Introduction

There is no question that under the law the prosecution may advance more than one theory of murder to prove a defendant guilty of murder. (*People v. Morgan* (2007) 42 Cal.4th 593, 616.) It is also true that if a jury is instructed on more than one theory of first degree murder, the jury need not reach a unanimous verdict as to one or more of the theories to convict, as

long as it finds unanimously that defendant is guilty of first degree murder under some theory. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1354; *People v Benevides* (2005) 35 Cal.4th 69, 100-101.)

However, in the instant case, the prosecutor did not seek a conviction based on any theory of murder other than first degree felony murder. He did not seek an instruction as to any other theory of murder, nor was one given. (IV CT 856 et seq; 12 RT 2407 et seq.) He expressly told the trial court that the only guilt theory upon which he was proceeding was first degree felony murder. (12 RT 2387.) No suggestion was made either in the prosecutor's argument or in the court's instructions that the jury could convict appellant based upon a theory of willful premeditated murder. In fact, at one point, the trial court appeared to expressly reject the notion that a conviction based upon any other theory of murder was possible. (12 RT 2388-2389.)

Therefore, if there was insufficient evidence to convict appellant of attempted robbery felony murder, appellant cannot be found guilty of murder. To prove that an attempted robbery felony murder, the prosecution must show that the murder "was committed in the perpetration of, or attempt to perpetrate robbery." (Penal Code section 189; *People v. Lindberg* (2008) 45 Cal.4th 1, 27-28.)

B. Legal Argument

Felony murder is a statutory creation which conclusively eliminates the prosecutor's burden to prove malice to obtain a first degree murder conviction. (*People v. Dillon.*(1983) 34 Cal.3d 441, 475.) The only state of mind that must be proven is defendant intended to commit the underlying felony; in the instant case, the attempted robbery/robbery of Ms. Rosa. (*Ibid; People v. Cavitt* (2004) 33 Cal.4th 187, 197.) This is because the intention of the Legislature in promulgating the felony murder statute was to deter the commission of various inherently dangerous felonies by issuing a "warning" that if death results from the commission of such a felony, the law will consider it a first degree murder, regardless of the other circumstances. (*People v. Burton* (1971) 6 Cal.3d 375, 387-388.)

As stated in Argument I, due to the rule of *corpus delecti,* the prosecution did not prove the *corpus delicti* of the underlying felony of attempted robbery therefore cannot prove the underlying felony of attempted robbery. There was insufficient evidence of intent or action to prove a robbery or an act toward its completion. According to the above law, if the underlying felony cannot be proved, neither can the felony murder charged based on that felony.

As stated above, the prosecutor deliberately chose not to pursue any other theory of first degree murder. Therefore, if the evidence is insufficient

to uphold a felony-murder conviction, appellant cannot be convicted of murder.

For this reason, the entire judgment against appellant must be vacated.

III. APPELLANT'S STATEMENTS AS TO HIS INVOLVEMENT IN THE SHOOTING OF MS. ROSA WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL, DUE PROCESS OF LAW, AND A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. Introduction and Factual Summary

Maria Rosa was killed on March 28, 2006. Immediately before the killing, a witness had seen two men on bicycles, one on a "10 speed," and the other, a shorter man than the first, on a BMX bicycle left at the scene. (AOB at pp. 3-4.) Three days later, a DNA sample was taken from the BMX (AOB 18) and on July 14, 2006, that DNA was matched to Gonzalez, suggesting his presence at the murder scene. (AOB 18-19.)

On August 16, 2006, both Gonzalez and his co-defendant Flint, were transported to the Los Angeles County Jail from the state prisons where they were serving sentences for unrelated crimes. (4 CT 716; AOB p. 8.) According to the prosecution, the reason for this Order was to secure their

presence for a live line-up. (3 RT 716.) The true purpose in transporting appellant and his co-defendant was to unconstitutionally elicit incriminating statements from them by employing a "sting operation" in which undercover officers posed as prison inmates. Those officers accompanied appellant and his co-defendant to the Los Angeles County Jail. During the transportation process and the stay at the jail, the undercover officers did everything in their power to get appellant and Mr. Flint to talk about their involvement. (AOB pp. 15 et seq.) However, well prior to August 16, 2006, the police had more than enough evidence upon which to arrest appellant for the murder of Ms. Rosa.

The prosecutor's "sting" operation worked perfectly. Without the presence of counsel, appellant was under the complete control of the authorities during their investigation, and they were able to subject him to whatever misleading investigative tactics they choose.

B. Procedural History

On February 8, 2008, appellant filed a Motion to Suppress All Statements of Defendant Made in the Presence of Undercover Officers and Fruits of Such Statements. (IV CT 702 et seq.) The Motion was based on the grounds that the statements were obtained in violation of appellant's rights under the Fifth and Sixth Amendments to the United States Constitution. (4 CT 702.) On February 13, 2008, the prosecution filed its

Opposition. (IV CT 714.) On March 6, 2008, a hearing was conducted to resolve the Motion. (2 RT 334.) Neither side presented arguments and the trial court denied the Motion. (2 RT 335-336.)

In his Motion, appellant argued that there was probable cause to arrest him for the murder of Maria Rosa prior the August 16, 2007 police operation. (III CT 706-707.) However, instead of doing so, the authorities arranged for a scheme so that the undercover officers could elicit statements from appellant without first appointing counsel. (III CT 704.) By doing so, the authorities deprived appellant of his right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution, in that his right to counsel attached before appellant was formally charged with the murder on September 26, 2006. In addition, appellant also argued that the prosecution's delay in filing formal charges against him so that statements could be obtained from him without being afforded the right to counsel was a violation of his due process rights warranting dismissal of the charges. (III CT 708.)

C. Legal Argument

1. Appellant was Denied his Right to Counsel Under the Sixth and Fourteenth Amendments to the United States Constitution

The United States Supreme Court in *Maine v. Moulton* (1985) 475 U.S. 159, 163 made it clear that the right to assistance of counsel as

guaranteed by the Sixth and Fourteenth Amendment is indispensable and fundamental to our system of criminal justice. (*Id.* at p. 168; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) Without the right to assistance of counsel, the "fundamental human rights of life and liberty" cannot be insured and justice cannot be done. (*Gideon, supra,* 372 U.S. at p. 343.) This is so because the right to counsel embodies "a realistic recognition of the obvious truth that the average defendant does not have the professional skills to represent himself." (*Id.* at p. 169 citing to *Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463.)

The general law is that the right to counsel does not attach until a defendant is arrested or at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions were imposed on his liberty. (*Rothgery v. Gillespie County, Texas* (2008) 554 U.S. 191, 194.) However, as stated in *United States v. Wade* (1967) 388 U.S. 218, 224, the right to counsel need not be limited to any particular moment in the prosecution but may attach "where results may well settle the accused's fate and reduce trial to a mere formality." This includes whether the prosecution is "formal or informal, in court or out, where counsel's absence may derogate from the accused's right to a fair trial." (*Wade* at p. 226.) As otherwise stated in *Powell v. Alabama* (1964) 287 U.S, 45, 60-65, the purpose of the right to counsel provisions of

the Bill of Rights was a recognition by the Founding Fathers that if a defendant was forced to stand alone against the State, even at a very early stage of a prosecution, the defendant's case may well be "foredoomed."

In his concurring opinion in *United States v. Gouveia* (1984) 467 U.S. 180, 193, Justice Stevens, joined by Justice Brennan, recognized the will of the promulgators of the Constitution as set forth in in *Powell* and *Wade.* Justice Stevens made clear that the law should not foreclose the possibility that right of counsel will, if appropriate, attach prior to the commencement of any formal proceedings. (*Ibid.*) By stating so, the two Justices acknowledged that "extension of the right to counsel to events before the trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered part of the trial itself. (*Id.* at p. 196; *United States v. Ash* (1973) 413 U.S. 300, 310.) According to Justice Stevens, the test that should be used to determine whether the right to counsel should attach is "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." (*Gouveia* at p. 196, *Ash* at p. 313.)

In the instant case, appellant was faced with a "changing pattern" of investigation that involved the use of undercover agents of the State to elicit statements from an "uncharged" accused, against whom the State has more than enough evidence to charge him. This was intentionally done in such a

manner to circumvent the accused's right to counsel. The State deliberately followed their predetermined scheme to deprive appellant, who "for all practical purposes, already been charged with murder," of his right to counsel prior to extensive questioning by the State's agents. (See *United States v. Gouveia, supra,* 467 U.S. at p. 194; *Escobedo v. Illinois* (1964) 378 U.S. 478, 486.) That the State had at least probable cause to charge appellant with the murder of Maria Rosa is demonstrated by the August 10, 2006 affidavit of Detective Thomas Keerfoot of the Los Angeles Sheriff Department. (II CT 423 et seq.)[2] The affidavit in question accompanied the State's request for a wiretap of the phones of various persons having knowledge of Ms. Rosa's murder. The affidavit stated that Genero Huizar saw two people on bicycles just two minutes to the shooting. The taller one was on a ten speed bike and the shorter one on a BMX bike. (2 CT 434-436) These two individuals were captured by a bank surveillance camera a very short time after the shooting. (2 CT 435-436)

The BMX bicycle was left at the scene of the crime. A DNA profile was developed from the handlebar grips. (2 CT 436.) This profile was submitted as a forensic unknown into the CODIS databank. (*Ibid.*) The purpose of this database was to allow a search of DNA profiles of convicted felons for a match to this forensic unknown. (*Ibid.*)

[2] This affidavit was originally sealed by the trial court. It was subsequently unsealed pursuant to appellant's Motion to Correct the Record dated

On July 14, 2006, the investigators of the shooting were notified by the California Department of Justice that the forensic unknown matched the profile of appellant. (2 CT 436) According to the affidavit, on May 19, 2006, investigators met with a confidential informant who advised them that he/she knew Shannon Volpe, who said she knew that "Grumpy" and a friend of his were "out during robberies when the murder happened." (2 CT 437.) She also stated that she had heard appellant and Mr. Flint joke about Ms. Rosa's shooting. (2 CT 441.) According to the informant, Ms.Volpe also stated that on July 1, 2006, another confidential informant told the investigators that appellant and Flint did the shooting. (2 CT 437-438.) The affidavit also revealed that appellant's nickname was "Grumpy." (2 CT 438.)

In addition, the affidavit related a phone conversations between appellant and other persons in which he essentially admitted involvement in the shootings. (2 CT 448-449.) From the above Detective Keerfoot reached the conclusion that appellant committed the murder of Ms. Rosa (2 CT 425.)

From the above facts, there can be no doubt that appellant was more than just a "person of interest" to the police. By the time the August 16, 2006 operation began, the authorities had focused on appellant and Flint as the only persons that could have committed the robbery. However, instead

of arresting appellant, which would have caused counsel to be appointed, the authorities took full advantage of the fact that appellant was already incarcerated, albeit for another crime, in order to effect a scheme which would have been otherwise impossible if appellant was a free man.

As stated in subsection III, C 1, *supra,* the law should not foreclose the possibility that right of counsel will, if appropriate, attach prior to the commencement of any formal proceedings. (*Ibid.*) In *Gouveia, supra,* 467 U.S. at p. 196, Justices Stevens and Brennan, acknowledged that "extension of the right to counsel to events before the trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered part of the trial itself." The instant case is such a situation. As such, according to the above described law, appellant should have been appointed counsel before the authorities set upon him with the full power of their arsenal, using an environment created for admissions to essentially secure a conviction.

Prior to August 16, 2006, appellant was "for all practical purposes, already had been charged with murder." (*Gouveia, supra,* 467 U.S. at 194.) The police had zeroed in on him as the prime suspect and it was inevitable that they were going to arrest him. However, by doing so they would have triggered the appointment of counsel, which would have terminated the undercover operation. (*Massiah v. United States* (1964) 377 U.S. 201, 204.)

As stated above, the absence of counsel prior to and during the undercover operation "foredoomed" his defense. (*Powell v. Alabama, supra,* 287 U.S. at pp. 60-65.) Therefore, the statements of appellant made as a result of this unconstitutional scheme and the illegal fruits therefrom, should be suppressed.

2. Appellant was Denied Due Process of Law Under the Fifth and Fourteenth Amendments to the United States Constitution

"Due process of law" is a "summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions or consciousness of our people as to be ranked fundamental or are implicit in the concept of ordered liberty." (*Rochin v. California* (1952) 342 U.S. 163, 169.)

Both the United States and California Supreme Courts have recognized that due process is a flexible concept rather than a "technical conception with a fixed content unrelated to time place and circumstances." (*Gilbert v. Homar* (1997) 520 U.S. 924, 930; see *Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552, 561.) This flexibility requirement calls for such procedural protections as the particular situation demands. (*Morrisey v. Brewer* (1972) 408 U.S. 471, 481.)

In general, to determine what process is constitutionally due, three factors must be balanced; the private interest that is affected by the

government action, the risk of deprivation of such an interest by the procedural process being followed, and the government's interest. (*Mathews v. Elridge* (1976) 424 U.S. 319, 335.) Specifically regarding the law of due process as it pertains to the appointment of counsel, it is clear that the refusal to appoint counsel for an indigent may result in the violation of a fundamental right guaranteed by our system of justice. (*Gideon v. Wainwright, supra,* 372 U.S. at pp. 342-343.)

Further, under the Fifth and Fourteenth Amendments to the United States Constitution due process is violated when the delay in charging a defendant was undertaken to gain a tactical advantage over the accused. (*United States v. Lovasco* (1977) 431 U.S. 783, 795.) The same is true under California law. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1251.) It is clear that a defendant seeking to dismiss charges on due process grounds must demonstrate prejudice arising from the delay in bringing the charges. (*People v. Caitlin* (2001) 26 Cal.4th 81, 107.) As stated in *People v. Nelson, supra,* 43 Cal.4th at p. 1251, the defendant must show some evidence of prejudice. This will shift the burden to the prosecution to justify the delay. Once a justification is given, the reviewing court must balance the harm against defendant against the reason for the delay. (*Ibid.*)

In the instant case, the due process violations of failure to appoint counsel and prosecutorial delay in instituting formal charging went hand in

hand. There was no question that the prosecution sought to delay the prosecution of appellant. This delay placed appellant in a position where the authorities could deprive him of his right to counsel until after he was subject to a wide-ranging sting operation in which he was subjected to activities of many undercover officers, all determined to extract inculpatory statements from him. The prejudice that was caused was manifest in that it produced inculpatory statements from appellant that he never would have uttered had he been given counsel prior to the operation.

The state's only interest in delaying attachment was to illegally obtain these statements. As such, all of appellant's statements obtained as a result of these due process violations, as well as the fruits therefrom, must be suppressed.

D. Prejudice

Obtaining these statements from appellant prior to appointment of counsel, violated his right to counsel, due process of law, a fair determination of guilt, death qualification and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. A trial court error of constitutional law required the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this

burden. The statements obtained by this unconstitutional process assured appellant's conviction, hence, the entire judgment must be vacated.

IV. THE TRIAL COURT'S ERROR IN DENYING COUNSEL'S MOTION TO CONTINUE THE TRIAL VIOLATED APPELLANT'S RIGHT TO COUNSEL, DUE PROCESS OF LAW, FAIR TRIAL, AND A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. Procedural History

On October 16, 2007, appellant's counsel, Katie Trotter, filed a Motion to Continue the Trial until February 4, 2008. (III CT 475.) Accompanying this Motion was a Declaration filed under seal. (Supplemental CT IV pp. 1-3.) The declaration stated that Ms. Trotter was appointed as appellant's counsel on October 16, 2006. Since that time she had been diligently preparing for trial. (*Id.* at p. 1.) She stated that there were more than 2,500 pages of discovery and more than 50 DVD's, CD's or other documents. (*Id.* at p. 2.)

Ms. Trotter also declared that her private investigator had been diligently working on the case gathering mitigation evidence. (Supplemental CT IV p. 2.) The investigator reported back to counsel that appellant had a lengthy juvenile and adult record. (*Ibid.*) He also told

counsel that he needed an additional 30 days to obtain all of the records from the Department of Corrections and California Youth authorities. (*Ibid.*) The investigator also stated he needed more time to gather appellant's birth and medical records. (*Ibid.*) The investigator recently learned that appellant's father was incarcerated at Corcoran State Prison. His subsequent interview with appellant's father revealed additional information that required investigation. (Supplemental CT IV, p. 2.) Further, the investigator revealed to counsel that he needed more time to investigate the aggravating factors as stated in the prosecutor's notification. (*Id.* at pp. 2-3.) The investigator told counsel that he had received certain DNA discovery from the prosecutor. (*Id.* at p.3.) Counsel stated that she believed that a continuance was necessary to fulfill her duty to render effective assistance of counsel. (*Ibid.*)

On October 16, 2007, a hearing was held on the Motion to Continue. (1 RT 103.) Ms. Trotter informed the court that appellant was not personally willing to waive time. (1 RT 104.) The court stated that in light of the Declaration, appellant's right to effective assistance of counsel outweighed his statutory right to a speedy trial and granted counsel's motion, continuing the trial until February 4, 2008. (*Ibid.*)

On February 8, 2008, Ms. Trotter filed another Motion to Continue, asking that the trial be continued to June 16, 2008, as day 0 of 30. (III CT

711.) Once again, she filed a sealed Declaration in support of her Motion. (Supplemental CT III, pp. 16-17.) In that Declaration, Ms. Trotter indicated that in spite of working diligently with her co-counsel, Mr. Peters, they were not prepared to present an adequate defense by the trial date of March 19, 2008. (*Id.* at p. 1.) Ms. Trotter further stated that she had not heard from her DNA expert about discovery sent to him and had been unable to obtain the services of mental health professionals in time to use them in mitigation. In addition, she stated that there were other witnesses that needed to be located and interviewed. (*Id.* at p. 2.)

A few days thereafter, the trial court held a hearing on counsel's motion. (2 RT 320 et seq.) Once again, Ms. Trotter informed the trial court that appellant would not agree to waiving time, even though it was explained to him that both counsel needed the additional time to prepare a proper defense. (2 RT 320.) She further stated that if the motion were granted, he would opt to represent himself. (*Ibid.*) Ms. Trotter stated that regardless of appellant's stated position, she and co-counsel felt compelled to proceed with the motion. (*Ibid.*)

At the request of counsel, the court explained to appellant that his counsel were trying to do the best possible job they could on his behalf and he had a right to be represented to the best of his counsel's ability. (2 RT 321.) The court also informed appellant that counsel needed additional time

to do what they felt was necessary on his behalf. (2 RT 321.) Appellant stated that he understood but once again refused to waive time. (2 RT 321-322.)

The prosecutor did not object to counsel's request. The only comments he made were regarding the fact that due to scheduling issues involving one of the assisting prosecutors and the chief investigating office, the trial could not begin until August 3, 2008. (2 RT 322) The court stated "I have a concern if I can find good cause again..." (2 RT 232.) The court further stated that appellant appeared to be an intelligent young man and understood the gravity of the case. However, in spite of finding good cause in the past, the court was not sure if it could do so again "in good conscience." (*Ibid.*)

Ms. Trotter stated that she did not agree with the court in that she believed that case law indicated that it was counsel's province to determine what sort of mitigation case to present. (2 RT 323.) The court disagreed citing to the Stanley (Tookie) Williams case, over which the court had presided (*Ibid.*) However, the court stated that this was not its real concern, which was whether it could keep finding good cause to continue over appellant's objection, especially when a five month continuance would be necessary. (*Ibid.*)

Ms. Trotter reiterated that she could not possibility be ready "with respect to that particular issue," presumably referring to the case in mitigation. (2 RT 324.) However, the court ruled that it could not find good cause for a five-month continuance when defendant refused to waive time. The court then indicated that whatever needed to be done "must be done expeditiously" and then stated "I'd love to be able to accommodate you but I am restrained." (*Ibid.*)

B. Legal Argument

The court's denial of the motion was not based on its perception that counsel was intentionally delaying the trial or exaggerating its need for more time in which to prepare. As stated above, it fully recognized that appellant's counsel were doing their best to represent appellant and, as such, the Motion was filed in the best interest of Gonzalez. Further, it did not dispute any aspect of the February 8, 2008 Declaration.

In addition, the trial court believed a continuance was in appellant's best interest. In fact, the court made clear that it "would love to accommodate counsel," indicating that the continuance was warranted. However, the court stated that it was "restrained" from granting it, considering appellant was an "intelligent young man" who fully understood his actions in requesting the trial go forward as scheduled. (2 RT 322.)

The court did not deny the motion as a result of the exercise of its valid discretion. It denied it because of either a misinterpretation or misunderstanding of the law.

The first misunderstanding had to do with the trial court's concern that it could not grant the continuance because of appellant's opposition. It is true that there are certain "fundamental" rights that can only be waived by defendant, directly. The most obvious of these are the right to self-representation, as long as the defendant has the mental capacity to do so. (*Faretta v. California* (1975) 422 U.S. 806, 820-821; *People v. Johnson* (2012) 53 Cal.4th 519, 526-528.) However, once a defendant accepts the representation of counsel, he generally does not have the right to control the defense strategy. This includes when to seek a continuance where appropriate. (*Townsend v. Superior Court of Los Angeles County* (1975) 15 Cal.3d 774, 781-782.)

Townsend made it clear that while the constitutional right to a speedy trial is the type of fundamental right that must be waived by a defendant, personally, the statutory right to be tried within 60 days (Penal Code section 1382, subd. 2) is not a "fundamental right and may be waived by counsel as part of the overall trial strategy." (*Ibid.*) Defendants' rights under section 1382 are creatures of statute and are "merely supplementary to and a construction of the Constitution." (*Sykes v. Superior Court* (1973)

9 Cal.3d 83, 89.) As such, the right to be tried within 60 days does not "carry the force or weight of constitutionally mandated imperatives." (*Townsend v. Superior Court of Los Angeles County, supra,* 15 Cal.3d at p. 781.)

Therefore, any concern of the trial court that appellant had a fundamental right to be tried within 60 days, hence had a veto power over the decision of trial counsel, was not supported by the law.

The proper concern in this case is the balance between appellant right to *effective* counsel and his statutory rights under Penal Code section 1382. The Sixth Amendment right to counsel in a criminal trial is not satisfied by the mere presence of a lawyer. The right to counsel necessarily involves "the right to *effective* assistance of counsel" (emphasis supplied.) (*McMinn v. Richardson* (1970) 397 U.S. 759, 771 n. 14.) This maxim also applies to the penalty phase of a capital case. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; *Silva v. Woodford* (9th Cir 2002) 270 F3d 825, 836.) As stated by the Ninth Circuit Court of Appeal, "[b]ecause of the potential consequences of deficient performance during capital sentencing, we must be sure not to apply a more lenient performance to the sentencing phase than we apply to the guilt phase." (*Mak v. Blodgett* (9th Cir 1992) 970 F.2d 614, 619.)

While the United States Supreme Court has not set forth specific guidelines for what is constitutionally effective attorney conduct in such a proceeding, it has stated that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Wiggens v. Smith* (2003) 539 U.S. 510, 521.)

However, the Supreme Court has cited with approval in both *Rompilla v. Beard* (2005) 545 U.S. 374, 387 and *Williams v. Taylor* (2000) 529 U.S. 362, 396 the ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980). This standard stated that it is the general duty of every trial lawyer to conduct a thorough investigation of the circumstances of each case and "explore all avenues of defense." The High Court has held that this duty to investigate is critical in the penalty phase of a capital trial because the defendant has a constitutionally protected right to present to the jury mitigating evidence. (*Williams v. Taylor, supra,* 529 U.S. at p. 393.

In regard to the penalty phase, trial counsel has an affirmative duty to conduct a "diligent investigation into his client's troubling background and unique personal circumstances." (*Williams, supra,* 529 U.S. at p. 415.) In addition, the United States Supreme Court has cited favorably to the more specific American Bar Association Guidelines as to what is to be considered "reasonable" in a constitutional sense for representation in the penalty phase of a death penalty case. These guidelines indicate that it is

necessary to go beyond mere rudimentary investigation and consider presenting topics such as medical history, history, employment and training history, as well as prior record and cultural and religious influences. (*Wiggins v. Smith, supra,* 539 U.S. at pp. 534-535.)

The holding of *Wiggins* is based upon the holding of the United States Supreme Court that there is a "belief, long-held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Boyde v. California* (1990) 494 U.S. 370, 382.)

This was precisely the constitutionally mandated defense that counsel was trying to provide appellant when it asked the court for the rather modest continuance until June, 2008. There was nothing unusual or frivolous about the nature of investigation that needed to be done before the trial began. It was the investigation *required* by the High Court in *Rompilla, Williams,* and *Wiggins*.

In essentially forbidding counsel to do what was required by the High Court, the trial court demonstrated its misunderstanding of the law. The standards placed upon death penalty counsel by the United States Supreme Court cannot be set aside just because a defendant demands an immediate trial. The reason why appellant was appointed counsel in the

first place was the law's recognition that all defendants were constitutionally entitled to competent counsel to navigate the mine field that is a criminal trial, especially a capital trial. (*Gideon v. Wainwright, supra,* 372 U.S. at pp. 342-343.)

The right to such effective counsel is as fundamental a right as exists in the constellation of constitutional protections. The right to be tried within the time limits of Penal Code section 1382 is not such a fundamental right. (*Townsend v. California Superior Court, supra,* 15 Cal.3d at pp. 781-782.) Without the requested continuance, counsel could not be the effective counsel required by the High Court. This is what the trial court failed to consider.

The particular circumstances of the instant case also lean heavily in favor of a continuance in this matter. This was not a case where the need for the continuance was the result of a lazy or indifferent defense counsel or counsel who brought the motion to harass appellant rather than to assist in his defense. (*People v. Floyd* (1970) 1 Cal.3d 694, 707.) The trial court made clear that counsel was behaving in a completely appropriate manner and in appellant's best interests. (2 RT 320-324.) This Court, in *Townsend, supra,* 15 Cal.3d at p. 784 had made clear that the standard was that counsel be "well-qualified to represent (appellant), and (was) pursuing (their) client's interest in a competent manner." Under this standard, the

continuance should have been granted and the court was incorrect when it stated that it could not grant the continuance because it was "restricted."

As stated above, the real restriction on the trial court should have been against acting in a way to prejudice appellant's right to a fair trial. Counsel was forced to trial without adequate knowledge of appellant's background and reasons for his prior crimes is unprepared counsel, and unprepared counsel violates a defendant's fundamental right to a fair trial. Counsel's abbreviated penalty phase presentation reflected the damage done by the trial court's refusal to grant the requested continuance. No mental health expert testified to explain to the jury the nature and effect of gang culture on a young man such as appellant. There was no professional to further explain the socio-economic factors that drove appellant's actions. There was no one to put appellant's current and past crimes in the perspective of the crime laden streets where he was raised. In short, because of the trial court's actions there was no "diligent investigation into his client's troubling background and unique personal circumstances." (*Williams, supra,* 529 U.S. at p. 415.) As stated above, it is a "belief, long-held by this society, that defendants, who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Boyde v. California, supra,* 494 U.S. at p.382. The denial of the

continuance directly deprived counsel of the ability to appeal to the jury in this manner.

In addition, the Declaration of February 8, 2008, made clear that defense counsel's consultation with his DNA expert was not yet completed. Counsel was therefore compelled to go to trial without being allowed time to gather enough information on perhaps the most vital single piece of evidence in this case; the only forensic evidence directly connecting appellant to the crime scene. This lack of preparedness manifested itself in a most perfunctory challenge to the DNA evidence. No question was raised about the laboratory's interpretation of the mixture of alleles from multiple contributors found on the bicycle handles, which yielded a set of alleles which was interpreted as consistent with appellant's DNA only by assuming the alleles inconsistent with appellant's profile belonged to another contributor and the alleles consistent with appellant's but not in the mixture had "dropped out."

Appellant was never asked by the trial court why he opposed the motion. He was a detainee at the Los Angeles County Jail charged with the murder of a Los Angeles County Deputy Sheriff. To surmise that appellant simply wanted out of that particular jail as soon as possible does not require a leap of logic or common sense. However, regardless of the reason, he was an uneducated man who knew nothing about the workings of a capital trial.

He took it upon himself take control of his trial away from his counsel at a most critical juncture. The court allowed him to do so in violation of both federal and state constitutional authority.

Because the trial court did not validly exercise discretion in its ruling, the question before this Court is neither a question of fact nor a mixed question of fact and law. It was a question of law, alone; whether and to what extent the trial court was restricted in granting counsel's motion for a continuance. Therefore, appellant is entitled to a *de novo* review without deference to the trial court's holding. (*People v. Cromer* (2001) 24 Cal.4th 889, 893; *People v. Lawler* (1973) 9 Cal.3d 156, 160.)

Using this standard, there can be no doubt that the trial court erred in denying the Motion to Continue.

C. Prejudice

The failure to grant a continuance in this case prevented counsel from investigating and presenting a constitutionally adequate case at the guilt phase and in mitigation of penalty. The trial court improperly denied counsel the time they needed to properly fulfill their obligations under the mandates of the United States Supreme Court.

The trial court's refusal to grant the continuance violated appellant's right to counsel, due process of law, and a fair determination of guilt, death penalty qualification, and penalty under the Fifth, Sixth, Eighth and

Fourteenth Amendments. A trial court error of constitutional law requires the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. Californian, supra,* 386 U.S. at p. 24.) The prosecution cannot meet this burden. The entire judgment must be vacated.

V. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH, EIGHTH AND FOURTEEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PURSUANT TO THE UNITED STATES SUPREME COURT'S DECISION IN CRAWFORD V. WASHINGTON

A. Factual Summary

In the spring of 2007, Juli Watkins was a Senior Criminologist for the Los Angeles County Sheriff's Office. (10 RT 2114-2115.) As part of the investigation of the instant crime, she was assigned by her supervisor to analyze, for any latent DNA, the BMX bicycle recovered from the scene of the crime. (10 RT 2115.) However, the first set of samples had contamination in the reagent blank, making any test results unusable. (10 RT 2119.)

Ms. Watkins informed her supervisor that she could not do a retest for another week. Her supervisor said that the retesting could not wait. (10 RT 2120.) Due to Ms. Watkins' unavailability to do a second round of tests, the case was assigned to Kari Yoshida, another Senior Criminalist, who

based upon her knowledge of the background of the case was asked to do a second sample. (10 RT 2120-2121.) According to Ms. Watkins, all of the DNA analysts followed the same protocol. (*Ibid.*)

Ms. Watkins testified at appellant's trial that Ms. Yoshida performed this second set of testing using swabs from various location on the bicycle, including the handlebars. (10 RT 2121.) She also testified that reports were made on this second round of testing, which both she and Ms. Yoshida signed. (*Ibid.*) The prosecutor asked Ms. Watkins whether Ms. Yoshida did a full analysis on the second sample. (10 RT 2122.) Appellant's counsel objected on the grounds that Ms. Watkins' testifying as to Ms. Yoshida's results was hearsay and that Ms. Watkins knew nothing about Ms. Yoshida's background. (10 RT 2123.) The trial court overruled the objection ruling that California law allows one expert to testify as to the report of another. (*Ibid.*) Ms. Watkins proceeded to testify as to Ms. Yoshida's qualifications to perform DNA analysis (10 RT 2123-2125.) Ms. Watkins further testified that Ms. Yoshida's sampling of the left handle bar grip yielded a mixture of DNA with a major and minor contributor. (10 RT 2123-2127.) Ms. Watkins testified that Ms. Yoshida compared this mixed sample with a reference sample appellant's DNA and this testing yielded the result that appellant could not be excluded as a contributor to the major

portion of the latent DNA sample lifted from the bike handle bars. (10 RT 2127-2132.)

Ms. Watkins also testified that using a conservative estimate the results Ms. Yoshida obtained indicated there is a one in a billion chance that a random person would share the same DNA typing as was deposited on the handle bar. (10 RT 2131.)

B. Legal Argument

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees to all defendants "the right to be confronted by all witnesses against them." In *Crawford v. Washington* (2004) 541 U.S. 36, 52, the High Court held the Confrontation Clause permits admission of "[t]estimonial statements absent from trial ...only when the declarant was unavailable and only where the defendant had a prior opportunity to cross-examine."

In so holding, the Court expressly abrogated its own decision in *Ohio v. Roberts* (1980) 448 U.S. 56. *Roberts* stated an out of court statement by an unavailable witness can be admissible under the Confrontation Clause of the Sixth Amendment as long as the statement fell within a "firmly rooted hearsay exception " or "bore a "particularized guarantee of trustworthiness. (*Id.* at p.66.)

In abrogating the above holding of *Roberts*, the High Court stated the principal function of the Confrontation Clause was to guard against the use of *ex parte* examinations against a criminal defendant. (*Crawford, supra,* 541 U.S. at p. 52.) As such, the *Crawford* Court ruled that the intent of the Framers of the Constitution would not be met if out-of-court statements, regardless of their innate reliability, were admitted before the jury *unless* the declarant had a prior opportunity to cross examine said declarant. (*Id.* at p. 58.) In rejecting the concept that a hearsay statement, if sufficiently reliable, can satisfy the Confrontation Clause, the *Crawford* Court stated "[d]ispensing with testimony because it is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at p. 62.)

The High Court further stated that the now discredited *Roberts* test would allow the jury to hear evidence that remained "untested by the adversary process" simply because it was judicially determined that said evidence was "reliable." (*Crawford* at p. 62.) To follow such a test would replace constitutional requirements with a more relaxed evidentiary standard promulgated by state law. (*Ibid.*)

Five years after *Crawford*, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 317-318, the United States Supreme Court specifically refused to carve out from *Crawford* what might be determined

a "forensic evidence" exception. The *Melendez-Diaz* Court held that a forensic laboratory report created specifically as evidence at a criminal trial is "testimonial" for Sixth Amendment purposes so that the prosecutor could not admit the truth of the report's contents. (*Ibid.*)

More recently, *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, decided the central issue to this Argument, that being whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification-made for the purposes of proving a particular fact- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. In *Bullcoming,* the defendant was charged with Aggravating Driving While Intoxicated. The blood alcohol testing was done by Curtis Caylor, who signed the report as the "certificate of analyst." (*Bullcoming, supra,* at p. 2710.) However, Mr. Caylor did not testify at trial. Instead, the prosecutor used the testimony of another scientist at the same laboratory where Mr. Caylor performed the test to "qualify" Mr. Caylor's report as a "business record," a designation which the trial court employed to admit the report as evidence of the conclusions therein stated. (*Id.* at pp. 2712-2713.)

The *Bullcoming* Court held that the evidentiary process employed by the prosecution and approved by the trial judge was unconstitutional in that

it violated the Confrontation Clause of the Sixth Amendment. The High Court reiterated its holding from *Crawford* that the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial only where the declarant was unavailable *and* defendant had a prior opportunity to cross-examine him or her. (*Bullcoming, supra,* 131 S.Ct. at p. 2713.) To qualify as a "testimonial statement," the statement must have the "primary purpose" of "establishing or proving past event's potential to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *Bullcoming, supra,* 131 S.Ct at p. 2716, fn 6.)

The federal case law in this matter has recently been supported by this Court in *People v. Lopez* (2012) 55 Cal.4th 569, 576-577. *Lopez* distinguished between the type of "testimonial" statements made by an expert in compiling a forensic report intended to be used at trial, as was the case in *Bullcoming* and the instant case, and a printout report from a blood alcohol measuring machine routinely used in driving while intoxicated cases. (*Id.* at p. 583.) In the latter instance, there is no witness to be cross-examined as to the results obtained from the print out, and such raw data generated by such machines does not constitute "testimonial statements" under *Bullcoming,* as machines are not "declarants." (*Ibid.*)

The instant case is a classic example of the type of hearsay testimony that is expressly forbidden by this *Crawford* line of cases. Ms.

Watkins played no role at all in the testing that yielded the result that appellant could not be excluded from the list of potential donors to the major part of the latent sample obtained from the BMX bicycle. It was Ms. Yoshida who performed the tests. Yet the trial court allowed Ms. Watkins to testify as to the test results, a clear violation of *Crawford* and its progeny.

C. **Prejudice**

A trial court error of constitutional law required the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The prosecution cannot meet this burden. As the improperly admitted DNA evidence was essential to appellant's conviction, the entire judgment must be vacated.

VI. BY DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED PURSUANT TO THE ILLEGALLY ISSUED WIRETAP ORDER, THE TRIAL COURT DENIED APPELLANT'S RIGHTS AGAINST ILLEGAL SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. Procedural and Factual History

On October 2, 2007, appellant filed a Motion to Suppress Wiretap Evidence obtained pursuant to an Order issued by Judge Larry Fidler on August 10, 2006. (Clerk's Supplemental III Confidential Transcript pp. 1-

10.) The declaration upon which this Order was based was a 37 page affidavit signed by Detective Thomas Kerfoot. (II CT 423 et seq.

As stated in appellant's Motion, the controlling statute is the California Wiretap Statute (Penal Code section 629.50 et seq.) This statute was promulgated to make sure that the statutory authority be used with restraint and only where the circumstances warrant the interception of wire and oral communication. (*United States v. Giordano* (1974) 416 U.S. 505, 515-516.) One of the aspects of the statute that provided such restraint was section 629.50 (a), which stated in pertinent part that only a "...district attorney or person designated to act as the district attorney in the district attorney's absence" can make application for a wiretap. In his Motion, appellant argued that there was no proof that the elected district attorney of Los Angeles County, Steven Cooley, was actually absent from his position when his Chief Deputy, John Spillane, made the application. (II CT 401.) Therefore, appellant moved that all of the evidence obtained through the wiretap Order be suppressed.[3]

In its opposition to the Motion (III CT 686), respondent argued that there is no provision in section 629.50 that requires proof of the District Attorney's absence. (III CT 689.) In addition, respondent argued that the

[3] In addition to the issue argued herein, appellant's Motion argued that Chief Batts of the Long Beach Police Department also acted in violation of section 629.50 (a). That issue is not being argued in this AOB.

statute in question recognized "the numerous and varied duties of a District Attorney and allows for another to take on the wiretap application responsibilities" (*Ibid.*) As an attachment to its opposition, respondent attached the first page of the Order authorizing the wiretap which in part stated "Chief Deputy John K. Spillane is 'the person designated to act as district attorney in the district attorney's absence," pursuant to Penal Code section 629.50 (a)." (III CT 694.)

On January 19, 2007, a hearing was held on the Motion. (1 RT 243.) Detective Kerfoot testified as to the procedure that was followed to obtain the warrant. 2 RT 268 et seq.) No evidence was presented to indicate the nature of Mr. Cooley's absence or the nature of Mr. Spillane's authority.

The trial court denied the motion without comment as to any issue regarding Mr. Cooley's absence or Mr. Spillane's authority. (2 RT 281-283.)

B. Legal Argument

Until very recently, there was no case authority that discussed the central issue raised in this Motion. However, a few months ago the Ninth Circuit Court of Appeals addressed it, at least in part, in *United States v. Perez- Valencia* (9th Cir 2013) 727 F.3d 852.

As stated in *Perez-Valencia*, wiretaps issued by state courts are regulated by federal law, specifically 18 U.S.C. section 2516 (2). This

statute states in pertinent part that the principal prosecuting attorney for any political subdivision has the power to make authorization to a superior court for a wiretap Order under the appropriate state statute.

A warrant was issued in *Perez-Valencia* under California Penal Code section 629.50(a). On appeal, defendant argued that as the language of 18 U.S.C. 2516 (2) did not specifically mention a designated replacement for a county district attorney in his absence, any warrant sought by such a replacement is invalid and the evidence obtained therefrom should be suppressed. (*Perez-Valencia, supra,* at p. 854.)

The Ninth Circuit disagreed with defendant, indicating that the California statute was validly constructed and it was proper for a designated substitute for the district attorney to seek such an Order in the district attorney's absence.[4] (*Perez-Valencia, supra,* at p. 855.) The *Perez-Valencia* court held that it did not believe that it was the will of Congress to suspend all wiretap activity during the absence or disability of the official specifically named in section 2216(2). (*Ibid.*)

However, in so holding, the *Perez-Valencia* court also held that "the attorney designated to act in the district attorney's absence- as section 629.50 specifies- must be acting in the district attorney's absence not just as

[4] In *Perez-Valencia,* the record indicated that the elected district attorney was out of his office from March 29-March 31, 2010, to attend to an ill family member who had just undergone surgery for a serious health condition.

an assistant district attorney duly designated with the limited authority to apply for the wiretap order, but as the assistant district attorney duly designated to act for *all* purposes as the district attorney of the political subdivision in question." (*Perez –Valencia, supra,* 727 F3d at p. 855 emphasis provided by court.)

In *Perez-Valencia,* the court remanded the case to the District Court to determine whether the assistant district attorney who applied for the Order was designated to act for all purposes as the district attorney in the absence of "the principle prosecuting attorney." (*Perez-Valencia, supra,* 727 F.3d at p. 855-856.)

Section 629.72 of the California Wiretap statute makes it clear that a Motion to Suppress evidence from a wiretap "shall be made, determined, and be subject to review in accordance with the procedures set forth in section 1538.5.) The High Court has held that exclusion of wiretap evidence is required … when "there is a failure to satisfy any of those statutory requirements that directly or substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." (*United States v. Giordano, supra,* 416 U.S. at p. 527; *People v. Jackson* (2005) 129 Cal.App.4th 129, 149.) Further, the good

faith of the law enforcement officers approving or executing a warrant under section 629.50 (a) is irrelevant. (*Jackson, supra,* at p. 160.)

The establishment that the proper person designated by statute sought the Order is directly related to the legislative intent to assure special care in assuring the proper procedure be followed in wiretap cases. (*United States v. Giordano, supra,* 416 U.S. at pp. 507-510; *Perez –Valencia, supra,* 727 F3d at p. 855.) In the instant case, there was no evidence presented either as to either the nature of District Attorney Cooley's absence or the nature of the authority of Chief Deputy Spillane. However, as stated above in the opposition, it was strongly suggested by the respondent that Mr. Spillane was appointed to handle only the wiretap duties so that Mr. Cooley could attend to his other functions. (3 RT 689.)

In any event, there was a failure on the part of the respondent to show that it followed this critical requirement of the California Wiretap statute. As such, the High Court in *Giordano* mandates the granting of appellant's motion and suppression of all evidence that resulted from the issuance of the warrant.

C. Prejudice

Because the error violated appellant's rights under the Fourth and Fourteenth Amendments, reversal of the judgment against him is required unless the state can establish beyond a reasonable doubt that the error was

harmless. (*People v. Jackson, supra,* 129 Cal.App. 4th at p. 165.) Given the extensive evidence from the wiretaps introduced against appellant at trial and its role in obtaining the convictions in this case, the respondent cannot possibly meet this burden and the intercepted transitions and all inculpatory fruits therefrom must be suppressed.

VII. THE TRIAL COURT'S ERROR IN ALLOWING AND PARTICIPATING IN COERCION OF TWO CRITICAL WITNESSES VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW, CONFRONTATION OF WITNESSES, AND A FULL AND FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS STATE LAW

A. Introduction

As indicated in the Statement of Facts, Jessica Rowan, Gonzalez's girlfriend, and Celina Gonzalez, his sister, were both critical witnesses. Both had allegedly heard appellant make several inculpatory statements regarding the shooting and had been aware of his involvement in it since the last few days of March, 2006.

On August 6, 2006, the Los Angeles District Attorney obtained an Order from Judge Larry Fidler of the Los Angeles County Superior Court to intercept telephone conversations pursuant to the investigation of the instant crime. (Clerk's Supplemental III Confidential Transcript pp. 1-10.)

These phone taps included phone numbers assigned to target subjects Jessica Rowan and Celina Gonzales. (*Ibid.*)

On September 10, 2006, Detectives O'Dowd and McMahon, of the Long Beach Police Department, interviewed Ms. Rowan about the crime. (10 RT 1944-1945; 10 RT 1948.) Essentially, Ms. Rowan told the detectives that she knew that appellant could not have committed the murder because he had been with her, in bed, when the murder occurred. (10 RT 1946.)

Unbeknownst to Ms. Rowan, her telephone conversations with Ms. Gonzalez had been intercepted pursuant to the August 10, 2006 wiretap order. In these conversations, the two discussed constructing the alibi for appellant which Ms. Rowan recited during the interview. Based on the intercepted communications and Ms. Rowan's statements of September 10, 2006, both Ms. Rowan and Ms. Gonzalez were arrested on September 27, 2006 and charged with conspiracy to obstruct of justice. (10 RT 1932; 10 RT 1952.) Ms. Rowan was then jailed pending trial until January 25, 2007, when she "pled open" to the court on the charge, meaning she entered a guilty plea without a promised or indicated sentence. Under the terms of her plea bargain, appellant's trial judge would determine if she testified truthfully at appellant's trial, and that judge's assessment of the "truth" of her testimony would determine the sentence she would receive in her case.

(*Ibid.*) Pursuant to this plea bargain, under which Ms. Rowan could be sentenced up to three years in state prison, depending on the judge's assessment of her veracity, Ms. Rowan testified at the trial.

The testimony of Ms. Rowan and Ms. Gonzalez was obviously important to the jury's ultimate determination because it was percipient testimony from witnesses who had seen appellant's actions and heard statements he made about it. However, their testimony was hopelessly and prejudicially tainted by the actions of the prosecution and the court. This was done in several ways, all of which, taken individually and cumulatively, deprived appellant of his right to due process of law, right to effective representation of counsel, and fair determination of guilt, death eligibility, and penalty.

The court allowed the prosecutor's use of blatantly suggestive leading questions that resulted in the prosecutor, in essence, testifying through the two witnesses. In addition, the court allowed the prosecutor to repeatedly threaten the witnesses with prison if they failed to answer his leading questions in the way that was clearly suggested in the questions themselves.

The combination of obvious suggestion supported by multiple threats by the prosecutor, assured that the only relevant "testimony"

rendered by these witnesses originated directly from the prosecutor's mouth.

However, the court's prejudicial error did not stop here. The trial court judged the credibility of the witnesses and decided they were not telling the truth, then actively sided with the prosecutor by warning these witnesses about the consequences of lying. It eventually went so far as to order Ms. Rowan's assigned Fifth Amendment counsel to tell his client that the court did not believe her and there would be serious consequences if she did not change her testimony and become more cooperative with the prosecution.

In order for our adversarial system to operate in such a way that a defendant is afforded due process of law, the court must be absolutely neutral. Within this overarching principal of judicial neutrality, there is no room for a court that expresses to a witness who is testifying under a plea bargain to "tell the truth" that she is lying because she is not saying what the prosecutor tells her to say. What the court's comments conveyed to the witnesses was that if they didn't answer "yes" to whatever absurdly suggestive question the prosecutor may proffer to them, they would be in violation of their plea bargains and imprisoned for three years.

In light of the above, the testimony of these witnesses was made completely unreliable, and as such violative of appellant right to Due Process of Law.

B. Pertinent Summary of Ms. Rowan's Testimony

Ms. Rowan was a very flawed witness. She had told many stories to many people, out of many personal motivations. (10 RT 1932.) Perhaps because of this she also had a very confused memory of her prior statements. From the very outset of her testimony, it was clear that the prosecutor realized the weakness of his own witness and the necessity of bolstering her credibility in the eyes of the jury. The prosecutor's tactic of choice was to essentially testify for her through a series of suggestive questions that needed only a "yes" answer from a witness who would agree to anything to stay out of jail and retain the custody of her children.

The onslaught of leading questions began almost immediately upon commencement of her direct examination. The prosecutor did not even trust his witness to relate her living arrangements with appellant without the benefit of suggestive leading questions. (10 RT 1930.) At one point, after a long string of such questions, the prosecutor began what was to be an obviously leading question stating "At some time I believe it was the morning--." (10 RT 1931.) Counsel objected on the ground that such a question would be leading. (10 RT 1931.) Without even hearing the entire

question, the court stated that "foundational questions are allowed." The fact that the trial court had no idea what sort of question was even being asked indicated that it was clearly giving notice that objections to leading questions would not be well received. (*Ibid.*)

The prosecutor followed with a series of suggestive leading questions to establish that appellant had told her that he had done something in Long Beach and had to leave. (10 RT 1931.) At this point, Ms. Rowan did state that appellant "just said he did something in Long Beach." (10 RT 1931.)

Instead of following up this response with a proper direct examination, asking non-suggestive questions intended to evoke an honest response from the witness, the prosecutor immediately proceeded to coerce his own witness through yet another series of unmistakably suggestive questions. The real purpose of these "questions" was to make it clear to Ms. Rowan that unless she testified according to the wishes of the prosecutor made clear by the content of his questions, she would be sentenced to prison pursuant to her plea bargain. (10 RT 1932.)

> Q: Now Ms. Rowan, you've actually testified in other proceedings; isn't that correct?
> A: Yes.
> Q: You've actually made several statements on tape to the police. Isn't that correct?
> A. Yes.

Q: You've actually made a proffer under oath about things that occurred; isn't that correct?
A: Yes
Q: And you're sitting here waiting to be sentenced on your case; isn't that correct?
A; Yes.
Q: Back I believe in was January of last year, January of 2007, you pled guilty, along with defendant's sister, Celina, to conspiracy to obstruct justice; isn't that correct?
A: Yes.
Q: You're awaiting sentencing on that by a different court. Isn't that true? (10 RT 1931-1932.)

If Ms. Rowan was not feeling enough coercion from the prosecutor, the trial court then exercised its obvious authority and power over a woman facing three years in prison and the removal of her children. The prosecutor asked what did appellant specifically tell her he had done. (10 RT 1932.) Ms. Rowan attempted to answer, "He said he was with a friend in Long Beach_ _" She got no further because the trial court interrupted her to admonish her to "Answer the question." (*Ibid.*)

The witness *was* answering the question. However, it became apparent that she was not answering it in the way she was supposed to answer it. In any event, the court prejudicially entered into the adversarial process.

After having been chastised by both the court and prosecutor, and effectively reminded that she would go to prison for several years unless she testified according to the wishers of the prosecutor, Ms. Rowan offered

the statement that appellant said "he tried to rob somebody." (10 RT 1932.) Again, instead of conducting a legitimate direct examination through the use of open-ended, non-suggestive questions, the prosecutor once again took control of the already cowed witness through yet another piece of testimony, couched as a question. "He didn't say 'somebody. He said it was a female; isn't that correct." (10 RT 1933.) Once again, counsel objected to the form of the question, only again to be overruled, and Ms. Rowan agreed that it was a female from Long Beach. (*Ibid.*)

When Ms. Rowan told the prosecutor that all she remembered was appellant telling her something about a robbery where a gun went off, the prosecutor told her that she made a different proffer under oath and accused her of lying stating "you're never going to forget what he told you." (*Ibid.*) He also told her that even though the prosecutor knew she did not want to tell the truth, she had to do so, alluding to the plea bargain. (10 RT 1934.)

When Ms. Rowan again tried to answer the prosecutor's question as to what appellant "specifically" told her, the prosecutor, not even bothering to hear her entire answer yet again interrupted and threatened her in the middle of her testimony—again assisted by the trial court.

> Witness: He said he tried to rob her and the gun went off. He was trying to get some money from her. I don't know if—.
> Prosecutor: Miss Rowan do you understand that you are looking at three years

> The Court: I am sorry, Ms. Trotter, overruled. Remember you are under oath right now. You understand that? (RT 1934.)

It can only be assumed that Ms. Trotter rose to her feet to object to either the form of the substance of the question. However, the trial court did not wait to hear Ms. Trotter's objections.[5]

The prosecution then launched upon a series of suggestive leading questions through which he essentially testified for the witness that appellant said he did the robbery because he needed money for drugs and that he noticed that the victim had a badge in her hand during their struggle. (10 RT 1935-1937.) Further, appellant said a gun was produced by the victim and "at some point he came up with a gun" (10 RT 1936.)

Before long, virtually every question that the prosecutor asked was suggestive, ending most often with the phrase "isn't that correct?" (10 RT 1943-1956.) In this way, instead of actually testifying, the witness was able to safely "yes" her way through the prosecutor's agenda without risking running afoul of a prosecutor prepared to put her in prison. Without actually hearing the witness testify to any of the facts, the jury was told that

[5] There were several occasions during the questioning of this witness where counsel did not object to clearly suggestive questioning. As a general proposition, "a defendant may not appeal of prosecutorial conduct unless in timely fashion, and on the same ground, the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Fuviana* (2010) 53 Cal.4th 622, 679.) However, a defendant will be excused from the necessity of making either a timely objection and/or a request for admonition if either would be futile. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.) The trial judge's consistent overruling of defense counsel's objection, on occasion not even stopping to hear what they might be, makes it clear that further objections would have met the same fate.

appellant said he used the Ms. Rowan's car to dispose of the murder weapon, the exact nature of the alibi that she supposedly created with Ms. Gonzalez and appellant's role in it. The jury further learned of the nature of the wiretaps put on her phone, her "lies" to the police, the possible location of the murder weapon, and any number of inculpatory conversations the witness supposedly had with appellant (*Ibid.*) The pattern of suggestive leading questions by the prosecutor continued with Ms. Rowan agreeing by a "yes" answer that she had visited appellant while he was in jail on other charges and surreptitiously wrote him a message telling him the police were looking for the gun used in the shooting. (10 RT 1950.)

Following this same pattern of ratification of the prosecutor's *de facto* testimony through unmistakably suggestive questions, Ms. Rowan acknowledged appellant told her his crime partner in the instant case was a "white boy" named Justin Flint. (10 RT 1953-1955.) Ms. Rowan further agreed with the prosecutor that appellant blamed her for the shooting because she refused to give him money for drugs. (10 RT 1956.)

The intimidation of Ms. Rowan only became worse as the direct examination continued and the prosecutor asked yet another leading question designed to place his interpretation of the evidence before the jury in the guise of her supposed testimony.

DA: "Didn't he tell you that he wanted to call Psycho at that moment because some things may have needed to be done?
W: I don't remember.
DA: You don't remember? Didn't he have you call Psych because he may need somebody hit?
W: No, all I remember is him telling me "If anything happens you know what to do." (10 RT 1957-1958.)

The prosecutor at this point addressed the court.

DA: Your Honor, referring to court page 2,117of the transcripts ...(10 RT 1958.)

Ms. Trotter asked for a sidebar at which the following transpired.

Ms. Trotter: Your Honor, I believe that this is not proper impeachment. The transcript is not an official court document. The proper way is to approach that witness with the transcript and ask her to read it and see if it refreshes her recollection. It would be different if we were referring to a reporter's transcript. This is supposedly a taped conversation.
DA: A couple of issues the court has as to the transcript itself. I was not admitting it into evidence if that is where Ms. Trotter is going.
Court: That's not where she is going. Correct?
Ms. Trotter: Yes
DA: That has been turned over years ago
Court: If it refreshes her memory,
DA: There was a second part of the objection that would have dealt with relevance and such, because this is talking about Frank trying to hit somebody, a witness in this case, and that comes in as part of...it's also corroboration of the clips and such.
Court: No. 1, she did not say that . The only thing she is talking about is impeachment. (10 RT 1958-1959.)

At this point, the court lent its weight explicitly to the process of compelling the witness's acquiescence in the prosecutor's agenda.

> Court: The other thing that I am getting concerned about is the lack of memory. Or is she not cooperating or doing what she is supposed to pursuant to her bargain? I can have Mr. Ross [her attorney] talk to her. Are you concerned about her cooperation or not?
> DA: I am not concerned at this point. I do think it is a lack of cooperation, but I do understand it. If I do have that concern, I will ask the court to do that.
> Court: Because I will send them into the jury room. I'm getting the feeling that her memory is going downhill, and to me that reflects a lack of cooperation pursuant to the plea bargain she's entered into. If it persists, I'll send the jury out and have Mr. Ross talk to her.
> DA: Perhaps we should just do that now, Your Honor. (10 RT 1959.)

Counsel strongly objected to this proposed procedure.

> Ms. Trotter: Your Honor...I object to that (the use of Mr. Ross.) I am objecting because it is the improper way to impeach the witness that Mr. Connolly was about to do.
> Court: This has nothing to do with that. That's the last series of questions where she keeps saying "I don't remember, I don't know, I don't remember. And then Mr. Connolly asks her a question, then all of a sudden she remembers. I do not like it. She's not volunteering information that she's supposed to, pursuant to any plea bargain, and she's being a difficult witness and that's not what she's supposed to be doing.
> Ms. Trotter: With all due respect, I differ with the court on that. This is a witness that they have apparently interviewed three times and it's not uncommon for anybody to remember (sic) what they have said. We have a transcript on September 10, 2006, September 27, 2006, January 25, 2007, which I don't think there's anything about that. Mr. Connolly has the transcripts. He can ask her to review it and see if it refreshes

her recollection. (10 RT 1960)

The court responded to this legally well-supported objection by making the following somewhat confusing statement.

> Court: The one example I can give you immediately is what the defendant said to her in jail when she made the statements there's no way she would remember what he said. So I disagree with you. I'm going to send them back and have Mr. Ross talk to her. Thank you. (10 RT 1960)

With the jury excused the court directed the following to Mr. Ross

> Court: Mr. Ross, I just want you to talk to your client and let her know that she is supposed to be telling the truth and volunteering answers without the prosecutor having to constantly remind her of what her statements have been in the past. I'm beginning to find lack of cooperation with this witness, which would violate her agreement. I'm getting very concerned and I don't like it. So if you would talk to her your client and tell her what she is facing unless she cooperates properly and answers questions that she knows with respect to a truthful answer. (10 RT 1061.)

Mr. Ross agreed to do so. After he spoke to his client he reported her to be "ready." In response to the court's question as to whether she understood her obligation, Mr. Ross answered "I have conferred with her, Your Honor, I have advised her of that." (10 RT 1061.)

Upon the return of the jury, Mr. Connelly asked the witness if it would refresh her recollection as to her conversation with appellant and Psycho to read part of a transcript. (10 RT 1962.)

Ms. Trotter objected on the ground that witness's counsel, Mr. Ross, was going over the transcript with her. (10 RT 1962-1963.) She requested that Mr. Ross be ordered to have no contact with Ms. Rowan during her testimony, except to object to a question being answered. (10 RT 1963.) The court agreed, ordering Mr. Ross to "only assist her respect to constitutional rights." (*Ibid.*)

Immediately thereafter, Ms.Rowan testified that appellant told her to call "Psycho" to deal with any possible "snitches" by killing them. (10 RT 1964.)

On cross-examination by defense counsel, Ms. Rowan related that just prior to the plea bargain of January 2007, she gave yet another statement to the authorities. (10 RT 1990.) In that statement, she told them appellant told her that he was sitting in a car with the "lady" and told her to "give me what you got." (10 RT 1991.) Appellant said he heard a gun "go off" before he fled (*Ibid*), and that Flint was with him at the time. (10 RT 1992.)

Ms. Rowan then testified that appellant never really told her that he was in the car with the victim and this testimony was based on what she saw "in her mind" and putting the pieces together from what appellant told her. (10 RT 2008-2010.) She stated what appellant really told her was the

crime occurred when the woman was walking out to the car. (10 RT 2009-2010.)

As this example illustrates, Ms. Rowan's testimony on direct examination might have been significantly different, and a more accurate reflection of the truth in the absence of coercion and the use of highly suggestive and leading questions.

C. Pertinent Summary of Celina Gonzalez's Testimony

The "testimony" of Ms. Gonzalez was elicited much in the same way as that of Ms. Rowan; through a series of blatantly suggestive leading questions by the prosecutor. The examination began with a set of leading questions regarding how and when appellant came to be at her apartment on March 28, 2006, suggesting that she picked up appellant sometime that morning. (10 RT 2020.) However, the witness answered "no" to this suggestion.

Ultimately, Ms. Gonzalez testified at some point at the end of March, appellant and Ms. Rowan arrived at her apartment in Downey, California to help her move. (10 RT 2020-2021.) Rather than ask what occurred at that time, the prosecutor followed the same pattern of suggestive questioning as with Ms. Rowan by asking "And while Frank was at your place, did he start to act strange?"(10 RT 2021.) Ms. Gonzalez seemed confused by the question but eventually stated he was walking

around, acting nervous. (*Ibid.*) Once again, the prosecutor responded by yet another leading, suggestive question, asking whether "at some point in time did he (appellant) break your microwave." Ms. Gonzalez simply answered "yes." (*Ibid.*)

The prosecutor continued to testify through a line of suggestive questions from which the jury learned that appellant had gone outside at that point and returned with a newspaper with a photo of the victim on the cover. (10 RT 2022.) Ms. Gonzalez testified that appellant set the paper down and stated "that's her." The prosecutor then asked "did he tell you over and over again that it was a robbery gone wrong?" The witness merely responded by saying "Yes, sir." (10 RT 2023.)

Ms. Gonzalez had pled guilty to conspiracy to obstruct justice for conspiring with Jessica Rowan to construct an alibi for Gonzalez. The gravamen of the charge was Ms. Gonzalez conspired with Ms. Rowan to create an alibi for appellant that Rowan and appellant were living with her at the time of the crime and that on the morning of the shooting she saw them together in bed. Through suggestive questioning the prosecutor provided the details of the alibi, with Ms. Gonzalez simply answering "yes" to the questions. (10 RT 2024-2025.)

Again, relying on suggestive leading questions about the phone taps, the prosecutor elicited that the police intercepted phone calls between Ms.

Gonzalez and Ms. Rowan in which they discussed the false alibi. (10 RT 2025-2026.) The first time Ms. Gonzalez spoke to the police, she provided the false alibi to them, not knowing they had tapes of her phone conversations with Ms. Rowan. (*Ibid.*)

Using yet another series of suggestive leading questions, the prosecutor effectively testified that after Ms. Gonzalez was arrested on September 27, 2006, she told the police Gonzalez told her the crime was a robbery that went wrong and that he thought that he shot a police officer. (10 RT 2026-2027.) The witness then answered "I don't remember" to another series of leading questions, directly suggesting that appellant told her that he was carrying a gun at the time of the murder. She was told by the prosecutor, over counsel's objection for argumentativeness, that she was under oath and had to tell the truth. (10 T 2029.) The prosecutor then asked Ms. Gonzalez where in Long Beach did Frank say he shot "the lady." (*Ibid.*) A frustrated witness answered "Why do you keep asking me? He didn't tell me directly." (10 RT 2030.)

As in the case of Ms. Rowan, the trial court threw its weight behind the prosecution's attempt to bully the witness into simply answering "yes" to his leading questions. The trial court harshly addressed the witness, stating, "[d]o not ask him any questions." (10 RT 2030.) The court then sent the jury to the jury room and then asked Ms. Gonzalez's counsel, Ms.

Vitale, if she wanted "to talk to (your) client before I talk to her?" (*Ibid*) Ms. Vitale stated that she did wish to speak with her client, and an unreported conference was held. (10 RT 2030.)

Once again, the trial court severely admonished Ms. Gonzalez, stating "[y]ou do not answer questions; do you understand that...don't do that again...Answer the questions you are asked and remember you are under oath." (10 RT 2030.)

The trial court then addresses the prosecutor, asking him "do you have things you can refresh her memory with, perhaps?" (10 RT 2030.) The prosecutor told the court, "I can let her read the report" (10 RT 2031.) The court then stated "[w]hatever you need to refresh her memory, you can do that...You can use anything." (*Ibid.*)[6]

Appellant's counsel responded to by correctly informing the court that if a witness claims that she does not remember, the way to possibly refresh her recollection is not to intimidate her. (10 RT 2031.) Counsel further objected to the court's allowing the prosecutor to ask the same question multiple times after being told the witness did not remember. (*Ibid.*)

[6] As this Court is well aware, you can't use "anything" to refresh recollection. There is a judicial and statutory process for going about this. This comment by the trial court was further indication of its attitude toward the witness and, for that matter, the defense case.

Ignoring the merits of counsel's objection to this entire process, the trial court made clear that as with Ms. Rowan, it did not believe Ms. Gonzalez stating, "But I find that both this witness and the last, Ms. Rowan, have not been as forthcoming as one would expect them to be given their precarious situation. And I am rather disappointed that their testimony isn't as forthcoming as it should be given the situation they are in." (10 RT 2031.)

Counsel responded;

> Well , Your Honor, with all due respect to the court, the court has just borne out what I have been getting at is that these two witnesses, Ms. Rowan and Ms. Gonzalez have given testimony based on their expectation that they may get a favor on their sentencing. And the court is in a precarious situation, and that's just the point. (10 RT 2031.)

The court responded;

> And the point is, Ms. Trotter, you would think, therefore they would be forthcoming when in point in fact, they are not which hinders them[7]. It does not help them. That is what makes their statements a problem. They are not helping themselves by refusing to remember or by making statements to the effect that they don't remember the defendant saying something, and then Mr. Connolly (the prosecutor) asking her, well didn't he say the following. And then she says "yes" over and over again. (10 RT 2031- 2032.)

[7] There is no evidence that the witnesses are not being "forthcoming." This was only the opinion of the prosecutor and the trial court. For whatever reason, the trial court simply assumed that Ms. Rowan and Ms. Gonzalez were lying and did, in fact, remember what they were being told to say.

Counsel pursued its objection, stating that the nature of the court's statements to the witness was a form of intimidation because , in effect, the court was warning the witness that she must agree with the prosecutor. (10 RT 3032.) The trial court responded by stating all he wanted was for the witness to tell the "truth," but the prosecutor always had to "drag information out of her." (*Ibid.*)

At this point, Ms. Gonzalez' counsel informed the court that her client was trying very hard but what occurred happened a long time ago and Ms. Gonzalez was doing her best to recollect the facts. (10 RT 2033.) The trial court stated "I understand it's a year and a half ago. But a situation that dynamic is something that one does not easily forget." (*Ibid.*) Appellant's counsel then restated the objection that both the court and prosecutor were intimidating the witness. (*Ibid.*) The court took exception to this, denying the accusation and stating, "Number One, she will not ask questions of anybody. And Number 2, she shall tell the truth, period. It's that simple. That's not intimidation. That's doing what's right." (*Ibid.*)

Ms. Vitale again attempted to explain to the court that her client *was* telling the truth , but the court completely rejected this possibility. (10 RT 2034.) Ms. Gonzalez then responded to an *additional* series of leading questions by answering "yes" to questions *telling* her where appellant said the shooting took place, why he targeted Ms. Rosa, and that he committed

the crime because he needed money to get high. (10 RT 2035-2036.) After reviewing Ms. Gonzalez's plea bargain with her, the prosecutor finished his provocative and suggestive questioning by asking her if appellant told her in her apartment that he killed the woman whose photo was in the newspapers. (10 RT 2037-2039.) The answer was an all too predictable "yes." (10 RT 2039.)

On cross-examination, Ms. Gonzalez testified that appellant never asked her to lie for him. (10 RT 2040.) Further, she stated she had never had the opportunity to listen to any prior statement she made or to read its transcription. (10 RT 2040-2041.) Appellant's counsel then properly refreshed the witness's recollection, asking her to read a highlighted part of the transcript to herself. (10 RT 2041.) After having done so, the witness stated she had seen no documents that indicated she told the police that appellant told her that he approached the victim as she was coming out of the house. (10 RT 2042.)

D. The Prosecutor's Conduct in Asking Blatantly Leading Questions and Intimidating these Witnesses Deprived Appellant Due Process of Law, Effective Assistance of Counsel, and a Fair Determination of Guilt, Death Eligibility and Penalty Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Analogous State Law

The denial of appellant's right to due process of law, right to effective assistance of counsel, and right to a fair determination of guilt,

death qualification, and penalty was accomplished through intricate intertwining of blatantly suggestive leading questions and threats to the witnesses by both the prosecution and the court. These threats repeatedly informed both Ms. Rowan and Ms. Gonzales that if they did not say exactly what the prosecutor wanted them to say, both would lose their freedom and Ms. Gonzalez would lose custody of her children. However, these threats only accomplished part of the task. They served to put these witnesses in a receptive frame of mind to want to please the prosecutor. However, considering how many different versions of the incidents in question they had related over time, it became very apparent that the prosecutor believed it would better serve his purpose not to have to ask any open-ended, probing questions to these witnesses as it was anyone's guess what they would say in response. Therefore, instead of conducting a proper direct examination and then impeaching each of them in a manner permitted by the law, he decided to couple the threats and coercion with leading questions. This questioning telegraphed to Ms. Rowan what she was supposed to "remember" about the events in order to fulfill her part of the plea bargain. All she had to do was answer "yes" and she was safe. Through his questions the prosecutor was allowed to put words in the frightened and intimidated witness's mouth, essentially testifying for her

and rendering her "testimony" tainted and unreliable. The same was true as to Ms. Gonzalez.

The instant case, and cases like it, are precisely the reason why the prohibition against leading question is not simply a matter of legal culture or tradition. It is a statutory enactment to prevent the undermining of the truth-seeking functions of trial that occurred in this case and resulted in the denial of appellant's right to due process of law and his other constitutional protections as described above. The Legislature clearly felt that the danger of such questions was so substantial that they codified the prohibition of such questions in direct examination in most instances in Evidence Code section 767.

> a. Except under special circumstances where the interests of justice otherwise require
>
> (1) A leading question may not be asked of a witness on direct or redirect examination
>
> (2) A leading question may be asked of a witness on cross or re-cross examination.

As explained by the Comment from the Assembly Committee of Judiciary

> The exception stated at the beginning of the section continues the present law that permits the leading questions on direct examination where there is little danger of improper suggestion or where such questions are necessary to obtain relevant evidence. This would permit leading questions on direct examination for preliminary matters, refreshing

> recollection, handicapped witnesses, expert witnesses and hostile witnesses. See Witkin, California Evidence 591,592 (1958)

As stated by *People v. Spain* (1984) 154 Cal.App.3d 845, 852-853,

> The danger in allowing a question that suggests to the witness the answer that the examining party desires (citation excluded) is to the truth seeking function of the trial. Allowing the examiner to put answers in the witness's mouth raises the possibility of collusion (citation omitted), as well as the possibility that the witness will acquiesce in a false suggestion (citation omitted.) This danger is substantially reduced, however when it is an adverse witness under cross-examination. The purpose of the cross-examination is to sift his testimony and weaken its force, in short, to discredit his direct testimony. Thus, not only the presumable bias of the witness for the opponents' cause, but also his sense of reluctance to become the instrument of his own discrediting, deprive him of any inclination to accept the cross-examiner's suggestions unless the truth forces him to do so.

In *People v. Williams* (1997) 16 Cal.4th 634, 672, this Court cited to two separate treatises of law in defining what constitutes an improper suggestive question.

> One treatise on evidence offers this explanation on leading questions. "A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading. The question which contains a phrase like 'did he not?' is obviously and invariably leading, but almost every other question maybe leading or not, dependent upon the content and context...The whole issue is whether an ordinary man would get the impression that the questioner desires one answer over another. The form of a question, or previous questioning, may indicate the desire, but the most important circumstance for consideration is the extent of the

> particularity of the question itself." (1 McCormick on Evidence 4th ed. 1992) section 6 pp. 17-18.)

Williams (Ibid.) then cited to the second treatise,

> Another treatise says that it is a question is leading if it "instructs the witness how to answer how to answer on material points, or puts in his mouth words to be echoed back,...or plainly suggests the answer which the party wishes to get from him."(3 Wigmore on Evidence (Chadborne edition) section 769, p. 155.)

Finally, *Williams* cited to Justice Bernard Jefferson who stated in his treatise,

> A question calling for a 'yes' or 'no' answer is a leading question of if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.'...When the danger [of false suggestion] is present, leading questions should be prohibited; when it is absent, leading questions should be allowed. (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) section 27.8, p. 762; *People v. Williams, supra,* 16 Cal.4th at p. 672.)

Appellant acknowledges that the law allows for situation where leading questions can be employed on direct examination.

As stated in the statute, leading questions may be used on direct examination in "special circumstances" and trial courts have broad discretion to decide when such special circumstances exist. (*People v Williams, supra* at p.672; Evidence Code section 767.) These special circumstances include when the subject of the questioning is non-

controversial or where it is legitimate to employ some suggestion to refresh a witness's memory or when an expert witness is being interrogated or when exhibits are being identified. (*People v. Campbell* (1965) 233 Cal.App.2d 38.) In addition, it has been generally held that leading questioning is not improper when it is designed to more quickly reach testimony material to material issues. (See *People v. Mason* (1948) 86 Cal.App.2d 445.)

In addition, leading questions may be employed in the questioning of small children, especially where there is evidence to corroborate the testimony of the child. (*People v. Doxie* (1939) 34 Cal.App.2d 511, 513.) Leading questions have also been allowed where witnesses do not speak English fluently (*People v. McNeal* (1954) 123 Cal.App.2d 222, 225) or had speech disabilities due to infirmities such as cerebral palsy. (*People v. Augustin* (2003) 112 Cal.App.4th 444, 449-450.)

What all these exceptions to the rule have in common was that the danger of false suggestion was largely absent. (*People v. Williams, supra,* 16 Cal.4th at 672.

Most recently, this Court in *People v. Pearson* (2013) 56 Cal.4th 393 discussed the actual form that a question can take. This Court reiterated that it is not whether a question can be answered in a "yes" or "no" that makes it a leading question, but whether the question, itself, is "unduly suggestive

under the circumstances" of the answer that the questioner wishes to invoke. (*Id* at p.426.)

For example the Court held the question "did you perceive any difficulty on the part of the defendant to think out in advance the thing he needed to get the job done at the Housing Authority" was not unduly suggestive even though it could be answered "yes" or "no." (*Pearson, supra* at p. 426.) Similarly ruled non-suggestive was the question "in March of 1995 did you perceive of any kind of defect, mental or otherwise, in the mind of the defendant." (*Id* at pp. 426-427.) This Court stated that the key in determining whether the form of a question is suggestive is whether they attempt to elicit a particular answer or simply offer a witness an opportunity to relate observations or not. (*Id.* at p.427.)

Nothing in the above law permits what occurred in this trial. There is no suggestion on the record that Ms. Rowan or Ms. Gonzalez were in some way disabled in a way that required leading questions to elicit the truth. They were neither traumatized nor impaired as defined in the above discussion of "special circumstances" that would permit leading questions. For the greatest part, the questions asked were not foundational. In fact, they were pervasively suggestive in that they put into the mouth of Ms. Rowan and Ms. Gonzalez detailed answers to relevant questions.

As stated by this Court in *People v. Williams, supra,* 16 Cal.4th at p. 672, the whole issue of suggestive questioning is "whether an ordinary man would get the impression that the questioner desired one answer over another." Further, according to *Williams,* a question is impermissibly leading if "it instructs the witness how to answer on material points, or puts words in the witness's mouth to be echoed back...or plainly suggests the answer which the party wishes to get from him." (*Ibid.*)

Considering the form of the "questions" and the context within which they were "asked," there can be no doubt what the prosecutor wanted the witnesses to say. Through the threats and coercion of both the prosecutor and the court, the entire examination was so finely choreographed that it was eventually made abundantly clear to both witnesses that they were on the stand simply to say "yes."

The tone of Ms. Rowan's direct examination had clearly been set. The prosecutor and trial court informed Ms. Rowan on multiple occasions that if her answers did not please the prosecutor, she would lose her children and go to prison. To make sure that this witness knew exactly which version of her many stories to tell, the prosecutor, with the help of the trial court, so informed her by the use of blatantly suggestive questions. The calculus was painfully simple; answer "yes" to whatever the prosecutor

asks and go free. The tone of the direct examination of Ms. Gonzalez was identical.

The prosecutor argued that it was necessary to ask leading questions to refresh the Ms. Rowan's recollection as to what she said in her many previous statements to the police. However, asking these types of leading questions, especially when accompanied by the threats and coercion attendant in this case, was not the prescribed means of refreshing a witness's recollection.

The law sets forth a very precise means of refreshing recollection when the witness claims that she does not presently remember the answer to the examiner's question and when the witness had previously made a statement regarding the subject matter of the in-court question. This process is controlled by Evidence Code section 771, which states that an examiner may use a writing to refresh the memory of as witness as to any matter about he testifies. (*Sullivan v. Superior Court* (1972) 29 Cal.App. 3d 64, 72.)

The specific procedure to refresh a witness's recollection by use of a written statement is set forth in *People v. Seiterle* (1966) 65 Cal.2d 333. After the witness states that she does not remember a particular matter, the examiner may then show the witness a prior statement in which the witness

answered the question. The witness then reads the statement to herself and the examiner then asks if the statement refreshed her recollection.

The prosecutor made no attempt to follow any such procedure with either witness. His direct examination began and ended with suggestive questioning coupled with threats from both himself and the court. If the witnesses had made prior statements that would have refreshed their recollection, the direct examiner should have had the witness read these statements to herself and then asked her if her memory was refreshed. If she said no, then her prior statements could be used as a basis of impeachment only if a finding was made that her failure of recollection was not genuine. Instead, over the objection of counsel and with the acquiescence of the trial court, the prosecutor bypassed this mandated process.

This resulted in the situation desired by the prosecutor. Instead of the orderly process where the witness is given an opportunity to refresh her recollection by her statements, the prosecutor got to testify for these witnesses. No specific prior statements by the witnesses were referenced by the prosecutor. Instead, the prosecutor created an atmosphere in which the jury was compelled to assume that Ms. Rowan and Ms. Gonzalez were *still* lying to protect appellant. Instead of refreshing the witnesses' present memory by reference to what they may have previously said, the prosecutor simply testified himself.

Further, there was an air of argumentativeness about the entire direct examination. If the witness's answer did not please the prosecutor, he essentially conducted a one-sided argument, talking past the witness, and making an argument to the jury that Ms. Rowan and Ms. Gonzalez still could not be trusted because of appellant's influence. As with all argumentative examination, this is improper "because it does not seek to elicit relevant competent testimony or often any testimony at all." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

As stated above, these suggestive, argumentative questions, were coupled with multiple prosecutorial threats against the witnesses' freedom and, perhaps even worse, the loss of Ms. Rowan's children. In this way the prosecutor secured the witnesses' cooperation, which in this case meant simply repeating the word "yes." The prosecutor's conduct served to put both witnesses in a state of mind where their testimony was not the product of their observations, but rather an attempt to protect themselves in light of the prosecutor's control over their fate.

Last year, the Ninth Circuit Court of Appeals in *United States v. Juan* (9th Cir 2013) 704 F.3d 1137, discussed a situation similar to that in the instant case. In *Juan*, defendant was charged with felony assault upon his wife. At trial, defendant's wife refused to cooperate with the prosecution, and her attendance at the trial had to be compelled by the

district court. During her direct examination, defendant's wife stated "she sustained her injuries when she accidentally fell behind his SUV." (*Id.* at p. 1140.)

"Sensing its case slipping away,"[8] the prosecutor improperly tried to introduce the witness's prior statements to law enforcement agents. (*Ibid*) The trial judge properly excluded this proffer. (*Ibid.*) The prosecutor then requested that the jury and witness be excused, at which point he managed to convince the trial court that it was necessary to appoint an attorney for the witness as she was perjuring herself. No objection was made by defendant's counsel. (*Ibid.*)

After the witness consulted with her counsel, she was recalled to the stand and testified that her injuries were caused by defendant striking her with his hands. (*Juan, supra,* at p 1140.) Defendant was convicted of all charges. (*Ibid.*)

The *Juan* court began its analysis began with the axiom that "[t]he Fifth Amendment Due Process Clause 'guarantees that a criminal defendant will be treated with the fundamental fairness essential to the very concept of justice.'" (*Juan, supra,* 704 F.3d at p-p.; 1140-1141; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872.) Citing to *Webb v. Texas,* (1972) 409 U.S. 95, 98, which held that a prosecutor or trial court cannot

[8] This is a direct quote from the Court of Appeals.

constitutionally force a defense witness off the stand by threats of perjury, the Ninth Circuit posed the question whether the rule also applies to a prosecutor threatening his *own* witness with perjury to force her to change her testimony. (*Juan* at pp. 1141-1142.)

The *Juan* court answered this question as follows;

> Despite (the) dearth of precedent, Juan persuasively argued that *Webb* and its progeny should apply to all witnesses. We have often stressed the imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights. (Citations omitted.) Violating this duty by bullying a prosecution witness away from testimony that could undermine the government's case is no less distortive of the judicial fact-finding process than improperly meddling with the testimony of a defense witness. Regardless of whose witness is interfered with, the constitutional harm to the defendant is the same-the inability to mount a fair and complete defense. We see no reason to doubt that the government substantial interference with the testimony of his own witnesses can violate the Due Process Clause.

The court continued,

> It also seems clear that the substantial and wrongful interference with a prosecution or defense witness that does not "drive the witness off the stand" but instead leads the witness to materially change his or her prior trial testimony can, in certain circumstances, violate due process. Instead, such violations have the potential to work greater harm than those that simply result in a blanket refusal to testify. When a witness is coerced into recanting testimony that was favorable to the defendant, the harm to the defense involves not merely the *prevention* of prospective testimony that *might* have bolstered its case, but the *retraction* of testimony that *did* bolster its case. See *Valenzuela-Bernal, supra,* 458 U.S. at 872 (due process is offended where the defendant is

wrongfully denied testimony that "would have been favorable and material.")

According to *Juan,* to prove that error was prejudicial, the defendant must prove, by preponderance of evidence, that "under the totality of the circumstances, the substance of what the prosecutor communicates to the witness is a threat over and above what the record indicates is necessary.'"(*Juan, supra,* 704 F.3d at p.1142.)

The Ninth Circuit has held "merely warning the witness of the consequences of perjury," when such a warning is warranted, does not necessarily unduly pressure the witness's choice to testify or violate defendant's right to due process." (*Williams v. Woodford* (9th Cir 2004) 384 F.3d 567, 603.) However, in the instant case there was clearly both "a threat over and above what the record indicates is necessary" and "a causal link between the prosecutor's threats and the witness's testimony." (*Juan, supra,* 704 F.3d 1142.) The nature and substance of the threat were clear and repeated to the two witness several times. Further it was made clear to the witnesses exactly what they had to say to escape the prosecutor's coercive threats.

It axiomatic of our judicial process that the prosecutor is always held to a standard of justice higher than that imposed on other counsel, in that as a representative of the sovereign his or her goal is not to "win" but to see

that justice be done. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) While the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*People v. Pitts* (1990) 223 Cal.App. 3d 606, 691.)

As stated by this Court,

> A prosecutor's ...intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it effects the trial with such misconduct with such unfairness to make the conviction a denial of due process (citation omitted) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to either persuade the court of the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

In *People v. Medina* (1974) 41Cal.App.3d 438, the court of appeal held that a defendant is denied a fair trial if the prosecutor's case depends largely upon accomplice testimony, and the accomplice is placed, either by the prosecutor or the court under a strong compulsion to testify in a particular fashion by promises of immunity which are subject to the condition that the accomplices would not materially or substantially change their testimony from tape recorded statements that they gave the police on prior occasion. (*Id.* at pp.454-456.) There are differences between *Medina* and this case; the witnesses here testified as accessories after the fact as

opposed to in *Medina,* where they were participants in the actual crime. (*Ibid.*) Further, the immunity agreement in *Medina* explicitly required that the accomplices testify according to a specific statement that they gave to the police prior to trial. (*Ibid.* at pp. 449-450.)

However, there are sufficient commonalities between the two cases that *Medina* does provide guidance in the instant case. The reason for the reversal in *Medina* was the immunity agreement created in the witness's mind an apprehension that to do anything but follow the script would invite punishment. There can be no other interpretation to the colloquies between the prosecutor and Ms. Rowan, for example at 10 RT 1931-1932 (AOB at p. 94) and with Ms. Gonzalez at 10 RT 2029-2030 (AOB p.104-107) that the prosecutor was informing the witness that her freedom, and in the case of Ms. Rowan, custody of her children, depended on her affirming as the truth the particular past statement the prosecutor offered up in his leading questions.

Through this improper suggestive questioning yoked with witness coercion by both the court and prosecutor, the jury heard the witness ratify everything the prosecutor demanded. By this point, the witnesses had already been threatened by both the court and the prosecutor as to what would happen to them if they did not simply answer yes. As such, the one word answers to the prosecutor's leading question were not an expression

of willingly given testimony reflecting the witnesses' actual recollection, but rather, an easy way out for the witnesses regardless of what the truth actually was.

E. Legal Argument as to Judicial Misconduct

It is a fundamental right of due process of law under the United States Constitution that a defendant's right to a fair trial depends on being tried in a court before an impartial judge. (See *Tunney v. Ohio* (1927) 273 U.S. 510, 523.) Impartiality requires that in conducting the trial, the judge should not become an advocate for either party. (*People v. Ringed* (1961) 55 Cal.2d 236, 241.) The failure of a trial judge to conduct himself in an impartial manner can so seriously prejudice the defense that it denies a defendant's right to a fair and impartial trial under both the federal and state constitutions. (*Powell v. Alabama* (1932) 287 U.S. 45.)

Over eighty-five years ago, this Court set forth the standard for judicial behavior. In *People v. Maloney* (1927) 201 Cal. 618, 626, this Court warned that the trial court must act in an impartial manner, and not become an advocate and "so intemperately espouse the cause of the prosecution in criminal cases [otherwise] no man charged with a penal cause of action is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies of the judge who sits on his case."

Appellant did not have such an impartial judge in this case. He had a judge who fully participated in the trial as would an advocate, using the inherent power of her office to intimidate the witnesses into "cooperating" with the prosecution by making clear they risked prison if they did not answer the prosecutor's leading questions in the way he clearly suggested he wanted.

For whatever reason, the trial court took it upon itself to pass judgment on Ms. Rowan's credibility. It decided that Ms. Rowan was not suffering from a natural memory lapse after having given multiple statements as much as two years before her testimony. Instead, the court decided she was lying. The same was true with Ms. Gonzalez. The trial court, without any rational basis in fact, rejected Ms. Gonzalez's counsel's informed opinion that her client was doing the best she could. (10 RT 2033.) Instead, the court intoned, without any factual proof that she was lying, that Ms. Gonzalez "shall tell the truth," meaning saying "yes" to anything the prosecutor suggested.

Obviously, there is no law that states that the presiding judge cannot form an opinion during the trial as to the credibility of a witness. However, if the court does form such a personal opinion, it is of paramount importance that he or she does not translate this belief into an action that deprives the defendant of a fair trial.

In the instant case, the court cast its lot with the prosecutor. Within a few minutes of the commencement of the prosecutor's constitutionally defective direct examination, the court interrupted Ms. Rowan as she was trying to answer the prosecutor's question, sending out a clear signal that it was dissatisfied with Ms. Rowan's answer. (10 RT1932; AOB 95-96.) Soon thereafter, the court refused to even allow counsel to object to the prosecutorial bullying described above. (*Id.*) After the prosecutor once again reminded Ms. Rowan that she was facing three years in prison, in the presence of the jury, the court reminded Ms. Trotter that she was "under oath right now." (10 RT 1934; AOB at p. 97.)

At this point, a reasonable person in Ms. Rowan's position would most certainly believe that the court was clearly siding with the prosecutor, did not believe she was telling the truth, and would abrogate her plea bargain if she wasn't more "cooperative." With both the prosecutor and court aligned against her and using the obvious power and authority of their respective offices to bring her to heel, it is little wonder she accepted the prosecutor's path to salvation and simply answered "yes" to all of his argumentative and suggestive leading questions.

The court's improper interference with this witness reached its apex at a side-bar discussion where the court stated that it was "concerned" about Ms. Rowan's lack of memory and whether or not she was "cooperating

pursuant to her plea bargain." (10 RT 1959; AOB at pp.99-100.) Over objection of defense counsel, the court ordered Ms. Rowan's Fifth Amendment counsel, Mr. Ross, to take her into a private room and tell her to stop being such a "difficult witness." (10 RT 1960.) The court stated:

> Court: Mr. Ross, I just want you to talk to your client and let her know that she is supposed to be telling the truth and volunteering answers without the prosecutor having to constantly remind her of what her statements have been in the past. I'm beginning to find lack of cooperation with this witness, which would violate her agreement. I'm getting very concerned and I don't like it. So if you would talk to her your client and tell her what she is facing unless she cooperates properly and answers questions that she knows with respect to a truthful answer. (10 RT 1061.)

The law makes it clear that it is not the province of the trial judge to interfere in the adversarial process by judging the credibility of a witness and then use its authority to "correct" a witness it deemed to have lied. Regarding the court's attitude toward witnesses, the court of appeal in *People v. Campbell* (1958) 162 Cal.App.2d 776, 787, stated that the trial courts have been admonished

> Time and time again of their duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders on advocacy...When the trial judge officiously and unnecessarily usurps the duties of the prosecutor by taking over the questioning of a witness and in doing so creates the impression that he is allying himself with the prosecution, harm to the defendant is inevitable.

In *Webb v. Texas, supra,* 409 U.S. 95, the United States Supreme Court overturned a conviction because of judicial bias and interference. In *Webb,* the defendant called a single witness, Leslie Mills. Before counsel was able to ask a single question of Mr. Mills, the court took it upon itself to single out this one particular witness and address him as follows:

> Now that you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that that you don't have to testify and anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood is that you would get convicted of perjury and that it would be stacked upon onto what you have already got, so that is the matter you have to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you are up for parole and the Court wants you to thoroughly understand the chances that you are taking by getting on that witness stand under oath. You may tell the truth and of you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't know anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know of the hazard you are taking. (*Ibid.* at pp. 95-96.)

After the admonition, counsel objected, pointing out that none of the witnesses for the State were so admonished. In reversing the conviction, the United States Supreme Court cited to *Washington v. Texas* (1967) 388 U.S. 14, 19 stating:

> The right to offer the testimony of a witness, and to compel their attendance, if necessary, is in plain terms the right to

> present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. (*Webb, supra,* 409 U.S. at p. 98.)

The Court then stated

> In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at a single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. (*Ibid.*)

While the trial court's actions in this case did not "drive" a possible defense witness off the stand, it committed an analogous and equally damaging error. It committed the same type of error that the prosecutor committed in *Juan, supra.* It used its authority to threaten a witness into giving the particular testimony suggested by the prosecutor's leading questions. This intercession by the court clearly placed it outside its role as neutral voice of law and trial procedure and into the role of an advocate. It is not the job of the court to judge the credibility of a witness, let alone to take upon itself the task of getting the witness to testify as to what the court feels was the "real truth." Regardless of what the court *personally* believes,

it may not translate that personal belief into action. Neither is it the court's function to enforce plea bargains in this manner.

In any event, the plea bargain was that these witnesses "tell the truth" not to please the prosecutor with her testimony. It was not the province of the court to determine what the "truth" was. Considering that Ms. Rowan made at least four recorded statements[9], all many months before her testimony at trial, it was at least arguable that Ms. Rowan was telling the truth when she indicated that her memory had failed her or began to recall an account she had given in a prior statement other than that which the prosecutor intended for the jury.

It was especially troubling that the court's enthusiasm for this highly improper procedure exceeded that of the prosecutor, who had to be convinced by the court to allow it to intercede. Only after being offered the court's assistance for a *second* time, did the prosecutor agree with the use of Mr. Ross. (10 RT 1959.) It was not stated in the record exactly why Ms. Rowan even had a lawyer. Presumably, it was to protect *her* right against self-incrimination while she was on the stand. It certainly was *not* for such counsel to serve as the court's agent in the rehabilitation of the prosecutor's witness.

[9] The dates of these statements were September 10, 2006 (10 RT 1967), two statements on September 27, 2006 (10 RT 1977 et seq), and January 18, 2007 (10 RT 1990.) In addition, the prosecutor presumably prepared his witness for trial, which would have produced additional statements, all adding to Ms. Rowan's confusion.

Further, the trial court's employment of Mr. Ross was as inconsistent as it was improper. As stated above, the trial court first used Mr. Ross as its agent to act *specifically at its order* in forcing Ms. Rowan to "tell the truth," which in this case meant saying "yes" to the prosecutor's suggestive questions. (10 RT 1961.) However, not long after, the trial court strictly admonished Mr. Ross that his only purpose was to advise Ms. Rowan on her Fifth Amendment rights. (10 RT 1963.)

The truth was Ms. Rowan had little memory of what actually happened from the date of the murder to the time of her testimony. In discussing her plea of January, 2007 and concurrent statement to the police, the prosecutor asked yet another leading question stating that the statement was made at the District Attorney's Office. The witness blindly answered "yes." In the prosecutor's very next question, he corrected himself, leading Ms. Rowan to say "yes" that she was in the *lock-up* when the statement was given. (10 RT 1966.) As stated, thanks to the coercion by the court and prosecutor, this witness was little more than an automaton, saying "yes" to every question.

It was not important where she gave the January, 2007 statement. What was important was the robotic way the witness answered "yes" to two contradictory questions. It is very clear that she would say "yes" to any

leading question if it would gain her freedom and reunion with her daughter.

The confusion and fear of this witness were additionally demonstrated during her cross-examination. Ms. Rowan stated that when the plea bargain was extended to her she never read it and that the only reason she signed it was that she wanted to get her kids back (10 RT 1973-1975.) At the time, her lawyer told her not to sign the document but she did because she wanted to get her kids back and her lawyer told her that if she did not sign the agreement she would go to prison. (*Ibid.*)

The Court's attitude toward Ms. Gonzalez was virtually identical. It insisted that Ms. Gonzalez was lying and that its actions were not done to intimidate, but rather to convince Ms. Gonzalez to "tell the truth." (10 RT 2032.) This was despite the fact that her own counsel represented as an officer of the court that her witness was trying her best to remember events that had occurred well over a year before. In addition, Ms. Gonzalez also testified on cross-examination that she never had an opportunity to review any statement she gave, making it even more unlikely she would remember exactly what she said at the time.

The court exceeded its authority by acting upon its questionable belief that these witnesses were lying, and therefore needed to be

threatened, coerced and led along by the prosecutor by improper suggestive questions to which they must answer "yes" or face imprisonment.

F. Summary and Prejudice

Ms. Rowan and Ms. Gonzalez were the two most critical witnesses for the prosecution in that they had spoken to appellant soon after the shooting. However, due to the confluence of error discussed above, neither of these witnesses actually testified. Having been subjected to threats by both the prosecutor and the trial court, they simply answered "yes" to a series of suggestive question which had the result of allowing the prosecutor to testify for them.

According to the above cited law, this error prejudicially deprived appellant of his right to due process of law, a fair determination of guilt, death eligibility, and penalty, and effective assistance of counsel under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as analogous state law.

A trial court error of constitutional law requires the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. Californian* , *supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

Appellant respectfully requests that the entire judgment be vacated.

VIII. THE COURT'S RESTRICTION OF APPELLANT'SCOUNSEL'S CROSS EXAMINATION OF JESSICA ROWAN AND CELINA GONZALEZ VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND RIGHT TO A FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY AND PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATED CONSTITUTION AND ANALOGOUS STATE LAW

A. Summary of Argument

As stated in Argument VII, the direct testimony of Jessica Rowan and Celina Gonzalez was rendered completely unreliable by the use of blatantly suggestive leading questions accompanied by the prosecutor's and trial court's intimidation of these witnesses.

In addition, the trial court refused to allow appellant to cross-examine these witnesses about their motivation for meekly acquiescing with the prosecutor's leading questions. The trial court sustained the prosecutor's objections to questions that would have revealed that the witnesses "testified" as they did because they were personally afraid that not agreeing with the prosecutor would result in their being incarcerated.

The court stated that such questions were "argumentative." They were nothing of the kind. The suppressed questions were critical to ascertain the biases of the witnesses whose testimony was most relevant

and critical to appellant's case. Denying counsel the right to inquire into that issue was a prejudicial error.

B. Relevant Facts as to Cross-Examination of Jessica Rowan

The direct examination of Ms. Rowan by the prosecutor was fully discussed in Argument VII. During the cross-examination of this witness, appellant attempted to inquire as follows.

> Counsel: You are afraid right now, aren't you, about whether or not you're going to get a deal on your case, aren't you?
>
> Ms. Rowan: Yeah.
>
> Counsel: You're trying to make sure that you say everything that the prosecutor wants you to say, aren't you?
>
> Prosecutor: Objection. That's argumentative.
>
> Court: Sustained.
>
> Counsel: Are you trying to make sure you say anything that the prosecutor wants you to say?
>
> Ms. Rowan: Yes.
>
> Prosecutor: Sustained. The answer is stricken.
>
> Counsel: Are you trying to give testimony here today that you think will be pleasing to the prosecutor?
>
> Prosecutor: Objection

Court: You're saying the same objectionable question in a different way.

Counsel: I thought I rephrased it.

Court: It's the same question. Just different words. Objection sustained.

Counsel: Do you feel Ms. Rowan, if the prosecutor is not in agreement with what you say you may get your three years in prison?

Prosecutor: Objection. Again, I think that's the same question. It's argumentative.

Court: I agree. (10 RT 1970-1971.)

Counsel then requested a side bar

Court: The issue is that she has to tell the truth, not what the prosecutor wants her to say. The only thing he wants her to say is the truth. The inference, the way you phrase it, is that he wants her to tell a story.

Counsel: No, Your Honor. I disagree with Your Honor. What I am trying to ask her is if her testimony is tainted by the fact that if the prosecutor's not in agreement, she will get her three years.

Court: You can ask her that. That's a different question. You can certainly ask her that, yes. (10 RT 1971-1972.)

In the presence of the jury, the following transpired.

Counsel: Is your testimony here today given in such a way that you feel will cause you not to get three years in prison?

Ms. Rowan: Yes.

Counsel: Okay. So you are concerned about what you say here today may affect you in terms of getting three years in state prison, isn't that right.

Ms. Rowan: Yes.

C. Relevant Facts as to Cross-Examination of Celina Gonzalez

Counsel attempted a similar cross-examination of Ms. Gonzalez.

Counsel: Now, as you sit here on the witness stand, do you feel compelled to agree with what the prosecutor says to you about what you told the police?

Prosecutor: Objection, Your Honor; That's just argumentative.

Court: I beg your pardon.

Prosecutor: Argumentative.

The Court: Overruled. You can answer.

Ms. Gonzalez: I don't understand.

Counsel: When the prosecutor makes statements to you...well withdraw that. You're concerned about sentence (sic) aren't you?

Ms. Gonzalez: Yes.

Counsel: And you want to agree with the prosecutor; isn't that right?

Prosecutor: Objection, Your Honor. That's argumentative.

Court: Sustained.

Counsel: Do you feel the prosecutor has some control over what kind of sentence you get?

Prosecutor: Objection, Your Honor; Relevance.

Court: Sustained.

Counsel: Do you feel that the prosecutor may make an argument at your sentencing time with respect to what sentence you may get?

Ms. Gonzalez: Yes

Counsel: And so when the prosecutor here asks you--makes a statement as to what you told police, do you feel inclined just to agree with him, is that true?

Ms. Gonzalez: I don't understand.

Counsel: Now, Mr. Connolly has asked you—or made a number of statements to you with respect to what the police—what you told the police; is that correct?

Ms. Gonzalez: Yes.

Counsel: And when he makes those statements to you, do you feel that you should say yes, I made those statements in order to help yourself out at sentencing?

Ms. Gonzalez: No.

Counsel: You do want to help your—give testimony that would help you out at your sentencing, don't you?

Ms. Gonzalez: Do I—excuse me?

Counsel: You want to give testimony that will help you out at your sentencing?

Ms. Gonzalez: Yes. (10 RT 2043-2044.)

D. Legal Argument

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to cross-examination of the witnesses against him, to test "the believability of a witness and the truth of his testimony." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) A violation of the Confrontation Clause occurs where a defendant is prohibited from engaging in otherwise appropriate cross-examination designed to "expose to the jury the facts

from which jurors...could appropriately draw inferences relating to the reliability of the witness. (*Ibid*: *Delaware v. Van Arsdale* (1986) 475 U.S. 673, 680.)

As quoted by *Davis, supra,* 415 U.S. at p. 315-316, Professor Wigmore stated "[t] he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 J. Wigmore, Evidence s 1395, p. 123 (3d ed 1940.)

Davis made clear that "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (*Davis, supra,* at p. 316.) Not only is the cross-examiner permitted "to delve into the witness's story to test the witness's perceptions and memories" (*Id*),"but to attack the witness's credibility by showing a bias or ulterior motive for relating the story given on the direct examination. (*Id*; see also *People v. Frye* (1998) 18 Cal.4th 894, 946.)

Cross-examination has been called the "greatest legal engine ever invented for the discovery of the truth." (*California v. Greene* (1970) 399 U.S. 149, 158; *People v. Brock* (1985) 38 Cal.3d 180,197.) Disallowing such cross-examination of both Ms. Rowan and Ms. Gonzalez effectively

disabled this engine. The motivations of a witness in giving her testimony, especially as to how they might affect bias either in favor of the prosecutor or against defendant are a vital area of cross-examination.

This basic legal tenet has been codified in Evidence Code section 780, which states in pertinent part

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
>
> ...(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies...
>
> (f) The existence or nonexistence of a bias, interest, or other motive.

In addition to this statutory mandate, "[a]s a general matter, a defendant is entitled to explore whether a witness has been offered any inducements or expects any benefits for his or her testimony, as such evidence is suggestive of bias. (*People v. Brown* (2003) 31 Cal.4th 518, 544; *People v. Phillips* (1985) 41 Cal.3d 29, 46-48.) This Court has also stated that evidence showing a witness's bias or prejudice that goes to his credibility, veracity, or motive may be elicited during cross-examination. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1054.)

Obviously, the cross-examination proffered must be relevant to a witness's bias or motivation to have testified on direct examination the way she did. (See gen Evidence Code section 210.) "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts" (*People v. Shcied* (1997) 16 Cal.4th 1, 13.) Evidence is irrelevant only if it leads to only speculative inferences. (*People v. Morrison* (2004) 34 Cal.4th 698, 724.)

This Court has long held that the trial court has no discretion to exclude relevant evidence (*People v. Heard* (2003) 31 Cal.4th 946, 973.) However, that is exactly what the trial court in this case did in the cross-examination of both Ms. Rowan and Ms. Gonzalez. The proffered cross-examination of these two witnesses was a direct inquiry in to whether they felt that in order to get the benefit of their respective plea bargains, they must please the prosecutor with their answers. Nothing could be more relevant, especially in a case such as this where the prosecutor and the trial court repeatedly threatened these witnesses with prison if they did not "tell the truth."

From the record more fully discussed in Argument VII, it is unmistakably clear that the prosecutor and the trial court equated the "truth" with "yes" answers to the prosecutor's highly suggestive questioning. Whenever either of these witnesses did not remember the answer to the

prosecutor's questions, or answered contrary to the clearly stated wishes of the prosecution, they were threatened with prison. Nothing could be more relevant, and more pertinent to any cross-examination of these witnesses than to test whether these "yes" answer were the product of the witnesses' free will or simply a reaction to the prosecutor's threats.

The trial court's error in unconstitutionally limiting the cross-examination in this Argument seemed to be based upon the same bias it demonstrated in Argument VII. The trial court had clearly decided that the prosecutor's version of the truth was *indisputably* the truth, the whole truth, and nothing but the truth, and that his motives were so beyond reproach that the defense was not even permitted to dispute them. In fact, in denying the proffered cross-examination of Ms. Rowan, the trial court actually stated that the only thing that the prosecutor wanted from the witness was the truth and that the cross-examination impermissibly raised the possibility that the prosecutor wanted Ms. Rowan to lie. (10 RT 1971-1972.)

Given the adversarial position taken by the trial court, it is little wonder that it refused to allow any sort of probing cross-examination as to the witnesses' motives. As the court had already irrebuttably presumed that the truth was embodied in the prosecutor's suggestive leading questions, there was no reason in its mind to allow such cross-examination. In

essence, the trial court was far more interested in protecting the record created by the prosecutor than allowing the defense a fair opportunity to seek out the motives of the witnesses and raise legitimate questions about the truthfulness of their testimony in light of the pressures that had been placed upon them to conform it to the prosecutor's prerferences.

There was nothing argumentative about the proffered cross-examination. An argumentative question is forbidden "because it does not seek to elicit relevant competent testimony or often any testimony at all." (*People v. Chatman, supra,* 38 Cal.4th at p. 384.) They are asked to convey the questioner's argument not to elicit an answer. These questions were intended to evoke an honest response from the witness as to the true motive behind their answering "yes" to the suggestive questions of the prosecutor.

In assessing the harm from the trial court's denial of cross-examination, this Court is to assume "that the damaging potential of the cross-examination were fully realized." (*Delaware v. Arsdale, supra,* 475 U.S. at p. 684.) Therefore, this Court has to assume that if the cross-examination was allowed to continue, both Ms. Rowan and Ms. Gonzalez would have testified that, in fact, they were answering "yes" to the suggestive questions just to please the prosecutor (and the judge) so they would not incarcerate them for three years.

There is no question that this admission would have rendered the testimony of these two witnesses completely unreliable in the eyes of the jury. As argued in Argument VII, these two witnesses were critical to the prosecution's case. Their testimony was obviously very important to the jury's ultimate determination as it represented percipient testimony from witnesses who were privy to appellant's actions and statements following the shooting.

Because the trial court's error violated appellant's constitutional rights, the prosecutor bears the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. Californian* , *supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

Appellant respectfully requests that the entire judgment be vacated.

IX. THE TRIAL COURT'S ERROR IN ALLOWING THE JURY TO CONSIDER IRRELEVANT YET HIGHLY PREJUDICIAL VIDEO TAPED "CLIPS" DEPRIVED APPELLANT OF DUE PROCESS OF LAW, EFFECTIVE ASSISRTANCE OF COUNSEL AND A FAIR DETERMINIATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. General Factual Summary

As stated more fully in the Statement of Facts, the Long Beach Police and the Los Angeles Sheriff's Department developed a plan to elicit

incriminating statements about the instant crime from both appellant and Flint. (AOB at p. 7-8.) In summary, the plan consisted of transporting appellant and Flint to the Los Angeles County Jail for some sort of hearing on an unspecified charge. Undercover officers were on the transportation bus, playing the role of fellow convicts. (AOB at p. 8) The bus was "bugged" to record any statements of the two. (*Ibid.*) Once the bus arrived at the jail, appellant and Flint were placed in "bugged" holding cells. In addition, undercover detectives were placed in these cells to provoke conversation that they hoped would lead to inculpatory admissions by the two suspects. (*Ibid.*)

The secretive efforts of the police were rewarded by dozens of audio-visual recordings of statements made both to and by appellant and Flint. (AOB at pp. 9-12.) The prosecutor referred to these recordings as "clips." Eventually most of these clips were played for the jury. The clips were numbered individually and the first 53 of them composed People's Exhibit 57. The transcript of these clips were denominated Court Exhibit "H."[11]

Appellant objected to the admission of many of these clips. For the greatest part, the trial court overruled the objections and the jury was able to hear and view them. The court erred in allowing some of these clips

[11] Court's Exhibit "H" also contained transcripts of recordings never shown to the jury.

before the jury over objection of counsel. This error deprived appellant of due process of law, effective representation of counsel, and a fair determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and analogous state law.

B. Clip # 16

In a pre-trial hearing, appellant objected to the admission of what ultimately became Clip #16.[12] (Exhibit "H" p. 300-301.) The essence of that clip was a discussion between undercover detective Javier Clift and appellant in which Clift and appellant talked about some crime he committed that involved a Mercedes. In response to Clift's inquiry as to why appellant had been transferred from state prison, appellant stated:

> With the car, the, the...for the car, the Mercedes ? Alright we took him for a little ride. Alright? But...he's like a clucker ya know? Like a nobody. I hope it's for the Mercedes . I'll be like, I'll take it Your Honor . Give it to me. How much 7, 10, 15, 20? Anything else, cool. (Court Exhibit "H" p. 301.)

At the pre-trial hearing, counsel objected to this clip's admission stating that it referred to a violent crime that had absolutely nothing to do with the instant offense, at least as far as the guilt phase was concerned. (9 RT 1724.) The prosecutor argued that appellant's statement showed his guilty frame of mind in that he was in effect stating that he would rather get

[12] Prior to trial, the prosecutor renumbered the clips. Under this renumbering, what was clip #21, became clip #16.

sentenced on a carjacking than on the instant shooting. (9 RT 1724.) Counsel responded by correctly stating that there was no mention of the Rosa shooting during this conversation, hence, the clip was irrelevant to any issue in this case but was prejudicial in that it revealed to the jury that appellant had committed a non-related violent crime. (9 RT 1725-1726.)

The trial court stated that even if appellant did not mention the murder, his response to Detective Clift's inquiry was an adoptive admission and, as such, the clip was admissible.

C. Legal Argument

1. Appellant's Statement was Irrelevant

According to Evidence Code section 210;

> Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

There is nothing on this clip that even suggests that whatever happened vis a vis this otherwise unidentified Mercedes had anything at all to do with the crime in question. It is nothing but sheer speculation that appellant's statements about the prison time he would be willing to serve on this otherwise unidentified act meant that he was comparing it to the sentence he would serve on *this* killing. (See *People v. Morrison*, supra 34 Cal.4th at p. 722.)

The test for determining the relevance of evidence is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identification, intent, or motive. (*People v. Hart* (1999) 20 Cal.4th 546, 605-606.) The fact that appellant *may have* committed some sort of crime involving a Mercedes does not meet the test of relevancy.

2. There Was No Adoptive Admission

The doctrine of adoptive admission in California is controlled by statute, Evidence Code section 1221, which reads as follows;

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

The test for admitting an accusatory statement against a defendant and the defendant's failure to deny such a statement is not whether defendant had an opportunity to deny the accusation, but whether the accusation was made upon circumstances that call for a reply. (*People v. Kiel* (2000) 22 Cal.4th 1153, 1189.)

For the adoptive admission exception to the hearsay rule to apply, no direct accusation in so many words is necessary; rather, it is enough that the evidence showed that the defendant participated in a private conversation in which the crime was discussed and the circumstances offered him the

opportunity to deny responsibility or otherwise dissociate himself from the crime, but that he did not do so. (*People v. Davis* (2005) 36 Cal.4th 510, 537.)

According to the above parameters, there was no adoptive admission by appellant. There never was an accusation or a statement by Detective Clift that at all related to the shooting of Ms. Rosa. The instant crime was never mentioned, therefore it cannot be expected that appellant comment upon it. The trial court was incorrect in ascribing the qualities of an adoptive admission to appellant's statements.

The statements in this clip were irrelevant and prejudicial evidence of criminal disposition. This sort of evidence is inadmissible under Evidence Code section 1101(a) which states in pertinent part;

> ...evidence 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 this Court stated recently in *People v. Rogers* (2013) 57 Cal.4th 296, 325-326, great care must be taken with the admission of other criminal acts in that they are inherently prejudicial. While there are exceptions to section 1101(a), notably sections 1101(b) and section 1108, no such exceptions exist here.

Even if it could be said that this clip had some small degree of relevance, it would still be inadmissible under Evidence Code section 352 which states;

> The 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.

In the instant case, whatever probative value the statement may have is clearly substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice by presenting the jury with an admission by appellant of another, unrelated violent crime.

The admission of clip #16 allowed the jury to learn that appellant was involved in violent criminal conduct around the time of the Rosa shooting. This information greatly prejudiced the jury against appellant, depriving him of due process of law, effective assistance of counsel, and fair determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A trial court error of constitutional law requires the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. Californian* , *supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

Appellant respectfully requests that the entire judgment be vacated.

X. THE TRIAL COURT'S ERROR IN ALLOWING ORAL TESTIMONY AS TO THE CONTENTS OF VARIOUS VIDEO-TAPE "CLIPS' VIOLATED BOTH CALIFORNIA'S "SECONDARY EVIDENCE RULE"AND APPELLANT'S RIGHTS TO DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, AND FAIR DETERMINATION OF GUILT, DEATH ELIGIBILITY, AND PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Law Revision Commission Comments to Evidence Code section 1521 state the following;

> Sections 1520 (proof of content of writing by original), 1521 (Secondary Evidence Rule), 1522 (exclusion of secondary evidence in criminal action), and 1523 (oral testimony of contents of writing) replace the Best Evidence Rule and its exceptions...Because of the breadth of the exceptions to the Best Evidence Rule, this reform is not a major departure from the former law, but primarily a matter of clarification and simplification...

Section 1520 (Content of Writing; Proof) states "a content of a writing may be proved by an otherwise admissible original." (Evidence Code section 1520.) Section 1523 (Oral Testimony of the Content of a Writing) states;

> a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.
>
> (b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Section 1521 (Secondary Evidence Rule), which codifies when secondary evidence may be used to prove the contents of a writing states "nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under section 1523."

It has long been established that an audio-visual recording such as the "clips" in the instant case are considered "writings" for the purpose of this law. (*People v. Kirk* (1974) 43 Cal.App. 3d 921, 928-929.)

What occurred in the instant case were multiple violations of section 1523. On many occasions, over the objection of counsel, the undercover officers present during the bugging of the holding cells were allowed to orally testify to prove the contents of the "clips." There was never a

question as to the accuracy of the "clips." None of them were lost or otherwise unavailable. (See *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059.) The clips literally spoke for themselves and as such section 1523 clearly forbade such oral testimony.

However, the trial court allowed the witnesses in question to "explain" these clips through their testimony. In general, the substance of this testimony was not based upon any expertise they possessed. As stated in Evidence Code section 801;

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

It has been long held that where the jury is just as competent to consider and weigh the evidence and draw the same conclusions as an "expert" there is no need for such expert testimony. (*PM Group v. Stewart* (2007) 154 Cal.App. 4th 55, 63; see gen *People v. Watson* (2008) 43 Cal.4th 652, 690-692.)

While the undercover officers were never formally denominated as expert witnesses, they were certainly treated as such by the court. On multiple occasions, they were allowed to "interpret" and opine on the meaning of the clip in question. However, except for their knowledge of certain gang terms that had to be translated so that the jury could understand their meaning, the testimony of these witnesses served only to "invade the province of the jury," which was perfectly capable of drawing their own conclusion. (*People v. Lowe* (2012) 211 Cal.App.4th 678, 683-684; *Piscitelli v. Friedenberg* (2001) 87 Cal.App. 4th 953, 972.)

In "clip 1", there was conversation about a carjacking and some unspecified murder. (Exhibit "H" p. 270.) Counsel objected to the speculative testimony accompanying the clip. (11 RT 2182.) Similarly in "clip 2," also involving a crime committed in which a car was involved, the court admitted over objection oral testimony as to which car appellant was referring. (Exhibit "H", 11 RT 2183.)

The same type of objection was overruled for "clip 3"(11 RT 2192; Exhibit "H" at p. 280), "clip 7" (11 RT 2204; Exhibit "H" at p. 286, clip 8 (11 RT 2204; Exhibit "H" at p. 286), "clip 9" (11 RT 2205; Exhibit "H" at p. 288), "clip 10" (11 RT 289; Exhibit "H" at p. 289), "clip 14 (11 RT 2215 ; Exhibit "H" at p. 297; "clip 15" 11 RT 2215; Exhibit "H" at p. 298), "clip 16" (11 RT 2217; Exhibit "H" at p. 300-301; "clip 34" (11 RT 2248;

Exhibit "H" at p. 343), "clip 35" (11 RT 2249-2250; Exhibit "H" at pp 344-345), "clip 46" (11 RT 2278; Exhibit "H" at p. 404), "clip 47" (11 RT 2279; Exhibit "H" at p. 404), "clip 47" (11 RT 2279; Exhibit "H" at p. 405; "clip 52"(11 RT 2293; Exhibit "H" at p. 418.)

These multiple violations of statutory law allowed the prosecutor to use their undercover officers to inappropriately reach conclusions about the nature of the clips instead of allowing the jury to judge for themselves what the clips really conveyed. These clips were essential to the prosecutor's case and the constant "narration" by the witnesses caused this evidence to be received in such a manner that misled the jury into allowing their minds to be made up by this narration.

Taken together, these errors constituted a denial of due process of law, effective assistance of counsel, and a fair determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. An error of constitutional law required the prosecution to bear the burden of proving its harmlessness beyond a reasonable doubt. (*Chapman v. Californian* , *supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

PENALTY PHASE ISSUES

XI. THE TRIAL COURT DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND A FAIR ADJUDICATION OF PENALTY PURSUANT TO THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ALLOWING THE JURY TO HEAR APPELLANT'S STATEMENTS ABOUT HIS PARTICIPATION IN 190.3(B) CRIMINAL ACTIVITY EVEN THOUGH THERE WAS NO *CORPUS DELICTI* AS TO SAID ACTS

A. Factual Summary

Prior to the commencement of testimony in the penalty phase, the prosecutor proffered several more "clips" (see Argument IX and X) that it claimed were relevant to the penalty phase. (13 RT 2500.) The first of these penalty phase "clips" consisted of statements that appellant made concerning his participation in some otherwise unspecified carjacking involving a Mercedes. ("Clip 1" (People's Exhibit 78), 13 RT 2502, Court Exhibit "H" at pp. 278.)

Counsel objected to the admission of "Clip 1" stating that, in effect this clip showed nothing more than a general propensity to commit crimes. (13 RT 2504.) The trial court stated the clip was relevant in that it evidenced appellant's "demeanor, character, and attitude toward crimes." (13 RT 2503.)

The prosecutor sensing that the court had misstated the law, interjected that he was seeking admission of this tape on the ground that it was evidence of a Penal Code section 190.3 (b) unadjudicated criminal offense. (13 RT 2505.) The trial court, realizing its error, acknowledged that this evidence was not admissible to show general demeanor and attitudes but agreed with the prosecutor that the evidence in question was evidence of an unadjudicated offense of violence under Penal Code section 190.3 (b). (13 RT 2505-2506.) Counsel objected on the ground that his clip only proved a general propensity to commit crime. The trial court overruled the objection. (*Ibid.*)

The prosecutor similarly proffered "clip 3". (13 RT 2507-2511; Court's Exhibit "H" at p. 300.) This clip consisted of appellant telling an uncover officer that he had been involved in 27 armed robberies when he was a juvenile. (*Ibid.*) Counsel objected on the ground that there was no "foundation " to these robberies. (13 RT 2507.) The court responded to this by deleting the number of robberies from the clip (13 RT 2509-2511), but admitting the rest of the clip.

B. Legal Argument

Appellant acknowledges that Penal Code section 190.3 (b) allows the penalty jury to consider "the presence or absence of criminal activity by the defendant which involved the use of force or violence or implied threat

to use force or violence." The criminal activity referred to in this section is conduct that constitutes an offense proscribed by statute. (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.) Further, the Code section 190.3 (b) offense must be proven beyond a reasonable doubt. (*People v. Lewis* (2006) 39 Cal.4th 970, 1052.)

Appellant does not question that the crime described in clip 1 could, under the right circumstances, qualify as an admissible (b) factor offense. However, in this case it does not qualify because of this Court's holding in *People v. Alvarez* (2008) 43 Cal.4th 268, 296-297, which stated the corpus delicti rule, fully discussed in this AOB, Argument I, applies to the use of (b) factor crimes. *Alvarez* made clear that only when the corpus delicti on the factor (b) crime is established, can a defendant's statements related thereto be considered by the jury. (*Ibid.*)

In the instant case, except for appellant's statements, no evidence, at all, was presented regarding the carjacking of a Mercedes. As stated in Argument I, the "prosecutor cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant." (See AOB at pp. 41-44; *People v. Ochoa, supra,* 19 Cal.4th at p. 404; *People v. Jennings, supra,* 53 Cal.3d at p. 364.; *People v. Beagle, supra,* 6 Cal.3d at p. 455.)

Therefore, the admission of "clip #1" into evidence was prejudicial error by the trial court in that it served only the impermissible purpose of alerting the jury to appellant's predisposition to admit violent crime. (See *People v. Boyd* (1985) 38 Cal.3d 762,762, 773-775; *People v. Easely* (1983) 34 Cal.3d 858, 878; see *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The admission of this evidence deprived appellant of due process of law and a fair determination of penalty under the Eighth and Fourteenth Amendment to the United States Constitution. An error of constitutional law requires the prosecution to bear the burden of proving the harmlessness of the error beyond a reasonable doubt. (*Chapman v. California* , *supra,* 386 U.S. at p. 24.) The prosecutor cannot meet this burden.

Regarding clip 3, while appellant admitted to several robberies, none of these admissions necessarily referred to any of the robberies that were testified to later in the penalty phase. (13 RT 2565 et seq; 13 RT 2572 et seq; 13 RT 2578 et seq; 13 RT 2619 et seq; 13 RT 2624 et seq; 13 RT 2633 et seq.)

Therefore, under the same logic and law as cited regarding "clip" 1, clip 3 was improperly admitted into evidence as it only demonstrated appellant's propensity to commit robberies, in general.

XII. BY ALLOWING THE ADMISSION OF IMPROPER VICTIM IMPACT EVIDENCE THE TRIAL COURT DEPRIVED APPELLANT OF HIS RIGHT TO A RELIABLE DETERMINATION OF PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In *Payne v. Tennessee* (1991) 501 U.S. 808, 827, the United States Supreme Court held "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 824.)

A few months later, in *People v. Edwards* (1991) 54 Cal.3d 787, this Court responded to the *Payne* decision by holding that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.* at p. 836.)

However, both *Payne* and *Edwards* placed limitations on this sort of evidence. This Court recognized *Payne's* admonition that victim impact evidence may be "so unduly prejudicial that it renders the trial fundamentally unfair" to the point that it violates the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

Therefore, in *Edwards*, this Court limited their holding stating it "only encompasses evidence that logically shows the harm caused by the

defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime and do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allows by *Payne.*" (*People v. Edwards, supra,* 54 Cal.3d at pp 833-836.)

This Court continued;

> Our holding does not mean there are no limits on emotional evidence and argument. In *People v. Haskett, [citations]*we cautioned "Nevertheless, the jury must face its obligations soberly and rationally, and should not be given the impression that emotion may reign over reason" [Citation] In each case, therefore, the trial court must strike a careful balance between the probative and prejudicial[citations] On one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury away from its proper role or invites an irrational or purely subjective response should be curtailed. (*People v. Edwards, supra,* 54 Cal.3d at p. 836.)

In *People v. Howard* (1992) 1 Cal.4th 1132, 1191, this Court confirmed that there are two separate yet related tests for the admission of this sort of evidence; one using a state standard and the other a federal constitutional one. Under state law, the argument and evidence presented to the jury under the "victim impact" rationale should not be so inflammatory so as to "divert the jury's attention from its proper role." (*People v. Edwards, supra,* 54 Cal.3d at pp. 835-836.) Under the federal test, the argument and evidence must not be so "unduly prejudicial that it render(ed)

the trial fundamentally unfair."(*Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

This Court has also set forth some more specific limitations under which the prosecutor must operate in the use of "victim impact" evidence. In *People v. Thomas* (1992) 2 Cal.4th 498, 536, the prosecutor is instructed that exhortations for sympathy and concern for the victim's family be "brief." This Court also restated that to be legally appropriate, prosecutorial comments must not be so inflammatory so as to invite an irrational or purely subjective response from the jury. (*Ibid.*) In doing so, this Court cited to one of its older death penalty decisions, *People v. Love* (1960) 53 Cal.2d 843, 854-857, where this Court held the prosecutor exceeded the limits of proper evidence and comment.

In *Love*, the defendant objected to a photo of the victim in the hospital taken immediately after her death and a tape recording of the victim's final moments, replete with the painful groans of a dying person in intense pain.

This Court held that the attending physician had already testified that the victim suffered pain as intense as any that could be inflicted upon a human being so the tape and photo was not essential to the prosecutor's case. In addition, it held that this was the type of evidence that should have been excluded. This Court indicated that the trial judge should have

considered that there are less inflammatory ways to present evidence of the victim's suffering and there was "no need to show the jurors the expression on her face or fill the courtroom with her groans. (*People v. Love, supra,* 53 Cal.2d at p. 857.)

In the instant case, in addition to calling many witnesses to the stand to evidence the special qualities of the victim and the impact of her loss upon her friends and family (AOB at 30-33), over objection of counsel, prosecutor played a victim impact video tape for the jury. (People's Exhibit 85; 15 RT 3030.)

The law concerning the admissibility of such videotapes is as follows. In *People v. Prince* (2007) 40 Cal.4th 1179, 1287-1288, this Court discussed the use of such videotapes as prosecutorial victim impact evidence. In *Prince*, the prosecutor proffered a twenty-five minute taped interview of one of Prince's murder victims, Holly Tarr. This interview was part of a series of interviews done by a local television station highlighting the accomplishments of certain high school students in the local area. (*Ibid.* at p. 1287.)

This Court affirmed the trial court's decision to allow this tape to be viewed and heard by the jury in that the trial court carefully deleted from the tape matters that "invited an irrational , and purely speculative subjective response." (*Prince, supra,* 40 Cal.4th at p. 1288.) These

exclusions included any musical background and other matters that would serve only "to invite empathy or emotional response." (*Id.* at p. 1287.) This Court described the videotape as follows:

> The interviewer devoted nearly the entire interview to Tarr's training and interest in acting and singing, adding a few questions concerning Tarr's ability to balance school and artistic commitments. The tape recording exhibits a young female interviewer and Tarr, seated in chairs in front of a plain backdrop. There is no music and there are no cuts to other images of Tarr—the interview is a calm, even static, discussion of Tarr's accomplishments and interests that takes place entirely in a neutral, bland setting. Under ordinary circumstances, the two young women's discussion would appear unlikely to invite empathy or emotional response. (*Ibid.*)

In essence, this Court put great emphasis on distinguishing between neutral presentations of that which makes a particular victim "special" and a carefully choreographed production intended to grab at the emotions of the jury. (*Prince*, *supra,* 40 Cal.4th at p. 1288.) *Prince* cited to *United States v. Sampson* (D.Mass 2004) 335 F.Supp 2d 166, 191, as an example of the former. In *Samson,* the district court sustained an objection to a videotape, set to a background of "evocatory contemporary music" the portrayed scores of photos of the victim in various stages of her life.

In addition, the *Prince* Court also cited to *United States v. McVeigh* (10th Cir 1998) 153 F.3d 1166, 1221 n 43 and *Salazar v. State* (Texas 2003) 118 S.W. 3d 880, 882 as cases where the trial court excluded carefully

produced and scored productions whose contents were designed to inject overt emotionalism into the jury's deliberative process. (*Prince, supra,* 40 Cal.4th at pp. 1288-1289.)

In *People v. Kelly* (2007) 42 Cal.4th 763, 794, this Court made clear that there are "no bright line rules" by which to determine when victim impact tapes may or may not be used. On a broad basis, *Kelly* stated that the purpose of such a videotape is to "remind that sentence...[that] the victim is an individual whose death presents a clear loss to society. (*Ibid; Payne, supra,* 501 U.S. at p. 825) yet, on the other hand warn that the prosecutor may not introduce irrelevant or inflammatory material that "diverts the jury's attention from its proper role or invites an irrational, purely subjective response." (*Ibid.*)

Citing *Salazar v. State* (Tex. Crim. App. 2002) 90 SW 330, 336, *Kelly* instructed that "what may be an entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual, are not necessarily admissible in a criminal trial.(*Kelly, supra,* 42 Cal.4th at p. 795.) This Court cautioned that "the punishment phase of a criminal trial is not a memorial service for the victim." (*Ibid.*)

Kelly, citing *Prince, supra,* 40 Cal.4th at p. 1289, warned that trial courts must exercise great caution in permitting the prosecution to present victim impact evidence in the form of a lengthy videotaped or filmed

tribute to the victim. Particularly if the presentation lasts beyond a few moments or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact that goes beyond what a jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents. In order to combat this strong possibility, the courts must strictly analyze evidence of this type and if the evidence is admitted, the courts must monitor the jurors' reaction to ensure that the proceedings do not become injected with a legally impermissible level of emotion. (*People v. Kelly, supra,* 42 Cal.4th at p. 795-796.)

In *People v. Robinson* (2005) 37 Cal.4th 592, 652, this Court warned that the "sheer volume" of victim impact evidence, regardless of the form in which it is presented, can result in unfair prejudice against a defendant. This Court encouraged trial courts to "place appropriate limits upon the amount, kind and source of victim impact and character evidence." (*Ibid.*)

Under the above decisions,, the trial court clearly erred in admitting People's Exhibit 85 into evidence. In fact, this videotape is exactly the type of victim impact evidence this Court instructed trial courts to suppress. The videotape was a professionally produced, eight minute presentation, which went for the greatest emotional impact as possible. It consisted of a series of friends and relatives, often barely in control of their emotions, effusively

lauding Ms. Rosa as one of the finest persons they knew. In most cases, this filming was done in a cemetery, with highly sentimental piano music playing in the background. When these friends and family members were not being filmed in the cemetery on the verge of tears, their voices were used as voice-overs to a series of photos of Ms. Rosa at all phases of her life, including her infancy. These photos include several shots of Ms. Rosa with various infants and children, with various individuals solemnly intoning how Ms. Rosa always wanted to adopt a baby. There was even a photo with Ms. Rosa and a person portraying Santa Claus. It ended with an unidentified elderly woman standing in the same cemetery, on the verge of emotional collapse, telling the intended audience, the jury, that now there was nowhere for her to go when she had problems because Ms. Rosa was dead.

This videotape was not an amateur production generally extolling the virtues of the victim. It was very professionally done, well choreographed to inject the penalty phase with the greatest degree of emotionality as possible and introduce an overstated degree of pathos that oral testimony could not possibly achieve. It indubitably swayed the jury with its overstated naked emotionalism. It was also unconstitutional in that it "divert(ed) the jury's attention from its proper role and invit(ed) an irrational, purely subjective response." (*Payne, supra,* 501 U.S. at p. 825.)

The trial judge relied upon *People v. Kelly* , *supra,* 42 Cal.4th 763 to justify the admission of this videotape.(14 RT 2789-2794) The court's reliance on *Kelly* was misplaced. At no point does *Kelly* soften the warnings cited above by both federal and state cases. In fact, as stated above, *Kelly* directly cites to all of these cases, reiterating the error in allowing videotapes before the jury that serve to cause emotional agitation and undermine the rational decision making process. (*Id.*at p. 795-796.)

In *Kelly*, this Court pointed out that for the greatest part the videotape admitted was not overly emotional and was not a "clarion call for vengeance." (*Kelly, supra,* at p. 797.) In addition, this Court made clear that the tape in *Kelly* did not simply repeat the oral victim impact testimony of other witnesses, another factor that favored its admission. (*Ibid.*)

There is nothing in this Court's holding in *Kelly* that would suggest that the instant videotape was admissible. It was indeed a call for vengeance as it blatantly played upon the jury's emotions, ending with an elderly woman on the verge of emotional collapse, standing in a cemetery wondering aloud how she would survive without Ms. Rosa. Further, it appeared that most of the people who spoke in the videotape had *already* testified in the prosecutor's death penalty case. (See AOB at pp.30-33.) Add to this the fact that the videotape was impassionedly musically scored from beginning to end, and it is clear that it should have been excluded.

This videotape was so explosive that it removed any chance that the jury would grant the appellant life. For this reason, the death judgment in this case should be reversed.

XIII. 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, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh*

(2006) 548 U.S. 163, 179, fn. 6; see also, *Pulley v. Harris* (1984) 465 U.S. 37, 51.)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime --even circumstances squarely opposed to each other to justify the imposition of the death penalty. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE SECTION 190.2 IS IMPERMISSIBLY BROAD

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, 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. (Citations omitted.)"(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7."). These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a

mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court has not as of yet taken up that challenge.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE SECTION 190.3, FACTOR (a), AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3, factor (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every

murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, or having had a "hatred of religion," or threatened witnesses after his arrest, or disposed of the victim's body in a manner that precluded its recovery. It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.) Relevant "victims" now include "the victim's friends, coworkers, and the community" (*People v. Ervine* (2009) 47 Cal.4th 745, 858), the harm they describe may properly "encompass the spectrum of human responses" (*ibid*), and such evidence may dominate the penalty proceedings (*People v. Dykes* (2009) 46 Cal.4th 731, 782-783).

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California*, supra, 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution. (See *Tuileapa v. California, supra*, 512 U.S. at pp. 986-990 (dissent of Blackmun, J.))

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH, THEREFORE VIOLATING THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3, factor (a), allows prosecutors to argue that every

feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make -- whether or not to condemn a fellow human to death.

D. APPELLANT'S DEATH VERDICT WAS NOT PREMISED ON FINDINGS BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY THAT ONE OR MORE AGGRAVATING FACTORS EXISTED AND THAT THESE FACTORS OUTWEIGHED MITIGATING FACTORS, THEREBY VIOLATING HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF ALL FACTS ESSENTIAL TO THE IMPOSITION OF A DEATH PENALTY

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors ..." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [*Apprendi*] ; *Ring v. Arizona* (2002) 536 U.S. 584 [*Ring*] ; *Blakely v. Washington* (2004) 542 U.S. 296 [*Blakely*] ; and *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*].

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (*United States v. Booker, supra,* 543 U.S. at p. 244.)

E. IN THE WAKE OF APPRENDI, RING, BLAKELY, AND CUNNINGHAM, ANY JURY FINDING NECESSARY TO THE IMPOSITION OF DEATH MUST BE FOUND TRUE BEYOND A REASONABLE DOUBT

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance -- and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are

"moral and... not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetroulias* (2006) 39 Cal.4th 1, 41.)

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at p. 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham*. *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Cunningham, supra,* 549 U.S. at pp. 290-291.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi*, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2, subd. (a)), *Apprendi* does not apply. This holding is simply wrong.

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC No. 8.88; CALCRIM No. 766.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at p. 604.)

F. WHETHER AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS IS A FACTUAL QUESTION THAT MUST BE RESOLVED BEYOND A REASONABLE DOUBT

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality".] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citations.]" (*Monge v. California, supra,* 524 U.S. at p. 732

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of

California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra*, 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion

would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

XIV. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown, supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39

Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Further, written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias, supra,* 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

XV.CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review -- a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 [emphasis added], the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportion-

ality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2' s lying-in-wait special circumstance have made first degree murders that cannot be charged with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions, and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing. Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme. (see *Kansas v. Marsh, supra,* 548 U.S. at pp. 177-178), this absence renders that scheme unconstitutional.

XVI. THE FAILURE TO INSTRUCT THAT STATUTORY MITIGATING FACTORS WERE RELEVANT SOLELY AS POTENTIAL MITIGATORS PRECLUDED A FAIR, RELIABLE, AND EVEN-HANDED ADMINISTRATION OF THE CAPITAL SANCTION

As a matter of state law, each of the factors introduced by a prefatory "whether" - 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. Edelbache*r (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "no" answer as to any of these "whether" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

XVII. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive, 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. This differential treatment violates the constitutional guarantee of equal protection of the laws.

XVIII. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ.

Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" -- as opposed to its use as regular punishment -- is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, as of January 1, 2010, the only countries in the world that have not abolished the death penalty in law or fact are in Asia and Africa -- with the exception of the United States. (Amnesty International, "Death Sentences and Executions, 2009 - "Appendix I: Abolitionist and Retentionist Countries as of 31 December 2009" (publ. March 1, 2010) [found at www.amnesty.org].

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot, su-

pra, 159 U.S. at p. 227; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia, supra,* 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes -- as opposed to extraordinary punishment for extraordinary crimes -- is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227.

XIX. THE CUMULATIVE EFFECT OF GUILT AND PENALTY ERRORS WAS PREJUDICIAL

There were numerous guilt and penalty phase errors in this case. This Court has recognized that guilt phase errors that may not be prejudicial to the guilt phase may nevertheless improperly and adversely impact the jury's penalty determination. (See i.e., *In re Marquez* (1992) 1 Cal.4th 584, 605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on both the guilt and sentencing outcome. (*Taylor v. Kennedy* (1978) 436 U.S. 478, 487-488; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

The cumulative weight of the guilt and penalty errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief with respect to the various guilt phase errors, the appellant's rights were violated under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and analogous state law. In the penalty trial, appellant was deprived of a fair and reasonable determination of penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and analogous state law.

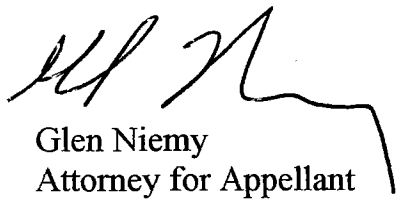
CONCLUSION

By reason of the foregoing, appellant, Frank Gonzalez, respectfully requests that the judgment of conviction on all counts, the special circumstances findings, and the judgment of death be reversed and this matter remanded to the trial court for new trial.

Appellant was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and death judgments. These grievous errors deprived appellant of his right to a meaningful determination of guilt and penalty.

The citizens of the State of California can have no confidence in the reliability of either verdict in this case.

Respectfully submitted,



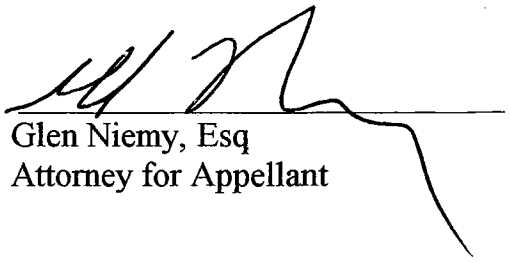
Glen Niemy
Attorney for Appellant

Date: March 28, 2014

CERTIFICATE OF COMPLAINCE

I, hereby certify that Appellant's Opening Brief was composed in 13 point font, New Times Roman Type and consists of a total of 44, 610 words.

March 28, 2014



Glen Niemy, Esq
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Frank C. Gonzalez
Superior Court 040292
Supreme Court S163643

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief** to each of the following by placing the same in an envelop addressed (respectively)

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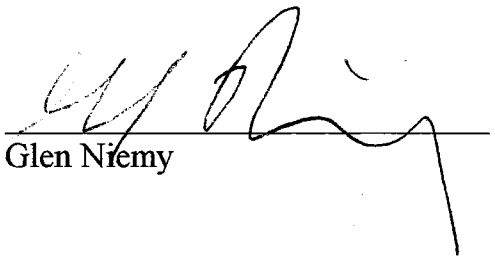
Each envelop was then on March 31, 2014, sealed and placed in the United States mail, at Bridgton, Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws

of California and Maine that the foregoing is true and correct this March 31, 2014, at Bridgton, Maine.

March 31, 2014



Glen Niemy