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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. OSWALDO AMEZCUA and JOSEPH CONRAD FLORES, Defendants and Appellants.	Superior Court No. No. KA050813 California Supreme Court No. S133660

APPELLANT JOSEPH CONRAD FLORES 'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE ROBERT J. PERRY PRESIDING

David H. Goodwin, State Bar #91476
P.O. Box 93579
Los Angeles, Ca 90093-0579
(323) 666-9960

DEATH PENALTY

TABLE OF CONTENTS

Table of Authorities (ii)

STATEMENT OF APPEALABILITY 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 10

THE PROSECUTION'S CASE

The April 11 Incident: The Murder of John Diaz, the Attempted Murder of Paul Gonzalez, and Possession of a Firearm by a Felon (Counts 42, 43, and 44) 10

The May 25 Incident: The Murder of Arturo Madrigal and the Attempted Murder of Fernando Gutierrez (Counts 45 and 46) 13

The June 7 Incident: The Murder of Paul Ponce (Count 1) 15

The June 19 Incident: The Murders of George Flores and Luis Reyes, the Attempted Murders of Joe Mayorquin, Robert Perez, and Art Martinez, Shooting at an Inhabited Dwelling, Possession of a Firearm by a Felon, and the Robbery of Luis Reyes (Counts 4 To 12) 17

The Incidents of June 25 and 25: The Attempted Murder of, and Assault On,Andrew Putney, and Arson of a Vehicle (Counts 14, 15 and 17) 25

The July 4 Incident: Possession of a Firearm by a Felon and the Arrest of Appellant and Amezcua (Count 35) 28

Ballistics and Firearms Evidence Pertaining to Multiple Counts 34

The April 30, 2001 Incident: Custodial Possession of A Weapon (Count 30) 35

The November 2, 2001 Incident: Attempted Murder and Assault on Steve Mattson (Counts 38 and 40) 36

Testimony of the Gang Expert 37

The Redacted Versions of the Prosecutor's Recorded Interviews with Appellant and Amezcua Which Were Played for the Jury 39

APPELLANT'S AND AMEZCUA'S DEFENSE 52

PENALTY PHASE 52

Evidence Presented Against Appellant 52

Evidence Presented Against Appellant and Amezcua 53

Evidence Presented Against Amezcua 55

Victim Impact Evidence 55

Appellant and Amezcua's Defense 56

ARGUMENTS 57

JURY SELECTIOPN ISSUES 57

I THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JUROR NO. 74 WHO, DESPITE CONSCIENTIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, STATED REPEATEDLY THAT SHE WAS WILLING TO CARRY OUT HER DUTIES AS A JUROR ACCORDING TO THE COURT'S INSTRUCTIONS AND THE JUROR'S OATH 57

A. Jury Selection Procedures 57

B. Prospective Juror No. 74 60

C. The Relevant Law and Application to This Case 63

D. Reversal of the Penalty Judgment Is the Appropriate Remedy Because Execution of the Death Sentence Would Deprive Appellant of His Life without Due Process of Law 70

II THE TRIAL COURT ERRED IN REJECTING THE DEFENSE REQUEST THAT THE QUESTIONNAIRE ASK PROSPECTIVE JURORS WHETHER THEY WOULD ALWAYS VOTE FOR DEATH IF APPELLANT WAS CONVICTED OF MULTIPLE MURDERS. THE RULING DEPRIVED APPELLANT OF CONSTITUTIONAL RIGHT TO A TRIAL BY JURY AND A RELIABLE DETERMINATION OF THE FACTS REQUIRED

IN CAPITAL CASES BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 73

A. Background 73

B. The Relevant Law and Application to This Case 75

C. Reversal of the Penalty Judgment Is the Appropriate Remedy because the Trial Court's Restriction of Voir Dire Creates Doubt That Appellant Was Sentenced to Death by a Jury Empanelled in Compliance with the Law 81

GUILT PHASE ISSUES 83

III APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO THE PRESUMPTION OF INNOCENCE WERE PREJUDICED BY HEIGHTENED COURTROOM SECURITY; THE TRIAL COURT DID NOT BASE ITS SECURITY ORDER EXCLUSIVELY ON CASE-SPECIFIC REASONS AND DID NOT STATE ON THE RECORD WHY THE NEED FOR THE HEIGHTENED SECURITY MEASURES OUTWEIGHED POTENTIAL PREJUDICE TO THE DEFENDANTS 83

A. Background 83

B. A Trial Court's Decision Regarding Heightened Courtroom Security Must Be Based on a Thoughtful, Case-Specific Consideration of the Need for Heightened Security and the Potential Prejudice to the Defendant. 87

C. The Trial Court Abused Its Discretion When It Failed to Engage in a Fact-Specific Analysis of the Need for Heightened Courtroom Security 93

D. As the Result of the Heightened Courtroom Security in This Case, There Is a Reasonable Probability That Error Affected the Trial's Result 95

IV THE TRIAL COURT ERRED IN ADMITTING THE JAILHOUSE INTERVIEW OF APPELLANTS BECAUSE THOSE STATEMENTS WERE PART OF SETTLEMENT NEGOIATIONS AND WERE PRIVILEGED UNDER EVIDENCE CODE SECTION 1152 98

A. Introduction 98

B. Procedural Background 98

C. Appellants' Jailhouse Statements to the District Attorney and His Investigator, When Viewed Contextually, Establish That They Were Made during Appellants' Efforts at Plea Negotiations 101

D. Admissions of Criminal Conduct Made in the Course of Plea Negotiations Are Inadmissible 106

E. Appellants' Admissions of Criminal Conduct Were Made in the Course of Negotiations with Levine Regarding Restitution and Should Have Been Excluded under the Rule of Tanner; The Failure to Do So Created Prejudicial Error 111

V APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF ARTURO MADRIGAL'S AUTOPSY ENTERED INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY 113

A. Introduction 113

B. The Record Fails to Establish that Dr. Carrillo was Unavailable or that Appellant Had Had a Prior Opportunity to Cross-Examine Him 116

C. Bullcoming and Melendez-Diaz v. Massachusetts Establish that the Results of the Forensic Autopsy Performed by Dr. Carrillo Are Testimonial Evidence and Together with Crawford and Davis a Clear Iteration that the Confrontation Clause Does Not Permit the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second 118

D. Permitting the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second Thwarts All Four Elements of Confrontation Identified in Maryland v. Craig 130

E. The Erroneous Admission of Dr. Carrillo's Testimonial Statements through the In-Court Testimony of Dr. Scheinin Was Not Harmless beyond a Reasonable Doubt 133

F. Appellant's Claim of Error Was Not Procedurally Defaulted because Counsel Rendered Ineffective Assistance in Failing to Object to the Confrontation Clause Violation 134

VI THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHEN HE INVITED THE JURY TO DEPART FROM THEIR DUTY TO VIEW THE EVIDENCE OBJECTIVELY AND INSTEAD TO VIEW THE CASE THROUGH THE EYES OF THE VICTIMS 137

A. The Prosecutor's Invitation to View the Case through the Eyes Of the Victims Was an Improper Appeal to Use Sympathy for the Victims in Deciding the Case 137

B. It Has Long Been Settled That Appeals to the Sympathy or Passions or Fears of the Jury Are Inappropriate at the Guilt Phase of a Trial 139

C. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law; Trial Counsel Failed to Provide Effective Legal Assistance When Counsel Failed to Timely Object to the Argument 145

1. Trial Counsel Failed to Provide Effective Legal Assistance Guaranteed by the Sixth Amendment to the Federal Constitution When Counsel Failed to Timely Object to the Argument 145

2. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law 147

VII THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE AND IN SO DOING VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF A CAPITAL JURY SUITABLY INSTRUCTED TO AVOID AN ARBITRARY AND CAPRICIOUS DEATH VERDICT 150

A. Background 150

B. Under the Eighth Amendment, It Is Improper To Instruct the Jury That Life Without The Possibility of Parole is a Lesser Punishment Than Death, or that Death Is a Greater Punishment . 151

C. The Law in California and the Uncertainties Attending It 161

D. Appellant Was Prejudiced by the Instruction 164

VIII THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA AND THEREFORE HIS LEVEL OF GUILT "FLOATS FREE" 166

A. Introduction 166

B. The Instructions Regarding the Liability of Principals Given to Appellant's Jury 168

C. The "Equally Guilty" Language of the Aider and Abettor Instructions Misdirected the Jury in Determining Appellant's Culpability for Murder. An Aider and Abettor's Guilt in a Murder Prosecution Is Based on the Combined Acts of the Principals, But on the Mental State of the Aider and Abettor. 170

D. The "Equally Guilty" Language of the Aider and Abettor Instructions Misdirected the Jury in Determining the Degree of Appellant's Murder Liability. An Aider and Abettor's Murder Liability Is Determined by Examining the Defendant's Personal Mens Rea and by Applying Penal Code Section 189 175

E. A Trial Court is Obligated to Correctly Instruct the Jury on the Applicable Law 181

F. The Failure to Instruct Correctly on the Elements of Aiding and Abetting Was Not Harmless Beyond a Reasonable Doubt 182

PENALTY PHASE ISSUES 187

IX THE TRIAL COURT ERRED WHEN IT ACQUIESCED TO THE DEMANDS OF APPELLANTS NOT TO ALLOW DEFENSE COUNSEL TO PRESENT ANY FORM OF DEFENSE IN THE PENALTY PHASE OR EVEN TO PROVIDE THE JURY WITH PROPER PENALTY PHASE INSTRUCTIONS 187

A. Appellants' Instructions to Counsel Not to Present a Defense. 189

B. The Request for Jury Instructions. 193

C. The Balance Between The Rights of Defendants and the Responsibilities of Counsel. 195

1. Decisions Under the Control of the Defendant 198

2. Decisions Under the Control of the Attorney 199

D. The State's Interest in Accurate Procedures 201

E. Prior Cases Which Analyzed Situations Where No Penalty Phase Defense Was Presented are Not Controlling Here, But To The Extent that Inconsistent Language Appears In Those Cases, They Should Be Disapproved. 209

1. The Principal Cases 209

2. Justice Mosk's Concurrence in Deere II 214

3. Deere I Controls; Bloom, Lang, Sanders, and Deere II Are Distinguishable on Their Facts and Incorrect in Assuming That A Represented Defendant May Control the Evidence Presented at the Penalty Phase. 217

F. Even If Capital Defendants May Override Counsel's Decision to Present a Penalty Phase, Counsel Must Be Permitted to Control he Preparation and Request of Jury Instructions. 224

G. Summary and Conclusion 226

X CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION 228

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD 230

B APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS MPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 232

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS ENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH, IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 234

1. 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; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated. 235

2. 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. 237

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt. 243

4. The Due Process and the Cruel and Unusual Clauses of the State and Federal Constitution Require That the Jury in Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty. 244

X CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION 228

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.2 IS IMPERMISSIBLY BROAD 230

B APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS MPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 232

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS ENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY DETERMINATION OF EACH FACTUAL PREREQUISITE TO A SENTENCE OF DEATH, IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. 234

1. 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; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated. 235

2. 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. 237

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt. 243

4. The Due Process and the Cruel and Unusual Clauses of the State and Federal Constitution Require That the Jury in Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty. 244

5. 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. 247

6. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty. 249

7. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury. 251

D 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. 252

E. ALIFORNIA'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. 254

CONCLUSION 257

CERTIFICATION UNDER RULE 8.504 257

TABLE OF AUTHORITIES ..... **PAGE(S)**

CASES

Adams v. Texas
(1980) 448 U.S. 38 64

Addington v. Texas,
(1979) 441 U.S. 418 ..... 243, 245, 247

Ake v. Oklahoma
(1985) 470 U.S. 68 202

Apprendi v. New Jersey
(2000) 530 U.S. 466 ..... passim

Armant v. Marquez,
(9th Cir. 1985) 772 F.2d 552 221

Atkins v. Virginia
(2002) 536 U.S. 304 ..... 156, 255, 256

Baxter v Montana
(2009) 2009 MT 449 155

Berger v. United States
(1935) 295 U.S. 78 ..... 140, 141

Blakely v. Washington
(2004) 542 U.S. 296 ..... passim

Blystone v. Pennsylvania
(1990) 494 U.S. 299 203

Brown v. Plata
(2011) 536 U.S. ___, 131 S.Ct. 1910 ..... 156, 157, 158, 159

Bryan v. Superior Court
(1972) 7 Cal.3d 575 ..... 98, 108

Bullcoming v. New Mexico
(2011) ___ U.S. ___ [131 S.Ct. 2705] ..... passim

Bush v. Gore
(2000) 531 U.S. 98, 121 S.Ct. 525 254

California v. Brown,
(1987) 479 U.S. 538. 247

Chapman v. California
(1967) 386 U.S. 18 ..... passim

Coy v. Iowa
(1988) 487 U.S. 1012 132

Crawford v. Washington
(2004) 541 U.S. 36 ..... passim

Cunningham v. California
(2007) 549 U.S. 270 ..... passim

Darden v. Wainwright
(1986) 477 U.S. 168 ..... 139, 145

Davis v. Alaska
(1974) 415 U.S. 308 132

Davis v. Georgia
(1976) 429 U.S. 122 ..... passim

Davis v. Washington
(2006) 547 U.S. 813 ..... passim

Deck v. Missouri
(2005) 544 U.S. 622 87

Delaware v. Van Arsdall (1986) 475 U.S. 673 133

Donnelly v. DeChristoforo
(1974) 416 U.S. 637 139

Dowdell v. United States
(1911) 221 U.S. 325 131

Drayden v. White,
232 F.3d 704 (9th Cir. 2000) 139

Duncan v. Louisiana
(1968) 391 U.S. 145 63

Estelle v. Williams
(1976) 425 U.S. 501 96

Evans v. Bennett
(1979) 440 U.S. 1301 ..... 152, 153, 156

Faretta v. California
(1975) 422 U.S. 806 ..... passim

Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.
(1969) 276 Cal.App.2d 770 110

Florida v. Nixon
(2004) 543 U.S. 175 ..... 196, 197

Ford v. Wainwright
(1986) 477 U.S. 399 256

Garcia v. Santana
(2009) 174 Cal.App.4th 464 226

Gardner v. Florida
(1977) 430 U.S. 349 ..... 205, 206, 245

Gideon v. Wainwright
(1963) 372 U.S. 335 195

Gilmore v. Taylor
(1993) 508 U.S. 333 ..... 70, 80, 156

Gilmore v. Utah
(1976) 429 U.S. 1012 152

Godfrey v. Georgia
(1980) 446 U.S. 420 233

Gonzales v. Oregon
(2006) 546 U.S. 243 154

Gray v. Mississippi
(1987) 481 U.S. 648 71

Gregg v. Georgia
(1976) 428 U.S 153. 247

Harmelin v. Michigan
(1991) 501 U.S 957. 248

Hilton v. Guyot
(1985) 159 U.S 113. ..... 255, 256

Holbrook v. Flynn
(1986) 475 U.S. 560 ..... passim

Illinois v. Allen
(1970) 397 U.S. 337 ..... 87, 96

In Johnson v. State
(Nev., 2002) 59 P.3d 450 ..... 238, 243

In re Atchley
(1957) 48 Cal.2d 408 200

In re Marquez
(1992) 1 Cal.4th 584 183

In re Sturm
(1974) 11 Cal.3d 258 248

In re Winship
(1970) 397 U.S. 358 ..... 245, 246

Indiana v. Edwards
(2008) 554 U.S. 164 ..... 201, 202

Jecker, Torre & Co. v. Montgomery
(1855) 59 U.S. [18 How.] 110 [15 L.Ed. 311] 256

Johnson v. Mississippi
(1988) 486 U.S. 578 ..... 70, 80, 223, 251

Jones v. Barnes
(1983) 463 U.S. 745 197

Kansas v. Marsh
(2006) 548 U.S. 163 ..... 228, 249, 250

Lenhard v. Wolff
(1979) 443 U.S. 1306 ..... 153, 154, 156

Lockhart v. McCree
(1986) 476 U.S. 162 75

Lopez v. Thurmer
(2009) 573 F.3d 484 96

Madrid v. Gomez
(N.D. Cal. 1995) 889 F. Supp. 1146 ..... 157, 158

Marriage of Gray
(2007) 155 Cal.App.4th 504 226

Martin v. Waddell's Lessee
(1842) 41 U.S. [16 Pet.] 367 [10 L.Ed. 997] 255

Martinez v. Court of Appeal
(2000) 528 U.S 152. ..... 201. 202. 220

Maryland v. Craig
(1990) 497 U.S. 836 ..... 115, 130, 131, 132

Massie v. Sumner
(9th Cir. 1980) 624 F.2d 72 207

Mattox v. United States
(1895) 156 U.S. 237 ..... 131, 132

Maynard v. Cartwright
(1988) 486 U.S. 356 233

McCarver v. North Carolina,
O.T. 2001, No. 00-8727 255

McMillan v. Shadow Ridge At Oak Park Homeowner's Ass'n
(2008) 165 Cal.App.4th 960 207

Melendez-Diaz v. Massachusetts
(2009) 557 U.S 305 ..... passim

Miller v. United States
(1871) 78 U.S. [11 Wall.] 268 [20 L.Ed. 135] 255

Mills v. Maryland
(1988) 486 U.S. 367 ..... 223, 248, 254

Miranda v. Arizona
(1966)384 U.S. 436. (8CT 1835-1842; 9CT 2201-2204.) 99, 100

Monge v. California
(1998) 243, 246

Monge v. California,
supra, 524 U.S. 243, 247, 252

Morgan v. Illinois
(1992) 504 U.S. 719 ..... passim

Myers v. Ylst
(9th Cir. 1990) 897 F.2d 417 ..... 248, 254

Neder v. United States
(1999) 527 U.S. 1 ..... 133, 168, 182

Penry v. Lynaugh
(1989) 492 U.S. 302 195

People ex rel. Dept. of Public Works v. Forster
(1962) 58 Cal.2d 257 110

People v. Adcox
(1988) 47 Cal.3d 207 232

People v. Ainsworth
(1988) 45 Cal.3d 984 ..... 91, 92

People v. Alfaro
(2007) 41 Cal.4th 1277 198

People v. Allen
(2008) 44 Cal.4th 843 198

People v. Anderson
(2001) 25 Cal.4th 543 240

People v. Andrews
(1970) 14 Cal.App.3d 40 140

People v. Ashmus
(1991) 54 Cal.3d 932 71

People v Bacigalupo
(1993) 6 Cal.4th 857 230

People v. Bailey
(2010) 187 Cal.App.4th 1142 ..... 204, 225

People v. Beagle
(1972) 6 Cal.3d 441 134

People v. Berryman
(1993) 6 Cal. 4th 1048 ..... 140, 148

People v. Bigelow
(1984) 37 Cal.3d 731 226

People v. Bittaker
(1989) 48 Cal.3d 1046, cert. den. 496 U.S. 931 (1990) 232

People v. Black
(2005) 35 Cal.4th 1238 239

People v. Blair
(2005) 36 Cal.4th 686 ..... passim

People v. Bloom
(1989) 48 Cal.3d 1194 ..... passim

People v. Blye
(1965) 233 Cal.App.2d 143 198

People v. *Bolton*
(1979) 23 Cal. 3d 208 141

People v. Bradford
(1997) 15 Cal.4th 1229 ..... passim

People v. Bradford
(2007) 154 Cal.App.4th 1390 196

People v. Brasure
(2008) 42 Cal. 4th 1037 80

People v. Breaux
(1991) 1 Cal.4th 281 194

People v. Brown
(1985) 40 Cal.3d 512 ..... 193, 239

People v. Brown
(1988) 46 Cal.3d 432 238

People v. Burgener
(1986) 41 Cal.3d 505 210

People v. Burnick
(1975) 14 Cal.3d 306 245

People v. Cain
(1995) 10 Cal.3d 1 194

People v. Cain
(1995) 10 Cal.4th 1 198

People v. Caldwell
(1984) 36 Cal.3d 210 177

People v. Cash
(2002) 28 Cal.4th 703 ..... passim

People v. Chadd
(1981) 28 Cal.3d 739 ..... 198, 206, 207

People v. Chun
(2009) 45 Cal.4th 1172 180

People v. Clair
(1992) 2 Cal.4th 629 148

People v. Clark
(2011) 52 Cal. 4th 856 148

People v. Cole
(2004) 33 Cal. 4th 1158 148

People v. Collins
(1975) 68 Cal.2d 319 112

People v. Concha
(2009) 47 Cal.4th 653 ..... passim

People v. Conner
(1983) 34 Cal.3d 141 99

People v. Cook
(2006) 39 Cal.4th 566 145

People v. Cox
(1991) 13 Cal.3d 618 194

People v. Crandell
(1988) 46 Cal.3d 833 200

People v. Crittenden
(1994) 9 Cal.4th 83 65

People v. Crow
(2006) 28 Cal.App.4th 440 ..... 107, 108, 109

People v. Cunningham
(2001) 25 Cal.4th 926 ..... passim

People v. D'Arcy
(2010) 48 Cal.4th 257 195

People v. Davenport
(1985) 41 Cal.3d 247 80

People v. Deere
(1985) 41 Cal.3d 353 209

People v. Deere
(1991) 53 Cal.3d 705 ..... passim

People v. Demetroulias
(2006) 39 Cal.4th 1 ..... 239, 248, 253

People v. Dennis
(1998) 17 Cal.4th 468 ..... 147, 148

People v. DeSantis
(1992) 2 Cal.4th 1198 194

People v. Dickey
(2005) 35 Cal.4th 884 239

People v. Dillon
(1984) 34 Cal.3d 441 230

People v. Duncan
(1991) 33 Cal.43d 955 194

People v. Duncan
(1991) 53 Cal.3d 955 161

People v. Duran
(1976) 16 Cal.3d 282 ..... 90, 92, 94, 95

People v. *Duvernay*
(1941) 43 Cal.App.2d 823 142

People v. Dyer
(1988) 45 Cal.3d 26 ..... 182, 232

People v. Dykes
(2009) 46 Cal.4th 731 233

People v. Earp
(1999) 20 Cal.4th 826 ..... 78, 140

People v. Edelbacher
(1989) 47 Cal.3d 983 ..... 145, 230

People v. Ervin
(2000) 22 Cal.4th 48 ..... 77, 78

People v. Ervine
(2009) 47 Cal.4th 745 233

People v. Espinoza,
(1992) 3 Cal.4th 806 ..... 140, 141

People v. Fairbank
(1997) 16 Cal.4th 1223 ..... 235, 237, 247

People v. Farnam
(2002) 28 Cal.4th 107 ..... 149, 238

People v. Fauber
(1992) 2 Cal.4th 792 ..... 193, 247

People v. Feagley
(1975) 14 Cal.3d 338 245

People v. Fields
(1983) 35 Cal.3d 329 ..... 142, 143, 149

People v. Fierro
(1991) 1 Cal.4th 173 250

People v. Fisher
(2009) 172 Cal.App.4th 1006 198

People v. Frierson
(1991) 53 Cal. 3d 730 222

People v. Gallego
(1990) 52 Cal.3d 115 193

People v. *Gionis*
(1995) 9 Cal.4th 1196 141

People v. Graham
(1969) 71 Cal.2d 303 ..... 168, 181, 182

People v. Guzman
(1988) 45 Cal.3d 915 66

People v. Hamilton
(1989) 48 Cal.3d 1142 195

People v. Hardy
(1992) 2 Cal.4th 86 ..... 182, 221, 232

People v. Harrington
(1871) 42 Cal.165 90

People v. Harris
(2005) 37 Cal.4th 310 ..... 159, 161, 162, 250

People v. Hart
(1999) 20 Cal.4th 546 134

People v. Hawthorne
(1992) 4 Cal.4th 43 ..... 237, 249

People v. Heard
(2003) 31 Cal.4th 946 71

People v. Hernandez
(2011) 51 Cal.4th 733 ..... passim

People v. Hill
(1998) 17 Cal.4th 800 ..... passim

People v. Hillhouse
(2002) 27 Cal.4th 469 231

People v. Hinton
(2006) 37 Cal.4th 839 196

People v. Horton
(1995) 11 Cal.4th 1068 ..... 201, 221

People v. Hovarter
(2008) 44 Cal.4th 983 207

People v. Howard
(2010) 51 Cal.4th 15 94

People v. Hoyos
(2007) 41 Cal.4th 872 145

People v. Jackson
(1960) 186 Cal.App.2d 307 201

People v. Jackson
(1980) 45 Cal.4th 662 199

People v. Jackson
(1996) 13 Cal.4th 1164 193

People v. Jackson
(1980) 28 Cal.3d 264 199

People v. Kaurish
(1990) 52 Cal.3d 648 ..... 65, 67, 69, 79

People v. Kirkpatrick
(1994) 7 Cal.4th 988 78

People v. Lang
(1989) 49 Cal.3d 991 ..... passim

People v. Laws
(1993) 12 Cal.App.4th 786 178

People v. Ledesma
(2006) 39 Cal.4th 641 ..... 145, 147

People v. Leonard
(2007) 40 Cal.4th 1370 ..... 144, 147

People v. Lindsey
(1978) 84 Cal.App.3d 851 200

People v. Livaditis
(1992) 2 Cal.4th 759 ..... 77, 80

People v. Lomax
(2010) 49 Cal.4th 530 94

People v. Lopez
(1998) 19 Cal.4th 282 ..... 204, 225

People v. Lopez
(2008) 42 Cal.4th 960 147

People v. Lucky
(1988) 45 Cal.3d 259 222

People v. Magana
(1993) 17 Cal. App. 4th 1371 108

People v. Malone
(1988) 47 Cal.3d 1 134

People v. Mar
(2002) 28 Cal.4th 1201 94

People v. Marks
(2003) 31 Cal.4th 197 91

People v. Marsden
(1970) 2 Cal.3d 118 222

People v. Marshall
(1990) 50 Cal.3d 907 251

People v. Martin
(1986) 42 Cal.3d 437 90

People v. Mattson
(1959) 51 Cal.2d 777 ..... 196, 202

People v. Maury
(2003) 30 Cal.4th 342 135

People v. Mayfield
(1997) 14 Cal.4th 668 220

People v. McCoy
(2001) 25 Cal.4th 1111 ..... passim

People v. McDaniel
(2008) 159 Cal.App.4th 736 95

People v. *McDonald*
(1984) 37 Cal.3d 351 185

People v. *McGreen*
(1980) 107 Cal. App. 3d 504 142

People v. *McKenzie*
(1983) 34 Cal.3d 616 ..... 199, 200

People v. Memro
(1995) 11 Cal.4th 786 198

People v. Mendoza Tello
(1997) 15 Cal.4th 264 135

People v. Morris
(1991) 53 Cal.3d 152 194

People v. Murtishaw
(1989) 48 Cal.3d 1001 193

People v. Nero
(2010) 181 Cal.App.4th 504 ..... 166, 173, 174, 175

People v. Nicolaus
(1991) 54 Cal.3d 551, cert. den., 112 S. Ct. 3040 (1992) 232

People v. Noguera
(1992) 4 Cal. 4th 599 194

People v. Ochoa
(1970) 9 Cal.App.3d 500 201

People v. Ochoa
(2001) 26 Cal.4th 398 77

People v. Olivas
(1976) 17 Cal.3d 236 252

People v. Ortiz
(1979) 95 Cal.App.3d 926 144

People v. Pantoja
(2004) 122 Cal.App.4th 1 135

People v. Peace
(1980) 107 Cal.App.3d 996 197

People v. Pearson
(S120750; filed January 9, 2012; 2012 Cal.Lexis 2) 66, 67

People v. Penoli
(1996) 46 Cal.App.4th 298 90

People v. Pensinger
(1991) 52 Cal.3d 1210 ..... 142, 143, 149

People v. Pinholster
(1992) 1 Cal.4th 865 ..... 77, 194

People v. *Pitts*
(1990) 223 Cal.App.3d 606 141

People v. Poindexter
(2006) 144 Cal.App.4th 572 180

People v. Pope
(1979) 23 Cal.3d 412 ..... passim

People v. Prettyman
(1996) 14 Cal. 4th 248 172

People v. Price
(1991) 1 Cal. 4th 324 140

People v. Prieto
(2003) 30 Cal.4th 226 ..... 239, 241, 253

People v. Quinn
(1964) 61 Cal. 2d 551 108

People v. Robinson
(2005) 37 Cal.4th 592 233

People v. Robles
(2007) 147 Cal.App.4th 1286 199

People v. *Rodgers*
(1979) 90 Cal App. 3d 368 141

People v. Rogers
(2006) 39 Cal.4th 826 247

People v. Ruiz
(1988) 44 Cal.3d 589 ..... 178, 180

People v. Samaniego
(2009) 172 Cal.App.4th 1148 ..... 166, 172, 173, 175

People v. Sanders
(1990) 51 Cal.3d 471 ..... 188, 212, 213, 222

People v. Scheller
(2006) 136 Cal.App.4th 1143 109

People v. Seals
(1961) 191 Cal.App.3d 734 200

People v. Sengpadychith
(2001) 26 Cal.4th 316 ..... 168, 182

People v. Siripongs
(1988) 45 Cal.3d 548 79

People v. *Slobodion*
(1948) 31 Cal.2d 555 184

People v. Snow
(2003) 30 Cal.4th 43 ..... 239, 253

People v. Stansbury
(1993) 4 Cal.4th 1017 ..... passim

People v. Steger
(1976) 16 Cal.3d 539 179

People v. Stevens
(2009) 47 Cal.4th 625 ..... passim

People v. Stewart
(2004) 22 Cal.4th 425 79

People v. Stewart
(2004) 33 Cal.4th 425 ..... 63, 66, 69, 71

People v. Strickland
(1995) 11 Cal.3d 946 149

People v. Talle
(1952) 111 Cal.App.2d 650 183

People v. Tanner
(1975) 45 Cal.App.3d 345 ..... 106, 107, 108, 111

People v. Tanner,
supra, 45 Cal.App.3d 350 111

People v. Tate
(2010) 49 Cal.4th 635 ..... 159, 161, 162, 163

People v. Thimmes
(2006) 138 Cal.App.4th 1207 ..... 135, 136

People v. Thomas
(1977) 245

People v. Thomas
(2011) 52 Cal.4th 336 ..... 161, 162, 163

People v. Thornton
(2007) 41 Cal.4th 391 146

People v. Towey
(2001) 92 Cal.App.4th 880 ..... 199, 200, 205, 225

People v. *Un Dong*
(1895) 106 Cal. 83 142

People v. Upshaw
(1974) 13 Cal.3d 29 197

People v. Valdez
(2004) 32 Cal.4th 73 221

People v. *Wagner*
(1975) 13 Cal. 3d 612 142

People v. Walker
(1988) 47 Cal.3d 605, cert. den., 494 U.S. 1038 (1990) 232

People v. Watson
(1956) 46 Cal.2d 818 ..... 87, 97, 112

People v. West
(1970) 3 Cal. 3d 595 108

People v. Wickersham
(1982) 32 Cal.3d 307 182

People v. Williams
(1970) 2 Cal.3d 894 200

People v. Williams
(1988) 44 Cal.3d 1127 213

People v. Wilson
(1992) 3 Cal.4th 926 146

People v. *Woodard*
(1979) 23 Cal.3d 329 183

People v. Wright
(1990) 52 Cal.3d 367 193

Pointer v. Texas
(1965) 380 U.S. 400 114

Presnell v. Georgia
(1978) 439 U.S. 14 245

Pulley v. Harris
(1984) 465 U.S. 37 ..... 228, 250

Ring v. Arizona
(2002) 536 U.S. 584 ..... passim

Rosales-Lopez v. United States
(1981) 451 U.S. 182 76

Santosky v. Kramer
((1982) 455 U.S. 745) 243, 245, 246

Santosky v. Kramer
(1982) 455 U.S. 743 245

Skinner v. Oklahoma
(1942) 316 U.S. 535 252

Speiser v. Randall
(1958) 357 U.S. 513 244

Spencer v. Texas
(1967) 385 U.S. 554 139

State v. Bobo
(Tenn. 1987) 727 S.W.2d 945 251

State v. Ring
65 P.3d 915 (Az. 2003) 243

State v. Whitfield,
107 S.W.3d 253 (Mo. 2003) 243

Strickland v. Washington
(1984) 466 U.S. 668 ..... passim

Taylor v. Illinois,
484 U.S. 400 ..... 197, 200

Taylor v. Kentucky
(1978) 436 U.S. 478 87

Townsend v. Sain
(1963) 372 U.S. 293 247

Townsend v. *Superior Court*
(1975) 15 Cal.3d 774 [126 Cal.Rptr. 251, 543 P.2d 619] 201

Tuilaepa v. California
(1994) 512 U.S. 967 ..... 194, 203, 233

United States v. Agurs
(1976) 427 U.S. 97 148

United States v. Booker
(2005) 543 U.S. 220 ..... 237, 239

United States v. Chanthadra
(10th Cir. 2000) 230 F.3d 1237 71

United States v. Inadi
(1986) 475 U.S. 387 131

United States v. Koon
(9th Cir. 1994) 34 F.3d 1416 139

United States v. Smith
(9th Cir. 1986) 780 F.2d 810 221

United States v. Valenzuela-Bernal
(1982) 458 U.S. 858 139

United States v. *Wade*
(1967) 388 U.S. 218 185

Uttecht v. Brown
(2007) 551 U.S. 551 ..... 65, 66, 70

Viereck v. United States
(1943) 318 U.S. 236 139

Wainwright v. Witt
(1985) 469 U.S. 412 ..... passim

Walker v. Superior Court
(1991) 53 Cal.3d 257 ..... 202, 222

Walton v. Arizona
(1990) 497 U.S. 639 236

Westbrook v. Milahy
(1970) 2 Cal.3d 765 252

Witherspoon v. Illinois
(1968) 391 U.S. 510 ..... passim

Woldt v. People,
64 P.3d 256 (Colo.2003) 243

Woodson v. North Carolina
(1976) 428 U.S. 280 ..... 69, 80, 203, 246

Zant v. Stephens
(1983) 462 U.S. 862 ..... 70, 80

CALIFORNIA STATUTES

California Code of Regulations, section 2280 et seq. 248

Evidence Code section 1153 ..... passim

Penal Code section 20 ..... 171, 185

Penal Code, section 186.22 113

Penal Code section 189 ..... passim

Penal Code section 190.2 ..... passim

Penal Code, section 190.2, subd. (a)(21) 113

Penal Code section 190.2, subd. (h) 203

Penal Code section 190.3 ..... passim

Penal Code section 190.3(a) 232, 234

Penal Code section 190.3, subd. (k) 203

Penal Code section 1018 ..... 198, 206, 207

Penal Code, section 1044 ..... 141, 208

Penal Code, section 1192.4 ..... passim

Penal Code, section 1259 ..... 168, 181

Penal Code section 1424 99

Rules of Court , Rule 2.1050 ..... 162, 163

Rules of Court, Rule 4.42(e) 253

OTHER STATE STATUTES

Oregon Revised Statutes, section 127.800-995 154

Texas Health & Safety Code chapter 166, Advanced Directives Act 155

Washington's Death with Dignity Act (Revised Code of Washington, chapter 70.245.) 155

CONSTITIONAL AUTHORITY

California Constitution , article I, section 16, of the California Constitution 63, 197

United States Constitution, Eighth Amendment ..... passim

United States Constitution, Fourteenth Amendment ..... passim

United States Constitution,Sixth Amendment ..... passim

JURY INSTUCTIONS

CALCRIM No. 400 ..... 172, 173, 174, 175

CALJIC No. 2.60 ..... 200, 225

CALJIC No. 2.61 ..... 200, 225

CALJIC No. 2.72 134

CALJIC No. 3.00 ..... passim

CALJIC No. 3.01 168

CALJIC No. 8.20 178

CALJIC No. 8.25 178

CALJIC No. 8.25.1 178

CALJIC 8.88 ..... passim

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INTERNET SOURCES

http://www.amnesty.org 255

http://www.cdcr.ca.gov. 160

David H. Goodwin
State Bar Number 91476
P.O. Box 93579
Los Angeles, CA 90093-0579
(323) 666-9960
E-mail: dgood18055@aol.com
Counsel for Appellant Joseph Flores

SUPREME COURT OF THE STATE OF CALIFORNIA'

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. OSWALDO AMEZCUA and JOSEPH CONRAD FLORES, Defendants and Appellants.	Superior Court No. No. KA050813 California Supreme Court No. S133660

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Cal. Const., art. VI, § 11; Pen. Code § 1239[1], subd. (b).)

STATEMENT OF THE CASE

Appellant Joseph Flores ("appellant") and co-appellant Oswaldo Amezcua ("Amezcua") were tried together in a multi-count trial. Both were convicted on multiple offenses and sentenced to death.

Appellant and Amezcua were initially charged by an information filed on April 2, 2002. (7CT 1642-1676.) A grand jury indictment was then filed on

[1] Unless otherwise indicated all statutory references are to the California Penal Code.

November 26, 2002. (1CT 155-162.) On December 3, 2002, the trial court ordered the indictment and information consolidated. (7CT 1744-1746; 2RT 595.) On January 22, 2003, an amended, consolidated information was filed alleging 47 counts and special circumstances, as well as a number of special allegations and sentence enhancements, as detailed below.

Appellant was charged with five counts of first degree murder, seven counts of attempted murder, and a variety of lesser offenses. In addition, a number of special circumstances and sentence enhancements were alleged. (7CT 1751-1792.) Amezcua was also charged with the same murder counts, eight attempted murder counts, and a substantial number of other, separate offenses. These charges and allegations are detailed below.

Appellant was charged with the first degree murder of Paul Ponce (Count 1), George Orlando Flores (Count 4), Luis Reyes (Count 11), John Luis Diaz (Count 42), and Arturo Madrigal (Count 45), in violation of Penal Code section 187(a).

In connection with the foregoing five murder counts, special circumstances were alleged as follows. With respect to Count 1, it was alleged as a special circumstance that the crime had been committed while lying in wait, within the meaning of Penal Code section 190.2(a)(15). With respect to Counts 4, 42, and 45, it was alleged as a special circumstance that the murders had been committed as a result of the discharge of a firearm from inside a motor vehicle, within the meaning of Penal Code section 190.2(a)(21). With respect to Count 11, it was alleged as special circumstances that the murder involved torture, occurred during a robbery, and was committed because the victim was a witness to a crime, within the meaning of Penal Code sections 190.2(a)(10), (17), and (18), respectively. Finally, as to the murder counts 4, 11, 42 and 45, it was alleged as a special circumstance that appellant had committed multiple murder within the meaning of section 190.2(a)(3).

Petitioner was charged with the attempted murder of Joe John Mayorquin (Count 5), Robert Perez (Count 6), Art Martinez (Count 7), Andrew Putney (Count 14),[2] Steve Mattson (Count 38), Paul Gonzalez (Count 43), and Fernando Guittierez (Count 46) in violation of Penal Code section 664 and 187, subd. (a).

Count 8 charged appellant with shooting at an inhabited dwelling in violation of Penal Code section 246. Count 12 charged appellant with robbery in violation of Penal Code section 211. Count 15 charged appellant with assault with a firearm on a police officer in violation of Penal Code section 245(d)(2). Count 17 charged appellant with arson in violation of Penal Code section 451(d).

Counts 3, 10, 14, 16, 35, 44, and 47 each charged appellant with possession of a firearm by an ex-felon in violation of Penal Code section 12021(a)(1). Counts 36, 40 each charged appellant with custodial possession of a weapon in violation of Penal Code section 4502(a)).

A number of sentence enhancements were alleged, as follows:

As to Counts 1, 4, 5-8, 11, 12, 14, 15, 42, 43, 45, and 46, it was alleged that appellant personally used a firearm within the meaning of Penal Code section 1203.06(a)(1).

As to Count 15, it was alleged that appellant personally used a firearm within the meaning of Penal Code section 12022.5(a).

As to Counts 1, 4, 5, 6, 7, 8, 11, 12, 14, 15, 42, 43, 45, and 46, it was alleged that appellant personally used and personally discharged a firearm within the meaning of Penal Code sections 12022.5(a)(1), 12022.53(b) and 12022.53(c).

As to Count 15, it was alleged that appellant discharged a firearm from a vehicle in the commission of a murder within the meaning of Penal Code section 12022.5(d).

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[2] Count 14 was charged as the attempted murder of a police officer within the meaning of Penal Code section 664, subdivision (e).

As to Count 1, 4, 5, 11, 12, 42, and 45, it was alleged that appellant personally discharged a firearm, causing great bodily injury or death, within the meaning of Penal Code section 12022.53(d).

As to Counts 1, 4 through 8, 11, 12, 14, 18, 38, 42, 43, 45, and 46, it was alleged that the offenses were committed for the benefit of a street gang within the meaning of Penal Code section 186.22(b)(1);

As to Counts 5, 12, and 38, it was alleged that appellant inflicted great bodily injury during the commission of the offenses within the meaning of Penal Code section 12022.7(a);

Lastly, as to all counts it was alleged that appellant had suffered prior convictions for robbery within the meaning of Penal Code sections 667(a)(1) and 667(b). (7CT 1751-1792.)

Like appellant, Amezcua was also charged with murder in Counts 1, 4, 11, 42, and 45; attempted murder in Counts 5 through 7, 18, 19, 38, 43, and 46; and the attempted murder of a peace officer in Count 18. Also like appellant, Amezcua was charged with shooting at an inhabited dwelling in Count 8, the robbery in Count 12, and the arson in Count 17. (7CT 1751-1792.)

In addition to the counts in which appellant and Amezcua were charged as codefendants, Amezcua was separately charged with attempted murder and the attempted murder of peace officers in Counts 20 through 24. He was also separately charged with second-degree robbery in Count 12, kidnapping in Count 25, and false imprisonment of a hostage in Counts 28 through 33 and Count 48.[3] He was further separately charged with assault with a semi-automatic firearm in Count 26, assault with a firearm in Count 27, being an ex-felon in possession of a

[3] Count 48 was not included in the Amended Information but was amended into the information by the court in order to conform to the proof in place of Count 25, a kidnapping count, which the court dismissed pursuant to Penal Code section 1118.1. (17CT 4465; 12RT 2785.)

firearm in Counts 2, 9, 13, and 34, and being in possession of a shank while in custody in Counts 37, 39, and 41. (7CT 1751-1792.)

Amezcua was charged with the special circumstances of lying in wait in Count 1, witness killing in Count 11, torture in Counts 1 and 11, robbery in Count 11, shooting from a vehicle in Counts 4, 42 and 45, and multiple murder in Counts 4, 11, 42, and 45. (7CT 1751-1792.) Finally, prior conviction, weapon use, and gang-benefit sentence enhancements were alleged against Amezcua in connection with most of the counts with which he was charged. (7CT 1751-1792.)

On May 21, 2003, pursuant to Penal Code section 190.3, the prosecution notified the parties of its intention to seek the death penalty. (7CT 1817; 2RT 633.)

The trial court committed reversible error by excusing a prospective juror for cause despite the juror stating that she was willing to carrty our her duties according to the court's instructions. (See Argument I.)

The trial court erred in rejecting a defense request to ask prospective jurors whether they would always vote for death if appellant was convicted of multiple murder. (See Argument II.)

The trial court erred in ordering the level of court room security used at trial without a showing of need for heightened security measures. (See Argument III.)

The trial court erred in admitting the jail house interview of appellant because that interview was part of settlement negotiations. (See Argument IV.)

The trial court denied appellant the right to confront witnesses when it admitted the autopsy report without requiring the coroner who authored the report to testify at trial. (See Argument V.)

The prosecutor committed misconduct and violated appellant's right to due process of law when he invited the jury to view the case through the eyes of the victims (See Argument VI.)

The trial court erred in instructing the jury that death is a greater punishment than life imprisonment without possibility of parole (See Argument VII.)

The trial court committed error when it erroneously instructed the jury that a person who aids and abets is "equally guilty" of the crime committed by a direct perpetrator. (See Argument VIII.)

The trial court erred when it acquiesced to the demands of appellants not to allow defense counsel to present any form of defense in the penalty phase or to provide the jury with proper penalty phase instructions (See Argument IX.)

The trial court committed numerous errors regarding the imposition of the death penalty. (See Argument X.)

On March 9, 2005, following the close of the prosecution's case, the Court granted a defense motion to dismiss a number of counts and allegations for insufficiency of the evidence pursuant to Penal Code section1118. The court dismissed the torture, robbery felony-murder, and witness-killing special circumstances relating to Count 11 (the murder of Reyes) and the gang allegation relating to Count 1 (the murder of Putney). (12RT 2766-2768, 2776-2778.)

A prison packet reflecting appellant's prior convictions was admitted into evidence as Exhibit 108, and it was stipulated that the convictions for robbery shown therein were accurate and that the fingerprints and photographs in the packet were appellant's. (13RT 2851.)

The jury found appellant and Amezcua not guilty of the murder of Paul Ponce charged in Count 1, and also found appellant not guilty of the charge of possession of a firearm by an ex-felon in Count 3. (13CT 4575-4576.)

Appellant and Amezcua were convicted of the first degree murder of Flores in Count 4, Reyes in Count 11, Diaz in Count 42, and Madrigal in Count 45. (17CT 4587-4703, 17RT 4668-4671, 14 RT 3034-3079) The multiple-murder special circumstances were found to be true as to both defendants.

As to the murder of Flores in Count 4, the jury found to be true the allegations against appellant that he had personally used a firearm, that the murder was committed by means of shooting a firearm from a motor vehicle, and that the murder had been committed for the benefit of a street gang.

As to the murder of Reyes, Count 11, the jury found to be true the enhancement allegation that the murder was committed for the benefit of a street gang.

As to the murder of Diaz in Count 42 and the murder of Madrigal in Count 45, the jury found true the allegations that appellant had personally used a firearm, that the murder was committed by means of firing a firearm from a motor vehicle, and that the murder was committed for the benefit of a street gang.

Appellant was convicted of the attempted murders charged in Counts 5 (Mayorquin), 6 (Perez), 7 (Martinez), 14 (Putney), and 46 (Guttierez). Amezcua was convicted of attempted murder in all these counts except Count 14, and was also convicted of attempted murder in Counts 18 through 24. As to Counts 5 through 7, the jury found to be true the allegations that appellant had personally used a firearm and that the offense was committed for the benefit of a street gang.

As to Count 14, the jury found to be true the allegations that Putney was a peace officer engaged in the performance of his duties, that appellant personally used a firearm, and that the offense was committed for the benefit of a street gang.

As to Count 46, the jury found to be true the allegations that appellant personally used a firearm and that the offense was committed for the benefit of a street gang.

In Count 8, the jury convicted appellant of shooting at an inhabited dwelling. The jury found to be true the allegations that appellant personally used a firearm and that the offense was committed for the benefit of a street gang.

In Counts 8, 16, 35, 44, and 47, the jury convicted appellant of possession of a firearm by a felon.

In Count 15, the jury found appellant guilty of assault on a peace officer with a semi-automatic weapon. In Count 17, the jury found appellant guilty of arson. Finally, in Count 36, the jury found appellant guilty of custodial possession of a weapon.

The jury found the allegation that appellant had previously been convicted of two counts of robbery to be true.

In addition to the murder and attempted murder counts enumerated above, the jury convicted Amezcua of one count of shooting at an inhabited dwelling, three counts of possession of a firearm by a felon, one count of robbery, one count of arson, two counts of assault with a semiautomatic weapon, six counts of false imprisonment of a hostage, one count of custodial possession of a weapon. (17CT 4543-4574, 14 RT 3034-3079.)

The jury was unable to reach a verdict on Count 38 (the attempted murder of Mattson), Counts 39 and 40 (possession of a shank by appellant and Amezcua), and Count 43 (the attempted murder of Gonzales). A mistrial was declared as to those counts. (14RT 3080-3082.)

The penalty phase of the trial commenced on March 22, 2005. (18CT 4724; 14RT 3094.) At appellant's request, and following a hearing on the subject, no evidence or argument was presented by the defense. (14RT 3086-3092.) The jury received its instructions and began deliberations later that day. (18CT 4725; 14RT 3218-3231.)

On March 23, 2005, the jury returned verdicts of death against both appellant and Amezcua. (18CT 4747, 4748, 4752; 14 RT 3236-3238.)

On April 20, 2005, the trial court heard and denied the motions for a new trial filed by counsel for appellant and Amezcua. (18CT 4770-4772, 4795; 14RT 3246.) With respect to the automatic motions to modify the verdict of death, defense attorneys informed the court that the defendants did not want the court to reduce the penalty or consider alternative sentences. (14RT 3246.) The court denied the motion to modify the death verdict. (18CT 4766; 14RT 3247-3249.)

Death sentences were imposed for Counts 4, 11, 42, and 45, respectively, based on the finding of the special circumstances of a drive-by murder for Counts 11, 42, and 45, and the special circumstance of multiple murder.

As to the capital offenses, the court also imposed sentence enhancements as follows. On Count 4, the court imposed a consecutive sentence of 25 years to life for discharging a firearm pursuant to section 12022.53(d), plus a consecutive sentence of 10 years for street gang activity pursuant to section 186.22(b)(1). On Count 11, the court imposed a consecutive sentence of 10 years for street gang activity pursuant to section 186.22(b)(1). On Count 42, the court imposed a consecutive sentence of 25 years to life for discharging a firearm pursuant to section 12022.53(d), plus a consecutive sentence of 10 years for street gang activity pursuant to section 186.22(b)(1). On Count 45, the court imposed a consecutive sentence of 25 years to life for discharging a firearm pursuant to section 12022.53(d), plus a consecutive sentence of 10 years for gang activity pursuant to section 186.22(b)(1). The court stayed the firearm enhancements alleged pursuant to section 12022.53(c) for Counts 4, 42, and 45.

With respect to the non-capital counts, the court imposed the following sentences. For each of the the attempted murders in Counts 5, 6, 7, 14, and 46, the court sentenced appellant to life in prison. Due to appellant's prior convictions, the court imposed a 45-year period of parole ineligibility on each of these five counts. The court also imposed a consecutive sentence of 25 years to life on count 5 pursuant to section 12022.53(d). On Counts 6, 7, 14, and 46, the court imposed consecutive sentences of 20 years to life pursuant to section 12022.53(c).

On Count 8, shooting a firearm at an inhabited dwelling, which the court selected as the principal term, the court imposed a sentence of 25 years to life. The court also imposed consecutive terms of 20 years to life pursuant to section 12022.53(c) and 10 years pursuant to section 186.22(b)(1);

On Count 17, the arson count, and each of counts 35 and 36, two of the weapon possession counts, the court imposed terms of 25 years to life.

The sentences for Counts 10, 12, 15, 16, 44, and 47 were stayed pursuant to section 654. (17CT 4747-4792, 4770, 4775-4784, 4792-4822, 4823-4841, 4842-4855 17CT 4772, 4766, 4768, 4856-4869, 14RT 3254-3275.)

The court noted that all of the counts involved separate victims and/or separate intents and objectives and ordered all of the sentences to be served consecutively. The court also imposed a restitution fine of $200 pursuant to Penal Code section 1202.4. (18CT 4775, 4842; 14RT 3254-3267.)

STATEMENT OF THE FACTS

The April 11 Incident: The Murder of John Diaz, the Attempted Murder of Paul Gonzalez, and Possession of a Firearm by a Felon (Counts 42, 43, and 44)

The city of Baldwin Park, California, is located in the southeastern corner of Los Angeles, County, not far from the border of San Bernardino County. According to the 2010 census, the city's population is 80.1% Latino or Hispanic. Baldwin Park is the home of the Eastside Bolen Parque gang. The name "Bolen Parque" resulted from another Hispanic gang's mispronunciation of the city's name. (11RT 2593.)

Around midnight on April 11, 2000, Paul Gonzales and his half-brother, John Diaz, were riding a bicycle on Merced Street in Baldwin Park. They had gone to the Circle K Market and were on their way back home. Gonzales was pedaling the bike while Diaz rode on the handle bars. (6RT 1637-1639.) Diaz was a member of the Monrovia gang and had multiple tattoos on his body, including a "Monrovia" tattoo above his right knee. (6RT 1612, 1647.) Gonzales was not a gang member. (6RT 1613, 1636, 1646-1647.)

On the ride home from the Circle K, Gonzales pedaled through an intersection at a green light, crossing in front of a black sport-utility vehicle (hereinafter, "SUV") that was waiting for the light to change. (6RT 1634-1638, 1647.) The SUV passed Gonzales and Diaz, made a U-turn, and drove towards them on the opposite side of the street. The SUV drove past them again and made another U-turn, so that it was again driving in the same direction in which Gonzales and Diaz were riding. (6RT 1638, 1640.)

As the SUV drew closer, Gonzales could see two people inside the SUV. The passenger shouted out, "Where you from?" Before Gonzales could respond, gunfire erupted from the SUV. (6RT 1641-1642.)

Gonzales jumped off the bike and took cover behind a parked car. After the SUV drove off, he saw Diaz walking to him, saying, "Call an ambulance, fool." (RT 1643.) Diaz then collapsed to the ground. Gonzales placed a sweatshirt under his head and yelled for help. (6RT 1646.)

Detective Ernie Collaso of the Buena Park Police Department had been parked at the Circle K Market and had seen Gonzales and Diaz ride up to the store on a bicycle. He watched them enter the market, remain inside for a few minutes, and then leave the store and walk away with the bicycle. (6RT 1623-1626.)

About two or three minutes after Gonzales and Diaz walked out of view, Collaso heard gunshots coming from the direction in which they had walked. Collaso drove out of the parking lot, but was unable to find anything. Shortly after that he received a radio call regarding a victim of a gunshot wound at 4536 Merced. Responding to that location, Collaso found Diaz lying on the ground. Diaz was still breathing. Collaso summoned paramedics. (6RT 1626-1627.) Diaz was pronounced dead at the hospital. (6RT 1628.)

Kenneth Clark, a homicide investigator for the Los Angeles Sheriff's Department, arrived at the scene of the Diaz shooting around 2:35 a.m. (7RT 1688-1689.) Clark found several shell casings and a bullet hole in the residence at 4536 Merced Avenue, the residence closest to where Diaz's body had been located. The shell casings were from nine-millimeter bullets. (7RT 1691-1696.) Clark did not recall if a bullet was recovered from the bullet hole in the residence. (7RT 1698.)

Clark attended the Diaz autopsy and retrieved a bullet recovered from Diaz, which was booked into evidence. (7RT 1700-1701.)

Dr. Vladimir Levicky, a medical examiner with the Los Angeles County Coroner's Department, performed an autopsy on Diaz on April 13, 2000. (6RT 1597, 1599.) Diaz had three gunshot wounds: 1) a gunshot wound to his left side, which perforated the liver and the interior vena cava, a major blood vessel;

2) a gunshot wound to the back, which perforated the liver, stomach, and aorta; 3) a gunshot wound to the buttocks, which perforated the bladder. The first two wounds would have been fatal, the third was classified as "life-threatening." (6RT 1600-1603.) The bullet from gunshot number 2 was recovered from the body. (6RT 1602-1603.)

At the time of the shooting, Gonzales had described the shooter to police as being between 18 and 22 years old, light-skinned, with short hair and/or "baldheaded." (6RT 1662, 1667.) He did not say that the person had a mustache. (6RT 1667.) He said the shooter had a "fade" haircut. (6RT 1668.)

Two years later, in June, 2002, Gonzales was shown a binder full of photographs of people to see if he could make an identification. (6RT 1662.) He "flipped through" the pictures until he found a picture of appellant that he said "resembled" the shooter. (6RT 1666- 1667, 1673, 1680-1681.)

At trial, five years after the incident and three years after the photo ID, Gonzales identified appellant as the passenger and shooter. Gonzales testified that the first time the SUV passed them, he managed to "glance" at the passenger. (6RT 1648-1649.) He identified appellant as the person in the passenger's seat, saying he was "90 percent sure." (6RT 1649-1650.) He did not recognize Amezcua. (6RT 1650.) Appellant was 34 years old at trial. (6RT 1649-1650, 1675, 1684.)

The May 25 Incident: The Murder of Arturo Madrigal and the Attempted Murder of Fernando Gutierrez (Counts 45 and 46)

On May 25, 2000, Arturo Madrigal was attempting to park his Chevy Blazer near the corner of Rexwood and Maine Street in Baldwin Park. The intersection of Maine and Rexwood lies within a part of Baldwin Park the Eastside Bolen Parque gang (or "ESBP") claims as its turf. (7RT 1702-1703.)

Madrigal's friend Fernando Gutierrez was sitting in the passenger seat. Another car pulled up next to the left side of Madrigal's Blazer. (8RT 2028-2030.)

There were about four people in the car, all male Hispanics with shaved heads, ages 20 to 25. (8RT 2032-2033, 2035.) One of them asked Gutierrez and Madrigal "where you from?" indicating they wanted to know whether Madrigal and Gutierrez belonged to a gang. Since neither man belonged to a gang, Madrigal responded, "We're not from nowhere." (8RT 2030, 2034.)

One of the people in the other car pulled out a gun. Gutierrez saw a flash and ducked down under the dashboard. (8RT 2030-2031.) Gutierrez did not know whether the driver or the passenger asked "Where you from" but thought one of the passengers had done the shooting. (8RT 2031, 2035-2036.) When the shooting stopped, Gutierrez could hear blood dripping from Madrigal, so he got out of the car to call for help. (8RT 2032-2033.)

Detective Mike Hemenway of the Baldwin Park Police Department responded to a call regarding the shooting. He saw a gray Chevy Blazer parked north of the curb with its motor running. Madrigal was in the driver's seat, with his head slumped back against the seat, and blood coming out of his ears and head. (7RT 1703, 1705, 1708.) He was dead. An autopsy later revealed that Madrigal died from a gunshot wound to the head. The bullet entered the left side of Madrigal's head, severing the brain stem and causing severe brain injury. The coroner recovered a nine millimeter bullet from the area of the wound. (7RT 1738-1739; 12RT 2721.)

Madrigal also had a grazing, non-fatal wound to his knee, which corresponded to a hole in the jeans that he had been wearing when he was shot. (7RT 1743.)

Jeff Walley, a firearms examiner for the L.A. County Sheriff's Department had collected ballistics evidence from the scene of the Madrigal shooting. He recovered four expended nine-millimeter Luger shell casings and two expended bullets from the area near the Blazer, and another expended bullet from inside the

car's door panel. (7RT 1714-1717, 1728.) Trajectory rods inserted into three bullet holes in the driver's side door showed that the shots had come from outside the Blazer. (7RT 1726.)

Firearms analysis showed the four expended cartridge casings had been fired from the same firearm. The two bullets recovered from the area of the Blazer, the bullet found in the car's door, and the bullet recovered from Madrigal's head during the autopsy all showed six lands and grooves with a right-twist. Although no weapon was ever recovered in connection with this shooting, this land and groove pattern was consistent with the bullets having been fired from a nine-millimeter Smith and Wesson semiautomatic pistol. (7RT 1711; 12RT 2721.)

Neither Gutierrez nor Madrigal were armed that night. (8RT 2033-2034.) Gutierrez only saw the men briefly and was not able to make an identification. (8RT 2036.)

Prosecution gang expert David Reynoso testified that the Madrigal shooting had been committed for the benefit of a gang. Madrigal's head was shaved, which created the appearance that he was a rival gang member present in the turf of the Eastside Bolen Parque gang, which would have been disrespectful to ESBP. (11RT 2563-2565.) Madrigal had several tattoos, including "My Jefito" on his left shoulder, "vero" on the back of his left hand, the letters "P," "E," "L," and "O" on the fingers of his hand, and the letter "M" on the upper right arm. (7RT 1746-1747.)

The June 7 Incident: The Murder of Paul Ponce (Count 1)[4]

In the early morning hours of June 7, 2000, Katherine Schafer was visiting her friend, Paul Ponce, at his home on Cobblestone Drive in Victorville. (7RT 1805.) Ponce was a member of the Eastside Belen Park gang, and had the word

[4] Both appellants were acquitted on this count.

"BOLENA" tattooed on his back. (7RT 1759, 1762, 1793, 1800, 1850-1851.) His gang nickname was "Vago." (7RT 1850-1851.)

Ponce's house had three bedrooms, one bathroom, and an attached garage. (7RT 1817.) At 4:47 a.m., Schafer and Ponce were in the garage doing laundry. (7RT 1805-1808.) Steve Villa, another of Ponce's friends, was in the bathroom of the house. (7RT 1817.)

Schafer and Ponce heard a knock at the front door. The home had a closed circuit security system, and the monitor in the garage showed an unknown car in front of the house. Ponce went to answer the door. (7RT 1805-1808.)

A few seconds later, Schafer heard gunshots. (7RT 1811.) She heard one shot after another for several seconds. (7RT 1813, 1820.) Schafer first tried to hide in a corner of the garage, then went into a nearby bedroom. After a few minutes of silence, Schafer came into the front room and found Ponce's body. He had been shot multiple times and was not breathing. (7RT 1763, 1814-1815.) Schafer called the police, who arrived a few minutes later. (7RT 1816.)

San Bernardino Sherriff's detectives recovered expended nine millimeter and .22 caliber cartridge casings at the scene. In addition, the officers found .22 caliber birdshot pellets embedded in the living room walls. (7RT 1838-1843.) Officers found small amounts of methamphetamine and cocaine in the house. A loaded .44 magnum revolver and a ,22 caliber revolver were also found in the front room. (7RT 1854-1855.)

An autopsy performed on Ponce's body revealed fourteen separate gunshot wounds. (7RT 1762-1763.) Nine of the wounds were entry wounds, and four of these wounds would have been fatal. (7RT 1786-1789.) These shots would have been fired in rapid succession. (7RT 1795.) Gunpowder stippling in the area of Ponce's right ear indicated that a shot which penetrated the ear had been fired from a distance of one foot or less. (7RT 1765-1767.) The forensic pathologist who performed the autopsy, Dr. Frank Sheridan, estimated that Ponce would have died within two or three minutes of being shot. (7RT 1793-1795.)

During the autopsy, Sheridan recovered three different kinds of ammunition from Ponce's body and provided them to San Bernardino County Sheriff's deputies. (7RT 1767.) Sheridan believed that the "main damage" had been done by a weapon that fired nine-millimeter bullets, three of which were found in the body, but two .22 caliber bullets and some birdshot pellets were also found in Ponce's body. (7RT 1796, 1801.) The different ammunition caused Sheridan to conclude that Ponce might have been shot simultaneously by two people, and possibly by three people. (7RT 1796.)

During her testimony, Katherine Schafer denied telling law enforcement officers that she saw only one male approach the door when she looked at the monitor in the garage. (7RT 1821.) However, the parties later stipulated that when she had been interviewed on the morning of the incident, Schafer had told San Bernardino Sheriff's Deputy William Holland that she heard a vehicle drive up and then saw the vehicle pull into the driveway on the garage monitor. She told Holland that a single male subject came to the front door and began to ring the doorbell over and over. (13RT 2854.)

About two weeks after the Ponce shooting, appellant told his friend Katrina Barber that his mother knew he had killed "his homeboy, Vago." (8RT 2077.)

The June 19 Incident: The Murders of George Flores and Luis Reyes, the Attempted Murders of Joe Mayorquin, Robert Perez, and Art Martinez, Shooting at an Inhabited Dwelling, Possession of a Firearm by a Felon, and the Robbery of Luis Reyes (Counts 4 To 12)

Katrina Barber knew both appellant and Amezcua.[5] At about 11:30 p.m. on June 18, 2000, she was sitting in front of her mother's house in a Toyota

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[5] At the time of trial, Barber was serving a five-year prison sentence for shooting at an inhabited dwelling house, an offense that occurred during the Ledford Street shooting incident described in the text. (8RT 2044; 9RT 2119.) The trial court

Corolla she had stolen when appellant and Amezcua approached and asked her for a ride. They drove around in Baldwin Park to buy gas for the car, then drove to Alhambra. (8RT 2043.) In Alhambra, the Corolla broke down, and Barber suggested that she steal another car. She then stole a white Toyota Cressida. (8RT 2044.)

After stealing the Cressida, Barber drove to appellant's mother's house in Hemet so appellant could get some clothes. They arrived there at about three a.m. and stayed there the rest of the night. (8RT 2045-2046.)

When they left the next morning, appellant and Amezcua had two black bags about three feet long. One of the bags had the clothing appellant had picked up from his mother's house; the other bag had about ten guns in it. (8RT 2046-2048.)

Barber drove appellant and Amezcua to La Puente to the house of their friend, Luis Reyes, with whom Barber had gone to school. (8RT 2049.) Reyes was a member of the Eastside Bolen Parque Gang. (8RT 2072.) While there at Reyes's house they showered, watched television and used crystal methamphetamine. (8RT 2048-2049.) Then they left, with Barber driving appellant in the Cressida, while Reyes drove Amezcua in a charcoal-grey Monte Carlo. (8RT 2050.)

Barber and Flores watched as Reyes pulled up next to another car in a hotel parking lot. Barber pulled the Cressida into the lot and parked two spaces away. Barber saw Reyes talking to the people in the other car and thought Reyes gave something to them. (8RT 2052.) Barber thought the other car looked like an "undercover cop car," but appellant told her he thought it looked like an F.B.I. car. (RT 2052-2053.)

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later instructed the jury that as a matter of law, Barber was an accomplice in Counts 4-12, and her testimony therefore required corroboration. (17CT 4517.)

After leaving the parking lot, Barber got back on the freeway to go back to her mother's house in La Puente. Along the way they lost Reyes and Amezcua. (8RT 2052-2053.)

As they were driving to Barber's mother's house, Barber and appellant drove past "a handful" of young men sitting on a wall in front of a house at 12864 Ledford Street. (8RT 1895.) A Cadillac and a Camaro were parked in the driveway, and a Honda was parked at the curb near the wall. (8RT 1881-1883.)

The area around Ledford is claimed by the Eastside Bolen Parque Gang. (8RT 1989.) Appellant asked Barber if she knew the young men, and she said no. Then appellant said "Well, flip a bitch to turn back around." (8RT 2052-2056.) Barber turned around the car around and drove back to where the young men were sitting. As she did so, Reyes and Amezcua drove up in the Monte Carlo. (8RT 2053-2055.)

There were four young men by the cinder-block wall: Robert Perez, George Flores,[6] Art Martinez, and Joe Mayorquin. (8RT 1895-1896.) Perez lived in the house. He was not in a gang, but two of his friends were inactive members of the 22nd Street Gang. (8RT 1916-1917.) The young men were not armed, but Martinez had guns the four men had fired at a firing range earlier that morning in a bag near him. (8RT 1897.) In addition, Flores had a number of tattoos, including tattoos reading "Monica," "Dominic," "Brown Pride," "J," "S," "22," and other tattoos of faces and figures. (8RT 1868-1869.)

Perez recalled seeing a brown Monte Carlo pull up in front of the house. (8RT 1897-1898.) He had noticed the car because his brother-in-law had been killed at that location in 1997, so he was "always watching [his] back." (8RT 1898.) The car drove past them, turned around, and came back. At that time, Perez told the others to go to the back of the house, but Flores and Mayorquin

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[6] Although they have the same last name, George Flores is not related to appellant.

wanted to see what was going on. The Monte Carlo had two people in it when it approached Perez. (8RT 1898-1899.)

According to Perez, a tan Toyota, driven by a female driver with a male passenger, also approached at that time. (8RT 1990-1991.) Perez identified appellant as the passenger in the Toyota. He remembered appellant from the tattoo on appellant's neck. (8RT 1904-1905.) Perez was also able to see the occupants of the Monte Carlo. (8RT 1902.) He identified Amezcua as the passenger of the Monte Carlo.

Barber and Perez both recalled that when she and appellant pulled up by the wall, appellant said, "Well, well, what do we have here?" (8RT 1908-1909, 2057.) She recalled that one of the men started to run, and that Amezcua got out of the passenger side of the Monte Carlo and started firing a pistol at the people who were in front of the house.

Perez, however, recalled that Amezcua had gotten out of the Monte Carlo holding a black pistol and approached George Flores. Perez heard Flores telling Amezcua that no one was disrespecting their neighborhood or them. (8RT 1903-1904.) At that time, Perez heard a shot, and he jumped for cover behind a black Camaro that was parked nearby. (8RT 1904.)

Appellant, still sitting in the passenger seat of the Cressida, started firing an AK-47 at the fleeing men. (8RT 2057-2059.) He fired three bursts of shots. After the first burst of gunfire, appellant handed Barber a .22 caliber semiautomatic pistol, and Barber also began firing in the direction of the young men. She fired three or four shots, but later testified she was not actually trying to hit the young men. (8RT 2059-2061.) Barber thought the shooting lasted for a couple of minutes, but wasn't sure. (8RT 2059.)

Perez recalled that the gunshots lasted about 10 to 15 seconds of "non-stop" firing. (8RT 1906.) To Perez, it sounded like there were two different guns, with the shots from one gun coming from the area where he had seen appellant. (8RT 1906-1907.) Although Perez did not see appellant with a gun

and did not know whether appellant got out of the car, he heard appellant slide something that caused a clicking sound before hearing what sounded like gun shots. (8RT 1907, 1922.) Perez though the shots coming from the area where appellant had been sounded louder than the other shots. When Perez got up, he could see smoke in the area. (8RT 1908.) Appellant and Amezcua continued shooting as the cars they were in drove away. (8RT 1909-1911.)

During the shooting, Katrina Barber saw one young man being hit by gunfire. She testified that the young man she had seen being shot had been trying to open the door of the house to get inside when he was shot and fell on the porch of the house. (8RT 2062.)

After the cars left, Perez got up from behind the Camaro and saw Flores lying on the ground nearby. (8RT 1882-1883.) Flores was not breathing or moving, and he appeared to be dead. (8RT 19112-1913.) A later autopsy showed that Flores had received two fatal gunshot wounds. The first gunshot entered the mid-back, passed through the spinal column, the left lung, the carotid artery, and jugular vein, and exited the front part of the neck. The second gunshot entered the left side of the back, passed through the scapula and shoulder joint, and exited in the left shoulder area. (8RT 1864-1866.)

In addition to Flores, Mayorquin suffered two gunshot wounds, one to his right arm and the other to his left thigh. Blood was found near the front porch near the area where Mayorquin had been sitting. (8RT 1885.) A bullet removed from Mayorquin was provided to Detective C. Wilson of the Baldwin Park Police Department and booked into evidence. (8RT 1913-1914; 10RT 2300-2301.)

The cinder block wall in front of the house was pockmarked from the impact of recently fired bullets. There were also bullet holes in the front of the house. (8RT 1881, 1883, 1886.) In addition, the Honda, the Cadillac, and the Camaro also had been hit by gunfire. (8RT 1951, 1956-1957.) There were seven bullet holes in the Cadillac. The bullets which struck the Cadillac came from two different directions. (8RT 1975-1976.) There were four bullet holes in the

Camaro. (8RT 1979-1980.) Four of the bullets recovered from the cars had been fired from a rifle. (8RT 1981.) Altogether, there were thirty bullet impacts at the scene. (8RT 1971.) Fourteen nine-millimeter shell casings were found at the scene, most of them in a pile near the Camaro. (8RT 1960.-1961.) In addition, sixteen 7.62 by 39 millimeter rifle cartridge casings were found behind the Honda. That type of casing is usually associated with AK-47 assault rifles. (8RT 1961-1962, 1964.) There was nothing to indicate that any bullets had been fired from the house towards the street. (8RT 1982.)

As they drove away from the Ledford Street house, Katrina Barber told appellant she wanted to go home, but appellant said she couldn't go home yet because of what happened and that he would have Reyes drop her off later. Barber got back onto the Interstate 10 freeway and followed the Monte Carlo car back toward San Bernadino. (8RT 2063-2064.) As they reached Ontario, the Cressida began to shake and "mess up" so Barber pulled off the Vineyard exit. Reyes and Amezcua, in the Monte Carlo, saw that the Cressida was having trouble and also exited there. (8RT 2064.) The two cars parked near each other in an unpaved area off the side of Guasti Road just went of Archibald. (8RT 2063-2064; 9RT 2167.)

As Barber was beginning to get her things out of the car, she heard gunshots coming from the Monte Carlo and saw Amezcua shooting Reyes. (8RT 2064-2068.) She thought she heard ten gunshots. (8RT 2068.) Appellant went back to the Monte Carlo, and he and Amezcua pulled Reyes out of the driver's side of the car. Reyes was bleeding badly but still alive; Barber could hear him choking and gagging. (8RT 2069.) Barber saw two cars drive by just after the shooting. (8RT 2069.)

Barber, appellant, and Amezcua got back into the Monte Carlo, and appellant told Barber to drive away. Barber hesitated because Reyes's right leg was still caught in the open door of the car, but appellant told her to "just run him over." (8RT 2072.)

After making a stop at Amezcua's cousin's house, the three returned to appellant's mother's house. Appellant told Barber she couldn't go home yet, so they remained there for three or four days. (8RT 2075.) During this period appellant's mother told appellant she wanted him to get rid of the guns or she was going to sell them to the Indians. Appellant told his mother that if she did he would have to kill her. (8RT 2076.) At another point during this period, Barber asked appellant if he was going to kill her. Appellant told her "If I wanted to kill you, I would take you out back and shoot you, throw you in the trunk, and take you to the hills, and nobody would ever know." (8RT 2077.) Barber told appellant, "Your mom would know," and appellant said "My mom wouldn't care because she knew I had to do that to one of my friends." He identified this friend as "his homeboy, Vago." (8RT 2077.)

A man named Andrew Quiroz was driving a van down Guasti Road at around 2:00 p.m. on June 19, 2000, when he saw Luis Reyes, who was lying face down on the road with bloodstains on his shirt. (9RT 2160-2161.) He approached Reyes and could see Reyes was still alive, breathing and making gurgling sounds. He told Reyes he had called for help. Reyes seemed responsive. (9RT 2159-2163.) The emergency personnel arrived about ten minutes later. (9RT 2164.)

Sergeant Dean Brown, a homicide detective with the Ontario Police Department, responded to a call to go to Guasti Road. He arrived at the scene at 2:47 p.m. The crime scene was already secured, and Reyes's body was lying by the side of the road. (9RT 2166, 2169.) A white 1984 Toyota Cressida was found at the scene, and when the license plate was run through police computers, the car was determined to have been stolen. (9RT 2169, 2171.) An expended nine-millimeter cartridge casing was found in the weeds by the side of the road, and an expended bullet was found in the road near Reyes. (9RT 2173-2174.) Fresh tire tracks were found near the body. (9RT 2176.) A baseball cap with a hole in the brim was found hear the body. (9RT 2175.)

When the deputy coroner turned Reyes's body over, a bullet fell from his back onto the street. (9RT 2177, 2181.) Another expended cartridge casing was found under Reyes's body. (9RT 2181.)

Police examined the Toyota Cressida. They found one .22 caliber cartridge casing was found on the front floorboard in the Cressida. Another was found behind the rear headrest. (9RT 2182.) Three 7.62 casings, commonly fired from an AK-47 rifle, were found in the Cressida. (9RT 2182-2183.) When police later ran the license number of the Cressida through the computer, they learned it had been stolen in Alhambra. (9RT 2182-2184.)

An autopsy showed that Reyes had died of multiple gunshot wounds. Including both entrance and exit wounds, Reyes's body had 19 gunshot wounds altogether. (11RT 2637-2640, 2672.) Gunpowder stippling indicated that some shots had been fired from a distance of two feet or less. (11RT 2673.) Reyes's wounds included gunshots to the right side of the neck, the upper part of the chest, both arms, the right shoulder, and the left hand. Bullets passed through Reyes's aorta, heart, and left lung. (11RT 2641-2668.) He also had three "graze" wounds across the front of the chest. (11RT 2669-2670.) Three medium-caliber, copper-jacketed bullets were recovered from Reyes's elbow, wrist, and chest. (9RT 2184-2185.)

The bullet recovered from Reyes's chest and the bullet found under Reyes's body were analyzed at the police crime lab. Based upon land and groove and secondary characteristics, the bullets were found to be consistent with test bullets fired from a nine millimeter Ruger later recovered from the Santa Monica Pier arcade and linked to Amezcua. (12RT 2756-2759.) In addition, fingerprints found in the Toyota Cressida were compared to Amezcua's fingerprints and found to match. (8RT 1942, 1944-1946, 1949.) A car payment receipt found in Reyes's wallet led police to connect Reyes to a black Monte Carlo. (9RT 2178-2179.)

Shortly after the Ledford Drive shooting incident, the police showed Perez a photograph of appellant, but he was not able to make an identification. The first time he identified appellant was in court. (8RT 1924.) However, Perez picked Amezcua out of a lineup. (8RT 1932.)

The Incidents of June 25 and 25: The Attempted Murder of, and Assault On, Andrew Putney, and Arson of a Vehicle (Counts 14, 15 and 17)

In June of 2000, Carina Renteria was dating appellant, whom she knew as "Jo-Jo". On the evening of June 24th, five days after the Flores/Reyes incidents, Renteria and appellant met at Renteria's sister's house. Appellant, who arrived with Amezcua, was carrying a large black duffle bag that was about two and a half feet long. (9RT 2189-2193.)

Renteria drove her purple Honda Civic with appellant in the passenger seat, while Amezcua drove Reyes's Monte Carlo. (9RT 2194-2198.) They first went to a 7-11 in Bloomington, where Renteria waited in the car while Amezcua and appellant went to get something to drink. When they came back outside, Amezcua got in the Monte Carlo and pulled out of the parking lot. (9RT 2194-2196.)

At about 10:30 p.m., Andrew Putney, a uniformed reserve deputy sheriff with the San Bernadino County Sheriff's Department, was driving a white Chevy Tahoe near the intersection of Cedar and Slover. Putney's car bore decals and roof lights that clearly marked it a sheriff's vehicle. As he approached the intersection, Putney saw the Monte Carlo leave a 7-11 at a high rate of speed. (9RT 2224-2225.) Putney had to slam on his brakes to avoid hitting the Monte Carlo, which had pulled across the traffic into the lane Putney was traveling in. (9RT 2227.) Intending to stop the car, Putney followed it while he ran the license plates. The check revealed that the car had been stolen and the occupants may have been armed and dangerous. (9RT 2226-2229.)

Still in the 7-11 parking lot, Renteria saw Putney's marked car following Amezcua's Monte Carlo. (9RT 2195-2197.) Renteria pulled out and followed them, remaining about two cars behind Putney's marked sheriff's car. (9RT 2197.) Amezcua took the Interstate 10 freeway, heading west toward Baldwin Park, where he, appellant, and Renteria intended to go to a club. Putney followed Amezcua, and Renteria followed Putney. (9RT 2198, 2203.)

According to Renteria, Amezcua's car began to pick up speed until it was traveling at about 70 miles per hour. (9RT 2203.) However, Putney thought the Monte Carlo was traveling at speeds as high as 85 miles per hour and also cutting in and out of lanes. (9RT 2229-2230.) As they approached the Sierra exit, Amezcua's car was in the second lane. Suddenly, Amezcua swerved across the right lane in front of a diesel semi-truck and took exit ramp. (9RT 2204-2205.) The maneuver was so sudden that Putney was unable to follow Amezcua off the exit and thus called in to advise the dispatcher he had lost the Monte Carlo. (9RT 2205-2206, 2230-2231.)

At this point, appellant told Renteria to speed up to catch up to the deputy's car. (9RT 2206-2207.) As Renteria was about to pass Putney's car on the driver's side, appellant leaned out the window and started firing a gun at the deputy's car. (9RT 2207-2208.) Putney at first thought he was hearing a car backfire, and then realized he was hearing gunfire and that his tire had been shot out. (9RT 2231-2232.) He looked to his left and saw Renteria's car passing him at about 90 miles per hour. He saw a male Hispanic hanging out the window and firing a weapon. Putney could see muzzle flashes from the gun. Although Renteria thought appellant fired four or five shots, Putney estimated about fifteen shots were fired at him. His car was hit by eight bullets. (9RT 2207-2208, 2232-2233, 2242, 2265.) Putney tried to follow Renteria's car, but eventually had to pull over. (9RT 2233-2234.)

Renteria, who did not know appellant intended to shoot at Putney's car, was frightened and angry. She yelled at appellant, telling him "how could you do that to me, that I had my babies to think of." (9RT 2208-2209.)

Appellant told Renteria to get off the freeway, which she did. (9RT 2209.) They went back to Renteria's sister's house for about ten minutes, then drove to appellant's mother's house in Hemet, where Amezcua met them. (9RT 2210.) At this point it was after midnight. (9RT 2213.) Renteria overheard Amezcua tell appellant that the Monte Carlo was too hot, and the two men then began planning to burn the car. (9RT 2211-2212.)

Appellant had taken the keys to Renteria's car, and he gave them to his mother who drove Renteria to a gas station to get some gasoline. Appellant's mother put gasoline in a red plastic gas container Renteria kept in her trunk, while Renteria went into the station to pay for the gas. The two women then returned to appellant's mother's house, and appellant took the gas can and put it in the Monte Carlo. (9RT 2213-2215.)

Amezcua and appellant then got into the Monte Carlo, and Amezcua drove the car to an area of Hemet and parked it in an isolated area. Appellant's mother and Renteria followed in Renteria's car and waited around the corner. In a few minutes, Amezcua and appellant came running back and got into Renteria's car, and appellant's mother drove them all back to her house. (9RT 2215-2218.)

Shortly after 3:00 a.m. on the morning of June 25, 2000, James McMillan, a firefighter with the California Department of Forestry, put out a vehicle fire to a Monte Carlo at 7th Street, near Sanderson, in San Jacinito, the town adjacent to Hemet. (10RT 2302-2305.) There were no people in the vicinity of the car, and McMillan called the San Jacinto Police because he thought the car might have been stolen. (10 RT 2304.)

The next day, Renteria returned to her sister's house. (9RT 2218.) Later, she told a co-worker, Andre Acevedo, what happened, and shortly after that she

was contacted by the Sheriff's Department. (9RT 2218-2219.) Renteria had several interviews with the Sheriff's Department, including one in which she gave the deputies appellant's pager number. (9RT 2219.) Renteria was charged and pled guilty to being an accessory to arson. She testified that she was not given consideration for testimony. (9RT 2221-2222.)

Putney described the shooter as a male Hispanic in his 20's with a shaved head, weighing about 200 pounds. (9RT 2243.) Later, when he saw a number of photographs, Putney said that the shooter looked like Amezcua, but he wasn't sure. (9RT 2244.)

Randy Beasley, a criminologist with San Bernadino Sheriff's Department, conducted a search of the freeway in the area where Putney's car had been fired on, and was able to collect expended shell casings. (9RT 2246-2249.) Beasley also observed six bullet impact areas on Putney's car and was able to recover several bullets. (9RT 2250.)

The July 4 Incident: Possession of a Firearm by a Felon and the Arrest of Appellant and Amezcua (Count 35)[7]

Shortly before midnight on the evening of July 3, 2000, police used the pager number they had obtained from Carina Renteria to page appellant. (9RT 2219.)

Santa Monica Police Officer Robert Martinez was at the department's East Substation on the Santa Monica Pier that night. Sometime after midnight, he received a call from dispatch telling him that a triple homicide suspect had just made a call from a public phone on the pier. Martinez was told the suspect was a male Hispanic with a thin build and a tattoo on the side of his neck. (10RT 2366-2369, 2386.)

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[7] With the exception of Count 35, possession of a firearm by a felon, section 12021(a)(1), all crimes committed the date of appellant's arrest were alleged only against Amezcua.

Three backup officers—Officer Leyva, Officer Sickles, and Officer Michael Von Achen—arrived at the substation. Von Achen had brought his police dog with him. When the four officers had assembled, Martinez and the other officers started walking west toward the end of the pier in the direction of the bank of pay phones near the Playland Arcade. They spotted appellant and Amezcua near the east door of the arcade. The two men were about thirty yards away and walking toward them. Appellant matched the description Martinez had been given. (10RT 2369-2371.) At that point, both appellant and Amezcua looked up. (10RT 2372.)

Appellant continued to walk toward the officers, but Amezcua turned and entered the arcade. (10RT 2372.) Officer Leyva approached and began speaking to appellant, while Martinez walked behind appellant and saw the tattoo on his neck. Martinez began a patdown search of appellant, who turned to get away. Martinez wrapped his arms around appellant, and both Martinez and appellant toppled to the wooden planking of the pier. Von Achen had his dog bite appellant's leg and hold him. After that, the officers were able to handcuff appellant. (10RT 2374, 2479-2483.) In a subsequent search, a fully loaded AP-9 semiautomatic nine millimeter pistol, admitted into evidence as People's Exhibit 80, was found behind appellant's back, in between the belt and the shorts appellant was wearing.[8] (10RT 2372-2376; 12RT 2711-2712.)

Santa Monica Police Sergeant Michael Braaten arrived at the pier in time to see the scuffle between Martinez and appellant. (10RT 2332-2334.) As he was approaching, he was told that another suspect had gone to the Playland Arcade at the end of the pier. Because the front of the arcade was being closed down by the employees, Braaten, Von Achen, and Martinez went to the rear of the arcade, which was the only other exit. (10RT 2334-2335, 2378.) Arcade patrons began

[8] The AP-9 pistol is similar to a TEC-9 pistol, but the two firearms have different manufacturers. (12RT 2711.)

to exit through the doors at the rear of the arcade. Martinez estimated that about thirty or forty people came out. (10RT 2378.)

Braaten took up a position near a concrete pillar at the rear doors of the arcade and directed Officer Von Achen into a position behind a pillar to his left. Martinez also took up a position to Braaten's left, where he had a wider field of vision and could see into the arcade. (10RT 2338.) Four other officers arrived and took up backup positions. Officer Cristina Coria was positioned near Martinez, and Officers Steven Wong and Renaldi Thruston were nearby. (10RT 2500, 2502-2503, 2524-2528, 2472-2475.)

Santa Monica Police Officer James Hirt also arrived at the scene. Because the front of the arcade seemed to be fully covered by other officers, Hirt went to the back of the arcade and took up a position at the southeast corner. He was armed with a shotgun. (10RT 2412.) As he arrived, he heard someone yelling, "He has a gun." A stream of patrons began running from the arcade and ran past him to the east, heading for the entrance to the pier. Several of the patrons dove for cover under nearby benches and behind trash cans. (10RT 2415.)

Martinez looked into the arcade and saw Amezcua come up from behind an Asian woman, grab her around the neck and shoulder with his left hand, and pull out a handgun with his right. (10RT 2379.) Martinez shouted that the suspect was to the right. (10RT 2339-2340.) Braaten heard Martinez, looked into the right side of the arcade, and also saw Amezcua with his left arm around the Asian woman, who was later identified as Cathy Yang.[9] (10RT 2338-2342, 2484-2489.)

Amezcua held the gun sideways, pointed at Martinez, and began tracking Martinez's movements. Martinez quickly took cover. Braaten, realizing that he could not shoot without risking hitting Yang, dropped to the planking and rolled

[9] Officer Steven Wong and Officer Renaldi Thruston also saw Amezcua holding Cathy Yang hostage as he was firing. (10RT 2502-2503; 11RT 2523-2527.)

back behind the pillar and out of the line of fire. As he did so, Amezcua fired a burst of shots. (10RT 2338-2344.) Once Braaten was safely behind the pillar, he peeked out to look toward Amezcua, who shot off another burst of gunfire. (10RT 2345.)

Wong estimated that Amezcua fired ten to fifteen gunshots out of the doorway of the arcade in the direction of the officers positioned to the west of the arcade. Several of the bullets struck the pillars where Braaten and Wong had taken cover. (10RT 2499-2501.)

Martinez heard a woman's voice yelling, "I've been hit." (10RT 2381.) He looked to his left and saw Officer Coria fall to the wooden planking of the pier. She had been hit in the left arm. (10RT 2382, 2415, 2468-2470, 2475.)

Hirt ran forward to take cover behind a trash can, intending to lay down covering fire so other officers could evacuate Coria. (10RT 2415.) Martinez reached down, pulled Coria to her feet, and took her around the front of the arcade toward the pier's East Police Substation to get her out of the line of fire. (10RT 2383.)

At this point a man[10] matching the description of Amezcua came running out of the arcade, looked at Hirt, and began to run away from Hirt in the direction of a blue fence at the western end of the pier. (10RT 2415.) Hirt shouldered his shotgun and shouted for the man to stop. Hirt felt an electrical jolt through his leg just as he fired his shotgun. His shot went low and missed the man at the fence. Hirt looked down and saw he had been shot in the left leg. (10RT 2415-2419, 2425, 2501.)

Wong also saw the man run out of the arcade doorway and jump over the blue fence. (10RT 2501.) Wong came out from behind his pillar, crossed behind

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[10] The man Hirt and Wong saw running for the blue fence appears to have been a civilian patron of the arcade who was fleeing the arcade when Amezcua began firing. It appears that Hirt and Wong both mistook this man for Amezcua because he matched the description they had been given of the suspect inside the arcade.

Braaten, and ran toward the man, in the process exposing the right side of his body to the open arcade doorway. As he passed the doors of the arcade, he felt something hit him in his right hip. (10RT 2501-2502.)

Hirt examined his wound while crouching down behind the trash can. As he stood up he looked through the arcade window and saw Amezcua with his arm around a woman's neck. Amezcua was pointing the gun at Hirt and shooting in his direction. (10RT 2420.) Hirt darted back toward the wall of the arcade and got down below the windows and out of the line of fire. (10RT 2420.)

Although most had fled, several civilian patrons were still inside the arcade. (10RT 2429.) Jing Huali was playing a game near the back door of the arcade when she heard shots and saw Amezcua. Huali ran to a position behind a fan, got on the floor, and put her arms over her head. As she lay there, she felt a pain in her left leg and discovered she had been shot. (11RT 2518-2520.)

Lorna Cass had come to the arcade with her two children, a friend named Paul Hoffman, and Hoffman's two children. Cass recalled that as they were getting ready to leave the arcade, shots rang out. She ducked for cover and saw a man whom she could not identify with a gun, holding an Asian woman in front of him. (10RT 2427-2429.) Cass and Hoffman were afraid to leave and remained inside the arcade. (10RT 2430-2431, 2438-2459.)

Bonnie Stone and Michael Lopez were also inside the arcade. After the shots started, Stone wanted to leave, but Amezcua ordered them to sit down around him, and she felt that she could not leave. (10RT 2432-2435.) Sabino Cardova, a ticket seller at that arcade at the pier, heard shooting and saw Amezcua with a gun holding Yang. Amezcua pointed the gun at Cardova and ordered him to sit next to him. Cardova complied. (10RT 2455-2459.)

For about five hours, Amezcua held the patrons hostage and kept the police at bay in a stand-off. Amezcua, who seemed to Lopez to be panicked and frightened, ordered the patrons to move the arcade machines closer to him to form a barricade and ordered them to sit around him. (10RT 2429-2430.) For the rest

of the stand-off, there was no more shooting. (10RT 2451.) At one point, he ordered Lopez to reload the magazine for his gun. (10RT 2441.) After about three and a half hours, Amezcua permitted Cordova to go to the bathroom. On the way back, Cordova gestured to police and jumped out a window. (10RT 2455-2456.)

About an hour and a half later, Amezcua told the hostages "I don't feel right holding you guys here. You guys can leave if you want." (10RT 2442.) He began to release hostages in singles and pairs. (10RT 2452.) Eventually, Amezcua released all the hostages and gave himself up. (10RT 2443.)

Twelve expended cartridge casings and three bullet fragments were found inside the arcade. The cases and fragments matched a nine millimeter Ruger semiautomatic pistol found in an alcove near one of the machines that had been moved to form a barricade. (12RT 2697-2699, 2707-2709.) The Ruger was admitted into evidence as Exhibit 106. Three magazines, each with a 15-round capacity, were also recovered in the arcade. (12RT 2700.)

Santa Monica Police Officer Michael Cabrera transported appellant to the hospital after appellant was detained. (11RT 2529-2530.) While appellant was in the hospital, Cabrera saw him reaching towards his waistband and trying to pull his pants higher. As appellant started to reach into his pocket, Carbera grabbed his hand and stopped him, pulling his hand out of his pocket. Cabrera patted the pocket and felt a hard object. He reached into appellant's pocket and pulled out a loaded Colt .25 caliber semiautomatic pistol which was later admitted into evidence as People's Exhibit 93. (11RT 2532-2536.)[11]

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[11] As noted above, a AP-9 semiautomatic nine millimeter pistol was found on appellant when he was detained at the pier. However, Count 35, charging possession of a firearm by a felon, alleged the possession of the .25 caliber as the basis of that count. (7CT 1778.)

Ballistics and Firearms Evidence Pertaining to Multiple Counts

Dale Higashi, a firearms identification expert criminalist with the Los Angeles Sheriff's Department collected bullets and casings at the Santa Monica pier on July 4, 2000. (12RT 2693-2697.) He also recovered and examined Exhibit 106, a Ruger nine-millimeter semi-automatic revolver found in the arcade. (12RT 2698-2700.) Higashi also examined the AP-9 semiautomatic pistol (Exhibit 80) and the .25 caliber pistol (Exhibit 93) found on appellant at the hospital. (12RT 2711, 2714-2715.)

Higashi concluded that the .25 caliber pistol found on appellant at the hospital (Exhibit 93) was not connected to any shooting incident in this case. (12RT 2731.)

Higashi determined that all of the bullets fired at the Santa Monica Pier shooting incident that had not been fired by police officers had been fired from the Ruger semiautomatic, Exhibit 106. (12RT 2727.)

Higashi examined the bullets from the Ledford Street crime scene and determined that fourteen of the nine-millimeter bullets found near the Honda were fired from the Ruger pistol recovered from the arcade. (12RT 2721-2722.) To Higashi's knowledge, no weapon was recovered that matched the AK-47 ballistic material recovered at the scene of the Ledford Street shootings. (12RT 2723.) The .22 caliber bullets from the Ledford Street scene were compared to a bullet received from the San Bernadino Sheriff's Department and Higashi determined that they had been fired from the same gun. (12RT 2725-2726, 2731.)

Kerri Heward, a criminalist in San Bernadino Sheriff's Department firearm and toolmarks unit, examined ballistics material in connection with the Reyes and Ponce shootings. She was of the opinion that a nine millimeter shell casing found at the Ponce murder scene was fired from the AP-9 semiautomatic nine millimeter pistol (Exhibit 80) found on appellant when he was arrested at the Santa Monica Pier. (12RT 2731, 2744-2746.)

In her opinion, a .22 caliber cartridge found at the Ponce scene was fired from the same weapon as a .22 caliber cartridge found at the Reyes scene. (12RT 2746-2747.)

She compared the bullets from the Putney shooting to the bullets from the Ruger found in the arcade at the pier (Exhibit 106), and determined that some of the bullets found at the Putney scene also matched bullets fired from that gun. (12RT 2751-2755.)

Some of the bullets found at the Reyes scene were all consistent with the Ruger found at the pier. She also examined two of the bullets recovered from Reyes during the autopsy and determined they were also fired from the same Ruger. (12RT 2755-2759.)

The April 30, 2001 Incident: Custodial Possession of A Weapon (Count 30)

On April 30, 2001, Deputy Sheriff Carlos Tello was assigned to a search team at the Los Angeles County Jail. (12RT 2682-2683.) As part of his assignment, he searched Cell 14 of Module 1700, the single-man cell occupied by appellant. (12RT 2683.) In a corner of appellant's bunk, wrapped in a towel, Tello found two oblong pieces of metal. One piece was two inches wide and eight inches long, and the other was two inches wide and twelve inches long. (12RT 2685.) The pieces were unsharpened, but Tello said "they were beginning to be sharpened." (12RT 2686.) Both pieces were capable of being used as a shank. (12RT 2685.) Tello was unable to produce the shanks at trial, but produced photographs which were admitted into evidence as People's Exhibit 104. (12RT 2687.)

The November 2, 2001 Incident: Attempted Murder and Assault on Steve Mattson (Counts 38 and 40)[12]

Deputies Fred Jimenez and Richard Thomsen were on duty in the high security unit of the Los Angeles County Jail on November 2, 2001. At around 6:00 p.m. Jimenez was preparing to take appellant, Amezcua, and three other inmates to the visiting area. One of the other inmates was Steve Mattson. (8RT 1985-1987.)

Because they were housed in a high security part of the jail, the inmates had to be placed in restraints while still in their cells with chains around their waists and their wrists cuffed behind their backs with handcuffs attached to the waist chain. (8RT 1987.) The five inmates were then removed from their cells and placed in a line, with Mattson at the front of the line and appellant and Amezcua at the rear. As they stepped out, appellant and Amezcua slipped their cuffs and both men sprinted toward Mattson, who was still cuffed. (8RT 1988-1989.)

The two men attacked Mattson from behind, punching, kicking, and stabbing him numerous times with shanks in the side, arms, and stomach. (8RT 1985-1986, 1988-1990, 2004-2006.) Appellant and Amezcua each had his own shank. (8RT 1992, 2007.) Mattson was cornered against a wall. (8RT 1990.) The attack went on for 30 seconds to a minute. Jimenez sprayed appellant and Amezcua with pepper spray and ordered them to stop fighting five or six times before they stopped attacking Mattson. (8RT 1991-1992.) Appellant and Amezcua retreated to their cells, passing their shanks off to other Hispanic inmates who were still in their cells. (8RT 1993, 2008, 2011.)

Mattson was bleeding profusely. He had been stabbed five times to his stomach. He also had several stab wounds to his shoulder. (8RT 1996.) He was hospitalized and treated for his wounds. (8RT 1996-1999.)

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[12] After the jury deadlocked on these counts a mistrial was declared as to both counts. (14RT 3080-3082)

The deputies secured appellant and Amezcua and placed the jail on emergency lockdown. Two teams of twelve deputies each began a search of the cells to recover the shanks. The deputies recovered the shank appellant had used. (8RT 1999-2000.) It was found hidden in the toilet of Cell 18, occupied by inmate David Torres. (8RT 2010-2012.) The shank was booked into evidence as People's Exhibit 52. (8RT 2013.)

Testimony of the Gang Expert

David Reynoso, a police officer with the Baldwin Park Police Department, has experience and training in issues relating to street gangs. In addition, having grown up in Baldwin Park, he is particularly familiar with the Eastside Bolen Parque gang. (11RT 2542-2544.) His testimony was offered only to establish that the Eastside Bolen Parque gang was a criminal street gang within the meaning of the applicable statutes. (11 RT 2547.)

The Eastside Bolen Parque Gang is a Hispanic gang with between 200 to 300 members. It was started in the 1960s, and was the prominent gang in the Baldwin Park area, before splitting into the Eastside and Northside gangs in the late 1960s. (11RT 2545-2546.) Reynoso testified that the Eastside gang has been responsible for numerous crimes ranging from vandalism to murder. (11RT 2547-2549.) Reynoso had been involved in "numerous cases in which members of the gang have been convicted of violent crimes and these crimes have been committed for the benefit of, at the direction of, and to promote the notorious reputation of the gang within the City of Baldwin Park." (11RT 2548.) Reynoso estimated the two or three homicides per year were committed in Baldwin Park by members of the Eastside gang. (11RT 2549.)

Reynoso had at least ten different contacts with appellant, starting in the early 1990's, and between ten and fifteen contacts with Amezcua during that time. (11RT 2544-2454.) Reynoso was of the opinion that appellant was a member of the Eastside Bolen Parque Gang. This was based on appellant's

admission to Reynoso of being a gang member, appellant's moniker, "Jo-Jo," which was known throughout Baldwin Park, and his tattoos reflecting gang membership. (11RT 2549-2550, 2554.) Appellant has "laro este," which is Spanish for "east side," tattooed on his neck. He also has "Bolen Parque" tattooed on his neck, immediately beneath the "laro este" tattoo. This is an "old school" tattoo which was common during the early 1990s, and therefore indicated to Reynoso that appellant had been a member of the gang for a long time. (11RT 2551.) This type of tattoo shows that the bearer of the tattoo "has shown allegiance to the gang by committing crimes or doing whatever it takes" to promote the interests and reputation of the gang. (11RT 2550-2552.) A person who wears such tattoos has been "jumped in" to the gang, meaning they have endured a beating by other gang members and proved allegiance to the gang. (11RT 2553.)

Reynoso was of the opinion that Amezcua was a member of the Eastside Bolen Parque Gang. This was based on Amezcua's admission of being a gang member, his moniker, "Wizard," and his tattoos reflecting gang membership. Amezcua has "Bolen" tattooed on his chest and "ESBP" on his hand. He has "ES" tattooed on his right leg and "BP" on his left leg. (11RT 2556-2558.)

Reynoso was familiar with the murders of Diaz, Gonzalez, Flores and the shootings of Madrigal and Guttierrez, and he was of the opinion they were committed for the benefit of the Eastside Bolen Park Gang because the victims were perceived to be members of rival gangs in the area claimed by the Eastside Bolen Park. The crimes would benefit the gang by enhancing its reputation. (11RT 2558-2570.)

He believed that the murder of Ponce was done to benefit the gang. His belief was based on the fact that Ponce was a member of the Eastside Bolen Parque Gang and he was selling large amounts of narcotics, but he was not sharing the proceeds with the gang. He had been boasting about the amount of money he had accumulated on his own and was no longer putting in work for the

gang. (11RT 2567-2568.) Reynoso said that Ponce's gang moniker was "Vago." (11RT 2567.) Reynoso also gave his opinion that the use of birdshot in the killing of Ponce, which Reynoso said is used the the killing of vermin, was intended as a symbolic message to other gang members. (11RT 2584.)

He believed that shootings of Reyes was also for the benefit of the gang because the Reyes was a member of the Eastside Bolen Park Gang, but there was information out that he had cooperated with the police and was a rat, which is the ultimate disrespect to the gang. (11RT 2571-2572.)

Certain crimes carry more prestige for a gang and shooting at police officers gives great prestige to the gang. (11RT 2579-2581.) As a result, Reynoso was of the opinion that the shooting of Putney and the incident at the Santa Monica pier were for the benefit of the gang. (11RT 2583-2385.)

Reynoso thought that the assault on Mattson was for the benefit of the gang because it enhances the gang's reputation in jail. (11RT 2587.) In Reynoso's opinion, any violent crime committed by a gang member is done to advance the prestige of the gang. (11RT 2615-2616.) Reynoso was of the opinion that appellant and Amezcua were "veteranos" of the gang and were well respected members... (11RT 2617-2619)

The Redacted Versions of the Prosecutor's Recorded Interviews with Appellant and Amezcua Which Were Played for the Jury

During the period when Amezcua and appellant were pro per, prosecutor Darren Levine met with both defendants on several occasions. Prior to the interview of February 21, 2002, Sheriff's Deputy Daniel Beers placed a digital recording device on a note pad and turned it on. Levine took the notepad into an attorney-client meeting area in the jail. Approximately one hour later, Levine emerged and gave the note pad to Beers, who turned off the recording device. Beers took the device to the laboratory and downloaded its contents, which he

placed it on a compact disk. (People's Exhibit 95; 11RT 2623-2624.) A redacted version of the recorded conversation was played for the jury during the prosecution's case, and a transcript of the conversation (People's Exhibit 95A) was also provided for jurors' use. (11RT 2675.)

During this interview, appellant told Levine about uncharged crimes he had committed between the date of his release from state prison on April 4, 2000, to the date of his arrest on July 4, 2000. In addition to setting that time frame for Levine (DPSuppIII, SuppCT 50:21)[13], appellant told Levine he was informing him of a new murder[14] (DPSuppIII, SuppCT 49:2-3) that took place in Baldwin Park (DPSuppIII, SuppCT 50:18) and that the victim was "on the handle bars of a bicycle and it was his friend or his brother who was riding him on the bike," and that one person "was never shot but the other one's dead." (DPSuppIII, SuppCT 49:20-22, 24.)

Appellant also told Levine "the first one died. The other one watched it, witnessed the whole thing," and "he could identify because the dude walked up on him after he shot him off the bicycle, bah, bah, bah, two more into him, looked at him. Only wasted five shots with a 9mm, so there's five casings. I mean, obvious." (DPSuppIII, SuppCT 50:9-10, 12-14.)

Later in the interview, Levine asked again about the shooting of the man riding on the handlebars of a bike, and appellant said: "A bike. I'll – I'll give you a bit more. He was wearing, uh, it was either a light gray or a light blue, and he had his legs sticking out because he didn't wrinkle his pants." Appellant told Levine that Amezcua was the driver and added, "[b]ecause as you must know, I

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[13] The citation to DPSuppIII, SuppCT 50:21 is a citation to line 21 of page 50 of the volume marked Death Penalty Supplemental III, Clerk's Transcript, Volume 1 of 1 Volume, Pages 1-263.

[14] When Levine indicated he was unaware of uncharged murders, appellant said, "Have you come close? Okay, uhm, wanna give him another bone. Uhm, uhm – " Amezcua replied, "Yeah." (DPSuppIII, SuppCT 49:5-7.) But, when Levine asked, "What are you guys talking about," Amezcua replied, "Nothing – nothing." (DPSuppIII, SuppCT 49:11-12.)

don't like drive a [unintelligible], you know. But it takes too much from me, if I have to drive, how do I shoot?"

The transcript reflects that when appellant said that Amezcua was the driver, Amezcua laughed and said, "Catch me?" (DPSuppIII, SuppCT 68:5-7, 9-10.)

Appellant also offered to give Levine information about another murder after their forthcoming trial was completed (DPSuppIII, SuppCT 51:4-5) and made reference to a murder committed by Amezcua and himself that had already been filed in Los Angeles County and assigned to another prosecutor (DPSuppIII, SuppCT 53:3-4). When Levine asked, "A murder that you guys did," appellant answered, "Uh-huh," and Amezcua said, "Yeah." (DPSuppIII, Supp CT 53:5-7.)

Appellant said, "We did more murders than you would even realize. . . . "Seriously." (DPSuppIII, SuppCT 60:5, 7.) Appellant also told Levine he was going to send someone to the library to obtain clippings of the other murders. (DPSuppIII, SuppCT 60:12-17.)

At this point, Amezcua said, "Can we talk about restitution?" (DPSuppIII, SuppCT 60:21.) Appellant said: "Oh, yeah. See, that's what we wanna do. Okay, we're gonna get a lot of restitution. We'll give you a murder if drop [sic] our restitution, so it'll only be 200 instead of a whole [unintelligible] of restitution, which we'll never be able to pay." (DPSuppIII, SuppCT 60:22-24.) Appellant explained that now that he's "going to death row," he didn't "wanna have a lot of restitution because when I buy a TV, they're gonna make me pay to the victims in [unintelligible] or right up front." (DPSuppIII, SuppCT 62:9-11.)

Appellant spoke of the Ledford Drive shooting and asked what happened to the individual who was shot on the porch, stating "the porch was tore up." (DPSuppIII, SuppCT 69.)

When Levine said he thought the defendants were a "good shot" and made reference to the shooting of the Tahoe in San Bernardino, appellant responded, "Yeah, it's hard to shoot when you're in a vehicle and both vehicles are moving

and one's turning." When Levine remarked that appellant "hit that car a lot of times," appellant said, "I should've used the other gun. 'Cause I had four on me that day, you know." Amezcua said he had five. (DPSuppIII, SuppCT 70:2-3, 9.)

Appellant said of witness Katrina Barber:[15] "Stupid broad. Her best bet was to just shut it up because she was not there, but she wanted to be there 'cause she decided she was gonna [unintelligible] and be somebody. If you look at her first and second statement, you know, bam." He said at trial he intended to say to her "Yeah, we gave you back your live [sic]. We could've killed you easy. But still, look what you did. You got more time – you got convicted because of your own. If you would've just shut it up, you were never there. But you wanted to place yourself at that scene and do 14 years, that's up to you." (DPSuppIII, SuppCT 71:18-21, 24, 72:1-3.)

Appellant told Levine that both defendants wanted to talk with him because they wanted him to make sure that a large restitution fine would not be imposed upon them. (DPSuppIII, SuppCT 74:15-24, 75:1-4.)

In discussing the charged counts contained within the pleading, Amezcua responded "Right" to Levine's statement that Amezcua "had one [shank] in the toilet." (DPSuppIII, SuppCT 79:20-21.)

Before Levine left them, appellant asked for autopsy photos, stating: "I want the autopsies. Hey, I look 'em all day. Anything with bullet holes – " . . . [¶] "Well, see I wanna see where they got their [unintelligible] and the fuckin' holes run in, where the bullet enters and checked out." (DPSuppIII, SuppCT 80:12-15.)

On March 18, 2002, Detective Thomas Kerfoot was present in the courtroom when appellant and Amezcua, still appearing in propria persona, asked for a meeting with Levine and Kerfoot to discuss charged and uncharged homicides. (11RT 2629-2630.)

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[15] The prosecution called Katrina Barber to testify in connection with the Ledford Drive and Luis Reyes crimes.

On March 28, 2002, Kerfoot and Levine met at the jail. Deputy Beers provided them with a digital recording device. Kerfoot and Levine then met with appellant and Amezcua and surreptitiously recorded the conversation, which was later placed on a compact disk. (People's Exhibit 96; 11RT 2629-2630.) A redacted version of the recorded conversation was played for the jury during the prosecution's case and a transcription (People's Exhibit 96A) provided for jurors' use. (11RT 2677, 12RT 2680.)

At the onset of the interview, Levine advised appellant and Amezcua that any information they provided could be used against them, that they did not need to talk to him or Kerfoot although they had requested the meeting so they could provide Levine with information about new cases in exchange for the imposition of limited restitution, and that they had a right to have a lawyer present. (DPSuppIII, SuppCT 91:20-22, 92:10-15.)

Appellant in turn said that in order to avoid being identified as snitches, "Like we said from the beginning, I will only state what I did. He will only state what he did." (DPSuppIII, SuppCT 92:18-19.)

Appellant also asked how Levine was going to "guarantee" his promises regarding restitution (DPSuppIII, SuppCT 92:17) and asked that Levine leave Katrina Barber, Carina Renteria, and his mother alone (DPSuppIII, SuppCT 93:2-6). Appellant stated that they were going to give Levine information on "[t]wo murders that you don't got us for. . . ." (DPSuppIII, SuppCT 93:13.)

Amezcua asked, "So how much of a guarantee can we have on the restitution though?" (DPSuppIII, SuppCT 99:4.) Levine said he would make his "best efforts" at requesting a $200 restitution for each of them. (DPSuppIII, SuppCT 99:8-16.)

Appellant hinted they might be willing to provide evidence of more than two murders. When Levine asked why, appellant said, "Well, we're figuring this. When we go up – up there, we might decide to give up another one, you know. And they'll say, 'Well, they were right about the last one, so they good reprises

[sic], you know. Try this one, boom. Who investigated this one? Who's been [unintelligible] for it.'" (DPSuppIII, SuppCT 101:1-10.)

Appellant then turned to the specifics of the sentence the prosecution was seeking for Katrina Barber. Levine said he would be open to giving her a sentence that would allow her to be out with credit for time-served, but also asked the defendants for assurance that Barber would be safe when she got out. (DPSuppIII, SuppCT 101-104.) Appellant said, "We ain't got a problem with her. Even with Co – Corina [Carina Renteria], truthfully, if we wanted to hurt them – " Amezcua interrupted, "We would've done it." Appellant resumed, "they'd have been hurt. And her mom would've been hurt in her apartment. Her brother neighbor would've been hurt. Catch me?" (DPSuppIII, SuppCT 104:18-22.)

Appellant then provided this description: "Okay, okay. There was a guy that rested in peace. I believe it was on Los Angeles Street in Baldwin Park and Merced. Uh, there's a restaurant on the same side of the street. Uh, three houses from that restaurant I believe there's a brown big pole." (DPSuppIII, SuppCT 106:13-15.) "There's a brown big pole. Okay, he was coming from the direction of a Circle K. He was on a handlebars of a bicycle, and his gang name is V-A-G-O, Vago, and he's from a gang called Monrovia. (DPSuppIII, SuppCT 106:17-19.)

Appellant said he did not know Vago before the shooting (DPSuppIII, SuppCT 106:20-21), and then continued with, "Uhm, he had light blue or light gray pants on. Wore a white shirt. And give you action one more time. A 9 millimeter pistol was used, not a revolver. It was a click, right. . . . [¶] [] Uh, I believe you should find five cases, right, there should be five cases, but one might not have landed there, but there's five bullet impacts. Uhm, there should be – one would be on his left side, towards possibly his rib side, like on the side right here – . . . [¶] by his rib. Uh, and he should have one to two there and two to three in his chest area, all chest shots." (DPSuppIII, SuppCT 106:23, 107:1-10.)

Levine asked whether they were walking or driving, and appellant replied, "No, we were driving." (DPSuppIII, SuppCT 107:18.) Levine asked who was driving and Amezcua replied, "I'm driving." (DPSuppIII, SuppCT 107:20.) Amezcua described the vehicle as a "four-runner." (DPSuppIII, SuppCT 108:10.) Appellant added, "Okay, it's late night, about – from 10:30 and nowhere past 12:00, within that time." (DPSuppIII, SuppCT 108:12-13.)

Appellant said, "And there was a bunch of candles placed there. Oh, supposedly – suppose – I went back, right. Criminal always goes back to see it. By that pole – that's why I remember the pole so clearly. The pole, there was – candles placed there, but he's from Monrovia and his name is Vago. . . ." (DPSuppIII, SuppCT 108:15-18.) Appellant continued, "Vago, right. And, uhm, there was a little dude that was right – he was on the – on the handlebars. The little dude was pedaling him, right. They fell off the bike, boom. And you'll be able to prove this because the little dude had just laid there, didn't run, and – and he see the dude get shot. Later on I found out that per – perhaps that was his brother, the guy went into shock. Okay, that's one. You'll be able to find that. . . ." (DPSuppIII, SuppCT 108:22-23, DPSuppIII, SuppCT 109:1-3.)

Appellant continued, "He went into shock. He – I already went to the hospital, and I felt bad for that. I didn't wanna hurt him. He wasn't a gang member. You could tell if was [sic] a gang member or not gang member. I let it off. I thought it perhaps been his brother, but it's not his brother, or it might be, but he was a regular dude [unintelligible]. That's why I saw we – we hurt some – some we don't – there was no reason to hurt him." (DPSuppIII, SuppCT 109:8-12.)

Appellant confirmed that he was the shooter, Amezcua the driver in this incident and that Kerfoot did not have the gun he used, which appellant described as "black, uh, I believe it's five to six – five in the click, one in the hole, which would be a Lawrence weapon, a Lawrence cheap." (DPSuppIII, SuppCT 109:13-20.)

Appellant then said, "I'll give you number two. That's why I tell you I like 9 millimeters. Same city, the street called Vinland, V-I-N-L-A-N-D, Street. . . .[¶] You'll find a blue blazer [sic], right?" Amezcua said, "No, primer. It's like a primer – " (DPSuppIII, SuppCT 110:15-19.) Amezcua described an "older model blazer" (DPSuppIII, SuppCT 110:21) with a "shell." (DPSuppIII, SuppCT 111:4.)

During a conversation between the defendants about the names of the streets involved, Amezcua said, "And we – we going south on Vinland, going down on that same street where you made a right. When you made a right on that – on Vinland, and going out Vinland, he made a right. Right when he stopped at the corner, he pulled over at the corner. We're going down south, making a left on the same street that he just turned on." (DPSuppIII, SuppCT 111:5-23.) Appellant said he was the shooter. Amezcua said, "I'm driving the car." (DPSuppIII, SuppCT 112:15-17.) Appellant said, "Right on Vinland, and down Vinland there's a turn. . . . [¶] I'll pull a G right here. He never let the driver see. . . . [¶] One – I believe two to three shots. There was two to three shots. I believe one in the face, one in the neck. Think there's two." Amezcua agreed with these statements. (DPSuppIII, SuppCT 112:4-9.) Both Amezcua and appellant said the passenger jumped out and ran. (DPSuppIII, SuppCT 112:10-13.)

Appellant said, "He was holding onto the steering wheel. He was holding on the steering wheel when I left." Amezcua said, "And he – and his head hit the – the horn, I believe." (DPSuppIII, SuppCT 112:20-21.) Appellant said, "He's dead." (DPSuppIII, SuppCT 113:4.) Appellant told Levine he would be able to "prove this because he had a passenger. That's the one that should've called 911." Amezcua added, "He ran." (DPSuppIII, SuppCT 113:8-10.)

Levine asked for the reason for the killing. Amezcua replied, "He was a gang member, man." Appellant said, "He was a gang member in the wrong area.

Territorial." Amezcua added, "Tribal instincts from a . . . [¶] place in the colonial days, you know." (DPSuppIII, SuppCT 113:17-23.)

Amezcua said he was driving a light bluish car, a stolen car. Amezcua said they were not looking for the victim and described it as "a vandal – it's a – it's a vandal type of thing. You're driving around your neighborhood looking for people to kill." Appellant said, "Right." Amezcua said, "Main objective." Appellant said, "He's not supposed to be in the neighborhood, and we finally seen him driving by on this night, okay." (DPSuppIII, SuppCT 114:10-17.)

Appellant said he had seen him before and that the victim was "from around here." (DPSuppIII, SuppCT 114: 18-21.)

Appellant described the location and the shooting this way. "You go down Vinland, then could go straight towards School, but before you get to Foster School, we turn in, bam, and it's a corner house equals to the corner that we pulled up next to. I domed him, boom, boom. That dude from the passenger side jumps out, runs, goes by the first house, bam. . . ." (DPSuppIII, SuppCT 115:6-10.) Appellant said he was the closest to the driver. "Yes. Because he stopped, we stopped, and I go boom, domed him. . . . (DPSuppIII, SuppCT 116:3-4.)

Appellant said he didn't know the driver's gang, "but he – he act stupid one time. You know what I'm saying." When Kerfoot suggested "disrespectful," Appellant said, "Yeah. So he – you – nobody got caught for these things, man, smooth as silk." (DPSuppIII, SuppCT 116:8-12.) Amezcua said appellant used "a different 9 millimeter." Appellant agreed and said it could have been a Smith and Wesson. He said he was "tight with 9. That's why – I – I like 9s." (DPSuppIII, SuppCT 116:15-18.)

Amezcua said, "If you have a casing from that big street on Vinland . . . [¶] that same casing will match the one on that same street, where four gang members walked up to a car and shot it with three 9 millimeters. (DPSuppIII, SuppCT 117:12-15.) Appellant agreed. (DPSuppIII, SuppCT 117:16.)

Appellant spoke again of the shooting involving the bicycle. "I popped him twice. He fell off the handlebars, the bike rolled over, boom. This dude standing closest to me. The other one's by – there's that little driveway right there, bam, and one tried to crawl with his hands like – he was like on his – on his butt with his feet on the ground and his hands on – in back of him, and he was trying to crawl back to me, pow, pow, put the rest to him." (DPSuppIII, SuppCT 122:14-18.)

Appellant said, "Yeah, the other guy was just in shock, just looking at me like – and I just looked at him like, 'Man, for what?['] He don't look like a gang member." (DPSuppIII, SuppCT 122:23, 123:1.)

Appellant told Levine that he had not even found half of the Redlands matters. Amezcua said, "You guys didn't even try." (DPSuppIII, SuppCT 123:6-12.)

Amezcua then turned to the shooting at Santa Monica Pier, saying, "But I'll tell you one thing, I would've – I would – I make suggestions if police officers at the Santa Monica pier were very lucky." Amezcua said, "Let me tell you what I had that day. . . . [¶] I had a fully automatic AK47 with a [unintelligible] and 20-round clip drum." (DPSuppIII, SuppCT 123:16-23.) Amezcua and appellant said they had an "AK47 with four clips, 30-round clips. Some are hollow point and some are not. . . ." Amezcua reiterated, "So you guys were lucky." (DPSuppIII, SuppCT 124:4-5, 9.)

Appellant and Amezcua noted that while they had given Levine and Kerfoot information about five murders, there were others. Appellant said, "Because, see, the whole thing is you – why give up all our marbles at one time. Catch me?" (DPSuppIII, SuppCT 133:23, 134:1.)

Kerfoot asked appellant and Amezcua what motivated them to "go out and just start capping - . . . [¶] people that are walking down the street?" Amezcua responded, " – what motivates you to go to work?" Appellant said, "Yeah. You

gotta go to – like it's your job, you know." Appellant also said, "I took a job and that's my job." (DPSuppIII, SuppCT 138:23, 139:1-6.)

Appellant explained, "That's it. That's my neighborhood, man. And it's territorial. Uh, Wolf pees on every spot that's his, and next side of a bar [unintelligible] you enter it, they'll go pee on your spot again and make – because you go in it. . . ." (DPSuppIII, SuppCT 139:23; 140:1-3.) As to the crimes committed outside his area, appellant said, "Well, see, the whole thing is [unintelligible] – let – let – let's – oh, we were trying to better the gang and instill fear to the rest of the gangs." (DPSuppIII, SuppCT 140:8-9.)

Appellant explained shooting the driver who he earlier said had been disrespectful in this way. "Yeah. You know, I mean, he was told not to drive in our hood, you know? Drive somewhere else. Go around the block. Take the long way. I caught him taking the short way, you know. The long way would've been get off the freeway, come up off on Merced, boom, by the McDonald's, boom, by La Puente, boom, make that turn and get to wherever you gotta go. But if they would listen or they don't believe." (DPSuppIII, SuppCT 140:20-23, 141:1.)

When Levine asked again about what Katrina Barber knew, appellant said, "My thing is I'm at peace of whatever I done, however I done it, you know. I'm – I regret not being – you know. And – and – and my thing is the only regret that I have is that three women were involved, my mom, Corina, Katrina, you know?" (DPSuppIII, SuppCT 141:12-14.)

Appellant spoke of Paul Ponce, saying, "Vago, Paul Ponce, he – he's a good person. Catch me? A real good person." (DPSuppIII, SuppCT 144:2-3.) Appellant also said, "I like him. I like him. You know? I mean, if he's dead. If you're gonna give it to us, if you can charge us for it, charge us to clean your books, that's cool. But don't run him through the mud. That's all we ask you. Yeah, that – that really – that really affects us." (DPSuppIII, SuppCT 144:17-20.)

Appellant and Amezcua said they went to the wake for Ponce and walked up to the casket and left within minutes of arrival because they didn't want to get caught there. Appellant said there would have been a lot of bloodshed. They both said they had many guns that day. (DPSuppIII, SuppCT 146.)

At a point in the conversation, Kerfoot asked what appellant and Amezcua had done with their duffle bags of weapons. Appellant replied, "Well, we can't tell you that. You know, but if we ever get out – . . . [¶] If we ever get out, will we be able to go get 'em and we'll be able to finish our mission? 'Cause our mission was not completed." Amezcua agreed, "Yeah." Appellant continued, "But I'll tell you, he had a – he had a – a 120-round drum that, bam, and a Chinese AK, and I took off the stock and put a short stock on it." (DPSuppIII, SuppCT 151:8-15.)

Kerfoot asked, "What was your mission?" Amezcua replied, "To kill as much people as I could. . . . [¶] Cops included." (DPSuppIII, SuppCT 151:21-23.) Appellant agreed, "Yeah." Amezcua said, "Unfortunately, we got cut short." (DPSuppIII, SuppCT 152:1-2.)

Amezcua and appellant then began to describe incidents in which they had had opportunities to kill police officers, but did not. In the earlier interview appellant and Amezcua had with Levine on February 21, 2002, they discussed a time when they had given a "pass" to a Baldwin Park police officer named Koback. They said they waited outside a nursery with two AKs for Koback to emerge, but then decided they had no reason to hurt him. (DPSuppIII, SuppCT 66-67.)

During the second recorded interview with Levine and Kerfoot, the defendants discussed again the fact that they did not shoot the officer who stopped in the nursery by the 7-Eleven store off of Benton. They also could have but did not shoot the "detectives in the red car" and also a "Mr. Reynoso," who may have been Baldwin Park detective and prosecution gang expert David Reynoso. (DPSuppIII, SuppCT 152:1-23.)

Appellant added, "Yeah. We could've caught them other times, tell 'em don't hang out at Public Taco off of Ramona by the Mobile [sic], because I wanted to get him when they each pulled up next to me, say, "Hey, [unintelligible]," (whispering) bam, bam, bam, jump on the freeway." Levine asked, "Why do you want cops so bad?" Appellant said, "They followed us. I can't go to the goddam eat a taco with him there." Amezcua agreed, "Yeah." (DPSuppIII, SuppCT 153:4-13.)

Levine asked appellant about the gun he had in the hospital following his arrest. Appellant said, "Yeah, yeah, yeah. I was gonna shoot a cop. I'm not gonna lie. That's why I kept saying, "Oh, I'm hurting, I'm hurting." But they had me handcuffed like this to the bar." Levine asked which cop he intended to shoot. Appellant said, "Whichever cop that was closest to me. I was trying to get the gun, but I couldn't reach and it wouldn't fall off, and if it would've fell out, he was gone." Levine pointed out that appellant was handcuffed. Appellant said, "And I was [simulating gunfire]. I had five shots, plus one, 'cause I always keep it in the hole. . . ." (DPSuppIII, SuppCT 154:13-23.)

Levine asked the defendants to provide him with the guns from the shootings involving Monrovia and the one that occurred off Vinland. Appellant said he would be able to give Levine the Monrovia firearm, a "black Lawrence," a "big ugly, ugly gun." (DPSuppIII, SuppCT 156:2-15.) Appellant also said, "Oh, I only shot five times. I only had five shots." (DPSuppIII, SuppCT 156:19.)

Toward the end of the conversation, appellant spoke again about the Blazer shooting. "Well, see, I don't believe – I don't think it was – it was – I'm – I'm telling you, homes, it was two shots. That blazer was two shots. I know what I can do. It was two shots, because I smiled and said, 'Hey, homie, two.' Catch me? And I counted after to top it off [unintelligible]. 'Cause I believe that one carried – that Smith and Western (sic) was a old Smith and Western (sic), and

I believe it carried eight with one or nine with one. Bad ass, boom. It had four clips [unintelligible]." (DPSuppIII, SuppCT 173:16-21.)

APPELLANT'S AND AMEZCUA'S DEFENSE

The parties stipulated that if Andre Acevedo, the security manager at the K-Mart where Carina Renteria worked, were called to testify, he would testify that Renteria had told him that during the Putney incident she was driving a car with three passengers in it and was following another car that was "loaded with firearms" when a police car moved in between her and the car she was following. (13RT 2852-2853.) She told Acevedo that she had an unknown person in the front passenger seat and two male passengers in the back seat. The two men in the back seat told her to speed up to get next to the police officer, and when she did so they rolled down the window and began shooting at the officer. (13RT 2853.)

Appellant presented no other defense. Amezcua offered a stipulation regarding Katherine Shafer's previously referenced statement to Deputy William Holland regarding what she had seen on the garage monitor during the Ponce shooting incident. (13RT 2854.) Otherwise, Amezcua presented no defense.

PENALTY PHASE

Evidence Presented Against Appellant

On March 29, 1995, David Wachtel was in Baldwin Park, sitting in the back seat of a car, talking with his friends, Buddy Jacob and a woman named Karen. (14RT 3107.) Wachtel looked up and say two men, one of whom he identified as appellant, jump over a fence and approach the car Wachtel was sitting in. Appellant tapped on the rear window of the car. Wachtell opened the door and appellant asked Wachtel if he and his companions had any money. Wachtel replied they did not. (14RT 3107-3109.)

Appellant then demanded Wachtel's wallet. When Wachtel refused, appellant showed him a gun, said, "Don't make me make you." Wachtel then

handed his wallet to appellant. (14RT 3109.) Appellant took Wachtel's wallet and pager. He also took Jacob's necklace, and went through Karen's purse, taking about $20 before he left. (14RT 3110-3111.) Karen called the police, and appellant was arrested shortly thereafter. (14RT 3111.)

Anaheim Police Officer Dustin Cikcel was working on assignment to the Los Angeles County Jail with the Sheriff's Department on May 10, 2001, and performed a search of appellant's cell for contraband. He was confiscating excess sheets and food that was classified as contraband, when appellant said, "You will see Cickel. Maybe not today, but you will see when you are not expecting it." (14RT 3119-3120.) Cikcel took this as a threat because of appellant's gang affiliation and history. (14RT 3120.)

Evidence Presented Against Appellant and Amezcua

In June, 2000, Timothy Obregon was living in Baldwin Park, where he had lived for thirty years. He had never been in a gang. (14RT 3148.)

At about 10 p.m. on June 13, he received a call from his friend, Richard Robles, who was a member of the Eastside Bolen Parque gang. Robles, who lived less than a block away, asked Obregon if he would drive Robles's "homeboys" to their homes. Obregon initially told him no because his girlfriend was on her way to his house, but he eventually agreed when Robles offered to pay him $40. (14RT 3148-3150.)

Robles arrived at Obregon's home with appellant and Amezcua. (14RT 3151.) Appellant had a big, black duffle bag, which he placed in the trunk of a grey Nissan belonging to Obregon's mother, Patricia Obregon, which Obregon intended to drive to take appellant and Amezcua where they were going. (14RT 3154.) Obregon, appellant, Amezcua, and Obregon's girlfriend, Alicia Garcia, went along with them. Alicia was in the front seat, Amezcua was sitting behind her, and appellant was sitting behind Obregon. (14RT 3149, 3152-3156.)

Following appellant's direction, they got on the Interstate 10 freeway, heading east. (14RT 3155.) There was very little conversation, which made Obregon uncomfortable. (14RT 3158.) At one point, Garcia asked how long it would take to get where they were going. Suddenly, Obregon heard a "popping" sound and saw bullet holes appear in the windshield. He realized he was hearing gunfire and saw Garcia "squirming." (14RT 3157-3159.) He heard Garcia say "Stop shooting me." (14RT 3160.) Orgregon looked back and saw Amezcua had a gun. He was putting another magazine in the gun and pointing it at Garcia's head. Appellant grabbed the gun and told Amezcua not to shoot again. (14RT 3159-3160.)

Garcia had blood pouring down her face. She was crying, saying "He shot me, and I am dying." (14RT 3161.) In the excitement, Obregon began to swerve, and appellant put something against the back of Obregon's neck and told him, "Better drive straight, motherfucker, or I will shoot you with this nine." (14RT 3161.)

Following appellant's directions, Obregon pulled off the freeway at the next exit after the junction to the 30 freeway. After the exit, appellant told Obregon to take a left and drive though a rural area of cornfields. Obregon was afraid he and Garcia were going to be killed and have their bodies dumped in the cornfield. Appellant asked Obregon, "Do you know me?" and Obregon said, "No, I don't know you." Appellant again asked, "Do you know me?" and Obregon said, "No. Look, I will tell them that we got carjacked. I won't say anything." (14RT 3166.) Garcia said "They are going to kill us, Tim. Don't you see they are going to kill us. They're going to kill us and take off in the car and leave us." Obregon, fearing the nervousness in her voice would make appellant and Amezcua nervous, yelled at her to shut up. (14RT 3167.) Garcia slumped in her seat and Obregon thought she was losing consciousness.

Appellant said that he was going to let them go where he could get Garcia help. He had Obregon pull over just past a Circle K convenience store in a

residential area, and Obregon got out of the car. Appellant asked Obregon for money, and Obregon then gave him $20. Appellant told Obrego to get "your girl" out of the car, and Obregon went to her door and opened it. Garcia was covered with blood. He put one hand under her thighs and another behind her waist. He took Garcia out of the car, laying her down on the sidewalk. (14RT 3164-3166.)

Appellant and Amezcua then got in the car and drove off, leaving Obregon and Garcia by the side of the road. It was about 12:30 a.m. (14RT 3168.) Obregon ran to a nearby Circle K and called 911. (14RT 3168.) When the paramedics arrived and cut Alicia's shirt, Obregon could see that Alicia had been shot in the chin and chest. (14RT 3169-3170.) Obregon was afraid so he initially told the police they had been carjacked (14RT 3169.)

Baldwin Park Police Officer Johnny Patino received a radio call at about 3:00 a.m. reporting that a car was burning in El Monte, a city adjacent to Baldwin Park. When he arrived at the scene, the car was fully engulfed in flames. The car was Obregon's mother's gray Nissan. (14RT 3182, 3184.)

Evidence Presented Against Amezcua

Additional penalty phase evidence was presented by the prosecution solely against Amezcua. Deputy Sheriff Juan Rivera testified he had located a shank in Amezcua's cell at the Los Angeles County Jail on November 19, 2004. (14RT 3114-3116.)

Victim Impact Evidence

Maria de Los Angeles Calvo, the mother of George Flores, described the impact of the killing of Flores on her life. She said George Flores was the youngest of her four children. When Baldwin Park police told her of Flores's death, she "went crazy. I didn't want to believe it." (14RT 3125.) Flores's funeral was the saddest, most difficult day of her life; she threw herself on the coffin because she wanted to go with him. Flores was a very good son to her. She has kept his clothing, jewelry, and other effects. Holidays are particularly

difficult for her. (14RT 3126-3127.) George Flores's son, her grandson, often cries and asks her why they took his father from him. (14RT 3127.) Ms. Calvo presented a number of photographs of George as a child, young adult, and grown man. (14RT 3128-3132.)

Michelle Gerena was a friend of George Flores and the wife of Flores's childhood friend. She described the impact of Flores's death on her life. When she found out Flores was dead, it "broke [her] heart." She and her husband had asked George to be the godfather of their daughter, but he was killed before she could be baptized. She said more than 200 people attended George Flkores's funeral. (14RT 3134-3135.) They often think of Flores. (14RT 3137.)

Vivian Gonzales was the mother of John Diaz and Paul Anthony Gonzales. She testified that Diaz was a caring and loving son, and she missed him very much. (14RT 3138.) Because of his death, Paul Gonzales is now an only child. When Diaz was shot, she heard the gunshots and ran outside. She saw that Diaz was shot, but she was not able to approach him because she could not bear to see him die. (14RT 3139-3141.)

She said the funeral was "heartbreaking" and was attended by so many people "the wake was standing room only." She is emotionally unable to go to his grave, so she made a little garden for him at home. Holidays are very hard, and she no longer celebrates some holidays like Christmas, because there is nothing happy about it anymore. (14RT 3141-3142.) She is always angry, and takes her anger out on her "poor" husband and sister. She often does not want to get out of bed. (14RT 3142.) John Diaz's daughter, Celeste, her granddaughter, often asks for her father. (14RT 3143, 3143.)

Appellant and Amezcua's Defense

As previously noted, the defense offered no opening statement or evidence in the penalty phase. (14RT 3194.)

ARGUMENTS

JURY SELECTION ISSUES

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JUROR NO. 74 WHO, DESPITE CONSCIENTIOUS RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, STATED REPEATEDLY THAT SHE WAS WILLING TO CARRY OUT HER DUTIES AS A JUROR ACCORDING TO THE COURT'S INSTRUCTIONS AND THE JUROR'S OATH

The trial court excused for cause Prospective Juror No. 74 who expressed some reservations about imposing the death penalty, but who also explained that she would impose the death penalty if she found "the aggravating was enough, then you know, it would be hard, but I could make the decision." (5RT 1384:28-1385:1.) In excusing a prospective juror for cause despite her willingness to fairly consider imposing the death penalty, the trial court committed reversible error under *Witherspoon v. Illinois* (1968) 391 U.S. 510 and *Wainwright v. Witt* (1985) 469 U.S. 412, violating appellant's rights to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. Jury Selection Procedures

The court employed a questionnaire in selecting a jury in this case. The questionnaire included the following questions, inter alia, pertaining to the death penalty.

> Are you so strongly opposed to the death penalty that you would **always** vote for life in prison without the possibility of parole and never vote for death for a defendant convicted of first degree murder and a special circumstance? (16CT 4201.)

> Are you so strongly in favor of the death penalty you would **always** [] vote for death and never vote for life in prison without the possibility of parole for a defendant convicted of first degree murder and a special circumstance? (16CT 4201.)
>
> Are you so strongly opposed to the death penalty that you would **always** vote against death regardless of what evidence of aggravation or mitigation is presented? (16CT 4202.)
>
> Are you so strongly in favor of the death penalty that you would **always** vote for death regardless of what evidence of aggravation or mitigation is presented? (16CT 4202.)
>
> In a penalty phase, would you want to hear evidence of aggravation and mitigation? (16CT 4202.)
>
> In a penalty phase would you **always** vote for death, regardless of the mitigating evidence? (16CT 4202.)
>
> In a penalty phase would you **always** vote for life, regardless of the aggravating evidence? (16CT 4202.)
>
> Regardless of your views of the death penalty, would you be able to vote for death for a defendant if you believed, after hearing all the evidence, that the death penalty was appropriate? (16CT 4202.)
>
> Will your feelings about the death penalty impair your ability to be a fair and impartial juror in this case? (16CT 4202.)

In his prefatory remarks to the potential jurors before voir dire examination, the trial court continued in the same vein. The court told the jury: "Jurors who would never impose death cannot sit in this case. [¶] Jurors who would never impose life cannot sit on this case." (5RT 1307:7-10.)

The court went on to explain that he and other judges have found that "people kinda break them sel[ves] down into four categories in a case like this." (5RT 1307:16-17.) The court explained further:

> We have the category number one people. These are folks that don't believe in the death penalty. And that's fine. Many of you said you could never impose death and I respect that decision. I am not here to try to change your mind. (5RT 1307:18-22.)

> But you are a category one person. You are somebody who would never ever vote to convict or to put to death someone at the hands of the state. And that's fine. I respect that decision. (5RT 1307:23-26.)
>
> We have a category two person. This is the person who's strongly in favor of the death penalty. He is kinda of an eye for an eye guy who says if this person, this defendant, committed murder with special circumstances, he must die. [¶] I don't care about his personal history or background. I don't care about the mitigating evidence. Murder means he should be executed. That is a category number two person. We have some of those in this group. (5RT 1307:27-1308:8.)
>
> Then we have what I call the category three person. And this is the person who says, you know, I believe in the death penalty. But, you know, I know myself. And I don't think I could ever vote to put somebody to death. (5RT 1308:9-14.)

The court went on to describe the anguish experienced by category three jurors who, though they believed in the death penalty, found when faced with making a decision that they could not vote for death. (5RT 1308-1309.) The court then described the category four person.

> Nothing wrong with being a category three person. Nothing wrong with being a category one person. Nothing wrong with being a category two person. (5RT 1310:1-4.)
>
> The reason I bring these up, is because I know some of you are going to fall in these categories. The 4th category, the category four person is the person who says, you know, I can go either way. I want to hear it all. And I was really happy to read the questionnaire. Many of you said I want to hear everything that I am entitled to hear before I have to make such a decision. But many of you said I could make such a decision. And that's all we're after. We want people that can make the decision. [¶] I am not sending any messages here. We want people to make a decision based on the evidence. And that's all we want. (5RT 1310:5-17.)

During his voir dire examination of the panel, the court asked each prospective juror to select the category that best fit him or her. For example, the court asked the following representative questions of Prospective Juror No. 1:

> The Court: What would you – How would you categorize yourself; Are you a number one, are you somebody that would never vote for death? (5RT 1314:15-17.)
>
> Are you a number two, are you somebody that would always vote for death if someone committed murder? (5RT 1314:18-19.)
>
> Are you a number [] three, someone who kinda believes in the death penalty but couldn't – could never impose death themselves? (5RT 1314:20-22.)
>
> Or are you a number four, someone who would be able to weigh all the evidence and make an appropriate decision? (5RT 1314:23-25.)

B. Prospective Juror No. 74

In her questionnaire responses, Prospective Juror No. 74 wrote that she had "no opinion one way or the other" about the death penalty, and added: "I just don't want to be the one to decide; I wouldn't choose to kill someone." (16CT 4201.) This prospective juror's ambiguity about the death penalty was reflected in some of her other responses. She considered death to be a more severe penalty than life without the possibility of parole because it "ends someone's life." (16CT 4201.) On the one hand, she said she was so strongly opposed to the death penalty that she would always vote for life without the possibility of parole and never vote for death, but on the other hand she said she was unsure about whether she was so strongly opposed to the death penalty that she would always vote against death regardless of the aggravating or mitigating evidence presented. (16CT 4202.)

Prospective Juror No. 74 also responded in her questionnaire by saying she would want to hear evidence of aggravation and mitigation in a penalty phase and that she would not always vote for death regardless of the mitigating evidence

and would probably always vote for life regardless of the aggravating evidence. (16CT 4202.) Significantly, she also said that she would be able to vote for death without regard for her views on the death penalty if, after hearing all the evidence, she thought death was the appropriate penalty. (16CT 4202.) And, importantly, she stated that her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case. (16CT 4202.)

In addition, Prospective Juror No. 74 stated that she (1) understood that the charges are not evidence; (2) understood that the defendants are entitled to the presumption of innocence; (3) understood that the State must prove the case beyond a reasonable doubt; (4) understood that the defendants are not required to prove their innocence; (5) understood the defendants have a constitutional right not to testify; (6) understood that she must judge the evidence as to each count separately; (7) understood she must judge the case against each defendant separately; and (8) agreed to follow the legal principles set forth in (1)-(7) and apply them in this case. (16CT 4200.)

In response to the court's request during voir dire examination that she select a descriptive category for herself, Prospective Juror No. 74 described herself as "pretty much a three." (5RT 1356:6-7.)

When the court questioned that, the following colloquy ensued.

> The Court: Pretty much a three. Are you a three? (5RT 1356:8-9.)
>
> Prospective Juror No. 74: Yeah, I would say so. It would have to be for me to put someone to death, the aggravating circumstance be a lot and there would be like no mitigating evidence. So it's a good chance that I am a three. (5RT 1356:10-14.)
>
> The Court: Well, but you are saying that you could put somebody to death.? (5RT 1356:15-16.)
>
> Prospective Juror No. 74: It would have to be really harsh circumstances. (5RT 1356:17-18.)
>
> The Court: That is all right. It's up to the People to persuade you. [¶] I am saying that number threes are people who

> say, Judge, I know myself. I could never, regardless of what the evidence was, put somebody to death. [¶] Are you that person? (5RT 1356:19-24.)
>
> Prospective Juror No. 74: Well, I could be a four with three tendencies. (5RT 1356:25-26.)
>
> The Court: Yes, and we're not allowing that this morning. No four with three tendencies. But I understand what you are saying. [¶] So are you a three or a four? [¶] You sound like you are a four? (5RT 1356:27-1357:3.)
>
> Prospective Juror No. 74: I could be a four. (5RT 1357:4.)
>
> The Court: Yeah, I think you are a four. But the prosecutor is taking a note here. Okay. (5RT 1357:5-6.)

Later, during questioning by counsel for appellant (Mr. Bisnow), Prospective Juror No. 74 reaffirmed that she could carry out her duties as a juror.

> Mr. Bisnow: Number 74? Where are you? Okay. You had some problems, but you think that you could be a neutral juror here? (5RT 1384:20-22.)
>
> Prospective Juror No. 74: Oh, yeah. (5RT 1384:23.)
>
> Mr. Bisnow: Okay. In both not only the guilt phase, but also the penalty phase? (5RT 1384:24-25.)
>
> Prospective Juror No. 74: Like I said before, I would lean towards, you know, like [sic] instead of death, but if I thought the aggravating was enough, then you know it would be hard, but I could make the decision. (5RT 1384:26-1385:1.)

On the other hand, under questioning by the prosecutor (Mr. Levine), replete with graphic descriptions of jurors having to return with a death verdict to the courtroom filled with the defendant's family,[16] Prospective Juror No. 74, waffled and said, "I don't think I could do it." (5RT 1388:11-12.)

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[16] The prosecutor said, for example: "Is there anybody that has listened to what I've said and starting to think, whoa, wait a minute, in front of the defendants, I am going to have to come back and return a verdict of death in front of them. [¶]

Later, in formulating the list of prospective jurors to be excused for cause, the trial court said: "And in addition to those jurors, I would add Number 74 who has vaccilated [sic] between being a three and a four, and I think Mr. Levine pushed her over or got her to commit to being a three." (5RT 1396:17-20.) The court thereupon excused Prospective Juror No. 74 for cause over objection of defense counsel. (3RT 898; 5RT 1396, 1397.)

As appellant explains in the next section, the law is settled that a prospective juror may be challenged for cause based upon her views regarding capital punishment only if those views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Stewart* (2004) 33 Cal.4th 425.)

As the foregoing shows, Prospective Juror No. 74 expressed both ambiguity and reservations toward the death penalty, but consistency in her representations that her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case and that she could weigh aggravating and mitigating evidence and reach a determination about penalty. The trial court therefore erred in excusing Prospective Juror No. 74 for cause.

C. The Relevant Law and Application to This Case

The Fourteenth and Sixth Amendments to the U.S. Constitution guarantee the right of trial by jury to criminal defendants in state courts. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150.) This right is also secured by article I, section 16, of the California Constitution. (Cal. Const., art. I, § 16.)

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, the U.S. Supreme Court held that Illinois infringed a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excused for cause all

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Maybe with their family sitting out in the audience, I have to tell a mother that her son is going to be put to death?" (5RT 1387:1-17.)

those members of the venire who expressed conscientious objections to capital punishment. Under *Witherspoon*'s standard, jurors may be excluded from the jury for cause if they make it unmistakably clear that they would automatically vote against death without regard to the evidence before them or if their attitude toward the death penalty would prevent them from making an impartial decision as to guilt. (*Id.*, at p. 522 fn. 21.)

In *Adams v. Texas* (1980) 448 U.S. 38, the Court revisited the *Witherspoon* standard and the iterations of that standard in the cases that followed it. *Adams* concluded that *Witherspoon*'s line of cases established the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the juror's performance of his duties in accordance with his instructions and his oath. (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.) One of the potential jurors in *Adams* had been excluded under Texas law after he had acknowledged that the possible imposition of the death penalty might affect his deliberations with the statement, "Well, I think it probably would [affect my deliberations] because after all, you're talking about a man's life here. You definitely don't want to take it lightly." (*Id.*, at p. 50 fn. 7.) The Court found that such a juror's acknowledgment was meant only to indicate the juror would be more emotionally involved or would view their task with greater seriousness and gravity. It did not demonstrate that the prospective jurors were unwilling or unable to follow the law or obey their oaths. (*Id.*, at p. 49.)

In *Wainwright v. Witt* (1985) 469 U.S. 412, the Court reaffirmed the standard articulated in *Adams* as the proper standard and clarified its decision in *Witherspoon*. The standard, *Witt* said, is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.) *Witt* observed that the *Adams* standard is proper because it is "in accord with traditional reasons for excluding jurors and with the circumstances

under which such determinations are made." (*Id.*, at p. 423.) "*Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ." (*Ibid.*)

More recently, in *Uttecht v. Brown* (2007) 551 U.S. 551, the United States Supreme Court reiterated the applicable principles as follows:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. (*Witherspoon* [*v. Illinois* (1968)], 391 U.S., at 521. . . . Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. [*Wainwright v.*] *Witt*, [*supra,*] 469 U.S., at 416. . . . Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424. . . . Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434 . . . ."

(*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

In *People v. Crittenden* (1994) 9 Cal.4th 83, 121, this Court held that a prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would "prevent or substantially impair" the performance of the juror's duties as defined by the court's instructions and the juror's oath.

In *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court recognized that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or

because such views would make it very difficult for the juror ever to impose the death penalty.

In *People v. Stewart* (2004) 33 Cal.4th 425, this Court elaborated upon *Kaurish*'s articulation of the standard. "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*, *supra*, 469 U.S. 412." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 447.) *Stewart* explained, "A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid.*)

In *People v. Pearson* (S120750; filed January 9, 2012; 2012 Cal.Lexis 2), the trial court, acting in express reliance on *People v. Guzman* (1988) 45 Cal.3d 915, excused a prospective juror after finding the juror held "equivocal views on capital punishment." This Court rejected such a reading of *Guzman*. Citing *Uttrecht*, *supra*, this Court noted:

> *Guzman* does not stand for the idea that a person is substantially impaired for jury service in a capital case because his or her ideas about the death penalty are indefinite, complicated or subject to qualifications, and we do not embrace such a rule. As the high court recently reminded us, 'a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause.'

(*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

Personal opposition to the death penalty is not itself disqualifying, since '[a] prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law.' (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) It follows the mere absence of strong, definite views about the death penalty is not itself disqualifying, since a person without strong general views may also be capable of following his or her oath and the law." (*People v. Pearson*, *supra*, slip opn., at p. 51; 2012 Cal. LEXIS 2 (Cal. Jan. 9, 2012).)

This Court further observed that the exclusion of prospective jurors holding equivocal views on capital punishment results in an unconstitutionally biased selection process.

> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146), the juror is not disqualified by his or her failure to enthusiastically support capital punishment."

(*People v. Pearson*, *supra*, slip opn., at p. 53; 2012 Cal. LEXIS 2 (Cal. Jan. 9, 2012).)

Here, Prospective Juror No. 74's questionnaire responses reflected a juror who had no fixed opinion about the death penalty in general, but who had concerns about imposing a penalty that would "end someone's life." Juror No. 74 said in her questionnaire that she would be able to vote for death without regard for her views on the death penalty if, after hearing all of the evidence, she thought death was the appropriate penalty. She wanted to hear aggravating and mitigating evidence during the penalty phase. She said she would not always vote for death regardless of the mitigating evidence and would probably always vote for life regardless of the aggravating evidence. She said her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case.

Further, she stated that she understood the legal principles that would govern the trial as they were set forth in the questionnaire and she agreed to follow and apply them in the case.

During voir dire examination by the court and then by defense counsel, Juror No. 74 said, "It would have to be really harsh circumstances," but that she could impose the death penalty. "Like I said before, I would lean towards, you know, like [sic] instead of death, but if I thought the aggravating was enough, then you know it would be hard, but I could make the decision." Then, in response to the prosecutor's emotionally fraught scenario involving the return of a death verdict before the defendant's mother, Juror No. 74 said, "I don't think I could do it."

In sum, Prospective Juror No. 74 stated a personal conscientious objection to *imposing* the death penalty, but stated and restated that if "the aggravating was enough, . . . it would be hard, but I could make the decision." It was only after the prosecutor had woven a hypothetical aimed at eliciting an emotional rather than a rational response that Juror No. 74 hesitated and said, "I don't think I could do it."

In all other ways, however, Juror No. 74's responses persuasively demonstrated an ability to set aside her personal reservations about imposing the death penalty, to weigh and consider the aggravating and mitigating evidence, and to make the determination about whether death is the appropriate penalty. Juror No. 74 affirmed by her questionnaire responses that she understood and agreed to abide by the legal principles that governed the trial and that she would be able to vote for death if, after hearing all of the evidence, she found death to be the appropriate penalty. And, she stated that her feelings about the death penalty would not impair her ability to be a fair and impartial juror in the case.

Decisions of the United States Supreme Court and of this Court, as set forth above, make it clear that a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person

under *Witt*, *supra*, 469 U.S. 412.) Juror No. 74's comment that "for me to put someone to death, the aggravating circumstance [would need] to be a lot," is not a sufficient basis for exclusion. In *Stewart*, this Court recognized that "A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People v. Stewart*, *supra*, 33 Cal. 4th at p. 447; see also *People v. Kaurish*, *supra*, 52 Cal.3d at p. 698.) A review of Juror No. 74's responses reveal a juror who said her feelings about the death penalty would not impair her ability to be a fair and impartial juror; a juror who said she wanted to hear aggravating and mitigating evidence; and a juror who had contemplated the process of weighing and considering such evidence and had decided that she could carry out her obligations as a juror if the "aggravating was enough."

Under the circumstances present here, Juror No. 74's brief emotional response to the prosecutor's hypothetical, when considered in conjunction with the remainder of Juror No. 74's responses, is not sufficient to establish a basis for exclusion for cause. Accordingly, the trial court's finding that Juror No. 74's views on imposition of the death penalty wou7ld prevent or substantially impair the performance or her duties as a juror is not supported by substantial evidence.

Appellant further contends that the prohibition against removing all jurors who may have moral qualms about the death penalty, even when those jurors have indicated a willingness to follow the law, tends to skew the jury panel in favor of death. As a result, this action further impacts the reliability of the decision to impose the death penalty, in violation of the Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (fundamental respect for humanity underlying Eight Amendment creates predicate that death is

SUPREME COURT OF THE STATE OF CALIFORNIA'

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. OSWALDO AMEZCUA and JOSEPH CONRAD FLORES, Defendants and Appellants.	Superior Court No. No. KA050813 California Supreme Court No. S133660

APPELLANT JOSEPH CONRAD FLORES 'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE ROBERT J. PERRY PRESIDING

David H. Goodwin, State Bar #91476
P.O. Box 93579
Los Angeles, Ca 90093-0579
(323) 666-9960

TABLE OF CONTENTS

Table of Authorities (ii)

STATEMENT OF APPEALABILITY 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 10

THE PROSECUTION'S CASE

The April 11 Incident: The Murder of John Diaz, the Attempted Murder of Paul Gonzalez, and Possession of a Firearm by a Felon (Counts 42, 43, and 44) 10

The May 25 Incident: The Murder of Arturo Madrigal and the Attempted Murder of Fernando Gutierrez (Counts 45 and 46) 13

The June 7 Incident: The Murder of Paul Ponce (Count 1) 15

The June 19 Incident: The Murders of George Flores and Luis Reyes, the Attempted Murders of Joe Mayorquin, Robert Perez, and Art Martinez, Shooting at an Inhabited Dwelling, Possession of a Firearm by a Felon, and the Robbery of Luis Reyes (Counts 4 To 12) 17

The Incidents of June 25 and 25: The Attempted Murder of, and Assault On, Andrew Putney, and Arson of a Vehicle (Counts 14, 15 and 17) 25

The July 4 Incident: Possession of a Firearm by a Felon and the Arrest of Appellant and Amezcua (Count 35) 28

Ballistics and Firearms Evidence Pertaining to Multiple Counts 34

The April 30, 2001 Incident: Custodial Possession of A Weapon (Count 30) 35

The November 2, 2001 Incident: Attempted Murder and Assault on Steve Mattson (Counts 38 and 40) 36

Testimony of the Gang Expert 37

The Redacted Versions of the Prosecutor's Recorded Interviews with Appellant and Amezcua Which Were Played for the Jury 39

qualitatively different from a sentence of imprisonment and there is corresponding difference in the need for reliability in the determination that death is the appropriate punishment); *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (Eighth Amendment requires a greater degree of accuracy and factfinding in a capital than in a noncapital case); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 (fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.)

D. Reversal of the Penalty Judgment Is the Appropriate Remedy because Execution of the Death Sentence Would Deprive Appellant of His Life without Due Process of Law

By erroneously excusing Juror No. 74 for cause, the trial court denied defendant the impartial jury to which he was entitled under the Sixth and Fourteenth Amendments to the United States Constitution. (*Uttecht v. Brown*, *supra*, 551 U.S. at pp. 6, 9.)

Witherspoon held that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521, fn. omitted.) The Court ordered the case reversed. "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.) (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 521-523.) In ordering the reversal, the Court said: "Whatever else might be said of capital

punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." (*Id.*, at p. 523.)

In *Gray v. Mississippi* (1987) 481 U.S. 648, the Supreme Court said: "Because the *Witherspoon-Witt* standard is rooted in the constitutional right to an impartial jury (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 416), and because the impartiality of the adjudicator goes to the very integrity of the legal system, the *Chapman* harmless-error analysis cannot apply. We have recognized that 'some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.' *Chapman v. California* (1967) 386 U.S. 18, 23. The right to an impartial adjudicator, be it judge or jury, is such a right. (*Id.*, at 23, n. 8.)" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668; see also *Davis v. Georgia* (1976) 429 U.S. 122, 123; *United States v. Chanthadra* (10th Cir. 2000) 230 F.3d 1237, 1270-1272.)

This Court has recognized that the controlling decisions of the Supreme Court compel the automatic reversal of the death sentence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962; *People v. Heard* (2003) 31 Cal.4th 946, 966; *People v. Stewart*, *supra*, 33 Cal.4th at p. 454.)

> "Furthermore, the governing high court decisions also establish that although such an error does not require reversal of the judgment of guilt or the special circumstance findings, the error does compel the automatic reversal of defendant's death sentence, and in that respect the error is not subject to a harmless-error rule, regardless whether the prosecutor may have had remaining peremptory challenges and could have excused Prospective Juror [74]."

(*People v. Heard*, *supra*, 31 Cal.4th at p. 966.)

For the reasons set forth above, appellant respectfully submits that the record does not support the trial court's excusal of Prospective Juror No. 74 for cause under the governing legal standard (*Wainwright v. Witt*, *supra*, 469 U.S. at

p. 424) and that this error requires reversal of appellant's death sentence without inquiry into prejudice.

II

THE TRIAL COURT ERRED IN REJECTING THE DEFENSE REQUEST THAT THE QUESTIONNAIRE ASK PROSPECTIVE JURORS WHETHER THEY WOULD ALWAYS VOTE FOR DEATH IF APPELLANT WAS CONVICTED OF MULTIPLE MURDERS. THE RULING DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A TRIAL BY JURY AND A RELIABLE DETERMINATION OF THE FACTS REQUIRED IN CAPITAL CASES BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The information charged appellant with committing multiple murders. The defense requested that the questionnaire to be used as an aid in vetting prospective jurors include a question intended to identify jurors who would automatically vote for death if appellant was convicted of multiple murders. Instead of the defense-proffered question, the trial court included a modified version of the question that changed the call of the question and thus failed to elicit the information sought by the defense. In so ruling, the trial court deprived appellant of his right to a fair trial and impartial jury, and reliable penalty determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

A. Background

Counsel for Flores, joined by Amezcua (4RT 1166), requested that the following question be included in the jury questionnaire:

> 1. If you find the defendant guilty of five different murders with special circumstances would you always vote for the death penalty? Yes___ No___ Please Explain. (11CT 2724.)

At the hearing on the matter, the prosecutor opposed the giving of the question. (4RT 1166:17.) The trial court advised counsel that he was concerned that the question would cause the prospective jurors to prejudge the evidence, but at the same time said he thought the question might be helpful. (4RT 1167:14-17.) The court then recounted this experience.

> I had a trial one time where we were doing voir dire without the benefit of the questionnaire on a case where a man had been accused of killing four women on four separate occasions. And I remember a prospective juror in the back row said, you know, your honor, if the evidence shows he killed four women I'm going to vote for death. And frankly, I commended the juror for the way he was so forthright with his feeling about that. Of course, he was excused from the jury. And that jury later returned a life sentence. (4RT 1167:18-27.)

The court continued:

> The question is, you don't want in a questionnaire or in voir dire to have jurors commit to certain positions based on what you expect the evidence is going to show. I know as an advocate you would like very much to try your case in voir dire. It is my job to keep you from doing so. (4RT 1168:2-7.)
>
> I don't know, I will think about it as to the number of murders. I don't think murder with special circumstance means very much to anybody. Special circumstances means a lot to lay jurors. I will try to fashion a question about the number of murders, perhaps. I will give some thought to it. (4RT 1168:8-13.)

The matter was put over for later resolution. (4RT 1168.)

At the next hearing, the court proposed the defense-proffered question be reworded as follows: "If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?" (4RT 1174:23-27.)

Both the prosecutor and counsel for Flores agreed to the form of the question and the court ordered the question included within the questionnaire.

(4RT 1175-1175.) The record reveals no specific concurrence by counsel for Amezcua, who at that point, in the absence of lead counsel, was represented by second seat defense counsel.17 (4RT 1173-1175.)

The question, as stated above, was included in the questionnaire. (11CT 2837.)

As appellant explains below, a challenge for cause may be based on a prospective juror's response when informed of facts or circumstances likely to be present in the case being tried. Here, appellant was charged with multiple murders and the defense sought to identify those jurors who would automatically vote for death in the event appellant was convicted of five murders. When the trial court modified the defense-proffered question by tacking on, in the conjunctive, consideration of mitigating circumstances, the court blurred the call of the original question in a way that suggested that only evidence of mitigating circumstances would suffice to prevent a death verdict. For the reasons set forth below, the court's refusal to include the originally requested question in the questionnaire was error.

B. The Relevant Law and Application to This Case

As explained above, the Fourteenth and Sixth Amendments to the U.S. Constitution guarantee the right of trial by jury to criminal defendants in state courts. (*Ante*, at p. 62.)

In *Wainwright v. Witt* (1985) 469 U.S. 412, the United States Supreme Court held that a prospective juror may be excluded for cause if the juror's views prevent or substantially impair the juror's performance in accordance with the juror's instructions and oath. (*Id.*, at p. 424.) In *Lockhart v. McCree* (1986) 476 U.S. 162, the Supreme Court recognized that the time to identify prospective

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[17] On an earlier occasion, the trial court stated that unless counsel stated otherwise, he presumed that both defendants were joining in on each other's motion. (3RT 898:7-9.)

jurors whose views would adversely affect the performance of their duties is during voir dire examination. (*Id.*, at p. 170 fn. 7 (state must be given opportunity to identify at voir dire prospective jurors whose opposition to death penalty would prevent them from performing jurors' duties).)

In *Morgan v. Illinois* (1992) 504 U.S. 719, the Supreme Court noted that the Constitution "does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." (*Id.*, at p. 729.) The Court then observed: "Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." (*Ibid.*) "*Voir dire* plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.)

In *Morgan*, the trial court, which conducted the voir dire examination in accordance with Illinois law, asked each prospective juror whether he or she had moral or religious principles so strong that he or she could not impose the death penalty "regardless of the facts." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 722.) The trial court, however, refused the defense request that the court inquire, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" on the ground that the court had asked substantially the same question as part of other more general questions. (*Id.*, at p. 723.) *Morgan* held the trial court's refusal of the defendant's request constituted reversible error. (*Id.*, at p. 725, 739.) In so doing, the Court took note that the belief that death should be imposed ipso facto upon conviction of murder reflects on a prospective juror's inability to follow the law, but that very same juror may very well believe he or she can be fair and impartial and follow the law and at the same time be unaware that his or her beliefs prevent him or her from following the law. (*Id.*, at p. 735.) *Morgan* concluded that a defendant is

"entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case in chief, has predetermined the terminating issue of his trial, that being whether to impose the death penalty." (*Id.*, at p. 736.)

In *People v. Cash* (2002) 28 Cal.4th 703, this Court recognized that *Witt*'s holding that a prospective juror whose views on the death penalty would prevent or substantially impair the performance of his duty as a juror encompassed two "real questions." Whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case, and its corollary, whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case. (*Id.*, at p. 719-720; *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 726-728.)

In *Cash*, a capital homicide prosecution, a general fact or circumstance present in the case was that the defendant has murdered his grandparents. Defense counsel sought to inquire during voir dire whether prospective jurors would automatically vote for death if the defendant had previously committed a prior murder (*viz.*, the murders of his grandparents), but was prohibited from asking that question by the trial court's ruling. This Court held that the trial court prejudicially erred in prohibiting voir dire on prior murder, which *Cash* described, as "a fact likely to be of great significance to prospective jurors," and one "that could cause some jurors invariably to vote for the death penalty." (*People v. Cash*, *supra*, 28 Cal.4th at p. 721.) *Cash* noted that "such particularized death-qualifying voir dire" had been held to be appropriate in *People v. Pinholster* (1992) 1 Cal.4th 865, 916-917 (felony murder); *People v. Ochoa* (2001) 26 Cal.4th 398, 431 (perpetrator not the actual killer); *People v. Ervin* (2000) 22 Cal.4th 48, 70-71 (hirer in murder-for-hire case); *People v. Livaditis* (1992) 2 Cal.4th 759, 772-773 (young defendant or lack of prior murder); *People v. Bradford* (1997) 15 Cal.4th 1229, 1320 (for cause excusal proper where prospective juror asked to conceive of circumstances in which he could render a death verdict provided hypothetical example of specified,

particularly extreme cases with more egregious facts than involved in present case.)

In *People v. Kirkpatrick* (1994) 7 Cal.4th 988, this Court held that a challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried. (*Id.*, at p. 1005.) *Cash* thereafter endorsed its holding in *Kirkpatrick* and in *People v. Ervin*, *supra*, 22 Cal.4th at p. 70; *People v. Earp* (1999) 20 Cal.4th 826, 853, in which this Court held in accord with *Kirkpatrick*, by noting that in those cases, "we affirmed the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence. . . ." (*People v. Cash*, *supra*, 28 Cal. 4th at pp. 720-721.)

The foregoing authority thus establishes that the parties are entitled to identify potential jurors who would automatically vote for either life or death based upon a fact or circumstance present in the case and that the time for making the necessary inquiries is during voir dire.

Here, of course, the question originally proffered by the defense was intended to identify jurors who, if they convicted appellant of five murders (a fact or circumstance present in the case), would always vote for death. The question was analogous to the question, which appellant has discussed above, that *Morgan v. Illinois* held the trial court should have allowed the defense in its case to make, to wit, "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" Additionally, contrary to the trial court's concern that the original defense question must be disallowed because it impermissibly allowed the jurors to prejudge the case, this Court has determined that court-imposed restrictions on particularized death-qualifying voir dire based on facts or circumstances present in the case creates reversible error. (*People v. Cash*, *supra*, 28 Cal.4th at p. 723.)

Appellant has asserted above that when the court reframed the question to include a refusal to consider mitigating circumstances ("If you found a defendant guilty of five murders, would you always vote for death and refuse to consider mitigating circumstances (his background, etc.)?"), the question linked a death verdict with a refusal to consider mitigating circumstances and obscured the call of the original question, i.e., what would the jury do in the absence of mitigating evidence? This was particularly germane in this case in which the defense presented no mitigating evidence.

The question that the defense needs to know in making challenges for cause is whether the prospective juror would *always* vote for death if multiple murders were proven and the defense did not present mitigation.

In fact, even without mitigation, the jurors need not always vote for death, regardless of mitigation. The question is not what the juror would do with evidence of mitigation, but what the juror would do without any mitigating evidence.

This principle is of exceptional importance in this case because the defendants elected not to present any mitigation. Therefore, the defense should have been allowed to inquire at the outset whether the juror would automatically vote for death if there was no mitigation.

This Court has recognized that California's death penalty sentencing process allows jurors to take into account their own values in weighing aggravating and mitigating factors. (*People v. Kaurish* (1990) 53 Cal.3d 648, 699; *People v. Stewart* (2004) 22 Cal.4th 425, 447.) Accordingly, a juror may vote for life and not death when the penalty phase evidence is limited to aggravating factors alone.

In addition, to the extent the revised question suggests that the lack of mitigating factor(s) may be construed as an aggravating factor, the impression is an incorrect principle of law. "[T]he absence of a mitigating factor may not be considered as an aggravating factor." (*People v. Siripongs* (1988) 45 Cal.3d 548;

People v. Davenport (1985) 41 Cal.3d 247, 289.) This Court has held that an instruction indicating that a jury may choose death simply on the basis of a lack of mitigation, without finding that the aggravating circumstances themselves warranted the most severe penalty, is error. (*People v. Brasure* (2008) 42 Cal. 4th 1037, 1065; see also *People v. Livaditis* (1992)2 Cal.4th 759, 784 (absence of mitigating factor is not itself aggravating is correct statement of law, but specific instruction to that effect is not required.)

Appellant further contends that the error in restricting death qualification voir dire fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors. As a result, the error impacts the reliability of the decision to impose the death penalty, in violation of the Eighth and Fourteenth Amendments, which impose greater reliability requirements in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (fundamental respect for humanity underlying Eight Amendment creates predicate that death is qualitatively different from a sentence of imprisonment and there is corresponding difference in the need for reliability in the determination that death is the appropriate punishment); *Gilmore v. Taylor* (1993) 508 U.S. 333, 342 (Eighth Amendment requires a greater degree of accuracy and factfinding in a capital than in a noncapital case); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 (fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.)

C. Reversal of the Penalty Judgment Is the Appropriate Remedy because the Trial Court's Restriction of Voir Dire Creates Doubt That Appellant Was Sentenced to Death by a Jury Empanelled in Compliance with the Law

This Court has held that a defendant who establishes that a juror who eventually served was biased against him is entitled to a reversal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975.) In *People v. Cash*, *supra*, as in the present case, the trial court's ruling prevented the defense from examining prospective jurors on the disqualifying view that the death penalty should be imposed invariably and automatically on the defendant if he had committed one or more murders other than the murder charged in the case. Like appellant, the defendant in *Cash* could not identify a particular biased juror because he was denied an adequate voir dire about convictions for other or multiple murders, which this Court recognized as "a possibly determinative fact for a juror," in *Cash*. (*People v. Cash*, *supra*, 28 Cal.4th at pp. 722-723.) *Cash* noted that when the court restricted voir dire about other murders, it created the risk that a juror who would automatically vote to impose the death penalty upon a defendant who had committed other murders would be seated and that the jury would act upon those views and thereby violate the defendant's due process right to an impartial jury. (*Id.*, at p. 723.) That, in turn, creates doubt the defendant was "sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment." (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739; *People v. Cash*, *supra*, 28 Cal.4th at p. 723.) *Cash* in accord with *Morgan* held that reversal of the judgment of death was the appropriate remedy. "Because the trial curt's error makes it impossible for us to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders other than the murder charged in this case, it cannot be dismissed as harmless. Thus, we must reverse defendant's judgment of

death. (*Morgan v. Illinois*, *supra*, 504 U.S. at p. 739.)" (*People v. Cash*, *supra*, 28 Cal. 4th at p. 723.

Appellant respectfully submits that his case is like that of *Morgan* and *Cash* and that reversal of the judgment of death is similarly warranted here.

GUILT PHASE ISSUES

III

APPELLANT'S RIGHTS TO A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO THE PRESUMPTION OF INNOCENCE WERE PREJUDICED BY HEIGHTENED COURTROOM SECURITY; THE TRIAL COURT DID NOT BASE ITS SECURITY ORDER EXCLUSIVELY ON CASE-SPECIFIC REASONS AND DID NOT STATE ON THE RECORD WHY THE NEED FOR THE HEIGHTENED SECURITY MEASURES OUTWEIGHED POTENTIAL PREJUDICE TO THE DEFENDANTS

A. Background

At the start of jury selection, eight uniformed deputy sheriffs guarded the courtroom. Both defendants objected to the visibly heightened level of security and to the resulting impression such a level of security would have upon the jurors and the trial. (5RT 1201-1202.)

Specifically, defense counsel objected that having eight uniformed deputies in the courtroom was excessive because each defendant was in fact belted to his chair and had one hand cuffed to his belt. Neither defendant was able to stand up (5RT 1203); neither defendant had heretofore "acted up in court." (5RT 1202.)

Counsel stated:

> [T]here [are] 7 bailiffs [later corrected to eight bailiffs] sitting in the room. My understanding is that there will be 7 deputy sheriffs in uniform sitting in this room throughout the trial and I would object to that. I think that it's onerous. I think that this is a difficult enough case without having the impression that would be left by having so many sheriff['']s deputies sitting in the courtroom throughout this trial, so I would object to the number of sheriffs that are here.

> My understanding is that neither of these gentlemen, Mr. Amezcua or Mr. Flores, have acted up in court and that at this point, there is no reason for that kind of a security detail to be present in front of the jury. So I would object to the number of bailiffs that are sitting here.

(5RT 1201:21-1202:7.)

The trial court took note of counsel's objection for purposes of the record, but declined to make any changes in the courtroom security measures. The trial judge indicated that his standard practice was to leave security issues to the "experts," i.e., to the bailiffs, and remarked that the trial involved two defendants who, though they had always acted appropriately within the courtroom, had been involved in a number of incidents in the county jail where they were housed. The court observed that the sheriff might at a later point in time choose to reduce the number of bailiffs within the courtroom if the defendants conducted themselves appropriately during the trial's progress. (5RT 1202:22-1203:10.)

The court stated:

> Well, I think that I *normally leave security issues up to the bailiffs, to the experts*. I feel that in this case, given that there have been a number of incidents at the jail, that there is understandably some concern above that present in most cases. I will watch the issue.
>
> I feel that I am going to allow the number of bailiffs to remain for today. I feel that this is going to be very quick. The jurors are going to be in and out in a matter of minutes. I will give some additional thought to the number of bailiffs that are necessary, but given the fact that we have two defendants, we have had a number of incidents at the jail. I think it's important for us to have what the security people call a show of force.
>
> My thought is that once we get going with the trial, and I do expect that there will be no problems. I think that Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court, and I think that once we get going, that *the sheriff will see that there is probably not the need to have such a number of bailiffs,* but your objection is noted for the record.

(5RT 1202:16-1203:10; italics added.)

Counsel for Amezcua responded with a description of the shackles worn by Amezcua.

> Just to flesh that out, I note and ask the court to note for the record that both Mr. Flores and Mr. Amezcua are belted to their chairs. In addition, they are cuffed one hand to their belt, and again that – I don't believe under this system either one them [sic] can even stand up.
>
> So I want the record to reflect that's the situation that they are in now.

(5RT 1203:11-18.)

The court observed that each defendant's restrained hand was concealed by a drape and reiterated that he would not consider any changes in the heightened level of security until a later time.

> Yes. And again, it has to do with security concerns. They – we have put a drape over the table so that the fact that one of their hands is handcuffed to the chair will not be known at this point.
>
> And again, I want to see how we go. Let's get into the trial and let's get going and see how it works out.

(5RT 1203:19-25.)

The defendants then objected to the shackling. (5RT 1204.) Counsel for appellant pointed out that while the draping might prevent the jurors from seeing either the handcuff or the belt restraints, the jury was likely to infer the defendants were restrained by the limitations in the defendants' movements. Counsel made the following objection to the shackling.

> Although because of the drape, the jury probably won't be able to see the handcuffs or the belt, they will see that only their left hand will be up, and no other hands at all times. So they probably are going to be able to infer that they are shackled.So we would have objection to that. \

(5RT 1204:3-8.)

The trial court disagreed and reiterated that precautions had to be taken in the case, but did not state why precautions were necessary. The court said, "Well, I don't think it's a big deal, frankly. I think that precautions have to be taken in this case." (5RT 1204:9-11.)

The record does not indicate that the number of courtroom bailiffs was subsequently reduced to fewer than eight or that the shackles binding appellant were either eliminated or reduced in severity.

What the record does plainly show, however, is that although the trial court made generic references to the defendants' jail incidents while acknowledging that the defendants had always acted appropriately within the courtroom, the court's ruling was but a continuation of its standard practice of leaving "security issues up to the bailiffs, to the experts." Moreover, when speaking of possibly revisiting the matter later, the court once again indicated the outcome would be subject to the sheriff's discretion – "that the sheriff will see that there is probably not the need to have such a number of bailiffs." (5RT 1202-1203.)

The court abused its discretion in so ruling because a trial court must exercise its own discretion when ordering heightened security procedures and may not defer decision-making authority to law enforcement officers. (*Holbrook v. Flynn* (1986) 475 U.S. 560; *People v. Stevens* (2009) 47 Cal.4th 625, 644.) The court must balance the need for heightened security against the risk that the increased security will prejudice the defendant in the eyes of the jury (*Holbrook v. Flynn, supra,* 475 U.S. at p. 570), precisely the concern voiced here by counsel for appellant. In addition, the court must base its decision on case-specific reasons and must state the reasons for its decision on the record. (*People v. Hernandez* (2011) 51 Cal.4th 733, 742, 744.)

Because it is reasonably probable that appellant would have obtained a more favorable result in the absence of the shackling and the presence of eight courtroom deputies, the collective effect of which was to convey to the jury that he must be separated from the community at large because he is especially dangerous or culpable, or is the cause of some official concern or alarm, the judgment of conviction must be reversed. (*People v. Watson* (1956) 46 Cal.2d 818, 837.)

B. A Trial Court's Decision Regarding Heightened Courtroom Security Must Be Based on a Thoughtful, Case-Specific Consideration of the Need for Heightened Security and the Potential Prejudice to the Defendant.

Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485; *Holbrook v. Flynn* (1986) 475 U.S. 560, 567.)

Courts have long recognized that "some security practices inordinately risk prejudice to a defendant's right to a fair trial and must be justified by a higher showing of need. For example, visible physical restraints like handcuffs or leg irons may erode the presumption of innocence because they suggest to the jury that the defendant is a dangerous person who must be separated from the rest of the community. (*Deck v. Missouri* (2005) 544 U.S. 622, 630; [*People v.*] *Duran* [(1976)] 16 Cal.3d [282], 290-291.) Because physical restraints carry such risks, their use is considered inherently prejudicial and must be justified by a particularized showing of manifest need. (*Duran*, at pp. 290-291; see *Deck v. Missouri*, at pp. 626-629; *Illinois v. Allen* (1970) 397 U.S. 337, 343-344; see also [*People v.*] *Stevens* (2009) [47 Cal.4th 625,] 643-644.)" (*People v. Hernandez* (2011) 51 Cal. 4th 733, 742.)

In *People v. Stevens*, *supra*, 47 Cal.4th at p. 638, this Court held that the stationing of a courtroom deputy next to a testifying defendant is not an inherently prejudicial practice that must be justified by a showing of manifest need. *Stevens* explained, however, that the trial court must exercise its own discretion and determine on a case-by-case basis whether such heightened security is appropriate. (Id. at p. 642.) The defendant in *Stevens* analogized to physical restraint cases and likened the deputy sheriff to a "human shackle" because the deputy sat or stood next to him while the defendant testified. (Id. at p. 636.)

Recently, in *Hernandez*, *supra*, this court considered a circumstance similar to that in *Stevens* in which a courtroom deputy followed the defendant to the stand and stood behind him while he testified. At a break in the defendant's testimony, defense counsel objected to the deputy's stationing and pointed out that the defendant was the only witness who had an armed guard behind him when he testified. The trial court explained that the deputy's stationing was done for security of the jury and this practice was followed in all of the court's trials. The court also refused the defense request for case-specific reasons for the heightened security, pointing to the defendant's 18-page rap sheet, which contained restraining order violations arising from the defendant's relationship with his ex-wife, as justification. The court viewed these violations as examples of the defendant's inability to comply with the orders of the court. (*People v. Hernandez*, *supra*, 51Cal.4th at p. 740.)

This Court made the following findings from this record. The trial court did not base its decision to station the deputy behind the testifying defendant on a "thoughtful, case-specific consideration of the need for heightened security, or of the potential prejudice that might result." (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 743.) Rather, the court's remarks showed the court was following a standard policy of stationing a deputy behind any defendant who testified,

"regardless of specific facts about the defendant or the nature of the alleged crime." (*Ibid.*)

Although the trial court had referred refer briefly to some case-specific reasons for heightened security, this Court concluded after consideration of the entire record "that the [trial] court elevated a standard policy above those individualized concerns and based its decision on the general policy. For example, the court mentioned that defendant was accused of inflicting a 'very bad injury' and had a long rap sheet with several restraining order violations, but these brief statements were made in response to defense counsel's observations after the court had twice ruled that the deputy would remain at the witness stand. The court then refused counsel's request that it determine whether any of the restraining order incidents involved violence. The discussion as a whole reveals that the court perceived this to be a routine order, and the court's scattered references to individualized facts constituted, at most, an effort to construct a post hoc justification for a security measure the court had already decided to employ pursuant to its standard policy. While the court did characterize the order as 'a discretionary call,' it made clear that the deputy's placement at the witness stand was 'just what happens *in every case that I've ever tried.*' (Italics added.)" (*Ibid.*)

Hernandez made clear that a court abuses its discretion when it fails to engage in a fact-specific analysis of whether heightened security measures are necessary. "Where it is clear that a heightened security measure was ordered based on a standing practice, the order constitutes an abuse of discretion, and an appellate court will not examine the record in search of valid, case-specific reasons to support the order. Trial judges should be mindful of their duty to state the reasons for their decisions on the record. As we have explained in the context of sentencing decisions, 'a requirement of articulated reasons to support a given decision serves a number of interests: it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the

judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned and equitable.' (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; see also *People v. Penoli* (1996) 46 Cal.App.4th 298, 303.) Here, the colloquy between the court and counsel shows that the court did not base its security order on case-specific reasons because it believed stationing a deputy at the witness stand during a defendant's testimony was an acceptable routine practice. The court's reliance on this standard practice, instead of on individualized facts showing that defendant posed a safety risk or flight risk, or a risk of otherwise disrupting the proceedings, was an abuse of discretion." (*People v. Hernandez*, *supra*, 51 Cal. 4th at p. 744.)

The presence of eight uniformed and armed deputy sheriffs in the physical confines of a single courtroom is, as counsel for appellant observed, onerous and arguably by virtue of numbers alone akin to the "human shackling" described in *Stevens*, *supra*, 47 Cal.4th at p. 636. Almost 150 years ago, in *People v. Harrington* (1871) 42 Cal.165, this Court held it was prejudicial error for a trial court to allow a defendant to appear before the jury with physical restraints unless there was "evident necessity" for the restraints. (*Id.* at p. 168.) Over 100 years after *Harrington*, this Court, in *People v. Duran* (1976) 16 Cal.3d 282 reaffirmed the *Harrington* rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. In doing so, *Duran* stated: "We believe that possible prejudice in the minds of the jurors, the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the *Harrington* rule." (*People v. Duran*, *supra*, 16 Cal.3d at p. 290.) At the same time, *Duran*, voicing the Court's recognition that the presence of too many armed guards in the

courtroom, like the use of physical restraints, affected the jury's perception of the defendant, stated that its opinion was not concerned with the use of armed guards in the courtroom, "*[u]nless they are present in unreasonable numbers*." Appellant's complaint is, and was at trial, of course just that – the armed guards in his courtroom were present in unreasonable numbers. It is the number of guards that deflates the distinction between shackling and monitoring recognized in *People v. Marks* (2003) 31 Cal.4th 197, 223-224, to wit, that "courtroom monitoring by security personnel does not necessarily create the prejudice created by shackling."

In *Holbrook v. Flynn, supra*, the U.S. Supreme Court declined to find that four uniformed state troopers sitting in the first row of the spectators' section of a trial of six defendants was so inherently prejudicial that it compromised the defendants' presumption of innocence and right to a fair trial. (*Holbrook v. Flynn, supra*, 475 U.S. at pp. 570-572.) The Court commented that it "[did] not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's choices of receiving a fair trial," but said also, " . . . we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section." (Id. at pp. 570-571.) *Holbrook* further reasoned: "Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants." (*Ibid.*)

In *People v. Ainsworth* (1988) 45 Cal.3d 984, a two-defendant case, the defendant objected to the number and placement of armed uniformed sheriff's deputies in the courtroom. The number of deputies fluctuated between four and six. The record showed that when six guards were present, two of them were posted near the doorway. (Id. at p. 1003.) *Ainsworth* concluded the heightened security measures were not unreasonable. This Court noted that the guards were

primarily concerned with security *outside* the courtroom and were strategically placed inside the courtroom. (*Ibid.*)

Appellant's case, in contrast, presented the prejudicial spectacle of eight armed deputies guarding two defendants and thus is distinguishable from the controlling fact pattern and the holdings in *Holbrook* and in *Ainsworth*. Rather, the disproportionate security presence in appellant's case falls within the boundaries of the other concern expressed in *Holbrook*, that of the "threat" to a defendant's chances of receiving a fair trial that is created when the courtroom is populated by too many uniformed and armed policemen in the courtroom. (*Ibid.*)

Ainsworth is distinguishable because there the guards were primarily concerned with security outside the courtroom, as reflected in the stationing of two guards near the door when there were six guards within the courtroom. In appellant's case, by contrast, court and counsels' perceptions were that the perceived danger lay within the courtroom in the presence of the two codefendants.

In *Duran*, the defendant, a life-term prisoner, appealed jury convictions of assault with a deadly weapon and possession of a dirk or dagger in prison. During trial, the defendant was physically restrained with wrist and ankle shackles and, on appeal, argued the heightened security measures constituted an abuse of discretion. (*People v. Duran*, *supra*, 16 Cal.3d 287-288, 293.) This Court made it clear that a defendant's prior record of violent conduct in and of itself is insufficient to justify heightened courtroom security measures. Instead, *Duran* indicated that a showing of nonconforming conduct within the courtroom was integral to the imposition of heightened courtroom security measures:

> "We do not mean to imply that restraints are justified only on a record showing that the accused is a violent person. An accused may be restrained, for instance, on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means. Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of

reasonable restraints if, in the sound discretion of the court, such restraints are necessary."

(*People v. Duran*, *supra*, 16 Cal.3d at pp. 292-293, fn. 11.)

C. The Trial Court Abused Its Discretion When It Failed to Engage in a Fact-Specific Analysis of the Need for Heightened Courtroom Security

Here, as the colloquy between court and counsel set forth in Subsection A, *supra*, establishes, appellant and codefendant Flores were belted to their respective chairs and unable to stand up when counsel made his objection. Each defendant also had one hand cuffed to his belt. A drape over the table prevented the jury from seeing the restraints, but counsel opined the jury would soon infer that each defendant was physically restrained by the defendant's repetitive use of only one hand.

The record shows that the trial court failed to engage in a fact-specific analysis of the need for heightened courtroom security. Instead, the trial court deferred the question of courtroom security "to the bailiffs, to the experts," i.e., the court substituted the bailiffs' exercise of discretion for its own. The court also justified the presence of eight uniformed deputies to guard two defendants by pointing to the defendants' involvement in county jail incidents, while at the same time acknowledging that the defendants had at all times acted appropriately within the courtroom.

Hernandez made clear that a trial court abuses its discretion when it fails to engage in a fact-specific analysis of the need for heightened courtroom security. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 744.) In *Stevens*, this Court said a trial court "may not defer decision-making authority to law enforcement officers, but must exercise its own discretion to determine whether a given security measure is appropriate on a case-by-case basis. (*People v. Stevens*, *supra*, 47 Cal.4th at p. 642; *People v. Hill* (1998) 17 Cal.4th 800, 841 [it is the

function of the court, not the prosecutor or law enforcement personnel, to determine whether manifest need supports use of physical restraints in courtroom].) Accordingly, the trial court abused its discretion when it yielded the issue of courtroom security "to the bailiffs, to the experts."

In addition, the trial court abused its discretion when it relied upon the defendants' conduct in the county jail to justify the heightened courtroom security measures. In *Duran, supra*, this Court stated: Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt *the judicial process* if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (*People v. Duran, supra*, 16 Cal.3d at p. 292 fn. 11; emphasis added.) This Court made clear that the trial court is vested, upon a proper showing, to order appropriate physical restraints for the defendant "[i]n the interest of minimizing the likelihood of *courtroom* violence or other disruption." (Id. at p. 291; emphasis added.) Thus, as noted above, heightened courtroom security measures may be appropriately taken when there is "[e]vidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained." (*People v. Duran, supra*, 16 Cal.3d at p. 292 fn. 11.) In the present case, the court expressly found that "Mr. Amezcua and Mr. Flores have conducted themselves in a very appropriate manner at all times with this court." (5RT 1203:5-7.) Accordingly, the court had before it no evidence of nonconforming conduct or planned nonconforming conduct within the courtroom.

In *People v. Mar* (2002) 28 Cal.4th 1201, in which the defendant objected to the court's order that he be shackled with a stun belt, this Court stated that when the objectionable conduct has occurred outside the courtroom sufficient evidence of the conduct must be presented on the record so that the court may make its own determination. *Mar* reiterated that the court may not simply rely upon the judgment of law enforcement or bailiffs. (Id. at p. 1202; see also *People v. Lomax* (2010) 49 Cal.4th 530, 559; *People v. Howard* (2010) 51 Cal.4th 15,

28.) In appellant's case, the trial court failed to conduct a formal hearing and no other evidence was before the court supporting the need for heightened courtroom security measures. Instead, the court simply deferred to the recommendation of the bailiffs. In doing so, the trial court abused its discretion.

In *People v. McDaniel* (2008) 159 Cal.App.4th 736, the Court of Appeal concluded that a defendant who was shackled during trial *without a finding of cause* had been denied due process and reversed the judgment after concluding this Court's decision in *Duran, supra,* compelled the conclusion that the trial court had abused its discretion. (Id. at pp. 740, 745.) On appeal, the Attorney General argued that the defendant's probation report revealed that the defendant, a prison inmate, had been shackled because he had committed a number of violent acts outside the courtroom, including an incident in which he beat, kicked, and slashed the throat of a fellow inmate who did not try to fight back. *McDaniel* declined to accept such information prepared after trial as an adequate substitution for the pre-shackling on-the-record determination required of the trial court by this Court's holding in *Duran.* (Id. at p. 745.)

These cases make clear that the trial court's failure to initiate procedures aimed at determining whether the heightened courtroom security measures complained of here were necessary and to make findings on the record justifying the procedures constituted error.

D. As the Result of the Heightened Courtroom Security in This Case, There Is a Reasonable Probability That Error Affected the Trial's Result

This Court has determined that "[d]ecisions to employ security measures in the courtroom are reviewed on appeal for abuse of discretion." (*People v. Hernandez, supra,* 51 Cal.4th at p. 741; see also *People v. Stevens, supra,* 47 Cal.4th at p. 632; *People v. Duran, supra,* 16 Cal.3d 282, 293 fn. 12.)

Courts have recognized that trial courts have a constitutional responsibility to balance the need for heightened security during a criminal trial against the risk that the additional precautions will prejudice the defendant in the eyes of the jury. "It is that judicial reconciliation of the competing interests of the person standing trial and of the state providing for the security of the community that . . . provides the appropriate guarantee of fundamental fairness." (*Lopez v. Thurmer* (2009) 573 F.3d 484; citing *Illinois v. Allen* (1970) 397 U.S. 337; *Estelle v. Williams* (1976) 425 U.S. 501, 506; *Holbrook v. Flynn*, *supra*, 475 U.S. 560.)

In *Illinois v. Allen* (1970) 397 U.S. 337, the Supreme Court held that the Constitution might permit, under some circumstances, a trial court to order that an obstreperous defendant be bound and gagged in the courtroom during his trial. The Court expressed reservations about this method of control; it acknowledged that "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." (Id. at p. 344.) The Court also recognized the possibility "that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant." (*Ibid.*) Thus, although the Court refused to rule out the possibility that binding and gagging might be the most reasonable way to deal with a disruptive defendant under certain circumstances, it made clear that such a measure would be appropriate only in the most extreme of cases.

In Estelle v. *Williams*, *supra*, the Court held that requiring a defendant to wear "identifiable prison clothes" violated his due process right to a fair trial. The Court wrote: "The constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." (*Estelle v. Williams*, *supra*, 425 U.S. at pp. 504-505.)

There can be no gainsaying that the presence of eight uniformed and armed deputies in the courtroom served as a constant reminder in appellant's trial

that the community and by implication those within the courtroom needed to be safeguarded from him. There can be no gainsaying that the pronounced limitations in appellant's ability to move necessarily produced by the physical restraints, and which no drapery could successfully conceal, served as a constant reminder in appellant's trial that he was perceived by the court authorities to pose a danger to others. The combination of these two factors was so likely to have been a continuing influence throughout the trial that it can be said there is a reasonable probability that impermissible factors affected the outcome of the trial. (*People v. Hernandez*, *supra*, 51 Cal.4th at p. 746; *People v. Watson* (1956) 46 Cal.2d 818, 837.)

For these reasons, reversal of the judgment of conviction is warranted.

IV

THE TRIAL COURT ERRED IN ADMITTING THE JAILHOUSE INTERVIEW OF APPELLANTS BECAUSE THOSE STATEMENTS WERE PART OF SETTLEMENT NEGOIATIONS AND WERE PRIVILEGED UNDER EVIDENCE CODE SECTION 1152

A. Introduction

On February 8, 2002, Deputy District Attorney and trial prosecutor Darren Levine interviewed Amezcua and appellant[18] in the Los Angeles County Jail. Later, on February 21 and March 28, 2002, the prosecutor and his investigator met again with Amezcua and appellant. As a result of information Levine received from appellants during his first (February 8) interview with them, Levine and his investigator surreptitiously audiotaped the February 21 and March 28 interviews.

At trial, over multiple defense objections, the trial court allowed the jury to hear redacted versions of the taped interviews as part of the prosecution's case-in-chief. Because appellants' statements were made during plea negotiations, their admission was prohibited by statute and public policy, as appellant explains below. (Evid. Code, § 1153; Pen. Code, § 1192.4; *Bryan v. Superior Court* (1972) 7 Cal.3d 575, 588 (policy favoring settlement of criminal cases underlies the exclusionary rule).

The admission of appellants' jailhouse interview statements, which comprised admissions, confessions, and specific details regarding both mens rea and actus reus elements of charged crimes, created prejudicial error.

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[18] Amezcua and appellant were pro se defendants at the times they were interviewed by the trial prosecutor.

B. Procedural Background

Amezcua, joined by appellant (3RT 871; 11RT 2636), objected to the admission of appellants' audiotaped jailhouse statements on a number of grounds,[19] including the objection that the statements were the product of the appellants' attempt to secure a reduced restitution amount. (8CT 1840-1841; 9CT 2203-2204.)

The trial court found that appellants' statements to the prosecutor were volunteered and spontaneous; found that appellants had a clear interest in sharing their information with the prosecutor; that appellants were experienced in the criminal justice system and well aware of their rights; that appellants were acting in propria persona and that the admonition of rights given appellants during the March 28 interview was more than sufficient. The court ruled that, subject to appropriate redacting, statements made by appellants during the February 21 and March 28 taped interviews were admissible as part of the prosecution's case-in-chief. The court also admitted statements made by appellants to the prosecutor during the February 8 interview, with the notation that the prosecutor had agreed not to use these statements in the prosecution's case-in-chief.[20] (3RT 871-874.)

The redacted audiotapes were played for the jury during the prosecution's case over renewed defense objection. (People's 95 and 96 (transcripts, respectively, People's 95A and 96A); 11RT 2675-2677.) The renewed defense

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[19] Appellants objected, inter alia, on the grounds that the statements were obtained in violation of appellants' right to counsel; right to remain silent; and the failure to provide advisements pursuant to *Miranda v. Arizona* (1966)384 U.S. 436. (8CT 1835-1842; 9CT 2201-2204.)

[20] Amezcua, joined by appellant, unsuccessfully moved to recuse the Office of the District Attorney pursuant to Penal Code section 1424; *People v. Conner* (1983) 34 Cal.3d 141; the Due Process Clause of the Fifth and Fourteenth Amendments; and on the ground that the personal participation of prosecutor Levine had created a conflict of interest for the District Attorney's Office that rendered it unlikely that appellants would receive a fair trial and due process of law. (9CT 2234-2238, 2285-2290; 10CT 2701-2703; 3RT 703.) The motion was denied. (4RT 1148-1149.)

objections, as stated by counsel for Appellant and joined in by counsel for Amezcua, were: "It would be on the 5th and 6th Amendment[s], that there was no *Miranda*. That the statement was coerced. That the statement was given through threats and promises. That the statement violated their rights as pro per and actually the second statement they not have even been pro per anymore because they were held to answer at prelim. [¶] If there was a conflict between Mr. Levine and the District Attorney's Office and his prosecution of this case, the D.A. should be recused and for all of those reasons and all the reasons stated in argument. We would be objecting to the tape as violative of our client's due process and constitutional rights." (11RT 2635:24-2636:8.)

Following an investigation into the information provided by appellants, Deputy District Attorney Levine convened a grand jury proceeding on November 25, 2002. (1CT 6.) Investigator Thomas Kerfoot testified that he and Levine met with Amezcua and appellant on March 28, 2002, at which time they discussed the heretofore uncharged murders of John Diaz and Arturo Madrigal at the heretofore uncharged attempted murders of Paul Gonzales and Fernando Gutierrez. Kerfoot further testified that he later provided the information to local law enforcement agencies whose investigations into the crimes were at the time of contact still open. (1CT 13, 20-26.) On November 26, 2002, the grand jury returned an indictment charging the appellants with the murders of Diaz and Madrigal and the attempted murders of Gonzales and Gutierrez attended by numerous weapons, gang, and special circumstance allegations. (1CT 155-162.) These allegations were subsequently folded into the Amended Information filed January 22, 2003, on which the case went to trial. (7CT 1751-1792.) Appellants were convicted of the first degree murders of Diaz and Madrigal and the premeditated attempted murder of Gutierrez and related enhancements and special circumstances. (17CT 4569, 4570, 4571; 14RT 3056-3057, 3057-3058, 3059.)

As appellant explains below, appellants' statements regarding their criminal conduct, viewed in context, were offered by and ultimately provided by

them during settlement negotiations directed at the amount of restitution to be imposed. Appellants had argued the statements should be excluded, albeit without specific reference to Evidence Code section 1153 and Penal Code section 1192.4, though with the same reasoning underlying the exclusionary rule propounded by those statutes, *viz.*, because they were made while appellants were bargaining to avoid restitution. (8CT 1840-1841; 9CT 2203-2204.)

C. Appellants' Jailhouse Statements to the District Attorney and His Investigator, When Viewed Contextually, Establish That They Were Made during Appellants' Efforts at Plea Negotiations

The jury heard the redacted, taped February 21, 2002, interview of appellants by Levine and his investigator (People's 95).

Early in this interview, in the context of a discussion in which Amezcua and appellant offer to provide information about additional murders, Levine is heard to remind appellant about a previous conversation regarding plea negotiations. Levine said:

> "When you came to me – remember last time you said to me 'give me – give me 50 years'. . . [¶] And with – without the 'L.'" (DPSuppIIICT 52:11-12, 14.) Appellant explained the earlier request in this way: "If you give me 50 years without the "L," I can get married and get a bone yard visit. . . . [¶] But if you give me the "L," I have no sex. (DPSuppIIICT 51:21-22, 24.) Appellant continued: "If you give me 50 years, I guarantee you I won't live 50 years. If you give me 85%, which I have to get it – " (DPSuppIIICT 52:8-9.) The conversation on this topic ended when Levine said, "it's not a personal thing but if it – if there's a death penalty, this is the case that – that warrants it. You know what I mean?"

(DPSuppIIICT 52:17-18.)

The parties discussed other topics for a while, including appellant's instructions on how to make pruno, before Amezcua and appellant brought the conversation back to negotiations regarding sentencing issues, specifically, to the issue of restitution. Amezcua asked: "Okay, if we talk about these murders,

– you tell – you can just say, hey – hey Ray ain't got the means to pay the money, it's so outrageous, we're gonna get it reducted or whatever, $200 bucks each we're happy with that (unintelligible)." (DPSuppIIICT 74:23; 75:2-4.)

Levine replied, "Alright, we'll see." And, also, "How many – how many of these deals are you gonna, uh – . . . try to make with me?" (DPSuppIIICT 75:5, 9, 11.) Appellant replied that in addition to the three murders with which they were charged at the time, "We can give you two more with the wink of an eye, right? Plus not counting the other one we already got – " (DPSuppIIICT 75:24-76:1.)

Appellant said that he and Amezcua understood that Levine would use any information they provided about new murders against them, but explained that they did not care because they accepted, wanted, death as their penalty.

> We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm, - when you're incarcerated, we do a lot of weird things. More than likely we're going to get hepatitis. . . [¶] We're gonna die in what, 20 years? We ain't gonna even make it to that chair, or that, uh, bed. . . .

(DPSuppIIICT 76:12-14, 16-18.)

The jury also heard the redacted, taped March 28, 2002, interview of appellants by Levine and his investigator (People's 96).

Levine began this interview by reminding Amezcua and appellant that they had previously talked to him about "work[ing] out something" regarding restitution. " – to come see you. This is in court, and also a number of times in court you guys have said that you wanted us to come talk to you about some cases and maybe work out something, either with regard to, uh, restitution issue – " (DPSuppIIICT 91:20-22.)

Appellant told Levine that he and Amezcua were willing to give Levine information about two additional murders he could not otherwise link to them if Levine promised not to "go after" appellant's mother, Katrina Barber, and Carina Renteria. (DPSuppIIICT 93.) Appellant explained: "So our whole main thing is

right, that we did. (DPSuppIIICT 59:22.) Levine responded: "Are you talking about the murders that are charged or additional ones?" (DPSuppIIICT 60:1-2.) Amezcua and appellant both replied, "new ones." (DPSuppIIICT 60:3-4.) Once more, the conversation wandered, until Amezcua said, "Can we talk about restitution?" (DPSuppIIICT 60:20.) Appellant said: "Oh, yeah. See, that's what we wanna do. Okay, we're gonna get a lot of restitution. We'll give you a murder if drop our restitution, so it'll only be 200 instead of a whole (unintelligible) of restitution, which we'll never be able to pay." (DPSuppIIICT 60:22-24.)

Amezcua and appellant explained to Levine that as inmates on death row, they would still be eligible to have money placed on their books, but that some of that money would then be taken in payment of the restitution amount imposed by the court. (DPSuppIIICT 61:1-17.) Appellant explained: "So, now I'm going to death row, something different, something new, right? And I don't wanna have a lot of restitution because when I buy a TV, they're gonna make me pay to the victims in (unintelligible) or right up front." (DPSuppIIICT 62:9-11.)

Appellant proposed giving Levine "a murder, . . . and, it's our own murder. We'll – I'll tell you everything I did and he'll tell you everything that he did. . . ." (DPSuppIIICT 62:17-19.)

The defendants went on to describe different incidents involving shootings (DPSuppIIICT 63-74.) Appellant assured Levine that Levine would get a death penalty conviction. (DPSuppIIICT 70:18.) Levine asked whether Amezcua and appellant preferred to talk to his investigator or to him about the "other murders." (DPSuppIIICT 74:15-16.) Appellant replied they preferred to speak with Levine. "We (unintelligible) with him. But see, you gotta make sure we don't get no re – we can get – see, there's a customary $200 fine for restitution." DPSuppIIICT 74:21-22.)

Corrected by Levine that restitution ranges in dollar amount from $200 to $10,000, Appellant said: "Okay, So, my thing is this, you can get $200 but if you

to go to another county jail, meet new people, kick back, enjoy ourselves, spend like two years out there, boom, and then go to death row." (DPSuppIIICT 95:21-23-96:1)

Appellant renewed the offer to provide information about other murders, prompting Amezcua to ask, "So how much of a guarantee can we have on the restitution though?" (DPSuppIIICT 99:4.)

Levine said:

> "I don't – personally, I don't think that's such a major issue, but I don't wear the black robe []. I'm not a judge. But I – I can't imagine me going to a judge and saying, 'Hey, you know, they talked to us about two cases, alright. Here's our reports on that. One of the things we told them was we could do everything we could to get 'em a $200 restitution instead of a $10,000 restitution.' And so all I can tell you is I'll make my best efforts to do it. Now, if – if – if we tell him, 'Hey, their conversations helped us solve two murders and we – they're good for it. I mean, we have independent evidence that says they're good for it,' and all that, and I don't see a judge balking at that at all, because what he's – what does it – what – what does it cost any judge really? Nothing. It's – "

(DPSuppIIICT 99:8-16.)

The talk returned to the fate of Katrina Barber, who was then in custody for her role in some of the charged crimes. Appellant asked whether Barber would be allowed to go home at some reasonable time. Levine said his office tended to listen to his recommendations in a case like this and that he would push for a sentence that would allow Barber to be sentenced to state prison and then released right away as the result of earned custody credits. (DPSuppIIICT 101-104.)

Having resolved sentencing/restitution issues for themselves and for Barber, Amezcua and appellant began to give Levine and Kerfoot specific and detailed information about the murder of John Louis Diaz and the attempted murder of Paul Gonzalez on April 13, 2000 (counts 42, 43) (DPSuppIIICT 106-110, 122-123, 134-136; and the murder of Arturo Madrigal and attempted murder

of Fernando Gutierrez on May 25, 2000 (counts 45, 46) (DPSuppIIICT 110-117, 173.) Amezcua and appellant also provided specific and detailed information about firearms evidence used in the commission of the charged crimes (DPSuppIIICT 117-121, 123, 155-156, 173) and about appellant's intention to use his firearm while in the hospital following his arrest on Santa Monica Pier (DPSuppIIICT 154).

Viewed in their proper context, the foregoing remarks lead inexorably to the conclusion that Amezcua and appellant had anticipated and accepted theirs will be a death sentence and that they were focused in these interviews on negotiating a deal with Levine that would net them what they perceived to be a valuable life-long benefit to them – the imposition of a reduced restitution sum – as well as lenity for appellant's mother, Katrina Barber, and Carina Renteria. As Amezcua and appellant explained, a reduced restitution sum allows them more money to spend to ease their life on Death Row. The record shows that Amezcua and appellant were persistent in seeking meetings with Levine for the purpose of negotiating issues pertaining to restitution, that they proposed to and did provide Levine with information, some of it otherwise unavailable to him, about charged and uncharged murders and attempted murders that, when used by the prosecution against them, would ensure that death would be the resulting penalty in exchange for their receipt of a reduced restitution amount and restrictions on the prosecution of the three women.

The record also shows that Levine recognized that appellants were negotiating a "deal" with him and that it was only after he basically agreed to their requests regarding restitution and lenity for the women that Amezcua and appellant provided information regarding criminal conduct.

As appellant next explains, Evidence Code section 1153, Penal Code section 1192.4, and public policy render admissions of criminal conduct made in the course of plea negotiations inadmissible.

D. Admissions of Criminal Conduct Made in the Course of Plea Negotiations Are Inadmissible

Evidence Code section 1153 provides: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

Penal Code section 1192.4 provides: "If the defendant's plea of guilty pursuant to Section 1192.1 or 1192.2 is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available. The plea so withdrawn may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

While these statutes do not expressly extend that rule of inadmissibility to any statements made during plea negotiations other than pleas of guilty and offers to plead guilty, the Court of Appeal, in *People v. Tanner* (1975) 45 Cal.App.3d 345, did. In *Tanner*, a criminal defendant wrote letters to the district attorney and deputy district attorney in charge of his case complaining that he had not been offered a fair plea bargain and admitting his involvement in the crime, but contending that other named codefendants were more culpable than he. At trial, the prosecution was allowed to introduce the defendant's letters as part of its case in chief. (*Id.*, at p. 348.) On appeal, the defendant argued that his letters were part of the plea bargaining process and therefore inadmissible under Evidence Code section 1153 and Penal Code section 1192.4. The Court of Appeal agreed and reversed the judgment.

Tanner recognized that exclusion of admissions made in the course of plea negotiations is important to the proper functioning of the criminal justice system and noted that a district attorney's ability to assess the defendant's culpability is

an important factor in the prosecution's decision on whether to settle a criminal case. *Tanner* reasoned that if the court wished to encourage negotiated pleas, then the defendant's actual guilt had to be part of the discussion, and, further, that exclusion of admissions will promote candor and facilitate settlements, while failure to exclude such admissions would hamper settlements. (*People v. Tanner*, *supra*, 45 Cal.App.3d at pp. 350-352.) In short, because public policy favors settlements; because the chances of achieving settlements are greatest when the defense is candid with the prosecution, *Tanner* construed the rule of Penal Code section 1192.4 and Evidence Code section 1153 to extend to admissions made in the course of plea bargaining negotiations. (*Id.*, at pp. 351-352; *People v. Crow* (2006) 28 Cal.App.4th 440, 450.)

Tanner also rejected the Attorney General's contention that the statutes should be limited to offers to plead guilty, i.e., to the plea offer itself. Under that interpretation, any incidental statements made in the course of plea negotiations, particularly admissions of guilt, would be admissible. (*Id.*, at p. 350.) *Tanner* rejected this argument: "In order to effectuate the purpose of Evidence Code section 1153 and Penal Code section 1192.4 as interpreted by our high court, we construe those sections to include admissions made in the course of bona fide plea bargaining negotiations. (*Id.*, at pp. 351-352.) The court noted: "Although most defendants understand what plea bargaining is and how it works, the Attorney General's proffered distinction between an offer to plead guilty and an admission of guilt is not one that those untrained in the law should be expected to make spontaneously or to appreciate the reasons for making. In short, such a distinction would be a trap for the unsophisticated, which we decline to read into the law." (Id., at p. 352.)

Thus, *Tanner's* "rule of inadmissibility applies, not merely to admissions of guilt, but also to 'any incidental statements made in the course of plea negotiations. . . .' [*People v. Tanner*, *supra*, 45 Cal.App.3d at p. 350.] That construction promotes candor, because '[t]he accused and defense counsel are

assured that anything said will not be used against them if the negotiations are unsuccessful.' (*People v. Magana* (1993) 17 Cal. App. 4th 1371, 1377.)" (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 450.)

Our Supreme Court has explained that public policy favoring the settlement of criminal cases underlies the exclusionary rule discussed here. (*Bryan v. Superior Court*, *supra*, 7 Cal.3d at p. 588; *People v. Quinn* (1964) 61 Cal. 2d 551, 555.) *Bryan* noted that such settlements benefit both the state and the defendant. (*Bryan v. Superior Court*, *supra*, 7 Cal.3d at p. 588; *People v. West* (1970) 3 Cal. 3d 595, 604-605.)

Other cases, as appellant shows below, have carved the contours of the rule of *Tanner* to establish that *Tanner's* rule prohibits the prosecution's use of such statements in its case in chief, but allows the statements to be used to impeach a testifying defendant. In addition, post-plea statements made by a defendant to a probation officer are not made inadmissible by the rule of Tanner, because, having been made after the entry of a guilty plea, the statements were determined to not have been made in the course of plea negotiations. On the other hand, the statements are rendered inadmissible not by the context in which they were made, but by the context in which they were used, i.e., if they were used during settlement negotiations.

Thus, in *Crow*, *supra*, the defendant made statements, assertedly inadmissible under *Tanner*, to a psychologist, who included them in a psychological evaluation. The defense counsel then forwarded the psychological evaluation to the prosecutor in the course of plea negotiations. (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 448.) At trial, the prosecutor used the defendant's statements to the psychologist to impeach the defendant's credibility after he first made contrary statements on direct examination in his testimony. *Crow* distinguished the use of defendant's statements to impeach and held that "the rule of *Tanner* – that evidence of statements made or revealed during plea negotiations may not be introduced by the People – must be limited to those situations in

which those statements are offered as substantive evidence of guilt, either in the prosecution's case-in-chief or otherwise. That rule does not prevent the prosecution from using evidence of those statements for the limited purpose of impeaching the defendant regarding testimony which was elicited either during the direct examination of the defendant or during cross-examination which is plainly within the scope of the defendant's direct examination." (Id., at p. 452.)

Crow, however, also found no distinction between statements originally made in the course of plea negotiations and statements made in the context of another purpose (psychological evaluation), but tendered to the prosecution in the course of plea negotiations, because in either event the statements were given to the prosecution in order to achieve a settlement. (*People v. Crow*, *supra*, 28 Cal.App.4th at p. 450 fn. 6.)

In *People v. Scheller* (2006) 136 Cal.App.4th 1143, the Court of Appeal declined to extend Tanner's rule of inadmissibility to a defendant's post-plea statements to a probation officer because the statements were not inadmissible on the theory they were made in the course of plea negotiations. (*Id.*, at p. 1148.)

Public policy in other areas also argues for excluding this type of statement. This is the intent behind Evidence Code section 1152 which (a) provides:

> Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, **as well as any conduct or statements made in negotiation thereof**, is inadmissible to prove his or her liability for the loss or damage or any part of it. (emphasis added)

The policy behind section 1152 it to encourage settlement negotiations. As the language makes clear, not only are offers to settle a case inadmissible, but any statement made in the course of settlement discussions are inadmissible.

The purpose of this section is to avoid deterring parties from making offers of settlement and to facilitate candid discussion which may lead to settlement.

(*Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 Cal.App.2d 770, 773.) "Negotiations might well be discouraged if a party knew that statements made by him might later be used to prove the invalidity of some other claim which he wished to assert." (*Ibid.*)

Although the offers to compromise have always been inadmissible, early cases held that the declarations of facts made in settlement talks were "not mere concessions made for the purpose of such offer, but are statements of independent facts." As such they were admissible against the party making them. (See *People ex rel. Dept. of Public Works v. Forster* (1962) 58 Cal.2d 257, 263.)

This rule was abrogated by the enactment of Evidence Code section 1152. As explained in the comments of the Law Revision Commission

The words "as well as any conduct or statements made in negotiation thereof" make it clear that statements made by parties during negotiations for the settlement of a claim may not be used as admissions in later litigation. This language will change the existing law under which certain statements made during settlement negotiations may be used as admissions.

The comment further explains that the reason behind the rule is equally applicable to admissions made during settlement negotiations. The prior rule placed a premium on the form of the statement, so that if the speaker prefaced the statement with "[a]assuming, for the purposes of these negotiations, that I was negligent . . ." the statement would be inadmissible, whereas the statement would be admissible if the speaker failed to say the magic words. Section 1152 was intended to eliminate that situation and allow for candor that was considered conducive to settlements without the need to say talismanic words. (Law Revision Commission Comments.)

E. Appellants' Admissions of Criminal Conduct Were Made in the Course of Negotiations with Levine Regarding Restitution and Should Have Been Excluded under the Rule of Tanner; The Failure to Do So Created Prejudicial Error

As appellant has shown in subsection three above, review of the exchanges between Levine, his investigator, and appellants establish that the parties were in negotiations to exchange information about charged and uncharged crimes committed by appellants for a reduced restitution amount. As such, appellants' statements, made in the course of bona fide plea bargaining negotiations, should have been excluded under the rule of *Tanner*.

Here, as appellant has noted in subsection three, comments by Amezcua and appellant make clear that they had accepted that sentences of death awaited them and they had an interest in negotiating a restitution amount that would bring benefit to the intervening years before their death. The rule of inadmissibility applies not only to admissions of guilt, but also to any incidental statements made in the course of plea negotiations. (*People v. Tanner*, *supra*, 45 Cal.App.3d 350.)

Accordingly, the trial court erred in allowing the jury to hear, as part of the prosecution's case in chief, the admissions of criminal conduct made by appellants in the jailhouse interviews with the prosecutor.

Moreover, the error was prejudicial to appellants. In the Procedural Background above, appellant explained that the Diaz and Madrigal murder convictions and the Gutierrez attempted premeditated murder conviction are the direct product of information provided to Levine and his investigator during these jailhouse interviews. Investigator Kerfoot testified at the grand jury, convened to hear evidence related to these crimes, that he provided the information obtained during the interviews to law enforcement agencies that resulted in the evidence being presented to the grand jury. The grand jury returned an indictment based on the evidence it heard. The indictment was later folded into the amended information on which the case went to trial. Appellants were convicted.

In addition to these counts of conviction, appellants provided firearms and mental state evidence relating to other originally charged crimes, enhancements, and special circumstances.

It is undisputed there was evidence against appellants, but the evidence contained in the redacted jailhouse interviews rendered the evidence against appellants overwhelming. Nor can it be said that the prejudice was limited to the Diaz, Madrigal, and Gutierrez counts because the specific details provided during these jailhouse interviews were so manifestly egregious that it would not have been possible to contain the prejudice to these few counts.

Under these circumstances, the admission of these jailhouse statements was so prejudicial as to distort the prosecution's evidence and cause a miscarriage of justice. It is therefore reasonably probable that a result more favorable to appellant would have been reached in the absence of the above error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Collins* (1975) 68 Cal.2d 319, 322.) Accordingly, reversal of the judgment is warranted.

V

APPELLANT WAS DENIED HIS RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT WHEN THE RESULTS OF ARTURO MADRIGAL'S AUTOPSY ENTERED INTO EVIDENCE THROUGH THE IN-COURT TESTIMONY OF A FORENSIC PATHOLOGIST WHO DID NOT PERFORM THE AUTOPSY

A. Introduction

Appellant was convicted in count 45 of committing the first degree murder of Arturo Madrigal (Pen. Code, § 187, subd. (a)) during a drive-by shooting (Pen. Code, § 190.2, subd. (a)(21)) for the benefit of a criminal street gang (Pen. Code, § 186.22). (17CT 4570; 14RT 3057-3058.)

In the course of prosecuting and convicting appellant of the murder of Madrigal, the prosecution introduced evidence of the results of Madrigal's autopsy, which was conducted in the Los Angeles County Coroner's Office by deputy medical examiner Dr. Juan Carrillo. (1CT 86-87; 7RT 1736.) At trial, Dr. Carrillo did not testify to the results of his autopsy. Instead, a *different* deputy medical examiner in the Coroner's Office, Dr. Lisa Scheinin, testified to the results of the autopsy performed by Dr. Carrillo. (7RT 1736.)

As a result of this procedure, Dr. Scheinin testified that Dr. Carrillo's autopsy report attributed the cause of Madrigal's death to "a gunshot wound of the head," and characterized the death as a homicide. (7RT 1739, 1744.) Dr. Scheinin testified that Dr. Carrillo described the wound "as entering the left side of the face just in front of the ear, then traveling left to right upward, and front to back through the head causing a severe brain injury that consisted of going through the cerebellum, and more importantly, severing the brain stem and hitting the inside of the skull on the right side, and [that Dr. Carrillo further reported that] a bullet was recovered from that area." (7RT 1739.) Dr. Scheinin also testified that renderings of the wound within the skull prepared by Dr. Carrillo accurately depicted the location of the gunshot wound suffered by Madrigal and

that Dr. Carrillo was able to determine the path of the bullet. (7RT 1741-1742.) Dr. Scheinin further testified that Dr. Carrillo also found a second, nonfatal, grazing gunshot wound to the knee and that he had located a corresponding hole in the left knee area of a pair of blue jeans. (7RT 1743-1744.) Dr. Scheinin was asked on cross-examination if Dr. Carrillo had determined the age of the grazing wound to the knee. Dr. Scheinin noted that Dr. Carrillo had made no specific statement about the age of the wound, but then offered her opinion that because Dr. Carrillo had failed to mention any crusting the wound was a fresh wound inflicted within a few hours of death or close to the time of death. (7RT 1745.)

The prosecution violated the Confrontation Clause by introducing one deputy medical examiner's testimonial statements in a forensic autopsy report through the testimony of a different deputy medical examiner who had neither performed nor observed any of the tasks or analyses described in the statements.

The Sixth Amendment to the United States Constitution, made applicable to the states via the Fourteenth Amendment (Pointer v. Texas (1965) 380 U.S. 400, 401, provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), the United States Supreme Court held that as a result of the Sixth Amendment's guarantee a witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S305; 174 L.Ed.2d 314] (*Melendez-Diaz*), the Court held that forensic laboratory reports made for the purpose of producing evidence for litigation, such as is the autopsy report in issue here, are testimonial evidence. (*Id.* 129 S.Ct. at p. 2532.)

Then, in *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705] (*Bullcoming*), the Court held that the prosecution violates the Confrontation Clause when it introduces a forensic laboratory report containing a testimonial

certification prepared by one scientist through the in-court testimony of a scientist who neither signed the certification or performed or observed the test reported in the certification.

The United States Supreme Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces one witness's testimonial statements through the in-court testimony of a second or surrogate witness.

In *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), for example, the Court found a Confrontation Clause violation because "the State admitted Sylvia's statement against petitioner, despite the fact that he had no opportunity to cross-examine *her*" [italics added].

In *Davis v. Washington* (2006) 547 U.S. 813, 826 (*Davis*), the Court found a Confrontation Clause violation when "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant."

In *Melendez-Diaz, supra*, Justice Kennedy in his dissent commented, "The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second." (*Id.* at p. 2546.)

In *Bullcoming*, the Court held that the admission into evidence of the defendant's blood alcohol level through the testimony of a substitute analyst from the same laboratory as the forensic analyst who prepared the report violated the defendant's right to confront the analyst who prepared the report. (*Id.* at p 2716..)

The United States Supreme Court has identified four "elements of confrontation" that serve the purpose of the Confrontation Clause "by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." (*Maryland v. Craig* (1990) 497 U.S. 836, 846.) (1) Confrontation enables cross-examination concerning the witness's factual assertions, his believability, and his character. (2) It guarantees that the witness gives his testimony under oath. (3) It

allows the trier of fact to observe the witness's demeanor. (4) It ensures that the witness testifies in the presence of the defendant. (*Ibid.*)

These elements of confrontation are only served when the forensic pathologist who made them testifies to his or her observations and analyses in the forensic autopsy report. They are not served when the testimonial statements are allowed into evidence through the in-court testimony of a surrogate witness.

Here, the record shows that neither the court nor the parties specified the evidentiary rule under which admission of this hearsay evidence was sought and admitted. The record also shows that defense counsel did not object to the admission of the autopsy evidence as a violation of appellant's Confrontation Clause rights under the Sixth Amendment. (7RT 1732-1735.) This court may, however, review appellant's claim in the absence of objection below because, in failing to object to this prejudicial evidence, defense counsel provided appellant with constitutionally ineffective assistance. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422.)

As appellant will further explain below, the erroneous admission of this evidence was not harmless beyond a reasonable doubt and he is entitled to have his conviction of this count reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. The Record Fails to Establish that Dr. Carrillo was Unavailable or that Appellant Had Had a Prior Opportunity to Cross-Examine Him

The record shows that on March 2, 2005, the prosecutor informed the court and counsel that the coroner he had intended to call that morning was unavailable because the coroner's wife had had a baby and that another coroner would be

available "in his place to testify off of the autopsy report" later in the day.[21] (7RT 1732-1733.)

Accordingly, Dr. Carrillo's unavailability was of a temporary nature, event-driven by the birth of a child and the prosecution's witness schedule. Although Dr. Carrillo was not available to testify on March 2nd, nothing in the record indicates that Dr. Carrillo would not be available to testify for the prosecution in the remaining days of trial.

Crawford held that the Sixth Amendment required that if the witness is unavailable, then, the defendant must have had a prior opportunity for cross-examination before the witness's testimonial statements may be admitted into evidence. Here, the record shows that Dr. Carrillo may have been temporarily unavailable, but fails to establish that Dr. Carrillo was unavailable for the remainder of the trial. The record also fails to establish that appellant had a prior opportunity to cross-examine Dr. Carrillo regarding Madrigal's autopsy. Instead, the record shows that the prosecution called Dr. Carrillo to testify about his autopsy of Madrigal's body at a grand jury proceeding held on November 25, 2002, before only 21 grand jurors, the trial prosecutor Mr. Darren Levine, and the grand jury's legal adviser Ms. Priver. No cross-examination of Dr. Carrillo took place. (1CT 7-11, 84-86.)

Thus, there was no adequate demonstration at trial that Dr. Carrillo was both unavailable to testify at trial or that the defense had a prior opportunity to cross-examine him on the subject of the Madrigal autopsy.

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[21] "Mr. Levine [the prosecutor]: . . . 'But also I had a problem – I was notified from the Coroner's Office that the coroner that was going to testify this morning, his wife had a baby. [] And they have to send a coroner in his place to testify off of the autopsy report and they won't be available until this afternoon.'" (7RT 1732:23-28, 1733:1-2.

C. *Bullcoming* and *Melendez-Diaz v. Massachusetts* Establish that the Results of the Forensic Autopsy Performed by Dr. Carrillo Are Testimonial Evidence and Together with *Crawford* and *Davis* Presents a Clear Iteration that the Confrontation Clause Does Not Permit the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second

In *Crawford*, the United States Supreme Court held that if the prosecution decides to introduce testimonial evidence, the Confrontation Clause guarantees the defendant the right to confront the declarant. (*Crawford, supra*, 541 U.S. at p. 68.)

The Court explained that the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence." (*Id.* at p. 61.) The Court stated that the Confrontation Clause ensures reliability through a procedural rather than a substantive guarantee. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent) but about how reliability can best be determined." (*Ibid.*)

In further expressions, the Court has repeatedly held that the prosecution violates a defendant's Confrontation Clause rights when it introduces a witness' testimonial statement through the in-court testimony of someone other than the maker or creator of the testimonial statement.[22]

In *Crawford*, in *Davis*, and in *Melendez-Diaz*, for example, the Court found confrontation violations in allowing police officers to testify to the testimonial statements others made in response to police questioning and in the admission of certificates containing forensic analysts' assertions regarding drug test results of substances found by police during their investigation. (*Crawford*,

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[22] See *Melendez-Diaz, supra*, 129 S.Ct. at p. 2552, Kennedy, J., dissenting, "The Court today . . . [holds] that anyone who makes a formal statement for the purpose of later prosecution – no matter how removed from the crime – must be considered a 'witness against' the defendant."

supra, 541 U.S. at p. 68; *Davis*, *supra*, 547 U.S. at p. 826; *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

In *Bullcoming*, the Court found a confrontation violation in allowing one scientist to testify to forensic laboratory results reached by another scientist in the same laboratory in procedures the surrogate witness had neither performed nor observed. (*Id.* at p. 2710) But for the forensic specialties involved, the salient facts underlying appellant's claim of error echo those of the defendant in *Bullcoming*.

The clear implication of these holdings is that, absent unavailability and the opportunity for prior cross-examination, the declarant must testify to his or her extrajudicial testimonial statements. (*Bullcoming*, at p. 2710; See *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, "The Court made it clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second. . . .")[23]

Other expressions by the Court lend credence to this assertion. For example, the Court has adhered to a literal reading of the constitutional text in formulating the principle that the Constitution ensures reliability of the evidence only through the procedural safeguard of confrontation. In keeping with that principle, *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, in which it had previously held that the Confrontation Clause did not bar testimonial statements that either fell within a firmly rooted hearsay exception or bore

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[23] Justice Kennedy supported this observation by quoting, and by making the bracketed annotations included here, from *Davis*: "[W]e do not think it conceivable that the protections of the *Confrontation Clause* can readily be evaded by having a note-taking policeman [here, the laboratory employee who signs the certificate] *recite* the unsworn hearsay testimony of the declarant [here, the analyst who performs the actual test], instead of having the declarant sign a deposition. Indeed, if there is one point for which no case – English or early American, state or federal – can be cited, that is it." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2546, Kennedy, J., dissenting, quoting from *Davis*, *supra*, 547 U.S. at p. 826.)

particularized guarantees of trustworthiness. The Court said: "Where testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment*'s protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (*Crawford*, *supra*, 541 U.S. at p. 61.)

Crawford further observed that where reliability is concerned, "replacing categorical constitutional guarantees [*viz.*, the cross-examination of the declarant prescribed by the Confrontation Clause] with open-ended balancing tests [*viz.*, assessing reliability through surrogate testimony]" does "violence" to the Framers' design because "[v]ague standards are manipulable." (*Crawford*, *supra*, 541 U.S. at pp. 67-68.)

Crawford continued:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from *Confrontation Clause* scrutiny altogether. **Where testimonial evidence is at issue, however, the *Sixth Amendment* demands what the common law required: unavailability and a prior opportunity for cross-examination.**

(*Crawford*, *supra*, 541 U.S. at p. 68; boldface emphasis added.)

Crawford concluded: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at pp. 68-69; boldface emphasis added.)

In *Davis*, the Court adhered once more to the principle that the Confrontation Clause ensures the reliability of testimonial evidence only through the guarantee of confrontation, by stating that the requirement of confrontation is compelled even in circumstances where precluding testimonial evidence results in a "windfall" for the criminal defendant. The Court rejected contentions that the Confrontation Clause should be construed to allow "greater flexibility in the use

of testimonial evidence" in domestic violence cases where the crime victims are more susceptible to coercion or intimidation and therefore more likely not to testify. The Court recognized that when the domestic violence victim does not testify the Confrontation Clause gives the criminal defendant a "windfall," but said: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.) Indeed, the Court explained it would only compromise the defendant's confrontation right, "on essentially equitable grounds" pursuant to the rule of forfeiture by wrongdoing, under the extraordinary circumstance when the defendant obtained the absence of a witness by wrongdoing. (*Ibid.* quoting from *Crawford*, *supra*, 541 U.S. at p. 62.)

In *Melendez-Diaz*, the Court repeatedly explained that it is the maker or creator of the testimonial statement the defendant is entitled to confront. In circumstances analogous to those in appellant's case, the Court explained it is the analyst who made the assertions in the report who must testify. For example, the Court expressly and specifically said the Confrontation Clause required that the defendant be able to confront the forensic analysts who performed the drug tests and whose testimonial statements were in issue.

> In short, under our decision in *Crawford* the **analysts'** affidavits were testimonial statements, and the **analysts** were "witnesses" for the purposes of the *Sixth Amendment*. Absent a showing that the **analysts** were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the **analysts** at trial. [Citation.]

(*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532; boldface emphasis added.)

In yet another demonstration that Confrontation Clause jurisprudence must adhere to the literal language of the constitutional text by compelling

confrontation,[24] the Court rejected the contention that analysts are not subject to confrontation because they do not directly accuse the defendant of wrongdoing. The Court reasoned that the analysts provided testimony against the petitioner by proving one fact necessary for his conviction – that the substance he possessed was cocaine. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2533.)

As part of this discussion, the Court explained that the Sixth Amendment contemplates two classes of witnesses – those against a defendant and those in his favor. The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to be confronted with witnesses "against him," and the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." The Court then spoke directly to the question in issue here: "Contrary to respondent's assertion [that the defendant is not entitled to confront the analysts themselves], there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." (*Id.* at p. 2534.)

Melendez-Diaz also rejected contentions that the analysts should not be subject to confrontation because forensic analysts are not "conventional" witnesses in that: (1) the analyst's report contains "near-contemporaneous observations," whereas a conventional witness recalls events observed in the past; (2) the analyst neither observed the crime nor any human action related to the crime; (3) the analyst's statements were not provided in response to interrogation. (*Id.* at pp. 2534-2535.)

In rejecting the first of these points – the notion that contemporaneous observations are a requisite for testimonial statements – the Court pointed out that its decision in *Davis* disproved the contention that contemporaneity of the

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[24] See criticism by the *Melendez-Diaz* dissent, Kennedy J., that the Court's adherence to the literal language of the constitutional text is "wooden" and "formalistic." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2547 ["the Court is driven by nothing more than a wooden application of the *Crawford* and *Davis* definition of 'testimonial. . . ."]; ["the formalistic and pointless nature of the Court's reading of the *Clause*"].)

reporting determined whether a statement is testimonial and its maker a witness within the meaning of the Confrontation Clause. In *Davis*, the domestic battery victim's report was so fresh the trial court admitted it as a present sense impression. (*Id. supra*, 129 S.Ct at p. 2535, citing *Davis*, *supra*, 547 U.S. at p. 820.)

The Court rejected the second point – that the forensic analyst was not a conventional witness because the analyst had neither observed the crime nor any human action connected with it – because the contention was patently unsupported by authority. The Court also reasoned that if the Confrontation Clause were held to exempt those who did not observe the crime or human action connected with it, the anticipated result would be that all expert witnesses would conceivably be exempted from confrontation and a police crime scene report would be admissible without the authoring police officer being subjected to cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.)

The Court rejected the third contention – that the forensic analysts should not be subjected to confrontation because their statements were not provided in response to interrogation – again on the ground the contention was unsupported by authority, but also because the analysts' affidavits before it were in fact, as was the autopsy report in appellant's case, prepared in response to a police request. The Court referred once more to its holding in *Davis* and pointed out that there it was the wife's affidavit regarding a domestic battery that was prepared in response to a police officer's request that triggered the Sixth Amendment's protection (*Davis*, *supra*, 547 U.S. at pp. 819-820). The Court analogized that circumstance to the circumstance in the case before it – where the analysts' affidavits were also prepared pursuant to a police request – and concluded that the analogous circumstances required that "the analysts' testimony should be subject to confrontation as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) In appellant's circumstance, Dr. Carrillo identified as the result of his autopsy findings a gunshot wound to the head as the cause of Madrigal's death

and characterized the death as a homicide, necessary elements in the investigation and eventual prosecution of appellant. The analogy to the circumstances in *Davis* and *Melendez-Diaz* is apparent.

The United States Supreme Court also demonstrated its adherence to the literal language of the constitutional text in rejecting contentions that essentially sought to guarantee the reliability of testimonial evidence produced by forensic laboratory analysts by means other than confrontation. *Melendez-Diaz* considered and systematically rejected arguments claiming that the scientific nature of the work of forensic analysts should cause them to be exempt from the requirements of the Confrontation Clause.

In this way, the Court rejected the contention that the Confrontation Clause should be construed to exempt "neutral, scientific testing," which, unlike testimony recounting historical events, is not "prone to distortion or manipulation," and the related contention that confrontation of forensic analysts would be of little value because the analyst is not likely to feel differently about the results of his testing when looking at the defendant. In the Court's view, these contentions harkened back to the rationale of *Roberts*, which the Court had overruled, and *Roberts*' reliance on indicia of trustworthiness. The Court reiterated the language it had set forth in *Crawford* – stating that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536, quoting *Crawford*, *supra*, 541 U.S. at pp. 61-62.)

Again demonstrating its adherence to the constitutional text, the Court stated that while there may be better or more effective ways to challenge the results of forensic testing, the Confrontation Clause guaranteed only one way: confrontation. The Court then echoed its statement in *Davis* when it rejected arguments that domestic violence victims should be exempted from the

confrontation requirement of the Confrontation Clause[25]: "We do not have license to suspend the *Confrontation Clause* when a preferable trial strategy is available." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

The Court explained that confrontation is required because "[f]orensic evidence is not uniquely immune from the risk of manipulation," and pointed to publications citing examples of convictions based on discredited forensic evidence. The Court noted that "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2537.) As part of this discussion, the Court dispensed with a dissent suggestion that the majority had relied on the published data in resolving the constitutional question before it with this simply stated, straightforward comment: "The analysts who swore the affidavits provided testimony against Melendez-Diaz, and they are therefore subject to confrontation. . . ." (*Id. supra*, 129 S.Ct. at p. 2537 fn. 6.)

The Court also demonstrated its adherence to the literal language of the constitutional text by rejecting the following contentions intended to admit the analysts' testimonial statements through substituted or surrogate means.

Melendez-Diaz rejected the contention that the analysts' affidavits satisfied the confrontation requirement because they were the equivalent of "official and business records admissible at common law." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.) The Court found that the forensic analysts' affidavits did not qualify as traditional official or business records because the regular course of the business was the production of evidence for use at trial, but also said that even if

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[25] In *Davis*, the Court acknowledged that when the Confrontation Clause operates to bar testimonial statements of domestic violence victims who do not testify the Confrontation Clause gives criminal defendants a "windfall." As appellant discussed above, the Court adhered to the literal guarantee of the Confrontation Clause and explained: "We may not, however, vitiate constitutional guarantees when they have the effect of allowing the guilty to go free." (*Davis*, *supra*, 547 U.S. at p. 833.)

the affidavits did qualify for admission as a business record, their authors would still be subject to confrontation. (*Ibid.*) The Court made it clear in the following elaboration that it was the analysts' role as creators of the testimonial evidence that subjected them to confrontation:

Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here – prepared specifically for use at petitioner's trial – were testimony against petitioner, and the analysts were subject to confrontation under the *Sixth Amendment*. (*Melendez-Diaz, supra*, 129 S.Ct. at pp. 2539-2540.)

As part of this discussion concerning business and official records, the Court considered the dissent's reliance on a class of evidence – a clerk's certificate authenticating an official record – that was both produced for use at trial and traditionally admissible. The Court noted that the clerk could by affidavit authenticate a copy of an otherwise admissible record, but the clerk "could not do what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant." (*Id.* at pp. 2538-2539, fn. omitted.)

This distinction drawn by the Court is particularly illuminating with regard to the issue of surrogate testimony discussed in this argument. The clerk in the illustration above was by way of affidavit able to authenticate an otherwise admissible document, but the clerk was not able to create it. In much the same way, a deputy medical examiner may be able to authenticate the procedures followed in the forensic protocol of an autopsy performed by another deputy medical examiner, but he or she can never be the creator of the testimonial evidence prepared by another.

Melendez-Diaz also rejected the contention that a defendant's ability to subpoena the analysts is a substitute for the right of confrontation. In addition to

shifting the burden of adverse witnesses who do not appear to the defense, the Court reiterated once more the premise and promise of the Confrontation Clause:

More fundamentally, the *Confrontation Clause* imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2540.)

Finally, the Court rejected a request that the requirements of the Confrontation Clause be relaxed to accommodate the needs of the judicial process. "The Confrontation *Clause* – like ["the right to trial by jury and the privilege against self-incrimination"] – is binding, and we may not disregard it at our convenience." (*Id.* at pp. 2541; see similar judicial declarations discussed above, from *Davis*, *supra*, 547 U.S. at p. 833; and from *Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2536.)

The Court reinforced its adherence to the principles set forth above in *Bullcoming*, in which the defendant's blood was drawn pursuant to warrant after he refused to take a breath test following his arrest for driving under the influence. The police sent the sample to the Scientific Laboratory Division of the New Mexico Department of Health to determine the defendant's blood-alcohol concentration. (*Bullcoming*, *supra*, at p. 2710) At trial, the State did not call Curtis Caylor, the analyst who performed the tests who, according to the prosecution, had recently been put on unpaid leave. Instead, the prosecution called Gerasimos Razatos, an analyst who was familiar with the laboratory's testing procedures, but who had neither participated in nor observed the test on the defendant's sample. (*Bullcoming*, *supra*, at p. 27120)

On review, New Mexico's Supreme Court concluded in light of *Melendez-Diaz* that the blood-alcohol analysis was "testimonial," but that the Confrontation Clause did not require the in-court testimony of the scientist who performed the

analysis for two reasons. First, the New Mexico court said the analyst who performed the testing was a "mere scrivener" who "simply transcribed the results generated by the gas chromatograph machine. [Citation.]" Second, the New Mexico court found the surrogate witness qualified as an expert witness on the gas chromatograph machine and thus was available for cross-examination regarding its operation. (*Bullcoming*, *supra*, at p. 2713)

On certiorari to the United States Supreme Court, New Mexico contended that surrogate testimony adequately satisfied the Confrontation Clause because the "true accuser" was the gas chromatograph machine and not the testing scientist who simply transcribed the results produced by the machine and, alternatively, that the forensic report was nontestimonial and therefore not subject to the Confrontation Clause. (*Bullcoming*, *supra*, at p. 2714)

Bullcoming pointed to representations in Caylor's report concerning the particular test and testing process he employed – foundational issues surrounding the blood sample testing, the particular testing done, and the precise protocol followed – that involved more than machine-generated numbers. (*Bullcoming*, *supra*, at p. 2714) Further, *Bullcoming* noted that the "comparative reliability of an analyst's testimonial report drawn from machine-produced data" is not constitutionally adequate because the Confrontation Clause commands that reliability be tested in the "crucible of cross-examination." (*Bullcoming*, *supra*, at p. 2714)

The Court observed that surrogate testimony could never convey what Caylor knew or observed about the particular test and testing process he employed. Lapses or lies on the part of the certifying analyst would not be reachable through the testimony of a surrogate. Caylor had been placed on unpaid leave, but Razatos had no knowledge regarding why that had been done, and defense counsel was precluded from asking questions designed to reveal whether incompetence or dishonesty was the reason for Caylor's removal. (*Bullcoming*, *supra*, at p. 2715)

Bullcoming concluded: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming*, *supra*, at p. 2716)

Finally, *Bullcoming* concluded that the laboratory report in its case resembled those in *Melendez-Diaz* in all material respects and so were testimonial statements for the reasons the reports in *Melendez-Diaz* were testimonial statements. In *Melendez-Diaz* and in *Bullcoming*, police provided seized evidence to a police-related laboratory for testing related to a police investigation. The analysts in both cases tested the materials and prepared certificates reporting the results of their testing. The certificates were "formalized" in a signed document and the absence of a notarization from the New Mexico certificate did not remove that certificate from Confrontation Clause governance. *Bullcoming* concluded that the certificate in issue before it fell within the "core class of testimonial statements," described in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming*, *supra*, at p. 2717)

The foregoing discussion shows that the United States Supreme Court has consistently rejected any and all contentions that would compromise or dilute the guarantee of the Confrontation Clause that reliability of the evidence is assessed only through confrontation. The Court's recognition in *Bullcoming* that when New Mexico elected to introduce the results of Caylor's testing, Caylor became the witness that the defendant had the right to confront is consistent with the precedent established in *Melendez-Diaz*, *Davis*, and *Crawford*. (*Bullcoming*, *supra*, at p. 2715) The Court's express statement in *Melendez-Diaz* that the Confrontation Clause required that the forensic analysts testify[26] and the Court's

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consistent adherence to the principle that confrontation is the only method of assessing reliability of the evidence lead inescapably to the conclusion that appellant was denied his right of confrontation under the Sixth Amendment when Dr. Scheinin testified to the results of the autopsy performed by Dr. Carrillo.

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D. Permitting the Testimonial Statement of One Witness to Enter into Evidence through the In-Court Testimony of a Second Thwarts All Four Elements of Confrontation Identified in *Maryland v. Craig*

In *Maryland v. Craig*, *supra*, the Supreme Court identified the "elements of confrontation" to be (1) "cross-examination"; (2) the giving of testimony under

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examine them, petitioner was entitled to ""be confronted with"" the analysts at trial. (*Crawford*, *supra*, 541 U.S. at p. 54.)" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

[27] The Court stated: "In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the *Sixth Amendment*. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be ""be confronted with"" the analysts at trial. (*Crawford*, *supra*, 541 U.S. at p. 54.)" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2532.)

oath; (3) "observation of [the declarant's] demeanor by the trier of fact"; and (4) "physical presence" of the defendant during the witness's testimony. (*Maryland v. Craig*, *supra*, 497 U.S. at p. 846.)

Cross-examination enables the defendant to "test the recollection of the witness" and to inquire into the circumstances underlying any of his prior recorded recollections introduced into evidence. (*Dowdell v. United States* (1911) 221 U.S. 325, 330.) A surrogate would not be able to testify to the recollection of a declarant. Here, for example, because Dr. Carrillo's findings were allowed into evidence through the testimony of Dr. Scheinin, the defense was unable to test the accuracy of Dr. Carrillo's written autopsy findings regarding, for example, the accuracy of his diagrams, or by reference to his testimony to the grand jury. In another example, Dr. Scheinin observed, when questioned about the age of the wound to the knee, that Dr. Carrillo had not made a specific notation about the wound's age, but then proceeded to offer her own opinion of the wound's age based on what Dr. Carrillo had written and what he had omitted to say about the wound. (7RT 1745.)

Cross-examination promotes truthful testimony at trial by allowing the defendant to "sift[] the conscience of the witness" testifying against him for the truth. (*Mattox v. United States* (1895) 156 U.S. 237, 242.) In addition, before trial, the prospect of facing cross-examination deters witnesses from making false testimonial statements. Allowing surrogate witnesses to testify to the declarant's testimonial statements eviscerates the deterrent effect of cross-examination by shielding the declarant from cross-examination.

Cross-examination allows the defendant to "force the declarant to clarify ambiguous phrases and coded references," in prior statements by the declarant the prosecution wishes to introduce into evidence. It allows the defendant to seek clarification of any "inconsisten[cies]" between the prior statements and the witness's in-court testimony. (*United States v. Inadi* (1986) 475 U.S. 387, 407 (Marshall, J., dissenting.) Here, again, Dr. Scheinin's efforts to attest to the

accuracy of Dr. Carrillo's diagrams or to testify to the age of the knee wound by supplementing Dr. Carrillo's descriptions with her own opinion testimony illustrate the point that the use of a surrogate thwarts the truth-finding purpose of cross-examination.

Cross-examination enables a defendant to attack the credibility of a witness by probing into his personal history, experience, sensory perceptions, motives. (See *Davis v. Alaska* (1974) 415 U.S. 308, 316.) Information of this nature, affecting a declarant's job performance or history of substance abuse, is not information typically known to a surrogate witness.

The Confrontation Clause requires witnesses to provide their testimony under oath, "impressing [them] with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." (*Maryland v. Craig*, *supra*, 497 U.S. at pp. 845-846.) The Supreme Court has made clear that while a "trial by sworn *ex parte* affidavit" is offensive to the Confrontation Clause, a system of "trial by *unsworn ex parte* affidavit" would be worse. (*Crawford*, *supra*, 541 U.S. at pp. 52-53 fn. 3; accord *Davis*, *supra*, 547 U.S. at p. 826.)

Confrontation of the declarant ensures that the jury has the chance to observe the witness who made the testimonial statement and to "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox*, *supra*, 156 U.S. at pp. 242-243.) Here, when Dr. Scheinin testified in place of Dr. Carrillo, it was Dr. Scheinin whose qualifications and credentials the jury heard and Dr. Scheinin the jury listened to and observed. It is therefore reasonable to expect that it was Dr. Scheinin's credibility the jury likely assigned to the testimonial statements actually made by Dr. Carrillo.

Confrontation traditionally guarantees a "face-to-face encounter between witness and accused." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1017.) "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" (*Ibid.*

quoting *Pointer v. Texas* (1965) 380 U.S. 400, 404.) The employment of a surrogate witness eliminates the face-to-face encounter between the defendant and the declarant and deprives the defendant of the opportunity to have the negligent or careless or intentionally malperforming declarant realize the import of his testimonial statements. A system that requires a face-to-face encounter between the witness who made the testimonial statement and a defendant facing death, as in this case, helps ensure that the declarant fully realizes the import of his testimony.

Moreover, the use of a surrogate witness, even an expert surrogate witness, is no more than an attempt to establish the reliability of the testimonial evidence, as *Bullcoming* recognized. As that Court stated: "[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Bullcoming*, *supra*, at p. 2716)

E. The Erroneous Admission of Dr. Carrillo's Testimonial Statements through the In-Court Testimony of Dr. Scheinin Was Not Harmless beyond a Reasonable Doubt

Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall*, *supra*, at p. 681.) The harmless error inquiry asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.)

The autopsy evidence, particularly evidence that Madrigal suffered a fatal gunshot wound to the head, was important to the prosecution's proof of an

intentional premeditated murder because the prosecutor argued that appellant and Amezcua stalked Madrigal and Gutierrez and that appellant confessed that he shot Madrigal by stating in the audio taped interview, "I domed him." (13RT 2873.) The jury was required to find proof of the corpus delicti independent of a defendant's admissions or confessions, as the court properly instructed it. (*People v. Beagle* (1972) 6 Cal.3d 441, 455; CALJIC No. 2.72; 17CT 4513.) The forensic autopsy evidence pertaining to Madrigal provided the necessary proof.

The admission of the autopsy evidence thus cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

F. Appellant's Claim of Error Was Not Procedurally Defaulted because Counsel Rendered Ineffective Assistance in Failing to Object to the Confrontation Clause Violation

In anticipation of respondent's claim that appellant's failure to object to Dr. Scheinin's testimony regarding the results of an autopsy she did not herself perform renders appellant's claim procedurally defaulted for appeal purposes, appellant here claims that trial counsel rendered ineffective assistance in failing to object to that testimony on Sixth Amendment grounds.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Malone* (1988) 47 Cal.3d 1, 33.) To prevail on his claim, appellant must establish that counsel's representation fell below an objective standard of reasonableness and that he consequently suffered prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.)

Tactical errors are generally not deemed reversible and counsel's decision-making must be evaluated in the context of the available facts. (*Id.* at p. 690.) The reviewing court will affirm the judgment to the extent the record on appeal

fails to disclose why counsel acted or failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Further, prejudice must be affirmatively proved. The record must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra,* 466 U.S. at p. 694; *People v. Maury* (2003) 30 Cal.4th 342, 389.)

In appellant's case, there can be no satisfactory explanation for counsel's failure to recognize and state a Confrontation Clause violation in the prosecution's attempt to have Dr. Scheinin testify to the results of an autopsy she did not perform. The United States Supreme Court issued its opinion in *Crawford* in 2004. Appellant's trial was held in 2005. *Crawford* by then had been recognized as a significant case in recent criminal defense jurisprudence. (See, e.g., *People v. Pantoja* (2004) 122 Cal.App.4th 1, 9, in which *Crawford* is described as "what may fairly be characterized as a revolutionary decision in the law of evidence.")

A standard of reasonable competence requires defense counsel to diligently investigate the case and research the law. (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212-1213; *cf., People v. Pope, supra,* 23 Cal.3d at p. 425.) There can be no dispute that *Crawford* is an important case in Confrontation Clause jurisprudence and, in particular, to the defense bar. Counsel failed to object to the admission of autopsy results and thus to the admission of evidence regarding gunshot wounds, including the trajectory and age of wounds, cause of death, and the assignment of death as a homicide, all indisputably a critical part of the prosecution's case. The failure clearly fell

below a standard of reasonable competence. (*People v. Thimmes*, *supra*, 138 Cal.App.4th at pp. 1212-1213.)

Appellant has addressed in the preceding section the remaining question of whether counsel's performance was prejudicial. The prosecution used evidence of the autopsy results as "science," as objective "corroboration" in arguing appellant was guilty of premeditated murder. The admission of the autopsy evidence cannot be said to have been harmless beyond a reasonable doubt with regard to proving that Madrigal's death was a premeditated murder. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

VI.

THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW WHEN HE INVITED THE JURY TO DEPART FROM THEIR DUTY TO VIEW THE EVIDENCE OBJECTIVELY AND INSTEAD TO VIEW THE CASE THROUGH THE EYES OF THE VICTIMS

During his guilt phase argument, the prosecutor invited the jury to "remember what it must have been like to be one of their victims." (13RT 2862:3-4.) His argument was an appeal to the jurors to permit sympathy for the victim to influence their verdict and, as such, constituted misconduct and a violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, in particular to his right to a fair trial and due process of law.

A. The Prosecutor's Invitation to View the Case through the Eyes of the Victims Was an Improper Appeal to Use Sympathy for the Victims in Deciding the Case

The closing argument made by the prosecutor at the guilt phase was peppered with appeals to emotion and passion that were divorced from the inquiry to a guilt phase trial where the concern is whether or not the defendants committed the acts with which they were charged.

Starting out by calling the defendants "cold-blooded killers," he continued, saying, "They shattered people's lives. They shattered people's bodies. They shattered people's bones. They shot them up to bits. Killer, hardcore gang members, predators, predators who describe their killing as having fun, as having so much fun out there. (13RT 2857.)

The prosecutor then urged the jury to send the defendant a message that although they may enjoy killing, it is not their world, and the jury could "do justice" by convicting for "this nonsense, to this trail of violence, to this senseless brutal violence.." The prosecutor later repeated his call to the jury "to do justice." (13RT 2858-2859.)

In describing the motives of the crimes, the prosecutor twice called the defendants "evil." (13 RT 2860.)

Later, the prosecutor told the jury of his concern that they the jurors would be benumbed by the evidence of so many murders.

> My concern, and I will just tell you right now here my concern is okay, you see one murder. You look at that, wow. You see two murders, wow. [¶] Three, wow. [¶] Four, then the fifth murder you see and you start to think, wow, people really do this. This isn't a movie. This is not a movie. This is not a television show, but what worries me is over time, you can get what? More pictures you look at it, the more you can get numb to it.

(13RT 2861.)

The prosecutor reminded the jurors they had promised to do their best and exhorted them to "remember what justice is." (13RT 2862.)

The prosecutor continued:

> "Remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs. what it must be like to be one of those people. [¶] That's what this case is about. The infliction of that kind of pain and cold hearted killing for what?"

(13RT 2862:2-9.)

Later, in his argument, the prosecutor turned to Amezcua'a actions on the Santa Monica Pier and, specifically, to the assault with a firearm involving Jing Huali (count 27). The prosecutor argued:

> "What do we know? Jing Huali, while she was laying down, the defendant shot her. An assault with a firearm. I point a loaded gun at your head, the assault is complete. That's it; it's done. You do not have to fire. [¶] I put my left arm around and I put a gun to your head, a loaded gun, completed, done, proven. I bet you would feel assaulted if someone had a loaded gun pointed at your head. [¶] She was shot."

(13RT 2894:28-2895:9.)

Later, when Mr. Levine discussed the Reyes how showed the jury a picture, saying, "That's not even the most gruesome picture… This is not even the worst picture I can show you." (13 RT 2884.)

Finally, he returned to the death or Reyes, repeating the theme of Reyes "[c]hoking on his blood" (13 RT 2885.)

B. It Has Long Been Settled That Appeals to the Sympathy or Passions or Fears of the Jury Are Inappropriate at the Guilt Phase of a Trial

Misconduct by a prosecutor may deprive a criminal defendant of the guarantee of fundamental fairness and thereby violate the Due Process Clause of the Fifth and Fourteenth Amendments. (*Darden v. Wainwright* (1986) 477 U.S. 168, 178-179; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) "Fundamental fairness" is the essence of the due process protection provided by the Constitution. (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564.) Misconduct by a prosecutor may also violate a defendant's right to a reliable determination of penalty under the Eighth Amendment. (*Darden v. Wainwright, supra,* 477 U.S., at pp. 178-179.)

In particular, the United States Supreme Court has warned against unfair and cynical emotional appeals, stating that a defendant is deprived of the right to a fair trial by the arguments of a prosecutor who "indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." (*Viereck v. United States* (1943) 318 U.S. 236, 247.) The universally recognized rule that appeals to sympathy are a form of misconduct has been referred to by one authority as the "paradigm" of prosecutorial misconduct. (Lawless, *Prosecutorial Misconduct* (4d ed. 2008, § p. 9.21; see also *Drayden v. White*, 232 F.3d 704 (9th Cir. 2000); *United States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1443

In addition, under California law a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct even if such action does not render the trial fundamentally unfair. (*People v. Earp* (1999) 20 Cal.4th 826, 858; *People v. (1992) 3 Cal.4th 806(1992) 3 Cal.4th 806* (1992) 3 Cal.4th 806, 820; *People v. Hill, supra,* 17 Cal. 4th at p. 819; *People v. Berryman* (1993) 6 Cal. 4th 1048, 1072 (*Berryman*); *People v. Price* (1991) 1 Cal. 4th 324, 447 (*Price*).)

The role of a prosecutor is not simply to obtain convictions but to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (*People v. Andrews* (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to a standard higher than that imposed on other attorneys because he or she exercises the sovereign powers of the state. (*People v. Hill* (1997) 17 Cal.4th 800, 819; *People v. Espinoza, supra,* 3 Cal.4th 806, 820.) "Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve." (*Id.* at p. 820.)

As the United States Supreme Court has explained:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

California law is in accord with *Berger*.

> The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.

(*People* v. *Hill* (1998) 17 Cal.4th 800, 819, internal quotation marks omitted; *People* v. *Gionis* (1995) 9 Cal.4th 1196, 1214; *People* v. *Espinoza*, *supra*, 3 Cal.4th 806, 820.)

Furthermore, it should be noted that there is no requirement that misconduct by a prosecutor be intentional or in bad faith before it can constitute reversible error, as the injury for the defendant occurs regardless of the prosecutor's intent. (*People* v. *Bolton* (1979) 23 Cal. 3d 208, 213-214.)

> It is idle for us to speculate whether the prosecutor's conduct resulted from ignorance of the law and his official duties, or was a `dishonest act or an attempt to persuade the court or jury, by use of deceptive or reprehensible methods.' Under either circumstances the unfair trial and the resultant conviction and punishment of the accused is an outrage and the insult to our system of criminal justice..."

People v. *Rodgers* (1979) 90 Cal App. 3d 368 at 372, quoted in *People* v. *Pitts* (1990) 223 Cal.App.3d 606.)

The trial court, and not the defense attorney, has the primary duty to curb prosecutorial misconduct. (Penal Code, § 1044.) "Fewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint." (*People* v. *Rodgers* (1980) 90 Cal.App.3d 368, 373.)

Accordingly, while appellant's counsel did not object to each and every instance of misconduct made by the prosecutor, this does not preclude this court from considering the issue of prosecutorial misconduct in all of the forms in which it occurred. "Failure to request the jury be admonished does not forfeit the issue for appeal if 'an admonition would not have cured the harm caused by the

misconduct.'" (*People v. Hill, supra*, 17 Cal.4th, at p. 820; *People v. Bradford, supra*,15 Cal.4th, at p. 1333.) Indeed, several Courts have held that a prosecutor's remarks which inflame the passions and prejudices of the jury constitute the sort of misconduct that is not curable by admonition, thus eliminating the need for defense objection in the first place to preserve the issue for appeal. (See, e.g. *People* v. *McGreen* (1980) 107 Cal. App. 3d 504, 519; *People* v. *Wagner* (1975) 13 Cal. 3d 612, 621; *People* v. *Un Dong* (1895) 106 Cal. 83, 88; *People* v. *Duvernay* (1941) 43 Cal.App.2d 823, 828.)

In this case, the prosecutor repeatedly invited the jurors to imagine themselves in the shoes of the victims. This is a form of misconduct that this court has repeatedly condemned. For example, in *People v. Pensinger* (1991) 52 Cal.3d 1210, the jury convicted the defendant of kidnapping a five-month-old baby and her five-year-old brother and of beating, mutilating, and murdering the younger child. During closing argument, the prosecutor said to the jurors: "Suppose instead of being Vickie Melander's kid this had happened to one of your children." The Supreme Court condemned the argument: "Such appeals to the sympathy or passion of the jury are misconduct at the guilt phase of trial." (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250; citing *People v. Fields* (1983) 35 Cal.3d 329, 362-363.)

In *Fields*, the prosecutor described the murder to the jurors from the victim's perspective, including:

> "Now, think of yourself as Rosemary [C.]. A young librarian from the University of Southern California; a quiet girl, not outgoing. You haven't been seen with a boyfriend. You take the bus to work. You are either a virgin, or you have had very minimal sexual activity in your lifetime. . . . [¶] [The] defendant demands that you write him out a check payable to his sister, Gail Fields. The defendant threatens to kill you unless you give him the money. You are now naked and tied to the bed rails of the defendant's bed. You are forced to write several checks. The defendant looks at your checkbook and figures out certain amounts of money on paper. You finally write out a check to Gail Fields for $ 222.81. . . . [¶]

> The defendant directs Gail to drive onto the Santa Monica Freeway, and all of a sudden the defendant shoots you on the side and you yell, 'Oh, God.' You hear Gail beg the defendant not to shoot you again, and the defendant shoots you again. . . . [¶] Do you wonder about heaven, about God? You know there is no escape. The defendant shoots you more times. He states that you are not dead, and he has to make sure you are dead, and he hits you with an object on your head leaving triangular marks, probably the gun. And there are now four lacerations on your head. And it takes 10 or 15 minutes for you to die. Blood meanwhile spatters on your face." (*People v. Fields*, *supra*, 35 Cal. 3d at pp. 361-362.)

This Court determined that the district attorney's argument was improper. "The prosecutor invited the jury to depart from their duty to view the evidence objectively, and instead to view the case through the eyes of the victim. His argument was an appeal to the jurors to permit sympathy for the victim to influence their verdict." (*Id.*, at p. 362.) *Fields* acknowledged that a prosecutor has the right to vigorously argue his case, but stated "the bounds of vigorous argument do not permit appeals to sympathy or passion such as that presented here." (*Id.*, at p. 363.)

In *People v. Stansbury* (1993) 4 Cal.4th 1017, this court found prosecutorial misconduct in the following argument: "Under what we are dealing with here, we are dealing with a 10-year old child who was taken from her home, taken to a place she had never been, experiencing things she had no idea how to deal with. [¶] She was degraded, violated, raped, evidence of oral sex. [¶] Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator." (*Id.*, at p. 1057.) Once again, this Court reiterated that a prosecutor's appeal for sympathy for the victim is improper when the jury is obligated to make an objective determination of guilt. (*Ibid.*)

In *People v. Leonard* (2007) 40 Cal.4th 1370, this Court found prosecutorial misconduct in the following improper appeal to the jurors' passions and fears during closing argument: "You know, Ms. Lange talk [sic] about in connection with the Round Table Pizza, imagine yourself, put yourself there. I ask you to put yourself there, also. [¶] Imagine in that last millisecond before the lights go out, when you hear the report of the gun, when you feel the wetness, which they do not know but we would know, the small vapor of blood that is blown out the back or the side of their head and they fall to the floor, and in their last moment of consciousness, they think, I misjudged this man." (*Id.*, at p. 1407.)

Here, the prosecutor's remarks are no less graphic and objectionable than the remarks illustrated above that this Court has determined to be improper. The prosecutor invited the jurors to imagine themselves as one of appellant's victims – being shot and choking on one's own blood and trying to get a last breath while blood is gurgling in one's lungs. The prosecutor also asked the jurors to imagine the experience of Jing Huali, of being encircled and held with a loaded gun to the head.

As the foregoing authorities demonstrate, a prosecutor may not appeal to the jury's sympathy or passions or fears by viewing the crimes through the experiences of the victim. In making the arguments challenged above, the prosecutor improperly argued the case and committed egregious misconduct.

In addition, the prosecutor committed a number of other forms of misconduct during his argument. In particular, the prosecutor resorted to disparagement and name-calling, referring to the defendants as "predators" and "evil." (13RT 2857, 2860.) It is misconduct for a prosecutor to conduct a personal attack on the defendant, or to make remarks in argument which have "no apparent purpose other than to degrade" appellant before the jury. (See *People v. Ortiz* (1979) 95 Cal.App.3d 926, 935 [prosecution disparagement of defendant comparing him to members of a cult practicing animal sacrifice].) Although a

prosecutor may argue vigorously and may even make use of opprobrious epithets directed at the defendant, those epithets must be reasonably warranted by the evidence. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.) The prosecutor's used of inflammatory disparagement was improper and deprived appellant of a fair trial.

C. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law; Trial Counsel Failed to Provide Effective Legal Assistance When Counsel Failed to Timely Object to the Argument

As noted above, a prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct. Such actions require reversal under the federal Constitution when they infect the trial with such unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) As also noted, under state law a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 606; *People v. Hoyos* (2007) 41 Cal.4th 872, 923; *People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

1. Trial Counsel Failed to Provide Effective Legal Assistance Guaranteed by the Sixth Amendment to the Federal Constitution When Counsel Failed to Timely Object to the Argument

Although appellant contends that no objection was required in order to preserve the prosecutor's misconduct for review (*People v. Hill, supra*, 17 Cal.4th, at p. 820; *People v. Bradford, supra*, 15 Cal.4th, at p. 1333), in order to ensure that the claim is preserved for federal review, he submits in the alternative that if this court should find the error waived due to counsel's lack of objection, that waiver constituted ineffective assistance of counsel.

Trial counsel failed to make timely objections to the prosecutor's arguments challenged here. This court has sometimes held that "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety." (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Appellant recognizes that claims of ineffective assistance are more properly raised in habeas corpus proceedings so that factual development, including counsel's explanation for his asserted error or omission, can occur. (*People v. Pope* (1979) 23 Cal.3d 412, 422.)[28] Here, however, there can be no satisfactory explanation for counsel's failure to timely object. Counsel failed to provide effective legal assistance guaranteed by the Sixth Amendment to the Federal Constitution, and this Court may reach appellant's claim of error. (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

In order to establish a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) If the record sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Pope*, *supra*, 23 Cal.3d at p. 426.) If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a reasonable probability that, but for counsel's unprofessional

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[28] Because appellant's counsel is appointed for the direct appeal only, he respectfully reserves the rights of appellant's as-yet unappointed habeas corpus counsel to raise this claim again on habeas corpus in the event that additional factual development substantially alters the record.

errors, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at p. 694; *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

In the instant case, appellant has shown that the prosecutor specifically asked the jurors to view the case through the victims' eyes and that this Court has repeatedly recognized that such an appeal constitutes misconduct because to do so appeals to the jury's sympathy or passions or fears. (See *People v. Lopez* (2008) 42 Cal.4th 960, 969-970.)

There can be no satisfactory explanation for counsel's failure to object to the prosecutor's invitation to the jury to substitute an appeal for sympathy for the victims in place of an objective determination of guilt. (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.) There was no tactical advantage to the defense to have the jurors view the case from the perspective of victims of the charged murders and assaults. The prosecutor's comments were not reasonable inferences to be drawn from the evidence (*cf., People v. Dennis* (1998) 17 Cal.4th 468, 522). The prosecutor's comments were not premised in appropriate hypotheticals (*cf.*, *People v. Lopez*, *supra*, 42 Cal.4th at p. 970), nor were they made as part of a reasoned rebuttal to a defense argument (*cf.*, *People v. Leonard*, *supra*, 40 Cal.4th at p. 1406.) The arguments challenged here constituted an open invitation to the jurors to substitute emotions for objectivity in reaching guilt phase verdicts, a tactic this Court has characterized as reprehensible misconduct and to which trial counsel should have objected.

2. The Improper Argument Denied Appellant a Fair Trial and Due Process of Law

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] In other words, the misconduct must be of sufficient significance to result in the denial of the

defendant's right to a fair trial. [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.]" (*People v. Clark* (2011) 52 Cal. 4th 856, 960-961.)

"When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another point in *People v. Hill* [(1998)] 17 Cal.4th 800, 822-823; accord, *People v. Clair* (1992) 2 Cal.4th 629, 663.) Moreover, prosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' (*People v. Dennis* [(1998)] 17 Cal.4th 468, 522.)" (*People v. Cole* (2004) 33 Cal. 4th 1158, 1202-1203.)

Here, the prosecutor's invitation to the jury to decide appellant's guilt of the charged crimes on the basis of sympathy, fear, and passions in lieu of a reasonable objectiveness was "of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108.) When the prosecutor invited the jurors to "remember what it must have been like to be one of their victims being shot and choking and trying to get your last breath out while your blood is gurgling in your lungs" (13RT 2862:3-6), the prosecutor was not drawing reasonable inferences from the evidence at trial. Instead, he was trying to incite the jurors' passions against appellant.

While the prosecutor's misconduct was not repeated frequently during his argument, it was devastating in its impact because the prosecutor asked the jurors to remember the experiences of *all* of the victims. As a result, the improper argument affected the outcome of all of the charged assaultive crimes. Moreover, the particularly graphic nature of the prosecutor's argument exacerbated the

prejudicial effect. It provided a personal and bloody overlay to the prosecution's case. The prosecutor's first appeal to passion and prejudice in asking the jury to put themselves in the place of the victims particularly egregious, but the second appeal, asking the jurors to imagine what it was like for Jang Guali to have a gun pointed at her head (13RT 2894:28-2895:9; emphasis added), was also prejudicial to appellant inasmuch as appellant was not even involved in that incident at the time it occurred. Appellant was already in custody at the time of Amezcua's hostage-taking in the arcade, and the prosecutor's argument pertaining to that incident thus not only improperly appealed to the passions and prejudices of the jurors, but also improperly invited the jurors to misdirect its passions against Amezcua toward appellant.

The prosecutor's argument was directed at eliciting an emotional response to, rather than an objective evaluation of, the evidence, and misdirected the jury's attention from its important function of properly assessing appellant's guilt or innocence of the charged crimes based on relevant evidence of his conduct and mental state. It instead caused the jurors to focus instead on irrelevant evidence of the victim's pain and fear, matters which are highly improper considerations for jurors at the guilt phase. The improper argument was thus of sufficient significance to deny appellant a fair trial.

The prosecutor's argument also violated California law because it involved the use of reprehensible methods to attempt to persuade the jury. (*People v. Strickland* (1995) 11 Cal.3d 946, 955; accord, *People v. Farnam* (2002) 28 Cal.4th 107, 167.) As discussed above, it is well settled that a prosecutor commits misconduct when he invites the jury to substitute its sympathy, fears, or passions in lieu of an objective determination of guilt. (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1250; *People v. Fields* (1983) 35 Cal.3d 329, 362-363.)

The prosecutor's comments were intentionally framed to encompass all the assaultive crimes and denied appellant a fair trial. Reversal is required.

VII

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE AND IN SO DOING VIOLATED THE EIGHTH AMENDMENT'S GUARANTEE OF A CAPITAL JURY SUITABLY INSTRUCTED TO AVOID AN ARBITRARY AND CAPRICIOUS DEATH VERDICT

A. Background

The trial court instructed the prospective jurors that death was a more severe punishment than life without the possibility of parole.

> [¶] The law says life without parole is a lesser sentence. It's less serious than death. Many of you said [in questionnaire responses], My God, I'd rather be dead than spend my life in prison. I'm telling you, the law that you have sworn to follow says, No, you cannot consider that. That may be your personal feeling. But you must agree to follow the law and the law says life without parole is a lesser punishment to death.[29]

(5RT 1305:26-1306:5.)

Counsel for appellant, joined by counsel for Amezcua, objected to the court's instruction, noting that even if the jury were to find the aggravating factors substantially outweighed the mitigating factors, the law still allowed the jury to find that death was not the appropriate penalty, which, in counsel's view, suggested that the law did not consider death to be the worse penalty. (5RT 1311:15-18, 1312.)

> [¶] Suppose if the reason they don't think it [the death penalty] is appropriate is that in this case they would think that the defendants would actually suffer more by getting L-WOP, doesn't that conflict with the proposition that the law presumes that death is more serious?

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[29] The punctuation in the text is at it appears in the Reporter's Transcript.

> To me, saying that the law presumes death is more serious takes away their discretion to decide what's appropriate in this case.

(5RT 1311:27-1312:1.)

The defense further explained that the instruction incorrectly limited the jury's decision-making. "It tends to make [the jury] think they can't come back with that decision [life without parole] because that is not the worst verdict, which it might be." (5RT 1312:8-10.)

The court founded the question "interesting," and said it would look into the issue. (5RT 1312:4-6, 11-14.)

Later, after a prospective juror stated that she believed the death penalty to be "the easy way out," the court responded, "You understand that the law says that's not the easy way out. That life without parole is a lesser sentence; do you understand that?" (5RT 1442:3-5.)

The defense again objected to the instruction that the death penalty was a more severe penalty than life without parole. (5RT 1444:4-5.)

The court replied that it could not find case authority stating that death is the more severe penalty, but that the jury instructions state that the only time the jury "can vote for death is if they find the evidence in aggravation substantially outweighs the mitigation." (5RT 1444:18-20.) The court added: "That pretty well says what the law feels about life versus death." (5RT 1444:20-21.)

B. Under the Eighth Amendment, It Is Improper To Instruct The Jury That Life Without The Possibility of Parole is a Lesser Punishment Than Death, or that Death Is a Greater Punishment.

Although California law appears to view death as a greater punishment than life imprisonment without the possibility of parole, a review of the authorities (see discussion below) suggests that the law on this point is not as explicit as has been believed. An evolving body of material increasingly suggests that the view as to which of these two punishments is really the greater is a

subjective rather than legal one, just as the decision as to whether the aggravating evidence is so substantial in comparison with the mitigating circumstances that death is warranted is a subjective rather than legal one in that individual jurors are free to assign whatever moral or sympathetic value each deems is appropriate to each factor.

The law recognizes that a competent defendant sentenced to death may knowingly and intelligently waive any federal constitutional right to appeal that sentence. (*Gilmore v. Utah* (1976) 429 U.S. 1012.) Gary Mark Gilmore was tried and sentenced to death by a Utah jury and neither sought nor obtained any appellate review of the death sentence imposed upon him by the trial court. Thereafter, his mother petitioned the United States Supreme Court for a stay of execution of the death sentence. The Court granted a temporary stay of execution in order to allow the State of Utah to respond, which it did. Gilmore, through counsel, also filed a response challenging his mother's standing to initiate proceedings in his behalf. (*Id.*, at pp. 1013-1014.) The Court determined that Gilmore's appearance in the case through the filing of a response necessarily eliminated his mother's standing to seek relief in his behalf. The Court also reviewed the appellate record and found that Gilmore's mental capacity and emotional stability had been evaluated and assessed and that he was found competent to make the necessary decisions concerning his sentence. (*Id.*, at pp. 1016-1017.) The Court thereupon dismissed the stay of execution over the dissents of three justices whose shared concerns focused on possible Eighth Amendment violations ("the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment") and the constitutionality of Utah's death penalty statute. (*Id.*, at pp. 1018-1020.)

In *Evans v. Bennett* (1979) 440 U.S. 1301, the United States Supreme Court (Rehnquist, J., as Circuit Justice) granted a mother's application for a stay of her son's execution based on her son's alleged incompetency. John Louis

Evans confessed to the crime at trial and asked the jury to find him guilty so that he could receive the death penalty pursuant to Alabama law. His conviction and sentence were appealed and affirmed by the Alabama courts and he unsuccessfully petitioned for a writ of certiorari in the United States Supreme Court. His mother then petitioned for the stay of execution. The application for stay indicated that Evans had refused to undertake any further appeals and had repeatedly expressed his desire to die. (*Id.*, at p. 1302.) In addition, Evans refused to be evaluated by a psychiatrist and expressed a preference for electrocution rather than serving the rest of his life in prison. (*Id.*, at p. 1305.) Justice Rehnquist granted a temporary stay in order to allow the matter to be considered by the full court, but opined:

> [¶] The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his debts on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed, in view of the allegations in the case of *Jacobs v. Locke*,[30] the death row conditions of confinement case presently pending in this Court, it may well be that John Evans has made the more rational choice."

(*Id.*, at p. 1305.)

In *Lenhard v. Wolff* (1979) 443 U.S. 1306, Justice Rehnquist, once more sitting as circuit justice, again granted a stay of execution so the case might be considered by the full Court. This case involved an application brought by the attorneys for a defendant under sentence of death questioning his competency because he had disassociated himself from efforts to have his sentence reviewed. (*Id.*, at p. 1307.)

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[30] The opinion provides no further citation for *Jacobs v. Locke* and a Lexis search produced no results. The case predates the United States Supreme Court online docketing system and does not appear to have ever been decided by the court, at least under that name.

In granting the stay of execution, Justice Rehnquist observed that had he been ruling on the application for stay as a member of the full court, he would have voted to deny the stay, explaining:

> [] The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum,* a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

(*Id.*, at pp. 1312-1313.)

These cases reflect a clear recognition by the United States Supreme Court that a defendant's decision to allow the execution of his death sentence may be an inherently rational one and that there is validity to the view that death is not necessarily the greater or most severe punishment.

The idea that death may be the better alternative exists in other areas of our culture and our lives.[31] For example, on-going discussions centering on legal, religious, and moral conceptions of suicide and a personal right to death have brought about state laws allowing physician-assisted death in this country, some directly or indirectly supported by judicial decisions. Voters in the state of Oregon approved a ballot initiative that established the Oregon Death with Dignity Act in 1994 and reapproved it after the state legislature placed a repeal of it on the ballot in 1997. (Oregon Revised Statutes, section 127.800-995). The act legalizes physician-assisted dying. In *Gonzales v. Oregon* (2006) 546 U.S. 243, the United States Supreme Court ended a federal challenge to the law by holding that the United States Attorney General was not empowered to overrule state laws

[31] "Death is easier than a wretched life; and better never to have born than to live and fare badly." – Aeschylus

determining what constituted the appropriate use of medications during life-ending procedures.

In 1999, Texas passed the Advanced Directives Act (Texas Health & Safety Code chapter 166). Section 166.046, subsection (e) of that act allows a health care facility to discontinue life-sustaining treatment ten days after giving written notice if the continuation of life-sustaining treatment is considered futile by the treating medical team.

In 2008, Washington voters passed Washington's Death with Dignity Act (Revised Code of Washington, chapter 70.245.) This act legalized physician-assisted dying with certain restrictions by allowing some terminally ill patients to determine the time of their own death.

In 2009, the Montana Supreme Court considered the question of whether a lower court had erred in its decision that competent, terminally ill patients have a constitutional right to die with dignity and that physicians who help them are protected from prosecution under the state's homicide statutes. (*Baxter v. Montana* (2009) 2009 MT 449, at ¶ 3.) The plaintiffs had alleged in part that mentally competent, terminally ill patients have a right to die with dignity under sections of the Montana Constitution that addressed individual dignity and privacy. The court chose to resolve the case at the state statutory rather than constitutional level. The court concluded that since suicide is not a crime under Montana law, the state's consent statute would shield doctors from homicide liability if they provided aid in dying to terminally ill, mentally competent adult patients who consented. (*Id.*, at ¶¶ 11, 12.) The court further concluded there was nothing in Montana Supreme Court precedent or Montana statutes to indicate that physician aid in dying was against public policy, and therefore the immunity provided by the consent statutes was applicable. (*Id.*, at ¶¶ 13, 25, 49.)

Thus, these illustrations taken from United States Supreme Court cases and state court decisions and statutes support the view that competent adults can and do rationally conclude that death is sometimes the less severe option.

Moreover, there has been judicial recognition of egregious conditions within California's prison system that supports the view that competent minds may rationally view life without possibility of parole as a greater penalty than death.

For example, in 2011, the United States Supreme Court held that a court-mandated population limit was necessary to remedy the violation of prisoners' rights under the Eighth Amendment. *Brown v. Plata* (2011) 536 U.S. ___, 131 S.Ct. 1910; 179 L.Ed.2d 969, affirmed a decision by a three-judge panel of the United States District Court for the Eastern and Northern Districts of California, which had ordered California to reduce its prison population to 137.5 percent of design capacity within two years. (*Id.*, 131 S. Ct. at p. 1923.) *Plata* found that severe overcrowding in California prisons prevented the State from providing prisoners with basic sustenance, including adequate medical care, and found these conditions to be incompatible with the concept of human dignity. (*Id.*, at p. 1928.) In reaching its decision, the Court discussed a prisoner's rights under the Eighth Amendment on a philosophic as well as pragmatic level. "As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'[32] (*Atkins v. Virginia* (2002) 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (quoting *Trop v. Dulles*

[32] It is worth noting that the notion of human dignity that has been held to be the core concept underlying the Eighth Amendment is echoed by the Death with Dignity titles of the physician-assisted suicide acts of Oregon and Washington and is implicit in the holdings that a competent mind may rationally choose death as the better option of *Gilmore*, *Evans*, and *Lenhard v. Wolff*, *supra*.

(1958) 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion)).)" (*Plata*, *supra*, 131 S. Ct. at p. 1928.)

Plata also took note of actual consequences of overcrowding to prisoners. The Court observed that California's prisons had operated at approximately 200 percent of design capacity for at least 11 years, resulting in prisoners being "crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. [Citation.] As many as 54 prisoners may share a single toilet. [Citation.]" (*Plata*, *supra*, 131 S. Ct. at p. 1923.) The Court further noted that "[p]risoners suffering from physical illness also receive severely deficient care. California's prisons were designed to meet the medical needs of a population at 100% of design capacity and so have only half the clinical space needed to treat the current population. [Citation.] A correctional officer testified that, in one prison, up to 50 sick inmates may be held together in a 12- by 20-foot cage for up to five hours awaiting treatment. [Citation.] The number of staff is inadequate, and prisoners face significant delays in access to care. A prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with 'constant and extreme' chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain.'" (*Plata*, *supra*, at p. 1925.)

In *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, the United States District Court for the Northern District of California concluded that prison officials at California's Pelican Bay State Prison had repeatedly violated the Eighth Amendment by engaging in a conspicuous pattern of excessive force and that the delivery of both physical and mental health care at the prison was constitutionally inadequate.

The court's factual findings regarding excessive force were based on: (1) the use of gas and taser guns during cell extractions, physical beatings resulting in

broken bones and the intentional infliction of pain, the immersion of a mentally ill inmate in scalding water producing second and third-degree burns over one-third of the inmate's body (*Madrid v. Gomez, supra*, 889 F. Supp., at pp. 1161-1168); (2) the use of fetal restraints in response to the kicking of cell doors (*id.*, at pp. 1168-1171); (3) the practice of confining naked or partially dressed and sometimes physically injured inmates in outdoor holding cages the size of telephone booths constructed of weave mesh metal and exposed to public view during inclement weather (*id.*, at pp. 1171-1172); (4) the use of cell extractions determined to be unnecessary and involving a strikingly high degree of force (*id.*, at pp. 1172-1178); and (5) unnecessary and reckless use of firearms (*id.*, at pp. 1178-1191).

The court's determination that physical and mental health care were inadequate was based on: (1) the need for mental health services at Pelican Bay (*id.*, at pp. 1214-1216); and (2) systemic deficiencies in the delivery of mental health care regarding staffing levels, screening and referrals, the state of psychiatric records, delays in transfers for inpatient and outpatient care, and illustrative examples of inadequate care (*id.*, at pp. 1217-1226). The court made similar findings regarding the inadequate provision of physical health care. (*Id.*, at pp. 1257-1260.)

The court found that prison officials took no action to seriously address the issue in continued disregard for the substantial risk of harm to inmates. (*Id.*, at pp. 1191-1198, 1226-1227.) The court further found that the omissions by the officials were of such a degree that they constituted deliberate indifference. (*Id.*, at pp. 1246-1255.)

The relevance of the findings regarding the conditions within California's prison system made in *Plata* and *Madrid* to the present discussion regarding the trial court's instruction that death is the most severe penalty is multifold. *Madrid* was decided in 1995 and chronicles prison conditions within Pelican Bay, which was opened in 1989. (*Id.*, at p. 1155.) *Plata* was decided in 2011 and addressed

constitutional violations in California's entire prison system that "have persisted for years." (*Brown v. Plata*, *supra*, 131 S.Ct. at p. 1922.) Thus, the conditions within California's prison system are of long-standing. They were also litigated and determined to violate the Eighth Amendment's Cruel and Unusual Punishments Clause, a guarantee binding on the States by the Due Process Clause of the Fourteenth Amendment. (*Ibid.*) Because California's unconstitutional prison conditions existed for a long time, because they were the subject of litigation, and because they were egregious in nature, it may reasonably be assumed they have been within the public awareness and thus provide adequate support for the view that life in prison with impossibility of parole is a punishment greater than death.

Finally, there is empirical evidence showing that, when presented with the opportunity to consider the issue, many in our society disagree which is the greater penalty. The trial court here observed that many prospective jurors in this case had questioned whether death was in fact the greater penalty. Case law on this subject, which appellant discusses in the following section, chronicles instances in which jurors in other cases have asked this question. (See, e.g., *People v. Harris* (2005) 37 Cal.4th 310, 361; *People v. Tate* (2010) 49 Cal.4th 635, 706-707.)

Appellants in this case expressed a preference for a death sentence in their jailhouse discussions with the prosecutor. Appellants, for example, explained in the context of their negotiations for a reduced restitution fine that if they were to get the death sentence they would be allowed to have televisions, radios, and compact discs during the time they were housed on death row. (DPSuppIII SuppCT 61:18-24.)

Flores contrasted that with his personal experience of serving a non-death sentence.

> I just – I just came out of high desert 180.[33] . . . [¶] So, 180. No program. You don't go to the yard or anything. The yard opens, the door opens, you try to kill your neighbor, unless he's not with us, you know. . . . [¶] So, now I'm going to death row, something different, something new, right? And I don't wanna have a lot of restitution because when I buy a TV, they're gonna make me pay to the victims. . . .

(DPSuppIII SuppCT 62:2-5, 9-11.)

Later, when the prosecutor asked why appellants were giving him information that could be used against them in this case, Flores replied:

> We don't care. The whole thing is, we want death, right? The whole thing, we want death before, uhm – when you're incarcerated, we do a lot of weird things. More than likely we're going to get hepatitis. . . . [¶] We're gonna die is [sic] what, 20 years? We ain't gonna even make it to that chair, or that, uh bed.

(DPSuppIII SuppCT 76:12-17.)

Later, Flores spoke again of appellants' feelings about the death penalty:

> [¶] But the death penalty isn't really fearful of it, right. . . . So we embrace it, you know? It's just another new place, like being in prison, you know. You know, I've been (*unintelligible*) the shoe [sic]. I've been in Level 3's. I've been in 270's, 180's. Bam, I've never been on death row. I heard it's pretty nice up there, isn't it?

(DPSuppIII SuppCT 162:3-8.)

For the reasons set forth here, appellant respectfully submits that the notion that a competent mind may rationally conclude that death is the less severe option is grounded in concepts of human dignity, which the United States Supreme Court has declared to be the core concept underlying the Eighth

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[33] This is an apparent reference to High Desert State Prison in Susanville, California, which the California Department of Corrections website states includes two buildings that are described as being of "180 design." (http://www.cdcr.ca.gov.) This number refers to the 180-degree range of vision of officers seated in the control booth and is considered the most secure form of prison design.

Amendment, and is supported by documented findings and by empirical evidence. Moreover, this notion is one that occurs with some frequency throughout various elements of our greater society and to that extent it does establish a general acceptance of the view that death is not always the most severe penalty.

C. The Law in California and the Uncertainties Attending It

In *People v. Thomas* (2011) 52 Cal.4th 336, this Court rejected the claim that the trial court erred in instructing that, "[f]or all purposes, you must consider and accept that death is a greater penalty than life imprisonment without possibility of parole." *Thomas* stated: "Under California law, death is a greater punishment than life imprisonment without possibility of parole. The instruction was proper." (*Id.*, at p. 361.) In so stating, this Court relied upon its decisions in *People v. Tate* (2010) 49 Cal.4th 635 and *People v. Harris* (2005) 37 Cal.4th 310. (*People v. Thomas*, *supra*, 52 Cal.4th at p. 361.)

In *Tate*, the trial court responded to the jury's question asking which punishment was the more severe – life without parole or death – by rereading CALJIC No. 8.88, which explains "each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*People v. Tate*, *supra*, 49 Cal.4th at p. 706.) *Tate* relied, as did *Thomas*, on this Court's decision in *People v. Harris* in finding the trial court had adequately conveyed the principle that death is the more severe penalty. (*Id.*, at p. 707.)

In *Harris*, this Court held that the trial court properly responded to a jury request as to which was the more severe penalty by instructing that "under the law the death penalty is the more severe penalty. Life in prison is not as severe as the death penalty." (*People v. Harris*, *supra*, 37 Cal.4th at p. 361.) *Harris* held: "That death is considered to be a more severe punishment than life is explicit in California law: CALJIC No. 8.88, approved in *People v. Duncan* (1991) 53

Cal.3d 955, 977-979, states in pertinent part, 'To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" (*People v. Harris*, *supra*, 37 Cal. 4th at p. 361.) Thus, it appears that though *Harris* characterized the instruction that death is a more severe punishment than life without parole as "explicit" in California law, the authority upon which *Harris* relied is the language of the jury instruction CALJIC No. 8.88.

However, a jury instruction is not the law. Rule 2.1050, subsection (b), of the California Rules of Court, states: "The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review."

In *Tate*, this Court explained *Harris*' characterization of the principle that death is the more severe punishment as being "explicit" in California law followed by a reference to the language of CALJIC No. 8.88 in this way. "Implicit in this analysis is the assumption that CALJIC No. 8.88 itself, by stressing that death is warranted only where aggravation 'so substantial[ly]' outweighs mitigation as to call for that penalty, makes the greater severity of the death penalty 'explicit.'" (*People v. Tate*, *supra*, 49 Cal. 4th at p. 707.)

Thus, in *Thomas*, this Court expressly stated that under California law death is a more severe penalty than life without parole in reliance upon *Tate*. *Tate*, in turn, relies upon *Harris*, which relied upon CALJIC No. 8.88, which, according to *Tate*, was properly relied upon by *Harris* because the language of CALJIC No. 8.88 makes the greater severity of the death penalty "explicit."

The problem with this line of reasoning, however, is that it does not conform to the strictures set forth in Rule 2.1050 of the California Rules of Court. The instructions themselves are intended to be accurate statements of the law, but they are not themselves the law. Subsection (b) reserves the "articulation and

interpretation of California law" to the Legislature and the courts of review. When the *Thomas-Tate-Harris* analysis is traced back to its origin – the language of CALJIC No. 8.88 – it appears that the jury instruction itself gave rise to the articulation of the now "explicit" law that death is the greater punishment. The analysis turns the principle embodied within Rule 2.1050 on its head.

Moreover, the law, as articulated by the Legislature in Penal Code section 190.3 does not contain the instruction's language relied upon by *Tate* and *Thomas* in finding the law to be "explicit." In speaking of *Harris*' analysis, *Tate* said: "Implicit in this analysis is the assumption that CALJIC No. 8.88 itself, by stressing that death is warranted only where aggravation 'so substantial[ly]' outweighs mitigation as to call for that penalty, makes the greater severity of the death penalty 'explicit.'" (*People v. Tate*, *supra*, 49 Cal. 4th at p. 707.)

In contrast, after listing the factors to be considered in determining the appropriate penalty, Penal Code section 190.3 states in much more neutral tones: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in the state prison for a term of life without the possibility of parole."

Thus, the Legislature's articulation of the standard is devoid of the language in the instruction that "death is warranted only where aggravation 'so substantial[ly]'" outweighs mitigation, the very language that this Court found made "explicit" that death is the more severe penalty. In contrast, Penal Code section 190.3 states only that the trier of fact can impose death if the aggravating circumstances outweigh the mitigating circumstances.

Appellant respectfully submits that the problems in reasoning of the *Harris-Tate-Thomas* line of cases that have been described here, and the authorities presented in the preceding section establishing that competent minds can rationally find that life without parole is a more severe penalty than death, compel reconsideration of the holdings that under California law death is the more severe penalty.

D. Appellant Was Prejudiced by the Instruction

Appellant was prejudiced by this instruction. Had the jury not been erroneously instructed that the death penalty was the greater punishment, some jurors may well have voted for life in prison without parole. Upon learning that appellant preferred a death sentence, the jurors may have voted for life in prison in order to impose the sentence perceived to be more severe by appellant.

This Court has recognized that a jury which realizes that the defendant is seeking the death penalty may well return a sentence of life in prison in order to punish the defendant more severely than giving him the death penalty. In *People v. Bloom* (1989) 48 Cal.3d 1194, this Court held that granting a capital defendant's midtrial motion for self-representation did not contravene the policy against state-aided suicide. In so doing, this Court explained that a jury "[f]aced with a defendant arguing a preference for the death penalty after conviction of death-eligible offenses" might well conclude that death was "too good" for the defendant and that life imprisonment with no hope of parole would be the more severe and more appropriate punishment. (*Id.*, at p. 1223.) *Bloom* elaborated:

> While qualitatively different from the death penalty, the punishment of life imprisonment without hope of release has been regarded by many as equally severe: "When a person is doomed to spend his final years imprisoned, with no (or few) prospects of release, then in terms of his human dignity, his individuality, his freedom, and his autonomy, one could well argue that the oppressive confines of a prison constitute as great an infringement of his basic human rights as a death sentence." (Sheleff, *Ultimate Penalties* (1987) p. 56.)

> Life imprisonment without possibility of parole has been described as "'not so much a substitute for capital punishment, as a slower and more disadvantageous method of inflicting it.'" (*Id.*, at p. 62, quoting penologist William Tallack.) As the philosopher John Stuart Mill put it: "What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards – debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?'"

(*Id.* at p. 60.;*People v. Bloom*, *supra*, 48 Cal. 3d at p. 1223 fn.7.)

Under the circumstances present in this case, including the nature and number of the crimes for which the jury found appellant guilty, and appellant's expressly stated preference for a death sentence, it is indeed likely that jurors seeking to impose the greater punishment upon appellant would have chosen the penalty of life without possibility of parole, which appellant described in his jailhouse statement as a life of privation without television, radio, or compact discs. Accordingly, reversal of the penalty judgment is required.

VIII

THE TRIAL COURT COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS "EQUALLY GUILTY" OF THE CRIME COMMITTED BY A DIRECT PERPETRATOR. IN A PROSECUTION FOR MURDER, AN AIDER AND ABETTOR'S CULPABILITY IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT THE AIDER AND ABETTOR'S OWN MENS REA AND THEREFORE HIS LEVEL OF GUILT "FLOATS FREE"

A. Introduction

The trial court instructed the jury similarly, stating that those who aid and abet a crime and those who directly perpetrate the crime are principals and "*equally guilty*" of that crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

That instruction incorrectly stated the law when it said that the actual killer and the aider and abettor are *equally guilty* of the crime. An aider and abettor of a homicide is not always as guilty as the actual killer. Rather, an aider and abettor's guilt in a homicide prosecution, not involving felony murder or the natural and probable consequences doctrine, is based on the combined acts of all the principals, but on the aider and abettor's own mens rea. An aider and abettor may therefore be culpable for a lesser crime than the direct perpetrator and it is error to instruct the jury to the contrary. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165; *People v. Nero* (2010) 181 Cal.App.4th 504, 515-518.)

Among other offenses, appellant was convicted by the jury of the first degree murders of George Orlando Flores (count 4) and Luis Reyes (count 11) and of the attempted willful, deliberate, and premeditated murder of Fernando Gutierrez (Count 46), counts for which Amezcua was the shooter.

As to Flores, as discussed in greater detail in the Statement of the Facts (*ante*, at pp. 19-21), the prosecution's evidence showed that appellant and Amezcua drove by a residence in front of which Flores was hanging out with several of his friends. A car drove by, turned around, and returned to the location where Flores was. Amezcua got out of the car and pointed a gun at Flores. When a shot was fired, the witness, Perez jumped for cover. He heard other shots, possibly from another gun. He later saw that Flores had been fatally shot. Perez might have heard a gun being loaded in the area where he had seen appellant. Appellant did fire at some cars in the area. Bullets from two guns were found in the area.

As to Reyes were as follows, as discussed in greater detail in the Statement of the Facts (ante, at p. 22), the prosecution's evidence showed after the Flores shooting, appellant, Katrina Barber, and Amezcua were driving around. They parked near Reyes's car. Amezcua fired shots at Reyes, killing him. Appellant asked Amezcua why he had shot Reyes.

As to the murder of Flores, the jury also found true the allegations of personal use of a firearm causing death, the murder was committed for the benefit of a street gang allegation, the murder was committed by means of firing a firearm from a motor vehicle, and multiple murder.

As to the murder of Reyes, Count 11, the jury found the murder to be in the first degree. It also found true the special circumstance that the murder was committed for the benefit of a street gang allegation, and multiple murder.

Appellant was entitled to have the jury consider his culpability in light of his own mens rea in deciding his guilt of the crimes of murder or attempted premeditated murder and, if found liable for murder or attempted murder, in determining the degree of murder or attempted murder for which he is liable. (*People v. Concha* (2009) 47 Cal.4th 653, 663.)

Defense counsel did not object with specificity to this instruction, but this failure has no legal consequence. A trial court has an independent duty to

correctly instruct the jury regarding applicable legal principles. (Pen. Code, § 1259; *People v. Graham* (1969) 71 Cal.2d 303, 317-318.)

Moreover, because the facts of this case demonstrate an instance in which the liability of the actual killer may have been greater than the liability of appellant (the prosecution's proof of appellant's acts and mens rea at the time of the individual shootings was sparse and appellant's post-crime statements do not necessarily prove he possessed the joint operation of act and intent required for proof of culpability), the instructional error may not be said to have been harmless beyond a reasonable doubt.

The misinstruction was not harmless error. Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) The effect of such violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, which asks whether beyond a reasonable doubt the jury verdict would have been the same in the absence of the misinstruction.

B. The Instructions Regarding the Liability of Principals Given to Appellant's Jury

The trial court instructed the jury in the language of the pattern CALJIC instructions, defining a principal and the liability of a principal (CALJIC No. 3.00) and defining an aider and abettor (CALJIC No. 3.01), as follows:

> Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation[,] is equally guilty. Principals include:
>
> 1. Those who directly and actively commit the act constituting the crime, or
>
> 2. Those who aid and abet the commission of the crime. (CALJIC No. 3.00; 17CT 4515; 13RT 2958.)

> A person aids and abets the commission of a crime when he or she:
> (1) With knowledge of the unlawful purpose of the perpetrator, and
>
> (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and
>
> (3) By act or advice aids, promotes, encourages or instigates the commission of the crime.
>
> A person who aids and abets the commission of a crime need not be present at the scene of the crime.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

(CALJIC No. 3.01; 17CT 4516; 13RT 2958-2959.)

The directive of these instructions is clear. The prosecution's evidence showed Amezcua shot Reyes, after which appellant dragged Reyes from the car and told Katrina Barber to run over Reyes. If the jury found that appellant acted as an aider and abettor, then it was bound by the instructions to find him "*equally guilty*" of first degree murder without first determining whether appellant acted with the requisite mens rea for murder and the requisite mens rea for the Penal Code section 189 elements for first degree murder, i.e., murder committed with premeditation and deliberation or preceded by lying in wait or by discharging a firearm with the specific intent to kill from a vehicle.

The instructions on an aider and abettor's liability incorrectly stated the law. An aider and abettor's guilt in a murder prosecution is based on the combined acts of the principals, but on the aider and abettor's personal mental state, as appellant explains below. None of the instructions dealing with the liability of principals corrects the misinstruction and misdirection.

C. The "Equally Guilty" Language of the Aider and Abettor Instructions Misdirected the Jury in Determining Appellant's Culpability for Murder. An Aider and Abettor's Guilt in a Murder Prosecution Is Based on the Combined Acts of the Principals, But on the Mental State of the Aider and Abettor.

Recently, in *People v. Concha* (2009) 47 Cal.4th 653, our Supreme Court was asked to determine whether a defendant may be liable for first degree murder when his accomplice is killed by the intended victim in the course of an attempted murder. In concluding that the defendant in such circumstances may be convicted of first degree murder if he personally acted willfully, deliberately, and with premeditation during the attempted murder, the Court relied on the theory of liability known as provocative act murder, which the Court described as "not an independent crime with a fixed level of liability," but rather "simply a type of murder." (*Id.* at p. 663.) Appellant was not prosecuted on a theory of provocative act murder and does not rely on *Concha* in that respect. What *Concha* does provide is a helpful path to understanding the extent and nature of accomplice liability in the context of a murder prosecution and an analytical framework that, when followed, shows why the trial court's instruction in this case that the actual killer and the aider and abettor are "equally guilty" was legally incorrect. Appellant relies on that particular aspect of *Concha*'s analysis.

Concha, in important part, relied and built upon the Court's earlier decision in *People v. McCoy* (2001) 25 Cal.4th 1111. In *McCoy*, the Court held that in some situations, an aider and abettor may be guilty of a greater homicide-related offense than the actual perpetrator, reasoning that an aider and abettor was liable for the combined acts of the aider and abettor and the direct perpetrator, but that his guilt was based on his own mental state. (*Id.* at p. 1118.)

Appellant first summarizes *Concha*'s conclusion in the words of the Court and then discusses the analytical framework that resulted in that conclusion.

> " . . . [A] defendant is liable for murder when the actus reus and mens rea elements of murder are satisfied. The defendant or an

> accomplice must proximately cause an unlawful death, and the defendant must personally act with malice. Once liability for murder is established in a provocative act murder case, **or in any other murder case**, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189*. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts, including a provocative act murder. Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder."

(*People v. Concha*, *supra*, 47 Cal.4th at pp. 663-664; italics in the original; boldface added.)

The Court began its analysis in *Concha* by defining murder, its required acts and mental states, and the effect of adding accomplice liability to the calculus.

"Murder is the unlawful killing of a person with malice aforethought. ([Pen. Code], § 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of death. [Citations omitted.]" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.)

"For the crime of murder, as for any crime other than strict liability offenses, 'there must exist a union, or joint operation of act and intent, or criminal negligence. ([Pen. Code], § 20.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) "To satisfy the mens rea element of murder, the defendant must *personally* act with malice aforethought. ([*People v.*] *McCoy* [(2001) 25 Cal.4th 1111,] 1118.)" (*Id.* at p. 660; italics added.)

In *People v. McCoy*, upon which *Concha* relied, the Court recognized that an aider and abettor may harbor a greater mental state than that of the direct perpetrator and thus be culpable of a greater crime than the actual perpetrator.

The Court based this conclusion on the premise that an aider and abettor's mens rea is personal and may be different from that of the direct perpetrator. (*People v. McCoy*, *supra*, at pp. 1117-1118.) " ' "[A]lthough joint participants in a crime are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.' " ' (Dressler, Understanding Criminal Law [(2d ed. 1995)], § 30.06 [C], p. 450, fns. omitted.)" (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)

McCoy concluded that an aider and abettor's liability is "thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118.) "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts. . . ." (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, fn. omitted.) (*People v. Prettyman* (1996) 14 Cal. 4th 248, 259.) "But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.) In sum, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Ibid.*)

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, which was filed before but in the same year as *Concha*, the Court of Appeal (Second District, Division Two) determined that the legal principles regarding aider and abettor liability set forth in *McCoy* required the finding that "CALCRIM No. 400's direction that '[a] person is equally guilty of the crime [of which the perpetrator is

guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*People v. Samaniego*, *supra*, 172 Cal. App. 4th at p. 1165.)

Samaniego said:

> Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" . . . , while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified. \

(*Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.)

The language of CALCRIM No. 400 in issue in *Samaniego*, like the language of CALJIC No. 3.00 in issue here, provided: " 'A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. . . . Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.' " (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1162-1163.)

Soon after *Concha* was filed, in *People v. Nero* (2010) 181 Cal.App.4th 504, the Court of Appeal (Second District, Division Three), considered whether an aider and abettor may be less culpable than the direct perpetrator and, in reliance on *McCoy*, concluded that an aider and abettor's liability may be greater or less than the direct perpetrator's. *Nero* concluded that *McCoy*'s principles that aider and abettor liability is "premised on the combined acts of all the principals, but on the aider and abettor's own mens rea" (*People v. McCoy*, *supra*, 25 Cal.4th

at p. 1120) and *McCoy*'s reliance on the notion that each person's mens rea "floats free" (*Id.* at p. 1121) controlled, and that there was therefore no reason for a different outcome when the actual killer was guilty of a lesser crime than the aider and abettor. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 515.) Because each person's mens rea "floats free," the court reasoned, each person's level of guilt would "float free." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1121.)

As noted, *Samaniego* concluded that the "*equally guilty*" language of CALCRIM No. 400 was "generally correct in all but the most exceptional circumstances," but misleading in the factual circumstances before it and should have been modified. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.) *Samaniego* thus sought to limit the scope of claims of error directed at the instruction. The state of the evidence in *Samaniego* was that there were no eyewitnesses to the actual shooting and therefore no evidence as to which defendant was the direct perpetrator.

In *Nero*, the jury was instructed with the "*equally guilty*" language of CALJIC No. 3.00, as was appellant's jury. (*People v. Nero*, *supra*, 181 Cal.App.4th 512.) In *Nero*, the evidence was such that the identities and actions of the direct perpetrator and the aider and abettor were clear, but the evidence regarding the aider and abettor's mens rea was not clear. The same is true of appellant's role as the aider and abettor, if in fact he was, and Amezcua' role as the actual killer in the Flores and Reyes killings and in the attempt to kill Gutierrez. Although the *Nero* jury had been given a number of other standard instructions that suggested the aider and abettor's mens rea was not tied to that of the direct perpetrator, the jury still questioned whether it could find the aider and abettor guilty of a greater or lesser offense than the direct perpetrator. This observation led *Nero* to conclude that the "*equally guilty*" language of the pattern instructions (CALJIC No. 3.00; CALCRIM No. 400) was misleading even in

unexceptional circumstances and required modification.[34] (*Id.* at p. 518 ["We believe that even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading."].)

In sum, *McCoy, Concha, Samaniego*, and *Nero* establish that a defendant charged with murder can be held vicariously liable for the actus reus, but not for the mens reas of an aider and abettor, because, as each of these cases has recognized, the mens rea of the aider and abettor "floats free," with the consequence that the level of guilt of the aider and abettor "floats free." They also establish that appellant's jury, instructed in the language of CALJIC No. 3.00 given to the *Nero* jury, was therefore incorrectly and misleadingly instructed regarding appellant's liability as an aider and abettor in the murders of Diaz and Madrigal and the attempted premeditated murder of Gutierrez. Reversal of the convictions is required.

D. The "Equally Guilty" Language of the Aider and Abettor Instructions Misdirected the Jury in Determining the Degree of Appellant's Murder Liability. An Aider and Abettor's Murder Liability Is Determined by Examining the Defendant's Personal Mens Rea and by Applying Penal Code Section 189

In *Concha*, four assailants, including the defendants, attempted to murder their intended victim, but during the assault, the intended victim stabbed one of the assailants to death in self-defense. A jury convicted two of the assailants of first degree murder for the death of their accomplice. The Supreme Court held that the trial court correctly allowed the jury to consider returning a verdict of first degree murder against the defendants for the death of their accomplice under the provocative act doctrine, but, in reliance upon *McCoy*, *supra*, reversed the convictions for first degree murder because the instructions given the jury "failed

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[34] CALJIC No. 3.00 and CALCRIM No. 400 have now been revised to incorporate language reflecting the holdings in *People v. McCoy*; *People v. Samaniego*; and *People v. Nero*.

to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation," i.e., with the mens rea required by Penal Code section 189 to elevate the degree of murder from second to first degree. (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.) *Concha* observed, " . . . it appears that the trial court did err when instructing on first degree murder . . . by not providing an instruction that explained that for a defendant to be found guilty of *first degree murder*, he *personally* had to have acted willfully, deliberately, and with premeditation when he committed the attempted murder. (*McCoy*, *supra*, 25 Cal.4th at p. 1118.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 666.)

Concha explained that murder requires that a defendant or an accomplice proximately cause an unlawful death and the defendant must personally act with the mens rea known as malice. The Court found that the defendants were guilty of murder (i.e., murder of the second degree by operation of law) as to any killing either of them proximately caused while acting together pursuant to their intent to kill (the mental state of malice) because although they did not intend to kill their accomplice, they had the intent to kill *a* person when they attacked the intended victim. (*Id.* at p. 661, 663.) However, the question regarding the degree of murder liability still remained to be determined.

> "Once liability for murder is established in a . . . murder case, the degree of murder liability is determined by examining the defendant's personal mens rea and applying *section 189*. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts. . . . Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder."

(*People v. Concha*, *supra*, 47 Cal.4th at pp. 663-664.)

Accordingly, "[o]nce liability for murder 'is otherwise established, section 189 may be invoked to determine its degree.' (*People v. Gilbert* (1965), 63 Cal.2d

[690], 705; see also *People v. Caldwell* (1984) 36 Cal.3d 210, 217, fn. 2, quoting *Gilbert* with approval; *People v. Cervantes* (2001) 26 Cal.4th 860, 872–873, fn. 15 ['If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent.'].) Section 189 states that if an unlawful killing is 'willful, deliberate, and premeditated,' or is perpetrated by means of 'poison, lying in wait, torture . . . , discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death,' using specific types of weapons, destructive devices, explosives, or ammunition, or in the perpetration of certain enumerated felonies, it is murder of the first degree. (Pen. Code, § 189.) 'All other kinds of murders are of the second degree.' (*Ibid.*) Therefore, 'assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree.' (*People v. Bland* (2002), 28 Cal.4th 313, 323-324, fn. omitted.) While joint participants involved in proximately causing a murder ' "are tied to a 'single and common actus reus,' 'the individual mentes reae or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their mentes reae are different, their independent levels of guilt . . . will necessarily be different as well.' " ' (Dressler, Understanding Criminal Law (2d ed. 1995) § 30.06[C], p. 450, fns. omitted, as quoted with approval in *McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)" (*People v. Concha*, *supra*, 47 Cal. 4th at pp. 661-662.)

In *Concha*, then, the Court found that each of the defendants shared an intent to kill a person when they attacked the intended victim. Thus, each defendant was liable for the combined attack and each had the requisite mens rea (malice) to be held liable for murder.

However, because Penal Code section 189 states that all murders are of the second degree unless they are one of the murders enumerated in that section, and because the trial court in *Concha* failed to require that the jury resolve whether

each defendant acted willfully, deliberately, and with premeditation, the Court reversed the judgment of conviction. (*People v. Concha*, *supra*, 47 Cal.4th 666.)

The identical instructional error compels that appellant's convictions for the murders of Flores and Reyes and the attempted premeditated murder of Gutierez must be reversed because the jury was incorrectly instructed that all principals are "*equally guilty*" where degree of murder liability is concerned.

This is so because, as Penal Code section 189 provides and *Concha* and *McCoy* establish, a person who maliciously intends to kill is guilty of first degree murder when he or she *personally* acts willfully, deliberately, and with premeditation or with any other mental state within the contemplation of section 189.

Here, the prosecution primarily contended that Flores and Reyes were intentionally killed willfully, deliberately, and with premeditation. Accordingly, the trial court instructed on murder perpetrated by means of a willful, deliberate, and premeditated killing with express malice. (CALJIC No. 8.20; 17CT 4520-4521; 13RT 2966-2967.) The jury was additionally instructed, however, on other alternate theories of liability for first degree murder – murder preceded by lying in wait and murder perpetrated by means of discharging a firearm from a motor vehicle where the perpetrator specifically intended to inflict death. (CALJIC Nos. 8.25, 8.25.1; 17CT 4521, 4522; 13RT 2967, 2968) Appellant was entitled to have his jury correctly instructed to find whether he personally had the requisite mens rea for first degree murder before returning first degree murder verdicts.

For the first degree murders identified in section 189, other than murder committed with premeditation and deliberation, the prosecution need not prove premeditation and deliberation (*People v. Ruiz* (1988) 44 Cal.3d 589, 614 [murder by lying in wait does not require independent proof of premeditation, deliberation, or intent to kill]; *People v. Laws* (1993) 12 Cal.App.4th 786, 792-793 [prosecution need not prove intent to kill for first degree murder based on lying in wait]), but the prosecution must show that the defendant had a specific

intent to do the underlying act that resulted in the killing (*People v. Steger* (1976) 16 Cal.3d 539, 546 [intent to inflict pain required for murder by torture]).

Steger is instructive. In *Steger*, our Supreme Court pointed out that because Penal Code section 189 defines certain specific types of unlawful killing as first degree murder and designates most other types of unlawful killing as second degree murder, "the prosecution is required to prove not only the elements of murder, but also the aggravating elements of first degree murder." (*People v. Steger, supra*, 16 Cal.3d at p. 545.) *Steger* reasoned: "In this perspective the phrasing of section 189 becomes clearer: 'All murder which is perpetrated by means of . . . torture, or *by any other kind* of willful, deliberate, and premeditated killing . . . is murder of the first degree . . . .' In labeling torture as a 'kind' of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder." (*Id.* at pp. 545-546.)

The Court explained:

> "The element of calculated deliberation is required for a torture murder conviction for the same reasons that it is required for most other kinds of first degree murder. It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the *state of mind* of the torturer – the cold-blooded intent to inflict pain for personal gain or satisfaction – which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder. [¶] Accordingly, we hold that murder by means of torture under section 189 is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain."

(*Id.* at p. 546; italics added.)

Thus, where appellant's mental state was concerned, in order to prove appellant culpable of first degree murder committed either with premeditation and deliberation or by means of lying in wait or by discharging a firearm from a

motor vehicle when the perpetrator specifically intended to inflict death, the prosecution was required to prove that appellant's mens rea satisfied the mens rea element to hold him liable for murder and to prove that appellant had the requisite mental state for first degree murder, i.e., a specific intent to commit murder after lying in wait for the victim or a specific intent to inflict death by shooting from a motor vehicle.

In *People v. Ruiz* (1988) 44 Cal.3d 589, the Court concluded that in adopting the lying-in-wait provision of Penal Code section 189, the Legislature required that "the defendant be shown to have exhibited a state of mind which is 'equivalent to' . . . premeditation or deliberation." (*Id.* 44 Cal.3d at p. 615.) In *People v. Poindexter* (2006) 144 Cal.App.4th 572, the court reiterated that first degree murder lying in wait requires (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) a surprise attack from a position of advantage following immediately. (*Id.* at p. 580; citing *People v. Morales* (1989) 48 Cal.3d 527, 557.) *Poindexter* defined a "substantial period" of watching and waiting as a period "long enough to demonstrate a state of mind equivalent to premeditation or deliberation." (*People v. Poindexter*, *supra*, 144 Cal.App.4th at p. 581; citing *People v. Ceja* (1993) 4 Cal.4th 1139.)

Murder committed by a drive-by shooting is first degree murder for which the prosecution need not prove premeditation and deliberation if it is perpetrated by means of (1) discharging a firearm from a motor vehicle; (2) intentionally at another person outside of the vehicle; (3) with the intent to inflict death. (Pen. Code, § 189.) As noted, murder committed by drive-by shooting requires a specific intent to kill. If the intent is to inflict only great bodily injury, rather than death, it appears the crime is not statutory first degree murder but could be second degree murder based on an implied malice theory. (See *People v. Chun* (2009) 45 Cal.4th 1172 (underlying felony merges with felony murder so as to preclude

application of second degree felony murder rule, but evidence showed implied malice from willful shooting with conscious disregard for human life).)

Accordingly, in order to convict appellant of first degree murder committed willfully, deliberately, and with premeditation or by means of lying in wait or by drive-by shooting, the prosecution was required by *McCoy* and *Concha* to prove appellant had the required personal mens rea for that degree of murder. Appellant was entitled to have the jury correctly instructed that his liability for the degree of murder rested on his personal mens rea. The instruction given appellant's jury, again, stated the contrary when it instructed that an aider and abettor and a direct perpetrator found liable for murder were equally guilty of the crime.

E. A Trial Court is Obligated to Correctly Instruct the Jury on the Applicable Law

As appellant has indicated above, defense counsel did not object to the incorrect instruction. Counsel's failure to specify the error claimed here does not, however, act as a bar to appellant's claim.

A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

In *People v. Graham* (1969) 71 Cal.2d 303, the trial court erred in failing to instruct on manslaughter due to diminished capacity. Not only was no defense

request for such instruction made, but all three defense counsel acquiesced in the court's statement that "'everyone agrees that there is no evidence from which involuntary manslaughter could be found; the only type of manslaughter that could be found here would be voluntary.'" (*Id.* at p. 317.) Despite this, our Supreme Court concluded in *Graham* that there is placed upon the trial court an "affirmative duty to instruct the jury on its own motion on the general principles of law relevant to the issues of the case [which] can [not] be nullified by waiver of defense counsel." (*Id.* at pp. 317-318.) An exception exists where "defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of a [correct] instruction." (*Id.* at p. 318; *People v. Wickersham* (1982) 32 Cal.3d 307, 331.) In all other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without need for an objection in the trial court.

Inasmuch as there is no evidence here that defense counsel acted as a matter of trial tactics to have the jury misdirected as to the law, the instruction given here which misstated the elements of the theory of criminal liability may be reviewed on appeal without need for an objection in the trial court.

F. The Failure to Instruct Correctly on the Elements of Aiding and Abetting Was Not Harmless Beyond a Reasonable Doubt

Failure to instruct correctly on the elements of aiding and abetting is assessed under the harmless beyond a reasonable doubt standard. (*People v. Hardy*_(1992) 2 Cal.4th 86, 185-186; *People v. Dyer* (1988) 45 Cal.3d 26, 64.) Misinstruction on elements of a crime is federal constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Not only did the court incorrectly instruct in this area, but the prosecutor also argued to the jury that the shooter and non shooter are "*equally guilty*" as

principles in the crime. (13R 2868.) Likewise, the prosecutor argued that appellant was "*equally guilty*" because after Reyes was shot by Amezcua, appellant suggested to Barber that she run over Reyes. (13R 2867.)

Unlike a defense attorney, the arguments of the prosecutor come from an official representative of the People, and is likely to carry great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

The fact that this was referenced in closing argument thereby compounds the error, as it has been recognized that when the prosecution refers to prior errors or misconduct during arguments, this is an indicia of prejudice. (*People* v. *Woodard* (1979) 23 Cal.3d 329, 341.)

Here, although Robert Perez identified appellant, this identification, although sufficient to sustain the verdict, is questionable and is not conclusive. The reason for this is because of dangers inherent in eyewitness testimony generally.

It has long been noted that in court identification is perhaps the most convincing type of evidence that there is. The jury cannot be anything but impressed by testimony of a witness that he saw the defendant commit the crime.

However, the vagaries of eyewitness identification have often been the subject of discussion by the leading figures in American jurisprudence35.

Indeed, numerous courts have recognized the unreliability of eyewitness identification.

In *In re Marquez* (1992) 1 Cal.4th 584, this Court denied the petitioner's habeas corpus petition on grounds of incompetency of counsel. In reaching this decision the Court explained that the strength of the prosecution's case rendered

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[35] Justice Frankfurter noted that "The identification of strangers is proverbially untrustworthy." (Frankfurter, *The Case of Sacco and Vanzetti* (1927) p. 30.) Similarly, Jerome Frank observed that "Perhaps erroneous identification of the accused constitutes the major cause of wrongful convictions." (Frank and Frank, *Not Guilty*. (1957) p. 61)

any inadequacy of counsel harmless. However, in a dissenting opinion, Justice Kennard pointed out the prosecution's case rested on the alleged confession of the defendant and the identification of three eyewitnesses.

In discussing the effects of eyewitness identification, Justice Kennard stated, at p. 1181:

> "The victim's wife and two children each positively identified petitioner at a lineup and at trial. But cases of mistaken eyewitness identification are not uncommon. As one court has observed: `However convinced, and convincing, [the eyewitnesses] were in their identification at trial, we cannot ignore the fact that the identification of strangers in violent crime situations is fraught with the hazard of mistake." (*Wilson v. Cowan* (6th Cir. 1978) 578 F.2d 166, 168) ...This court, too, has recognized the fallibility of eyewitness identification in such circumstances. (*People* v. *McDonald* (1984) 37 Cal.3d 351, 363-364.)" (See also appendix to *People* v. *Anderson* (1973) 389 Mich. 155, [205 N.W.2d. 461], reviewing the factors rendering eyewitness identification unreliable and referring an array of articles and studies, referred to in *People* v. *Bustamonte* (1981) 30 Cal.3d 88, 98, fn. 6)

In fact, courtroom identifications are closer in nature to a formality than to substantive evidence. As stated by Wigmore:

> "Ordinarily, when a witness is asked to identify the assailant...who is the subject of his testimony, the witness' act of pointing out the accused..., then and there in the courtroom, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize him would tell for the accused; but <u>the affirmative recognition might mean little against him</u>.

(4 Wigmore, *Evidence*, (3d ed.) p. 208, emphasis added, quoted in Justice Traynor's opinion in *People* v. *Slobodion* (1948) 31 Cal.2d 555, 559.)

As to this count, Perez was the only witness to identify appellant at trial, after failing to do so from photographs shortly after the shooting.

"The dangers for the suspect are particularly grave when the witness opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*United States* v. *Wade* (1967) 388 U.S. 218, 288-289, quoted in *People* v. *McDonald*, *supra*, 37 Cal.3d at 363.)

Other factors frequently cited as being detrimental to an accurate identification are also applicable, namely, the stress of the moment, the fact that Perez had never seen the assailants before, and the delay between the offense and the first identification. In short, although Perez was able to make an identification, that item of evidence must be evaluated in its proper perspective with a recognition of the dangers inherent with that type of evidence.

This questionable identification of Perez was largely bolstered by the evidence of appellant's role as the driver in both events through the comments made primarily by Flores, but some made by appellant, during their recorded jailhouse interviews with the prosecutor. These interviews were conducted a few years after the charged crimes were committed and while they may serve as circumstantial evidence of appellant's mental state at the time of the commission of the various crimes, appellant was entitled to have the jury consider such evidence in the context of the presence or absence of other evidence of his mental state at the times the crimes were committed in determining his culpability.

Penal Code section 20 requires a joint operation of actus reus and mens rea at the time of the commission of the crime. (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) The instruction stating that principals in the commission of the crime are "*equally guilty*" manifestly directs the jury away from an evaluation of appellant's individual mens rea.

The case for first degree murder committed with express malice, premeditation, and deliberation or by means of lying-in-wait or by shooting from a motor vehicle with the intent to kill may have been strong, but it should and must be distinguished from the determination of appellant's involvement in the case. The case for first degree murder was strong for any person identified as the

actual killer, but the evidence did not allow appellant's identification as the actual killer. As to any other perpetrator, there is an inherent reasonable doubt as to the personal mens rea of that individual.

In the absence of proof that appellant possessed the requisite mens rea, it is not possible to state beyond a reasonable doubt the jury verdict would have been the same in its determination that appellant was guilty of the murders of Flores and Reyes and that the murder was murder of the first degree or the attempted willful, deliberate, premeditated murder of Gutierrez in the absence of the misinstruction. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

For these reasons, the error was not harmless beyond a reasonable doubt and reversal of both first degree murder convictions and the attempted premeditated murder conviction is warranted.

PENALTY PHASE ISSUES

VI

THE TRIAL COURT ERRED WHEN IT ACQUIESCED TO THE DEMANDS OF APPELLANTS NOT TO ALLOW DEFENSE COUNSEL TO PRESENT ANY FORM OF DEFENSE IN THE PENALTY PHASE OR EVEN TO PROVIDE THE JURY WITH PROPER PENALTY PHASE INSTRUCTIONS.

Prior to the verdicts in the guilt phase of the trial, both appellants informed the court that they did not wish to present any defense in the penalty phase in the event that guilty verdicts were returned. As a result of this request, and in spite of the fact that the attorneys for both appellants informed the court that they had witnesses that they wanted to call, no penalty phase defense was ever presented. Later, when the defense attorneys requested jury instructions in the penalty phase, the court declined to consider them because the defendants themselves objected. No defense argument was presented to the jury or at the automatic motion for a reduction of the penalty.

The trial court's refusal to allow defense counsel to present a defense deprived the defendants of the right to counsel, the right to a jury trial, the right to due process of law, and the right to a reliable determination of the facts in a capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment to the Constitution of the United States. The error also defeated the state's own interest in fair, accurate, and reliable capital judgments.

While certain decisions of this Court over the last two decades contain language which appears to disagree with appellant's contention, those cases are both distinguishable and, to the extent they are inconsistent, were wrongly decided. *People v. Bloom* (1989) 48 Cal.3d 1194, and *People v. Blair* (2005) 36 Cal.4th 686, are inapposite because the defendants there were acting in propria persona, unlike appellant and his co-defendant, both of whom were represented

by counsel throughout the trial. In *People v. Lang* (1989) 49 Cal.3d 991, *People v. Sanders* (1990) 51 Cal.3d 471, and *People v. Deere* (1991) 53 Cal.3d 705 (*Deere II*), this court primarily addressed contentions of ineffective assistance of counsel, a claim which appellant does not raise in this direct appeal. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) To the extent that other language in any of the foregoing decisions appeared to disapprove of appellant's contention that defense counsel may present mitigating evidence over the objection of the defendant, that language was based upon *Bloom,* supra, in which the defendant represented himself, and on the faulty premise that such a rule would be unenforceable because the defendant could simply dismiss counsel and represent himself, and could then choose to present no mitigating evidence. (See, e.g., *People v. Lang, supra*, 49 Cal.3d at p. 1031; *People v. Blair, supra*, 36 Cal.4th at p. 737.) However, a defendant who has once accepted counsel for the guilt phase of a trial may neither control counsel's strategic decisions regarding the defense nor may he dismiss counsel and represent himself in the penalty phase. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365, and cases there cited.) In view of the importance of the interests of both criminal defendants and the state itself in obtaining fair, accurate, and reliable death judgments, this court should restore to counsel the control of the presentation of evidence and contrary language in the foregoing cases should be disapproved.

Moreover, even if this court were to determine that capital defendants can exercise control over their attorneys' strategic decisions with respect to the defense to be presented in the penalty phase, the foregoing constitutional provisions prohibit capital defendants from controlling the legal instructions which guide the jury's exercise of its sentencing discretion, and reversal is required for this separate reason.

A more detailed discussion follows.

A. Appellants' Instructions to Counsel Not to Present a Defense.

Near the conclusion of the guilt phase, Robert Perlo, counsel for Amezcua, informed the court that if guilty verdicts were returned, Amezcua did not want his family members called as witnesses in the penalty phase, nor did he want Mr. Perlo to present any other penalty defense. (12RT 2816-2817.)

Mr. Perlo said that he had prepared a penalty phase and had several witnesses to call. He said that he had explained to Amezcua what he had prepared and had also explained the nature of the penalty phase he wanted to present. He said that Amezcua had informed him that "he does not want any evidence introduced on his behalf during the penalty phase of this trial." (12RT 2817.) Mr. Perlo said he had also explained to Amezcua that the failure to present a defense would increase the likelihood that Amezcua would suffer the death penalty, and "that any chance we would have to achieve a life without parole verdict would be diminished if not completely eliminated by the failure to present any mitigating evidence." (12RT 2817.) He said "I believe that Mr. Amezcua understands that." He said that Amezcua "continues to desire that I present nothing." (12RT 2817.) Mr. Perlo also said that all four defense attorneys had sat down with both defendants and discussed this issue. (12RT 2818.) He stated that both appellants "felt they wanted to be present and wanted to make joint decision, and I think these are joint decisions that they are making." (12RT 2818.)

Counsel for appellant, Mr. Bisnow, then informed the court that "Mr. Flores has the same desire, your honor." (12RT 2819.) He said "I just want to put on the record what the evidence is that we would introduce. I have explained it all to him. I told him we have a much better chance of avoiding the death penalty." (12RT 2819.) Mr. Bisnow continued:

> We have his family, his mom, his sister, his stepmother, and we have three expert witnesses. Doctor Woo would say he has brain damage. Mr. Vasquez is an expert in the prison system and can testify about the conditions of incarceration which might clear up some of the statements he made about wanting to be on Death Row on the tape, and also Doctor Adrian (sic) Davis[36] who's a psychologist. [¶] And in particular we have a list here of nine things that I would offer in mitigation. There is evidence of parental criminality. Both his parents had criminal histories. Parental drug use, both his parents had extensive drug histories, especially with heroin. [¶] Family instability, he moved all over the place. He had went to four different elementary schools. [¶] Parental rejection and neglect. His father was aggressive, but did not involve himself in his raising, and his mother abandoned him in favor of using heroin and different times in her life. There was exposure to domestic violence. His mom and dad had physical assaults in front of him. [¶] Learning disabilities in elementary school. He was diagnosed as possible ADHD, and he was in mentally disabled classes throughout elementary school. [¶] He had poverty in his life. His mom was living on welfare. She used some of the money from welfare to get drugs. [¶] He had a history of head injuries that he suffered as a child before the age of 12. [¶]And finally, there was substance abuse with all his sisters, and in the families of both the mother and father. [¶]We would be putting on all those things, and those were nine different things that would be mitigating circumstances that we would argue to the jury. I explained to Mr. Flores that and he says no, I don't want that. I don't want my parents involved. I want no witnesses on my behalf. Period.

(12RT 2919-2920.)

The court explained to both defendants that their decision could result in a verdict of death and that the court wanted to make sure the decisions were knowingly and voluntarily made. (12RT 2822-2823.) When the court asked why appellant had decided to forego mitigating evidence, appellant said:

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[36] Dr. Davis's first name is spelled "Adrienne."

> If, in fact, they say that I'm guilty and I did all these crimes, I do not want my attorneys to—how would you say—put my family and friends or whoever on there and make it—blame them for something I may have done, and that's my thing. [¶] I did this supposedly, or whatever they allege that I did, I did it without them. In my mind I stand alone. I would feel incorrect and will not—am very adamant about it—will not allow anybody, nobody to get them on the stand.

(12RT 2823.)

In response to a question from the court, appellant said he had made this decision in 2000, and had thought about it for the last five years. (12RT 2823.)

When questioned by the court, Amezcua expressed similar views. (12RT 2824.)

The court did not inquire as to why a desire to not place blame on his family would preclude other aspects of the defense, such as requesting jury instructions or arguing to the jury.

The Court asked if appellant was attempting to commit something like "suicide by cop," where a person intentionally puts himself in a position where the police will shoot and kill him. (12RT 2827.) In response, appellant said that if he were to get the death penalty, it would be more likely that he would die of old age on death row. (12RT 2828.) On the other hand, if he received the death penalty, he would be likely to get "better appeal action," and that would make it more likely that he would eventually get out of prison.[37] (12RT 2828.)

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[37] In his influential article, "Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle," (2011) 44 Loyola of Los Angeles Law Review, S41-S244, Ninth Circuit Senior Judge Arthur Alarcon cited, among many other examples of the "dysfunctional" nature of California's death penalty procedures, the case of Billy Joe Johnson, a "self-proclaimed white supremacist" who, after being convicted of killing a fellow gang member, told his defense attorney to try to get him sentenced to death, because, as his attorney explained, 'living conditions at San Quentin prison's death row will be better than if he serves a life term at Pelican Bay State Prison." Id., at p. 59.) The irony of Mr. Johnson's request was also

The court informed both defendants that if they were to get the death penalty, the decision to not put on a penalty defense would not be one that could serve as grounds for reversal. Appellant replied "We are giving that piece only up, the rest is open." (12RT 2829.)

The court reiterated that counsel had prepared a penalty defense consisting of mitigating evidence, but that the defendants were "the controlling person[s]" and they could say that they did not want the evidence presented. Appellants stated that they understood that. (12RT 2831-2832.) The court then interviewed each defendant separately, during which time appellant reiterated the position he had stated earlier. (12RT 2832-2837.)

After the conclusion of the guilt phase, the court again held a hearing with the defendants to determine if they had a change of mind. Both appellants said that they had had a chance to think about the issue, but that they had not changed their minds. (13RT 3015-3016.) Both also indicated that they did not want their attorneys to present any arguments. (13RT 3016, 3019.)

In response to a question from the court, both appellants stated that they were hoping for a death verdict. (13RT 3017.) They again stated that they did not want any witnesses called on their behalf. (13RT 3020.)

In response to an inquiry from the court, both attorneys indicated that they believed both defendants were sincere in these wishes. (13RT 3020.)

After the prosecution rested in the penalty phase, in the presence of the jury, the defense announced that they would waive opening statements and would not be presenting any evidence. (14RT 3193.) The defense presented no arguments at the end of the penalty phase or at the hearing on the automatic motion to reduce the penalty. (14RT 3194.)

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discussed in an article in November, 2011, issue of *The Atlantic Magazine*, "The Appeal of Death Row."

B. The Request for Jury Instructions.

At the close of the penalty phase, appellant's counsel submitted several jury instructions. The court asked whether these instructions were submitted "with the approval of your client," and appellant said, "No, I object to that." (14RT 3195.) The court then asked *appellant*, "so then are you going to withdraw them," and appellant said, "Yes." (14RT 3196.) Counsel for Amezcua indicated that he had also intended to join in the request for those instructions but that Amezcua objected. The court then ruled, "I'm not going to give them at the defense request." However, counsel for both appellants immediately clarified for the record that the defense actually requested the instructions but the defendants themselves objected. (14RT 3196.) The requested instructions were therefore never given to the jury.

The instructions requested by appellant's counsel consisted of the following:

(1) "Nothing in these instructions requires any juror to vote for the death penalty unless, upon completion of the "weighing process," he or she decides that death is the appropriate penalty under the circumstances." (18CT 4740.) The authority provided for this requested instruction was *People v. Brown* (1985) 40 Cal.3d 512, 538-541 and *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1007. (18CT 4740.) (18CT 4740.)

(2) "In this part of the trial, the law does not forbid you from being influenced by sympathy or pity for a defendant. If any of the mitigating evidence or any aspect of the case, arouses in you compassion, mercy, or pity, you may consider this response in you in deciding the appropriate penalty to impose in the case." (18CT 4741.) The authority provided for this requested instruction included *People v. Jackson* (1996) 13 Cal.4th 1164, 1244, *People v. Wright* (1990) 52 Cal.3d 367, 441-442; *People v. Gallego* (1990) 52 Cal.3d 115, 771, 844, and *People v. Fauber* (1992) 2 Cal.4th 792, 844. (18CT 4741.)

(3) "If you have a reasonable doubt as to which penalty to impose, death or life in prison without the possibility of parole, you must give the defendant the benefit of that doubt and return a verdict fixing the penalty of life in prison without the possibility of parole." (18CT 4742.) The authority provided for this requested instruction was *People v. Morris* (1991) 53 Cal.3d 152, 227-228.

(4) "If you have any lingering doubt concerning the degree of guilt of the defendant as to the charge of which he was found guilty, or if you have any lingering doubt concerning the truthfulness of any of the special circumstance allegations which were found to be true, or if you have any lingering doubt as concerning your finding of the defendant's sanity, you may consider that lingering doubt as a mitigating factor or circumstance." (18CT 4743.) The authority provided for this requested instruction included *People v. Cain* (1995) 10 Cal.3d 1, *People v. DeSantis* (1992) 2 Cal.4th 1198, 1235-1240, and *People v. Cox* (1991) 13 Cal.3d 618, 678, fn. 20. (18CT 4743.)

(5) "Even if the aggravating factors substantially outweigh the mitigating factors, it is within your discretion to return a verdict of death or life imprisonment without the possibility of parole. (18CT 4745.) The authority provided for this requested instruction was *People v. Noguera* (1992) 4 Cal. 4th 599, 642, .*People v. Danielson* (1992) 3 Cal.4th 691, 717, and *People v. Duncan* (1991) 33 Cal.43d 955, 978. (18CT 4745.)

(6) "Within the broad categories of aggravation and mitigation, the law of this state does not place any specific weight or numerical value on any particular aggravating or mitigating circumstance. It is entirely up to you to determine whether in your independent opinion one or more factors outweigh others, no matter what the number." (18CT 4744.) The authority provided for this requested instruction was *People v. Pinholster* (1991) 1 Cal.4th 865, 968, fn. 25, *People v. Breaux* (1991) 1 Cal.4th 281, 314-315, and *Tuilaepa v. California* (1994) 512 U.S. 967, 971-973. (18CT 4744.)

(7) You may spare defendant's life for any reasons you deem satisfactory, including humanitarian considerations or mercy, if you chose to do so." (18CT 4746.) The authority provided for this requested instruction was *People v. Pride* (1992) 3 Cal.4th 195, 262 and *Penry v. Lynaugh* (1989) 492 U.S. 302, 307. (18CT 4746.)

C. The Balance Between The Rights of Defendants and the Responsibilities of Counsel.

A criminal defendant has the right to counsel and the correlative right to represent himself. (*Gideon v. Wainwright* (1963) 372 U.S. 335, *Faretta v. California* (1975) 422 U.S. 806). However, this court has held that a defendant has no right to a middle position, i.e., to accept counsel yet control counsel's decisions and tactics. (See, e.g., *People v. Clark* (1992) 3 Cal.4th 41, 97; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14.)

As this court recently stated, when a defendant is represented by an attorney, it is the attorney who controls the case.

> "It is settled that a criminal defendant does not have a right both to be represented by counsel and to participate in the presentation of his own case. Indeed, such an arrangement is generally undesirable." (*People v. Clark* (1992) 3 Cal.4th 41, 97; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) "If [a criminal defendant] chooses professional representation, he waives tactical control; *counsel* is at all times in charge of the case and bears the responsibility for providing constitutionally effective assistance. Upon a 'substantial' showing [citation], and entirely subject to counsel's consent ... , the court *may* nonetheless permit the accused a limited role as cocounsel. *Even so, professional counsel retains complete control over the extent and nature of the defendant's participation, and of all tactical and procedural decision.*" (*People v. Hamilton* (1989) 48 Cal.3d 1142. 1164, n. 4.)

(*People v. D'Arcy* (2010) 48 Cal.4th 257, 281-282, emphasis in original, unofficial citations removed.)

With respect to the penalty phase of his trial, appellant did not elect to discharge his attorney and represent himself under *Faretta*, although he was well aware of that option since appellant had at one time been pro per. Because appellant continued to be represented by counsel, he relinquished control over certain decisions to his attorney.

> By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics. Included in that narrow exception are such fundamental matters as whether to plead guilty, whether to waive the constitutional right to trial by jury, whether to waive the right to counsel, and whether to waive the privilege against self-incrimination. As to these rights, the criminal defendant must be admonished and the court must secure an express waiver; as to other fundamental rights of a less personal nature, courts may assume that counsel's waiver reflects the defendant's consent in the absence of an express conflict.

(*People v. Hinton* (2006) 37 Cal.4th 839, 873-874, quoted in *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1410, internal quotation marks and citations omitted.)

Similarly, *People v. Mattson* (1959) 51 Cal.2d 777 held that a defendant does not have *absolute* right to participate in the presentation of his case when he is represented by counsel, although a trial court *may* allow such an arrangement in the exercise of its discretion. (*Id.* at 797.) However, this court in *Mattson* went on to explain

> "The court, however, should not permit a litigant both to have counsel and to actively participate in the conduct of the case ... *unless the court on a substantial showing determines that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious conduct of the court's business will not thereby be substantially hindered or delayed.*"

(*Ibid.*, italics added.)

In *Florida v. Nixon* (2004) 543 U.S. 175, the United States Supreme Court stated that "[a]n attorney undoubtedly has a duty to consult with the client

regarding 'important decisions,' including questions of overarching defense strategy. [Citation]. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' " (*Id.* at pp. 186-187; see also *Taylor v. Illinois*, 484 U.S. 400 [an attorney has authority to manage most aspects of the defense without obtaining his client's approval]).

While a defendant does not relinquish all control by accepting counsel, the areas in which the defendant maintains control are relatively limited. Thus, the courts have stated that the defendant has the final say in the questions of whether to plead guilty, waive a jury, testify, or take an appeal. (*Jones v. Barnes* (1983) 463 U.S. 745, 751; *Florida v. Nixon* (2004) 543 U.S. 175, 186-187.)

However, even in these areas the control of the defendant is not absolute. Thus, although the United States Supreme Court in *Jones* and *Nixon* stated that it is the defendant's right to waive jury trial, those statements were dicta, and were not part of the holdings of those cases or the issues actually presented. (*Jones, supra,* 463 U.S. at p. 751, *Nixon, supra*, 543 U.S. at 187.)

In *People v. Peace* (1980) 107 Cal.App.3d 996 the Court of Appeal stated

> "[r]eversal was required because the trial court accepted a jury waiver over defense counsel's objection that the waiver was against the advice of counsel. The right to trial by jury cannot be waived without the consent of counsel. *"[A]lthough there is a constitutional right to a jury trial, there is no correlative right to a trial without a jury.* [Citations.] Accordingly, a defendant does not have a constitutional right to waive a jury trial over his counsel's objections."

(Id. at p.1007, italics added.)

Likewise, while it has been said that it is the defendant's choice whether to enter a guilty plea, that right appears to be one that cannot be exercised over the objections of counsel. (*People v. Upshaw* (1974) 13 Cal.3d 29, 33-34: Cal. Const., Art. I, §16.) Conversely, even though a defendant has entered a not guilty plea, in a capital case an attorney may concede guilt in the penalty phase as a tactical matter even if his client has not personally agreed to the concession.

(*People v. Cain* (1995) 10 Cal.4th 1, 30), and even if the client seeks to veto counsel's decision. (*People v. Memro* (1995) 11 Cal.4th 786, 858.)

Indeed, in capital cases, the defendant's degree of control over the case is actually less than that of a non-capital defendant. For example, while in non-capital cases the defendant controls the decision whether to plead guilty, in capital cases a guilty plea cannot be entered over the objection of the attorney. (Penal Code section 1018; see *People v. Chadd* (1981) 28 Cal.3d 739, 751.) In *People v. Alfaro* (2007) 41 Cal.4th 1277, this court explained that the Legislature imposed the requirement that counsel concur in a capital defendant's decision to plead guilty because "the state has a strong interest in reducing the risk of mistaken judgments," and "the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent." (*Id.*, at p. 1299.)

Thus, while there are certain fundamental decisions that remain within the control of the defendant, the state's interest in avoiding "mistaken judgments," particularly death judgments, requires that a capital defense attorney retain control over certain aspects of the defense. Accordingly, appellant will briefly review the law pertaining to these two spheres of control.

1. Decisions Under the Control of the Defendant

Generally speaking, a defendant personally controls decisions concerning the exercise or waiver of fundamental constitutional rights, whereas the attorney controls matters of strategy and tactics, as well as procedural matters. (*Faretta v. California*, *supra*, 422 U.S. at pp. 820-821.)

Thus, a criminal defendant must personally waive his constitutional right to be present at a hearing. (*People v. Fisher* (2009) 172 Cal.App.4th 1006, 1013-1014.) Similarly, a criminal defendant has the right to testify over the objection of counsel. (*People v. Blye* (1965) 233 Cal.App.2d 143, 149; *People v. Allen*

(2008) 44 Cal.4th 843, 860; *but see People v. Towey* (2001) 92 Cal.App.4th 880, 884 [unlike right to jury trial, the California Constitution does not require "an express personal waiver of the right to testify"].)

The defendant also has the personal and fundamental right to admit a probation violation over the objections of his attorney. (*People v. Robles* (2007) 147 Cal.App.4th 1286, 1291.) In *Robles*, the Court of Appeal for the Second Appellate District explained that although the attorney

> "is 'captain of the ship' with respect to the general control of the case, a defendant retains the personal and fundamental right to decide certain matters, such as whether to plead guilty, whether to testify, and whether to waive a jury trial. The decision to admit a probation violation is tantamount to the decision to plead guilty to a substantive charge."

(*Id.* at p. 1291.)

2. Decisions Under the Control of the Attorney

As noted in *Robles*, once a defendant retains an attorney and enters a plea of not guilty, the attorney is the "captain of the ship" with the authority to make all but a few decisions relating to fundamental constitutional rights. (*People v. Jackson* (1980) 45 Cal.4th 662, 688.) Thus, "[d]efense counsel is generally authorized to make tactical decisions regarding the introduction of evidence and to control court proceedings, without the necessity of first obtaining a personal waiver from the client." (*People v. Jackson* (1980) 28 Cal.3d 264 314.)

In *People* v. *McKenzie* (1983) 34 Cal.3d 616, this court explained that once an attorney is appointed in a criminal case, he has both the authority and the duty to control the proceedings. This authority includes:

> "deciding what witnesses to call, whether and how to conduct cross-examination... what motions to make, and most other strategic and tactical determinations. (*Townsend* v. *Superior Court* (1975) 15 Cal.3d 774, 781 [126 Cal.Rptr. 251, 543 P.2d 619]; *People* v. *Berumen* (1969) 1 Cal.App.3d 471, 476 [81 Cal.Rptr. 757]; ABA Standards, Defense Function, std. 4-5.2.)"

(*McKenzie* at p. 631; see also *Taylor v. Illinois* (1988) 484 U.S. 400, 417-418 [the attorney maintains control over the decision whether to call a particular witness to the stand].)

The courts of this state have consistently held that once a defendant enters a plea of not guilty, it is the attorney who has the power to decide which witnesses to call. (*In re Atchley* (1957) 48 Cal.2d 408, 418; *People v. Williams* (1970) 2 Cal.3d 894, 905; *People v. Seals* (1961) 191 Cal.App.3d 734, 739; *People v. Lindsey* (1978) 84 Cal.App.3d 851, 85.)

Similarly, the attorney controls the decision over which jury instructions to request. In *People v. Towey* (2001) 92 Cal.App.4th 880, the defendant argued on appeal that the trial court erred in accepting defense counsel's waiver of a request for CALJIC No. 2.60 [no inference of guilt may be drawn from defendant not testifying] and CALJIC No. 2.61 [defendant may rely on the state of the evidence], because the court had not obtained the defendant's personal waiver of these instructions. The court rejected this contention, holding that "the right to have the jury instructed using CALJIC Nos. 2.60 and 2.61 is not, in itself, a "fundamental right of a personal nature' that requires an express personal waiver by a defendant." (*Id.*, at p. 884.) In addition, the court noted that "decisions concerning which instructions to request and which instructions to waive generally are matters of tactics," and found that counsel's decision to forego the instructions in that case was tactical in nature. (*Ibid.*)

The control over which instructions should be requested, a matter within the control of counsel under *Towey*, is comparable to other areas of tactics which are within the control of the attorney. For example, "a defendant represented by counsel cannot, . . . dictate what motions counsel will bring on his behalf; with a few exceptions, none of which apply here, counsel has authority to control court proceedings." (*People v. Crandell* (1988) 46 Cal.3d 833, 860.)

Similarly, while a defendant has a right to represent himself, a court may refuse to allow the defendant to use the jail's law library if the attorney objects to the client using the library. As the court stated in *People v. Ochoa* (1970) 9 Cal.App.3d 500, it is "intolerable for an attorney who is trying a serious case, to be constantly 'quarter-backed' by a layman." (*Id.*, at p. 504, n. 2.)

A number of other cases also show that the decisions regarding trial tactics are matters for the attorney and are not subject to the control of the defendant. For example, defense counsel may request a continuance beyond the trial date limit of section 1382, even over the defendant's express objection. (See *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780.) Counsel may also refuse to exercise a peremptory challenge against a judge, even if the client wishes to do so. (*People v. Jackson* (1960) 186 Cal.App.2d 307, 317.) Defense counsel may also stipulate to a read-back of testimony without the presence of counsel or defendant. (*People v. Horton* (1995) 11 Cal.4th 1068, 1120.)

D. The State's Interest in Accurate Procedures

The foregoing apportionment of spheres of control over defense decision-making between the defendant and his counsel is an attempt to balance the interests of the individual defendant, on the one hand, against the interests of society and the courts, on the other. The right of self-representation, and the right to make decisions regarding certain fundamental constitutional rights, affirms "that respect for the individual which is the lifeblood of the law" (*Martinez v. Court of* Appeal (2000) 528 U.S. 152, 156) and ensures that a defendant's constitutional right to present his own defense is observed. Conversely, the allocation to defense counsel of control over the defense serves to protect the interests of society in a fair and accurate legal process. (*Indiana v. Edwards* (2008) 554 U.S. 164, 176-177.)

Legal "proceedings must not only be fair, they must 'appear to be fair to all who observe them.'" *Indiana v. Edwards, supra,* 554 U.S. at p. 177, citing

Wheat v. United States (1988) 486 U.S. 153, 160.) Thus, even where a request of self-representation has been granted, "[a] trial judge may also terminate self-representation or appoint 'standby counsel' -- even over the defendant's objection -- if necessary." (*Martinez v. Court of Appeal,* supra, 528 U.S., at p. 162, citing *Faretta, supra*, 422 U.S. at p. 834, n. 46.) Similarly, a state may deny a request for self-representation, and may insist that defendants who are competent to stand trial must still be represented by counsel, where by reason of mental illness they are not competent to conduct trial proceedings by themselves. (*Indiana v. Edwards, supra*, 554 U.S. at p. 178.)

This court has also "often recognized the 'inherent powers of the court ... to insure the orderly administration of justice.' [Citations.]" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 279.) For example, this court has held that a trial court

> should not permit a litigant both to have counsel and to actively participate in the conduct of the case (as by conducting examination of witnesses, interposing objections, arguing points of law or of fact, addressing the jury, etc.) unless the court on a substantial showing determines that in the circumstances of the case the cause of justice will thereby be served and that the orderly and expeditious conduct of the court's business will not thereby be substantially hindered, hampered or delayed.

(*People v. Mattson* (1959) 51 Cal.2d 777, 797.)

The interests of both parties in the accuracy and fairness of legal proceedings is never higher than in the penalty phase of a capital trial. "We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, . . ." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 84.)

The Eighth Amendment to the United States Constitution requires that a capital defendant who has been found eligible for the death penalty must receive

"an individualized determination on the basis of the character of the individual and the circumstances of the crime." (*Tuilaepa v. California* (1994) 512 U.S. 967, 972; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-304.) That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime. (*Tuilaepa, supra*, 512, U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307.)

To fulfill this purpose, the Legislature has required the trier of fact to consider a number of specified factors in deciding whether to sentence the defendant to death. (Penal Code §190.3.) For example, the jury must consider whether a defendant has a mental disease or defect which affected his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law. (Penal Code §190.2, subd. (h).) The jury must also consider any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime. (Penal Code §190.3, subd. (k).)

The Legislature scheme of Penal Code section 190.3, however, relies upon counsel acting as the advocate for the defendant. If the attorney is forbidden from presenting such evidence, whether by the court or by the client himself, the state's interest in ensuring the accuracy and fairness of its death judgments is defeated. Moreover, the state's interest is reliable judgments is defeated no matter the defendant's motivation was in seeking to prevent his attorney from presenting mitigating evidence. Whether the defendant is attempting to commit judicially assisted suicide out of remorse for his offense, or whether he believes he will never actually be executed, or whether he believes living conditions are better at San Quentin than they are in Pelican Bay, the refusal to permit counsel to present mitigating evidence prevents the jury from hearing factors which may mitigate the defendant's culpability. In this case, where counsel had prepared what appears to have been a comprehensive penalty phase defense, the impact of the court's acquiescence in the defendant's objection was to preclude the jury from

hearing facts and argument that would present the entire picture of whether the State should put the defendant to death. In effect, the defendants were permitted to take the decision away from the jury, in whose hands the Legislature had placed it, and instead to select their own punishment.

Justice Mosk warned of the danger of just such a situation in his concurring and dissenting opinion in *People v. Stansbury* (1994) 4 Cal.4th 1017. Justice Mosk pointed out that when a capital defendant prevents the presentation of mitigating evidence by his counsel, the defendant is effectively permitted to "manipulate the legal system" and to render the standard penalty phase jury instructions ineffective. Noting that the defendant in *Stansbury* was a "manipulator" who had prevented the presentation of available mitigating evidence, Justice Mosk noted that

> the instructions themselves really made no sense in the context of this case. The references to weighing the aggravating against the mitigating factors, and to the mitigating evidence that defendant might proffer, were essentially meaningless because of the lack of a single piece of mitigating evidence. No jury should be placed in such an untenable position, and no death judgment based on such an unbalanced proceeding should be carried out.

(*People v. Stansbury, supra*, 4 Cal.4th, at p. 1075, Mosk, J., concurring and dissenting.)

As Justice Mosk suggested in Stansbury, an additional reason to prevent the defendant from interfering with his counsel in the penalty phase is to ensure that the jury is properly instructed and can make sense of the instructions. The trial court is required to give the jury appropriate instructions to ensure that a proper result is reached. It is well established that "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287; *People v. Bailey* (2010) 187 Cal.App.4th 1142, 1154.) As a result, even if the defendant is

permitted to insist that no defense be presented, the State must still correctly instruct the jury on all relevant principles of law.

As noted above, it is the attorney, not the defendant, who controls the question of which jury instructions should be requested. (*People v. Towey, supra,* 92 Cal.App.4th 880, 884.) This decision is left to the attorney both because jury instructions require legal knowledge and research, and because jury instructions are matters of tactics, and do not generally concern the exercise of fundamental constitutional rights by the defendant personally. (See *Towey,* supra, 92 Cal.App.4th, at p. 884.)

In this case, the jury was placed in precisely the "untenable position" of which Justice Mosk warned in *Stansbury.* The power to request instructions at the penalty phase was taken away from counsel and instead given to the defendants, neither of whom had any legal training. A review of their colloquy with the court reveals that neither defendant had a complete or sophisticated understanding of the purpose of penalty phase evidence, and appellant in particular thought it had something to do with putting the "blame" on his parents and family for his conduct. (12RT 2823.) More troubling, it appears that these two defendants actually wanted the death penalty, and their interference with counsel's attempt to request proper instructions thus undermined the state's interest in ensuring the accuracy and fairness of its death verdicts.

The principle that counsel, not defendants, must control at least the request for jury instructions takes on greater importance when it is borne in mind that in capital cases the state has a greater interest in a reliable verdict that it does non-capital cases. "Death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) Not only is death "different" from the defendant's perspective, but

> [f]rom the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the

> death sentence be, and appear to be, based on reason rather than caprice or emotion.

(*Id.* at p. 357-358.)

When a capital defendant is permitted to prevent the presentation of mitigating evidence and interfere with counsel's decision to request jury instructions, there is grave danger that the death sentence will be based upon the caprice or emotion of the defendant, thereby undermining the state's interest in rational, accurate, and fair procedures.

In *People v. Chadd* (1981) 28 Cal.3d 739, this court discussed the interest the State has in limiting the right of a capital defendant to totally abandon all defenses. In *Chadd*, a capital defendant stated he wished to plead guilty against the consent of his attorney. When the defendant was found competent the trial court allowed him to plead guilty to all counts and to admit the charged enhancements and the special circumstance allegations. (*Id.* at pp. 744-746.) This Court reversed, directing the trial court to strike the defendant's pleas of guilty to four of the counts and his admissions of charged enhancements and special circumstances allegations, holding the trial court erred in accepting the guilty plea without the consent of defendant's counsel as required by Penal Code section 1018, which requires counsel's consent before a guilty plea for a capital offense can be received. (*Id.* at p. 746.)

The Court rejected respondent's argument that prohibiting such a plea would unconstitutionally allow counsel to "veto" a capital defendant's decision to plead guilty. The court stated that the Attorney General "fail[ed] to recognize the larger public interest at stake in pleas of guilty to capital offenses." (Id. at pp. 747-748.) This court noted that the amendment to section 1018 requiring the consent of counsel to a guilty plea in a capital case would practically preclude such a plea, since an attorney would not be likely to consent to such a plea. (*Id.* at pp. 749-750.)

Chadd also rejected respondent's contention that *Faretta* required allowing the defendant the right to plead guilty, stating:

> "The Attorney General in effect stands *Faretta* on its head: from the defendant's conceded right to "make a defense" in "an adversary criminal trial," the Attorney General attempts to infer a defendant's right to make no such defense and to have no such trial, even when his life is at stake. But in capital cases, as noted above, the state has a strong interest in reducing the risk of mistaken judgments. (6) Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent."

(*Id.* at p. 751.)

The state's interest in ensuring accurate judgments also prevents a defendant from waiving the automatic appeal from a death sentence. "A state may require reasonable proceedings in order to protect its own interests in the fairness of its determinations." (*Massie v. Sumner* (9th Cir. 1980) 624 F.2d 72, 74.)

The fairness and accuracy of the Anglo-American judicial system is based on the concept that truth can best be found in adversarial proceedings in which each side presents its case. "In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1026, internal quotation marks and citation omitted.) "The fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel." (*McMillan v. Shadow Ridge At Oak Park Homeowner's Ass'n* (2008) 165 Cal.App.4th 960, 965.)

When a defendant seeks the death penalty, the truth seeking purpose of the adversary system is defeated. This may be an acceptable and necessary accommodation to the needs of judicial economy in situations where a defendant is pleading guilty to an offense, but when the defendant is permitted to prevent

the presentation of mitigating evidence and even prohibit his attorney from arguing to save his life, the state's paramount interest in the accuracy and fairness of its death penalty judgments is undermined, and that is an outcome that should not be acceptable to any court. Worse, when a court permits a defendant to exercise veto power even over his counsel's efforts to prepare and submit jury instructions, there is a grave danger that the jury's sentencing discretion may not be properly guided. While it may be impossible to avoid such a result if the defendant discharges counsel and represents himself under *Faretta*, this distortion of the system should not be tolerated when the defendant is represented by counsel.[38]

In *People v. Stansbury, supra*, 4 Cal.4th 1017, 1073, Justice Mosk also warned of the danger to the state's interests if a capital defendant is permitted to commit "judicial suicide." (Id. at p. 1073.) The danger of "judicial suicide" can be avoided simply by holding that the decisions regarding jury instructions, which witnesses to call, and whether or not to make arguments are matters that fall within the purview of defense counsel.

Finally, it is important to bear in mind the fact that a trial court judge is charged with the authority, power, and duty "to control all proceedings during the trial...with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Penal Code § 1044.) For the trial court to acquiesce in the demands of the defendants that no defense be presented abrogates this duty.

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[38] It is noteworthy that *Faretta* is based on the Sixth Amendment right to counsel, but does not implicate the 5th or 14th Amendment Due Process Clauses or the Equal Protection Clause. When self-representation is not an issue, as it was not here, *Faretta* is not applicable. Accordingly, the case is not a basis for permitting a defendant to limit the presentation of mitigating evidence, prevent his counsel from arguing for life, or permitting a defendant to interfere with the submission of jury instructions.

Appellant contends that cases cited above were correct in concluding that jury instructions, the choice of which witnesses to call, and the choice of which arguments to make are tactical and strategic matters that fall within the purview of trial counsel, and that an attorney may make decisions regarding these matters even though the client disagrees. Indeed, to hold otherwise would strip the attorney of any meaningful function and effectively render the client without any representation. Appellant may have had the right prior to trial to fire his attorney and represent himself, but having elected not to do so, he cannot dictate tactics that normally are within the attorney's purview. (*People v. Bradford, supra*, 15 Cal.4th at p. 1365.)

E. Prior Cases Which Analyzed Situations Where No Penalty Phase Defense Was Presented are Not Controlling Here, But To The Extent that Inconsistent Language Appears In Those Cases, They Should Be Disapproved.

On several occasions since the reintroduction of the death penalty in 1978, his Court has addressed the question of whether the failure to present a penalty defense at the defendant's request violates the Sixth Amendment right to counsel and/or the Eighth Amendment's guarantee of a reliable penalty determination. As appellant will show, the cases are distinguishable to the extent that they involved either self-represented defendants or claims of ineffective assistance of counsel. To the extent that any language in the decisions is inconsistent with the principle that the defense attorney controls the goals, strategy, tactics, witnesses, or other matters pertaining to the presentation of the penalty phase, appellant respectfully submits they should be disapproved.

1. The Principal Cases

In *People v. Deere* (1985) 41 Cal.3d 353 (*Deere I*), the defendant, with his counsel's consent, pleaded guilty to the charges against him and admitted a special circumstance allegation. The defendant then waived jury trial on the issue

of penalty, again with the concurrence of counsel, presented no mitigating evidence, and requested a verdict of death. This Court reversed the resulting death judgment, holding that a defense attorney's failure to present any mitigating evidence in the penalty phase of a capital trial deprives the defendant of effective assistance of counsel under the Sixth Amendment to the United States Constitution. This Court further held that counsel's failure to present mitigating evidence defeated the state's independent interest in assuring a reliable penalty determination under the Eighth Amendment. *Deere I* reasoned that allowing a defendant to bar his counsel from introducing mitigating evidence because he wants to die violates the fundamental public policy against "misusing the judicial system to commit a state-aided suicide" and also prevents this Court from fulfilling its duty to review a judgment of death upon the complete record of the case "because a significant portion of the evidence of the appropriateness of the penalty would be missing." (*Id.*, at pp. 363-364; see also *People v. Burgener* (1986) 41 Cal.3d 505, 541-542.)

Four years later, in *People v. Bloom* (1989) 48 Cal.3d 1194, this Court again considered the issue of whether the Eighth Amendment is violated when no mitigation evidence is presented in the penalty phase by a defendant. In *Bloom*, the defendant chose to represent himself during the penalty phase and to have his former guilt phase counsel act as advisory penalty phase counsel. The defendant presented no mitigating evidence and, in his closing argument, urged the jury to impose the death penalty, stating not only that he had taken a life and deserved to die, but that he wanted to die. (*Id.*, at p. 1216.) The jury imposed a death sentence.

On appeal, the defense argued that the failure to present mitigating evidence made the death judgment unreliable under the Eighth Amendment. However, this Court rejected this argument, holding that the reliability required by the Eighth Amendment in death penalty cases "is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases

pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*Id.,* at p. 1228.) This Court disapproved *Deere I* to the extent that case had suggested that a defendant's failure to present mitigating evidence, in and of itself, is sufficient to make a judgment of death constitutionally unreliable. In short, in *Bloom* this court found the death judgment was constitutionally reliable, i.e., that a defendant cannot be found to have "misus[ed] the judicial system to commit a state-aided suicide," because the proper trial procedures were carried out.

Next, in *People v. Lang* (1989) 49 Cal.3d 991, 1030, this Court rejected a capital defendant's contention that his trial counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel by acceding to his demand that his grandmother not be called to testify as a defense penalty phase witness. *Lang* also concluded that even if counsel had acted improperly by acquiescing to the defendant's demand, the impropriety would not result in reversal because the doctrine of invited error operated "to estop a defendant from claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own request." (*People v. Lang, supra,* 49 Cal.3d at p. 1032.) *Lang* also noted that the defendant had predicated his Sixth Amendment claim on his trial counsel's acquiescence to his demand and not on "any antecedent act or omission of counsel," such as the failure to adequately investigate the availability of mitigating evidence and advise the defendant of its significance. (*Id.*, at p. 1033.)

In addition to claiming his counsel was ineffective, the defendant in *Lang* also argued that the failure to present his grandmother's mitigating testimony defeated the state's independent interest in assuring a reliable penalty determination in his capital case. This Court relied on its earlier holding in

Bloom regarding the reliability required by the Eighth Amendment and *Bloom*'s disapproval of *Deere I* in holding the death judgment was not unreliable merely because defense counsel had not called defendant's grandmother. (*People v. Lang*, *supra*, 49 Cal.3d at p. 1030.) Again, it is worth noting that *Lang*, as is true of *Bloom*, did not disapprove *Deere I*'s holding that the failure to present mitigating evidence defeats a state's independent interest in a reliable death judgment because it prevents this Court from fulfilling its obligation to review a judgment of death upon a complete record.

In *People v. Sanders* (1990) 51 Cal.3d 471, upon which the trial court in this case relied in acquiescing to appellant's request that no penalty phase defense be presented on his behalf (13RT 3020-3021), this Court held that a defendant's "knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine adverse witnesses, and present closing argument at the penalty phase estops him" from claiming on review that counsel's performance was constitutionally inadequate. In so doing, *Sanders* relied on its holding in *Lang*, *supra*, and its disapproval of *Deere I*, *supra*. (*Id.*, at pp. 526-527.)

As to the state's independent interest in achieving a reliable penalty verdict, *Sanders* relied on the decisions in *Lang* and *Bloom* in holding that the failure to present mitigating evidence did not compromise the judgment of death. In *Sanders*, as was true in appellant's case, there was no mitigating evidence, no cross-examination, and no closing argument. Sanders argued that as a result the jury had nothing to "weigh" against the prosecution's penalty phase evidence with the result that the verdict of life without the possibility of parole was effectively foreclosed. This court rejected that argument, stating that

> The required reliability is attained with the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present. A judgment of death

> entered in conformity with these rigorous standards does not violate the Eighth Amendment reliability requirements.

(*People v. Sanders*, *supra*, 51 Cal.3d 471, 526.)

Sanders concluded that in light of the decisions disapproving the reasoning of *Deere I*, the defendant's knowing and voluntary decision to forgo his right to present mitigating evidence, cross-examine witnesses, and present argument at the penalty phase of his trial estopped him from claiming a reversal based on a claim of ineffective assistance of counsel. (*People v. Sanders*, *supra*, 51 Cal.3d at p. 527, citing *People v. Lang*, *supra*, 59 Cal.3d at pp. 1031-1032.)

Once more, appellant notes that *Sanders* made no reference to, and its holding did not rely upon, that portion of *Deere I*'s determination that the state's independent interest in the reliability of its death judgments requires this Court's review of the case upon a complete record. In addition, in a footnote this court in *Sanders* specifically noted that in its prior cases "[w]e left open the possibility that the state's interest in a reliable penalty verdict may be compromised when, in addition to the defendant's failure to present available mitigating evidence, the jury was also given misleading instructions and heard misleading argument." *Sanders, supra*, 51 Cal.3d at p. 526, n. 23, citing *People v. Bloom, supra,* 48 Cal.3d 1194, 1228, fn. 9, and *People v. Williams* (1988) 44 Cal.3d 1127, 1152.)

After this court's decision in *Sanders*, the defendant in *Deere I*, whose penalty judgment was reversed by this Court, was again sentenced to death following a retrial of the penalty phase. His automatic appeal was heard by this Court, which affirmed the death judgment in *People v. Deere* (1991) 53 Cal.3d 705 (*Deere II*). The defendant again contended in *Deere II* that his trial counsel rendered ineffective assistance in failing to present evidence in mitigation. This Court reiterated the disapproval of *Deere I* that it had expressed in *Bloom* and *Lang,* to the extent *Deere I* suggested the failure to present mitigating evidence constituted ineffective assistance of counsel, and endorsed *Lang*'s use of the invited-error doctrine to estop the defendant's claim that counsel was ineffective

because counsel acted or omitted to act in conformance with the defendant's own requests. (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at p. 717.)

2. Justice Mosk's Concurrence in *Deere II*

The opinion in *Deere I* was authored by Justice Mosk. In *Deere II*, Justice Mosk wrote separately regarding this Court's disapproval of the analysis of *Deere I* and its holding in *Bloom* that the "reliability [required by the Eighth Amendment in death penalty cases] is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Deere*, *supra*, 53 Cal. 3d at p. 728; quoting from *People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)

In his concurrence, Justice Mosk sought to reaffirm the teaching of *Deere I* that defense counsel's failure to present mitigating evidence introduced error into the penalty proceeding.

> "To permit a defendant convicted of a potentially capital crime to bar his counsel from introducing mitigating evidence at the penalty phase . . . would . . . prevent this court from discharging its constitutional and statutory duty to review a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing.
>
> "This deficiency of the record implicates [a] paramount concern of the state: in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgment. . . . [T]he United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. . . . [T]he high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor.

> "To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated."
>
> *Deere I* also held that so long as "the record . . . demonstrates the possibility that at least *someone* might have been called to testify on [the] defendant's behalf and to urge that his life be spared[] (41 Cal.3d at p. 367, italics in original), the error cannot be deemed harmless. When the sentencer in a capital case is deprived of all or a substantial part of the available evidence in mitigation, the potential for prejudice is too obvious to require proof. Indeed, short of substituting a verdict of its own, there is no way for a reviewing court to determine what effect unpresented mitigating evidence might have had on the sentencer's decision. We have no doubt that a judgment of death imposed in such circumstances constitutes a miscarriage of justice: not only [would the] defendant not have [had] a fair penalty trial -- in effect he [would have] had no penalty trial at all." (*People v. Deere* (*Deere I*), *supra*, 41 Cal.3d at p. 368, citations and internal quotations omitted.)
>
> But in *People v. Bloom*, *supra*, 48 Cal.3d 1194, a majority of this court disapproved the analysis of *Deere I*. They stated that the reliability [required by the Eighth Amendment in death penalty cases] is attained when the prosecution has discharged its burden of proof at the guilt and penalty phases pursuant to the rules of evidence and within the guidelines of a constitutional death penalty statute, the death verdict has been returned under proper instructions and procedures, and the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1228.)"

(*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 727-728, quoting from *Deere I*, *supra*, 41 Cal.3d, at pp. 363,364, internal citations omitted.

Justice Mosk also explained, in an analysis and argument appellant herein adopts, that finding the reliability required by the Eighth Amendment in the procedural safeguards described in *Bloom* impermissibly allows "form to prevail

over substance" in a circumstance in which "a person's life is at stake." (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at p. 728.)

> Manifestly, the penalty phase of a capital trial in this state is an adversary process. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective of punishment in accordance with deserts. In other words, the system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. It follows that the system requires meaningful adversarial testing. When such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law.
>
> Further, as the United States Supreme Court has repeatedly emphasized, "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1236-1237, citations and internal quotations omitted (conc. & dis. opn. of Mosk, J.).)
>
> Thus, contrary to the *Bloom* assertion, the reliability required by the Eighth Amendment in death penalty cases can be assured only when the record on which the verdict is based is complete, i.e., when it does not lack any significant portion of the evidence of the appropriateness of the penalty that counsel reasonably concludes . . . makes the most compelling case in mitigation. (*People v. Deere* (*Deere I*), *supra*, 41 Cal.3d at pp. 363, 364, fn. 3.)

(*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 728-729, internal quotations omitted.)

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3. *Deere I* Controls; *Bloom, Lang, Sanders,* and *Deere II* Are Distinguishable on Their Facts and Incorrect in Assuming That A Represented Defendant May Control the Evidence Presented at the Penalty Phase.

Appellant submits that *Deere I* controls in this situation and that the holdings in *Bloom, Lang, Sanders*, and *Deere II* are inapposite in the circumstances presented in this case.

The first of these cases, *People v. Bloom,* is distinguishable because that case involved a defendant who represented himself at the penalty phase. (*Id.*, 48 Cal.3d at pp. 363-36.) By contrast, appellant, though he had been pro se at one point earlier in the case, was represented by counsel at the penalty phase, and his counsel had prepared and sought to present a penalty phase on appellant's behalf. The Sixth Amendment concerns implicated when a defendant choses to represent himself are not present when a defendant chooses to be represented by counsel, and *Bloom* is therefore distinguishable.

Lang, Sanders, and *Deere II* are also distinguishable to the extent that each of those cases involved the analysis of claims of ineffective assistance of counsel for failing to present mitigating evidence in the penalty phase. Appellant is not raising a claim of ineffective assistance of counsel in this direct appeal. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)[39] Instead, he argues that the court's acquiescence in a defendant's objection to his counsel's intention to present a penalty phase defense is error because the decision of what defense to present belongs to counsel, not the client, and because a contrary rule would defeat the state's interest in fair, accurate, and reliable death judgments.

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[39] Appellant's counsel is appointed only for direct appeal purposes. Under *Pope* and this court's policies in capital cases, ineffective assistance of counsel is more appropriately raised in habeas corpus proceedings, and no counsel has yet been appointed for such proceedings. Appellant's counsel therefore does not know whether ineffective assistance of counsel claims may be raised in appellant's habeas proceedings and makes no representation to that effect.

It is true that language in these three cases also rejected arguments that the heightened interests of the defendant and the state in reliable death decisions requires a defense in mitigation. (See, e.g., *People v. Bloom, supra*, 48 Cal.3d at pp. 1227-1228) To the extent that these arguments addressed the ineffective assistance of counsel claims raised in those cases, the court's statements rejecting these arguments are mere dicta. Furthermore, to the extent that the court's statements rely upon the language in *Bloom*, the court's reliance was misplaced inasmuch as *Bloom* did not address a situation in which the defendant was represented by counsel.

Appellant recognizes that an argument similar to that which he makes here was also raised and rejected in *People v. Blair* (2005) 36 Cal.4th 686, 736-738. In that case, a dispute arose between a self-represented defendant and his advisory counsel concerning the presentation of mitigation in the penalty phase. Advisory counsel sought to have the defendant examined by a psychiatrist and also sought to present evidence in mitigation, but the defendant refused. Ultimately, no mitigation evidence was presented, other than the defendant's city college transcripts. (*Id.*, 36 Cal.4th at p. 736.)

On appeal, the appellant contended the defendant has no right to self-representation at the penalty phase, and in the alternative argued that permitting him to preclude investigation and presentation of mitigating evidence at the penalty phase violated his right to a reliable penalty determination. This court rejected both contentions. (*Id.*, 36 Cal.4th at p, 737.)

However, once again, *Blair* is distinguishable on the same basis that *Bloom* is distinguishable—it is a case involving a pro se defendant. Here, where a defendant is represented by counsel, it is counsel's decision whether to present evidence at the penalty phase. A defendant who has chosen to be represented by counsel gives up his right to control the defense counsel prepares and presents.

In *Bloom*, *Blair*, and other cases, this court stated that because a defendant may opt to represent himself, any rule requiring defense counsel to present

mitigating evidence over the client's wishes would be unenforceable and self-defeating because the defendant could simply "fire" his lawyer, represent himself, and then decline to present evidence. (See, e.g., *People v. Blair*, *supra*, 36 Cal.4th at p. 737.) Indeed, this court appears to have based its rejection of defense arguments on this point primarily on this contention. However, appellant respectfully submits that this contention is simply incorrect.

First of all, even assuming *arguendo* that a defendant retains the right to represent himself at the penalty phase, a proposition with which appellant respectfully disagrees,[40] the court's assumption that a rule permitting counsel to present mitigation in the penalty phase over his client's objection would be unenforceable and self-defeating is unwarranted. It does not necessarily follow that any defendant who objected to mitigating evidence at the penalty phase would therefore fire his lawyer and represent himself from that point on. Defense

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[40] Appellant recognizes that this court has previously rejected arguments that a defendant has no right to represent himself when the case reaches the penalty phase. (*People v. Blair* (2005) 36 Cal.4th 686, 737, and cases there cited.) For purposes of preserving this argument for potential federal review, appellant respectfully reasserts it here and contends that *Martinez v. Superior Court* (2000) 528 U.S. 152, compels the conclusion that the right to self-representation does not extend to the sentencing phase of a capital trial, both because such phases are creatures of statute and did not exist at the time the Sixth Amendment was adopted, because the defendant's interests in autonomy are diminished after he has been convicted beyond a reasonable doubt of a capital crime, and because the state's interest in reliable death judgments requires that the balance be drawn in favor of representation by counsel at the penalty phase. All of these arguments were rejected in *Blair*, *supra*, 36 Cal.4th at pp. 737-738. In addition, appellant contends that mitigation investigations commonly disclose evidence, such as that which counsel apparently obtained in this case, indicating that the defendant suffered brain damage and other mental impairments which should cause any court grave concern regarding the reliability of any judgment reached after such a defendant chose to forego the presentation of mitigating evidence, even if such a defendant might clear the relatively low hurdle of competence to stand trial. Finally, for the reasons set forth in the text, appellant submits that a defendant who makes a *Faretta* motion at the commencement of the penalty phase does so in an untimely manner, and such a motion should be denied.

attorneys and their clients often disagree on many strategic and tactical matters during the course of a trial, but defendants do not automatically chose to have counsel dismissed and represent themselves each time such disagreements arise. A competent defendant may still rationally chose to continue with an attorney with whom he disagreed on penalty phase strategy for many reasons, including his belief that he required the assistance of counsel in the guilt phase, his trust in his attorney, his deference to counsel's greater experience, his desire to have counsel make arguments in his defense, his desire to have counsel handle such other aspects of the proceedings as a new trial motion, his fear of representing himself against an experienced prosecutor, or for many other reasons. Thus, even if this court is correct that the right of self-representation continues in the penalty phase, the fact that it is possible that some defendants might chose to dismiss their attorneys in order to prevent them from presenting a penalty phase does not justify unilaterally removing authority over the penalty phase defense from counsel in all cases.

Secondly, a defendant who has accepted the assistance of counsel in the guilt phase has no right of self-representation in the penalty phase of a capital trial that can be asserted at that late date. (*People v. Bradford, supra*, 15 Cal.4th at pp. 1364-1365.) When a motion for self-representation is not made in a timely fashion prior to trial, self-representation is no longer a matter of right but is subject to the trial court's discretion. (*Ibid.*; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 809.) In the event that a motion for self-representation is first made at the commencement of the penalty phase, the trial court should exercise its discretion to deny the motion.

The right of self-representation is not absolute. (*Martinez v. Court of Appeal, supra*, 528 U.S. at p. 163.) Thus, a defendant can forfeit this right by engaging in obstructionist tactics or misconduct. (*Faretta, supra*, 422 U.S. 834, n. 46.) "The right of self-representation is not a license to abuse the dignity of the

courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (*Ibid.*)

More significantly, however, a defendant who wishes to represent himself must make an appropriate motion *in a timely manner*. (*Martinez,* supra, 528 U.S., at p. 163.) A criminal defendant's assertion of his sixth amendment right to self-representation must be knowing and intelligent (*Faretta v. California, supra,* 422 U.S. 806, 835), timely and not for the purpose of delay, (*United States v. Smith* (9th Cir. 1986) 780 F.2d 810, 811), and unequivocal. (*Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552, *cert. denied,* 475 U.S. 1099, 89 L. Ed. 2d 902, 106 S. Ct. 1502 (1986).)

On many occasions, this court has held that *Faretta* motions made as late as the eve of trial are untimely. (See, e.g., *People v. Frierson, supra,* 53 Cal.3d at p. 742 [self-representation motion made on September 29, 1986, when trial was scheduled for October 1, 1986, was made on "the eve of trial" and was untimely]; *People v. Valdez* (2004) 32 Cal.4th 73, 102 [*Faretta* motion made "moments before jury selection was set to begin" deemed untimely]; *People v. Horton* (1995) 11 Cal.4th 1068, 1110 [self-representation motion made on the date scheduled for trial untimely]; *People v. Clark* (1992) 3 Cal.4th 41, 99–100 [case had been continued day to day after Aug. 10 "in the expectation that the motions would be concluded and jury selection set to begin at any time," and hence the defendant's Aug. 13 motion was "in effect the eve of trial" and untimely].) Under these authorities, a defendant may not wait until the completion of the guilt phase and then suddenly declare his intention to represent himself at the penalty phase, because such a motion would be untimely.

The penalty phase is not a separate trial. As this court observed in *Blair, supra,* "for Sixth Amendment purposes the penalty phase of a capital case is 'merely a stage in a unitary capital trial.'" (*Id.*, 36 Cal.4th at p. 737, citing, *inter alia, People v. Hardy* (1992) 2 Cal.4th 86, 194.) If the penalty phase is merely a portion of a unitary trial, then a defendant who makes his *Faretta* motion as late

as the eve of trial, or after jury selection has begun, makes an untimely motion which the trial court may, and should, reject pursuant to its inherent control over the proceedings. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 279.) Appellant can find no case which guarantees a defendant the right to represent himself at one portion of a unitary trial, but to then have counsel appointed to represent him at another portion of the same trial. Indeed, the law is to the contrary; "[a] criminal defendant has no right both to be represented by counsel and to participate in the presentation of his own case. (*People v. Clark*, *supra*, 3 Cal. 4th at p. 97.) Such an arrangement is generally undesirable. Although a court may authorize it, it should do so "only upon a 'substantial' showing that it will promote justice and judicial efficiency in the particular case." (*People v. Frierson* (1991) 53 Cal. 3d 730, 741.) It is difficult to see how the cause of justice or judicial efficiency would be advanced by permitting a defendant represented by counsel to take over the case by himself at the penalty phase.[41]

For all the foregoing reasons, appellant submits that a capital defendant has no right to represent himself in the penalty phase, or to control the presentation of mitigating evidence in that phase, once he has accepted counsel and the trial has begun. Accordingly, to the extent that *Bloom, Lang*, *Sanders*, *Deere II*, and *Blair* all rest upon the contrary proposition that a rule permitting counsel to control the penalty phase presentation would be unenforceable, those cases should be disapproved.

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[41] While a capital defendant who has accepted counsel in the guilt phase has no right to self-representation in the penalty phase, he may still seek to dismiss counsel and replace him by means of a Marsden motion. (*People v. Marsden* (1970) 2 Cal.3d 118. However, in *People v. Lucky* (1988) 45 Cal.3d 259, this court explained that "[t]here is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney." (*Id.*, at pp. 281–282, citations omitted.)

Justice Mosk was correct in *Deere I* and in his concurrence in *Deere II*. The interests of the defendant and the state in a reliable death judgment are only served if the jury has before it a complete record on which to base its penalty phase verdict. (*People v. Deere* (*Deere II*), *supra*, 53 Cal. 3d at pp. 728-729.)

Here, the record was manifestly not "complete" because it lacked any penalty phase defense, even though counsel had prepared one. Counsel had done a comprehensive investigation and intended to present appellant's mother, sister, and stepmother, among other family members, as well as three expert witnesses counsel had retained. Counsel intended to present a doctor to testify that appellant suffered from brain damage, as well as corrections expert Daniel Vasquez to testify about the conditions of incarceration which appellant would face, as well as a psychologist, Dr. Adrienne Davis. Counsel also explained that he intended to present evidence of parental criminality, parental drug use, family instability, parental rejection and neglect, domestic violence, learning disabilities, poverty, a history of head injuries suffered prior to the age of 12, and substance abuse throughout his family. Counsel also noted that in addition to having brain damage and possible ADHD, appellant had been placed in mentally disabled classes throughout elementary school. In view of the extensive mitigating evidence counsel could have presented, it is difficult to express just how incomplete the record was. Moreover, it is difficult to understand how a court could have heard this litany of mental illness and organic impairment and still concluded, without further inquiry by a trained mental health professional, that the defendant was sufficiently competent to prevent his counsel's intended presentation of mitigating evidence.

The United States Supreme Court has frequently stated that the Eighth Amendment and evolving standards of societal decency impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Mills v. Maryland* (1988) 486 U.S. 367, 377).

As this Court observed in *Lang*:

> This deficiency of the record implicates another paramount concern of the state: "in capital cases . . . the state has a strong interest in reducing the risk of mistaken judgments." . . . Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment.' (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 (plur. opn. of Burger, C. J.).)

(*People v. Lang*, *supra*, 49 Cal. 3d at pp. 1060-1061.)

Permitting a defendant who is represented by counsel to bar his attorney from presenting mitigating evidence in the penalty phase not only deprives the defendant of the effective assistance of counsel and interferes with counsel's rightful control of strategic decisions, but also defeats the state's interests in eliminating "mistaken judgments." For the foregoing reasons, appellant respectfully submits that the trial court erred in acceding to the defendants' objections to their counsels' presentation of mitigating evidence.

F. Even If Capital Defendants May Override Counsel's Decision to Present a Penalty Phase, Counsel Must Be Permitted to Control the Preparation and Request of Jury Instructions.

While appellant maintains that it is the defense attorney who controls decision making regarding whether to present a penalty phase, including which theories to present and which witnesses to call, he respectfully submits that even if this court were to disagree with this contention, counsel must still control the decision over which jury instructions to prepare and present.

As previously noted, the courts of this state have previously held that it is the attorney who controls the decision over which jury instructions to request. In

People v. Towey (2001) 92 Cal.App.4th 880, the defendant argued on appeal that the trial court erred in accepting defense counsel's waiver of a request for CALJIC No. 2.60 [no inference of guilt may be drawn from defendant not testifying] and CALJIC No. 2.61 [defendant may rely on the state of the evidence], because the court had not obtained the defendant's personal waiver of these instructions. The court rejected this contention, holding that "the right to have the jury instructed using CALJIC Nos. 2.60 and 2.61 is not, in itself, a "fundamental right of a personal nature' that requires an express personal waiver by a defendant." (*Id.*, at p. 884.) In addition, the court noted that "decisions concerning which instructions to request and which instructions to waive generally are matters of tactics," and found that counsel's decision to forego the instructions in that case was tactical in nature. (*Ibid.*) Thus, the decision must be left to the attorney both because jury instructions require legal knowledge and research, and because jury instructions are matters of tactics.

Moreover, the courts must ensure that the jury is properly instructed to ensure that a proper result is reached. It is well established that "[a] court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. Lopez* (1998) 19 Cal.4th 282, 287; *People v. Bailey* (2010) 187 Cal.App.4th 1142, 1154.) The defendant cannot be permitted to control a process which is aimed at ensuring that the jury's discretion as to the penalty to be imposed is appropriately guided. As a result, even if the defendant is permitted to insist that no defense be presented, the court must still correctly instruct the jury on all relevant principles of law.

In this case the requested instructions all involved principles of law to which the trial court at least should have given consideration in deciding which instructions to give to the jury. All requested instructions were supported by authority showing that they were, at the very least, instructions that should be given on request. However, because the court erroneously concluded that the defendants had the power to veto their attorneys with respect to all matters

relating to the penalty phase, the court never considered the propriety of giving those instructions. As a result, the court did not exercise its discretion in determining whether those instructions were proper instructions for this case. This was not a misuse of discretion, but a failure to even exercise discretion.

The failure to exercise discretion is not reviewed in the same manner as is the case when a court merely abuses its discretion. While a claim of abuse of discretion is reviewed in a deferential manner, the failure to exercise discretion at all is not entitled to any discretion because there is nothing to which the reviewing court may defer. Instead, the error is reversible per se. (*People v. Bigelow* (1984) 37 Cal.3d 731, 742.) Put another way, a trial court's failure to exercise discretion is "itself an abuse of discretion." (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477, *Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.) Because the court failed to exercise discretion regarding the defense penalty phase instructions, reversal is required.

G. Summary and Conclusion

Although a defendant maintains control over limited aspects of litigation, when the defendant elects to be represented by counsel, he relinquishes control over other areas of the case, particularly such strategic and tactical matters as what witnesses to call, what jury instructions to request, and what arguments to make. He may not accept counsel for the guilt phase and then take control of the case himself in the penalty phase.

In this case, appellant's attorney should have been allowed to make the decisions regarding the defense to be presented in the penalty phase. The failure to allow the attorneys to control these aspects of the case deprived defendant of the right to counsel, the right to a jury trial, the right to due process of law, and the right to a reliable determination of the facts in a capital trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment to the Constitution of the United States. Moreover, the court's acquiescence in the defendants' objections

to counsel's proposed strategy defeated the state's interest in a reliable capital judgment. For all the foregoing reasons, reversal is required.

X

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.)[42] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

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[42] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (548 U.S. at p. 178.)

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. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

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 (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for 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 PENAL CODE § 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.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-two special circumstances[43] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. 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

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[43] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in People v. Superior Court (Engert) (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

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 U.S. 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 should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[44] (See Section E. of this Argument, *post*).

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[44] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in Furman v. Georgia (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(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(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.[45] 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,[46] or having had a "hatred of religion,"[47] or threatened witnesses after his arrest,[48] or disposed of the victim's body in a manner that precluded its recovery.[49] It also is the basis for admitting evidence under the rubric of "victim impact" that is no

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[45] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88, par. 3.

[46] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, cert. den., 494 U.S. 1038 (1990).

[47] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, cert. den., 112 S. Ct. 3040 (1992).

[48] *People v. Hardy* (1992) 2 Cal.4th 86, 204, cert. den., 113 S. Ct. 498.

[49] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, cert. den. 496 U.S. 931 (1990).

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" 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* (1994) 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.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) 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.

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; IT THEREFORE VIOLATES 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(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.

1. 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; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

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.

At the start of the trial, the court also told all prospective jurors that if they reached the penalty phase there would be no requirement of proof beyond a reasonable doubt as to aggravating factors, nor was there a burden of proof on the State for the decision as to penalty. (5RT 1215-1216, 1239, 1241, 1265-1266, 1304-1306, 1331, 1418-1419, 1446.)

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 [hereinafter *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*].

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts

supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id. at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The supreme court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 313.)

In reaching this holding, the supreme court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the

maximum he may impose *without* any additional findings." (*Id.* at 304; italics in original.)

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 244.)

In *Cunningham,* the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. *(Cunningham v. California, supra*, 549 U.S. at 274.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (549 U.S. at 282.)

2. 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"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[50] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (14RT 3299), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88 [Spring 2010 Revision]; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[51] These factual determinations are essential

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[50] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

[51] *In Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though Ring expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that Ring requires a jury to make this finding as well: '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.'" (*Id.* 59 P.3d at p. 460.)

prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[52]

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; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

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 factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[53] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing

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[52] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown (Brown I) (1985) 40 Cal.3d 512, 541.)

[53] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* 549 U.S. at p. 289.)

Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (549 U.S. at pp. 276-279.) That was the end of the matter: *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.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (Id. p. 293.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").

(*Cunningham, supra,* 549 U.S. at pp. 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(a)), *Apprendi* does not apply. (*People v.*

Anderson (2001) 25 Cal.4th 543, 589.) After *Ring*, this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.)

This holding is simply wrong. As section 190, subd. (a)[54] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, 549 U.S. at p. 279.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." (*Apprendi*, *supra*, at 494.) In effect, "the required finding [of an aggravated circumstance] expose[d] [*Ring*] to a greater

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[54] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. (*Ring*, 536 U.S. at 604.)

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

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 8.88.) "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 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (Id. 542 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (2003) 65 P.3d 915, 943; accord, *State v. Whitfield,* 107 S.W.3d 253 (Mo. 2003); *State v. Ring,* 65 P.3d 915 (Az. 2003); *Woldt v. People,* 64 P.3d 256 (Colo.2003); *Johnson v. State,* 59 P.3d 450 (Nev. 2002).[55])

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[56] As the high court stated in *Ring*, *supra*, 536 U.S. at p. 609:

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[55] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

[56] 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 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, 441 U.S. 418, 423-424 (1979).)

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

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.

4. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

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.

Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Id.* at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

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.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement 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 (emphasis added), quoting *Bullington v. Missouri*, 451 U.S. 430, 441 (1981), and *Addington v. Texas*, *supra*, 441 U.S. 418, 423-424.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

5. 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* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S 153, 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.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (Id. 11 Cal.3d at p. 267.)[57] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (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;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39

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[57] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

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.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 548 U.S. at pp. 177-178 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

6. California's Death Penalty Statute as Interpreted by the California Supreme 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-proportionality-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 cann*ot 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*. (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). 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.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does

not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

7. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding three incidents of unadjudicated criminal activity allegedly committed by appellant and devoted a considerable portion of its closing argument to arguing these alleged offenses.

The U.S. Supreme Court's recent decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not

instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

D. 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 U.S. 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.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[58] as in *Snow*,[59] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge makes a sentencing choice in a non-capital case, the court's "reasons ... must be stated orally on the record." California Rules of Court, rule 4.42(e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, by contrast, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante*.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in

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[58] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, *supra*, 30 Cal.4th at p. 275; emphasis added.)

[59] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, *supra*, 30 Cal.4th at p. 126, fn. 3; emphasis added.)

California, no reasons for a death sentence need be provided. (See Section C.3, *ante*.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[60] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

E. 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.

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[60] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. at p. 609.)

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* (1985) 159 U.S 113, 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; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[61] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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[61] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

CONCLUSION

Based on the foregoing Arguments and Authorities, appellant submits that the judgment of conviction be reversed.

Dated:

David H. Goodwin
Attorney for appellant

CERTIFICATION UNDER RULE 8.360

Pursuant to Rule 8.360, subdivision (b)(1), California Rules of Court,I certify that the attached Appellant's Opening Brief is contains less than 102,000 words. In particular, this brief contains 83.083, excluding the Proof or Service, this certification, and the tables.

In making this certification, counsel has relied on the word count of the word processing system used to prepare this brief (Word).

David H. Goodwin

Attorney for appellant

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, David H. Goodwin, declare that I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579.

On April , 2012, I served a copy of the attached Appellant' Opening Brief on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California addressed as follows:

Viet Nguyen, DAG
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013
Counsel for respondent

Clerk, Capital Appeals
Los Angeles Superior Court
210 W. Temple Street Rm M-3
Los Angeles, CA 90012

Clerk, Capital Appeals
Los Angeles Superior Court
210 W. Temple Street Rm M-3
Los Angeles, CA 90012
For: Hon. Robert J. Perry (Dept 104)

Wesley VanWinkle
PO Box 5216
Berkeley, CA 94705
Assisting attorney

Office of the District Attorney
210 W. Temple St
Los Angeles, CA 90012

Joseph Flores
San Quentin Prison
P.O. Box V-76699
San Quentin, CA 94974

Janyce Blair
321 Richmond Street
El Segundo, Ca 90245
Counsel for appellant Amezcua

Mark Goldrosen
255 Kansas St., Ste 340
San Francisco, CA 94105
Assisting attorney for Counsel for appellant Amezcua

Executed on April , 2012, at Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

David H. Goodwin