SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. RAMON SANDOVAL, JR., Defendant/Appellant.	Case No. S115872 CAPITAL CASE

SUPREME COURT
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Los Angeles County Superior Court, Case No. BA240074
Hon. Joan Comparet-Cassani, Presiding

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DEATH PENALTY

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Mr. Sandoval respectfully submit this reply to the Respondent's Brief ("RB") filed by the Attorney General's Office.

INTRODUCTION

Mr. Sandoval's entitlement to appellate relief in this capital appeal is based on five principal categories of errors, deficits, and irregularities in the proceedings below: a) a multi-faceted Fourth Amendment violation; b) errors and omissions that compromised Mr. Sandoval's defense concerning the only contested issue in the guilt phase, i.e., whether he acted with premeditation and deliberation; c) the insufficiency of the prosecution's evidence; d) the unconstitutional removal of a prospective juror during jury selection for the penalty-phase retrial; and e)

prejudicial violations of Mr. Sandoval's right to a fair penalty determination.[1]

A. Fourth Amendment Issue

Mr. Sandoval sought an evidentiary hearing in support of his Fourth Amendment claim. (3 RT 309-311, 314-316; 1 CT 97-98, 103-104, 236, 240-241.) He made a showing in the trial court that police had made material misrepresentations and omissions in an affidavit that resulted in issuance of a warrant to search his home. (3 RT 306-311, 524-529; 1 CT 105-140, 239-241.) Execution of the search warrant led to Mr. Sandoval's arrest, discovery of the murder weapon, and Mr. Sandoval's eventual confession. (8 RT 1630-1632, 1636-1637, 1652-1653; 10 RT 1966-1968; 1 CT 99; 2 CT 268-322.)

Mr. Sandoval did not receive a full and fair hearing on his Fourth Amendment claim. The trial court improperly refused to conduct an evidentiary hearing. In refusing to do so, the court improperly relied on extrajudicial factfinding. (AOB 72-116; pp. 7-22, *infra*.)

Mr. Sandoval is entitled to a remand to the trial court for a full and fair hearing on his Fourth Amendment claim.

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[1] In the introduction to Mr. Sandoval's opening brief, the above-specified five principal categories are noted, along with additional categories. The additional categories involve challenges to the death penalty and its administration. (AOB 71.)

B. Guilt-Phase Issues Pertaining to Mr. Sandoval's Mental State at the Time of the Shooting

During the guilt phase, the only contested issue was Mr. Sandoval's mental state. Specifically, the only question was whether he acted with premeditation and deliberation. (6 RT 1101-1104; 10 RT 1931, 2045-2050.) With respect to that issue, the trial court committed a series of errors: First, the trial court allowed the prosecution to present gang expert testimony concerning Mr. Sandoval's mental state. (AOB 162-187.) Second, the trial court allowed the prosecution to seek to prove Mr. Sandoval's mental state with notes written before the shooting by Mr. Sandoval's fellow gang member, Rascal, even though there was no evidence that Mr. Sandoval had any awareness of the notes or their contents. (AOB 188-207.) Third, the trial court refused Mr. Sandoval's request to instruct the jury that circumstantial evidence can only support a finding of premeditation and deliberation if the evidence is not only consistent with that mental state but also inconsistent with the existence of any other mental state. (AOB 222-239.) Fourth, the trial court failed to instruct the jury concerning circumstantial evidence relating to the mental state the prosecution was required to establish in connection with the four special circumstance allegations in this case. (AOB 239-248.)

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As discussed in Mr. Sandoval's opening brief, the foregoing errors are prejudicial individually and cumulatively. (AOB 185-187, 206-207, 237-239, 247-248.)[2] Had the planned attack on the intended target, Toro, been carried out, and had it been fatal, the resultant case would not have been close on the issue of premeditation and deliberation. However, that is not what happened. At the last moment, the attack on Toro was averted. Detectives Black and Delfin drove onto Lime Avenue, and Mr. Sandoval shot them. Any premeditation and deliberation in connection with the shooting of the detectives would have had to come to fruition with extraordinary rapidity. Indeed, the detectives drove only the length of two houses from the time that Mr. Sandoval saw them until the time that he opened fire on them.

C. Insufficiency and Invalid Theory of Transferred Premeditation

The murder was committed mere seconds after the detectives turned onto Lime Avenue. Thus, the prosecution's evidence was legally insufficient to support a first degree murder conviction on either a theory of premeditation and deliberation or a theory of lying in wait. (AOB 130-162.) *A fortiori*, the prosecution's evidence was insufficient to support the jury's lying-in-wait special

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[2] "Sometimes the cumulative effect of errors that are harmless in themselves can be prejudicial." (*People v. Loy* (2011) 52 Cal.4th 46, 77.)

circumstance finding. (AOB 249-259.)

Furthermore, the prosecutor advanced an invalid transferred premeditation theory in his argument to the jury during the guilt phase. The prosecutor improperly argued that the evidence of premeditation and deliberation concerning the planned attack on Toro could serve as evidence of Mr. Sandoval's mental state when he shot at the detectives. It is not possible to determine from the record whether the jury relied on that invalid transferred premeditation theory. (AOB 137-138, 159-162.)

In light of these deficiencies, the first degree murder conviction and the lying-in-wait special circumstance finding cannot stand.

D. Witherspoon-Witt Error

In the penalty-phase retrial, the trial court impermissibly removed a prospective juror, D.M., for cause. Although the prospective juror equivocated somewhat when questioned about whether he would ultimately be able to return a death verdict, the record contains no support for a finding that the prospective juror was substantially impaired. The prospective juror is a death penalty supporter. He unequivocally maintained that he would abide by the trial court's instructions and serve impartially.

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The trial court applied an erroneous legal standard during jury selection — impermissibly deeming mere juror equivocation during voir dire as a basis to remove a juror for cause. Additionally, the trial court applied a double-standard that favored the prosecution in the jury selection process. (AOB 269-318.)

The trial court's removal of the prospective juror necessitates reversal of the death judgment.

E. Issues in the Penalty-Phase Retrial

Mr. Sandoval's penalty-phase retrial was unfair in light of the following events that occurred during the proceeding: While on the witness stand, a key prosecution witness, who is police officer, called Mr. Sandoval a "son-of-a-bitch." (AOB 319-324.) The prosecutor presented evidence to the jury that Mr. Sandoval had admitted to committing uncharged shootings with the murder weapon, even though the trial court had ruled the evidence inadmissible. (AOB 334-341.) The prosecutor told the jury Mr. Sandoval had lied to them, even though Mr. Sandoval did not testify. (AOB 342-251.) The prosecutor presented an emotional audio-visual presentation that brought five jurors to tears. (AOB 351-358.) The trial court refused to allow defense counsel to inform the jury that a life without parole (LWOP) sentence would result in Mr. Sandoval spending the rest of his life in prison. (AOB 358-375.) The trial court refused to inform the jury that individual

jurors could consider mitigating evidence even if the jurors did not unanimously agree that the mitigation had been established. (AOB 375-379.) And, the trial court never got to the bottom of circumstances consisting of troubling and presumptively prejudicial juror misconduct; after the disclosure of evidence that jurors were discussing the case prior to deliberations and may have been engaging in pre-deliberation balloting, the trial court never definitively determined the nature and extent of the misconduct the jurors had engaged in. (AOB 324-333.)

In light of the foregoing unfairness, the death judgment imposed in this case cannot stand.

DISCUSSION

I.

THE TRIAL COURT ERRONEOUSLY FAILED TO HOLD A *FRANKS* EVIDENTIARY HEARING AFTER MR. SANDOVAL MADE A SUBSTANTIAL, PRELIMINARY SHOWING THAT THE POLICE SUBMITTED A RECKLESSLY MISLEADING SEARCH WARRANT AFFIDAVIT.

Police executed a search warrant at Mr. Sandoval's home in the early morning hours on May 2, 2000. (8 RT 1630, 1652-1653.) During the search, police found the murder weapon. (8 RT 1636-1637; 1 CT 99.) Also during the search, police apprehended Mr. Sandoval. (8 RT 1631-1632; 1 CT 99.) Shortly thereafter, Mr. Sandoval confessed. (10 RT 1966-1968; 2 CT 268-322; People's

Exhibits 73 and 73-A.) In the trial court, Mr. Sandoval requested a *Franks* hearing in order to challenge the search warrant affidavit that led to all of this damning evidence. (3 RT 309-311, 314-316; 1 CT 97-98, 103-104, 236, 240-241.)[3] The trial court denied the request. (3 RT 306-319, 526-529; 5 CT 1123.)

The Attorney General contends that the trial court properly denied Mr. Sandoval's request for an evidentiary hearing because Mr. Sandoval purportedly failed to make a substantial showing that the search warrant affidavit was deliberately or recklessly misleading. (RB 29.) However, the Attorney General's analysis of the issue does not get to the heart of the matter. The heart of the matter is that the sufficiency of the search warrant affidavit depended on Rascal's credibility, and the affidavit did not accurately portray relevant, available information concerning Rascal's credibility.[4] With respect to this subject, Mr. Sandoval made a sufficient preliminary showing to warrant a *Franks* evidentiary hearing.

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[3] "The hearing where a defendant challenges the veracity of the affiant's statements under oath is commonly called a *Franks* hearing." (*People v. Estrada* (2003) 105 Cal.App.4th 783, 790.)

[4] As defense counsel put it in the trial court, "[I]f you cut down to everything, the basis for that is that [Rascal], the co-suspect [Rascal], told us it was Ramon Sandoval who did the shooting." (3 RT 308.)

A. The Showing of Probable Cause in the Search Warrant Affidavit

Law enforcement's effort to show probable cause in the affidavit consisted of the following averments:

- Detective Delfin gave the following account to fellow officers: Detectives Delfin and Black drove onto Lime Avenue. Detective Delfin saw two Hispanic males on the street. One was in his late teens to early twenties, and had "a long style haircut"; he was standing next to a vehicle, looking at houses. The other Hispanic male exited the vehicle and ran across the street. Gunfire then began raining down on Detectives Delfin and Black.

- Shortly after the shooting, police who were canvassing the neighborhood found Rascal hiding in the courtyard of one of the homes. Rascal was on CYA parole for a felony assault.

- During an interview, in which police considered Rascal a witness, Rascal said he had been confronted by a group of African-American males while walking through the area. Rascal said he fled when they made "derogatory remarks about Hispanics."

- Rascal told police he had been in possession of a .45 caliber semi-automatic weapon. However, after the shooting, he discarded it, because police arrived on scene, and Rascal did not want to be found with the gun. Rascal said he had not fired the gun. He told police that Det. Delfin could vouch for his credibility. At the time Rascal made this comment, he had not been informed by police that Det. Delfin was one of the victims of the shooting.

- Police felt Rascal was not being fully forthcoming with them. When they told him that Det. Delfin had been one of the victims of the shooting, Rascal became visibly shaken and

began crying.

- Rascal then told police that Mr. Sandoval, who was a fellow member of B.P., was responsible for the shooting.

- Rascal said that he and Mr. Sandoval had met up with two other individuals in Compton before the shooting. The four of them drove to Long Beach in two vehicles. When they arrived on Lime Avenue, Rascal saw Mr. Sandoval step out of the vehicle he had been in. Mr. Sandoval was holding an AR-15.

- Rascal exited the vehicle he had arrived in. He walked across the street. Rascal saw an unmarked police vehicle on the street. He heard gunfire. He looked and saw Mr. Sandoval firing the AR-15 at the unmarked police vehicle.

- Rascal ran and hid until he was apprehended by police.

- Rascal identified Mr. Sandoval's photo in a photo line-up. He then showed police where Mr. Sandoval resided.

- Police interviewed a witness named Jimmy Falconer. Mr. Falconer was driving on Lime Avenue at the time of the shooting. Before the shooting, Mr. Falconer had seen a Hispanic male cross the street. He saw an unmarked police vehicle move toward that individual. Then, he saw another Hispanic male, with a shaved head, open fire on the police vehicle.

- Police also interviewed Vincent Ramirez.[5] Mr. Ramirez is a member of E.S.P. Mr. Ramirez was inside his residence on Lime Avenue. Mr. Ramirez heard gunfire. He went to a window to observe what was happening. As he got to the window, the gunfire ceased. He saw a Hispanic male with a

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[5] Although not noted in the search warrant affidavit, Mr. Ramirez's gang moniker is "Toro." (6 RT 1136, 1139, 1266; 7 RT 1284; 9 RT 1809, 1817.)

shaved head run across the street.

- There is an ongoing gang feud between B.P. and E.S.P.

(1 CT 109-118.)

Thus, the showing of probable cause in the affidavit depended *entirely on Rascal's credibility*. Rascal was the only person mentioned in the affidavit who identified Mr. Sandoval as the shooter. Further, Rascal was the only person mentioned in the affidavit who provided any evidence that Mr. Sandoval had any role in this case at all. Rascal provided the *sole* link to Mr. Sandoval. Thus, any finding of probable cause hinged on Rascal's credibility.

B. The Substantial, Preliminary Showing of Mr. Sandoval's Entitlement to a Franks Evidentiary Hearing

The showing/proffer Mr. Sandoval made in support of his request for a *Franks* hearing consisted of the following:

- Police did not disclose in the search warrant affidavit that Rascal was a suspect in two other pending homicide investigations.

- Police did not disclose that, prior to applying for the warrant to search Mr. Sandoval's residence, they had obtained a warrant, from a different judge, to search the residence of an alternate suspect.

- Police considered Rascal a suspect, and not a witness, from the moment they arrested him. Logic and common sense dictate that police must have viewed Rascal as a suspect, since they

found him hiding in the neighborhood right after the shooting, he had a significant criminal history, and he had admittedly been in possession of a gun at the time of the shooting.

- Police failed to disclose circumstances that tend to show Rascal's statements to them were involuntary. These circumstances include the following:

  » Police refused to honor Rascal's request for counsel, and turned away a lawyer who attempted to visit him while they were interrogating him.

  » Police told Rascal he did not need a lawyer.

  » Police accused Rascal of shooting Det. Black.

  » Police subjected Rascal to a gunshot residue test.

  » Police deprived Rascal of sleep and subjected him to otherwise coercive conditions of confinement.

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» Police threatened to shoot Rascal's brother unless Rascal identified the person who shot the detectives.[6]

(1 CT 97-104, 237-241; 3 RT 306-311, 522-529.)

This was a more than sufficient showing to entitle Mr. Sandoval to an evidentiary hearing concerning his *Franks* claim. Indeed, the "'threshold showing'" a litigant must make to get a *Franks* evidentiary hearing is "less ... than a preponderance of the evidence...." (2 LaFave, *Search and Seizure* (4th ed. 2004)

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[6] Eventually, police did shoot Rascal's brother in the course of arresting him. (2 RT 177; Aug. RT 40-43.) Thus, Rascal's testimony about the police threatening to kill his brother has the ring of truth. Along these lines, in *People v. Benjamin* (1999) 77 Cal.App.4th 264, the court noted: "[W]here reliable independent evidence indicates that an event did occur, an ex post assessment that the event is unlikely . . . is almost without probative weight. [Citation.] Accordingly, while probable cause for a search cannot be supported by the results of the search [citation], there is no reason why the results of the search cannot support the truthfulness of the statements made in a search warrant affidavit by an affiant whose credibility is under attack. [Citation.] For instance, if the affiant had stated that strong marijuana odors could be smelled, and no marijuana had been found in defendant's house, defendant could reasonably argue that the statements had to be false. Conversely, where an affiant states that strong marijuana odors could be smelled, and there are rows and rows of adult marijuana plants in the house, the latter would tend to corroborate the truthfulness of the former. In short, while the fruits of a search cannot transform an unlawful search into a lawful one [citation], no violence is done to that principle where the results of the search are used to confirm the veracity of that which was already sufficient to establish the probable cause for the search. Just as the truth of the representations in a search warrant affidavit can be attacked with newly acquired evidence (such as subsequent interviews with witnesses) so, too, can it be corroborated with such evidence." (*Id.* at p. 275, internal quotation marks omitted.) Thus, Rascal's testimony about the threat police made to shoot his brother is corroborated by the fact that police actually did shoot his brother after making the threat.

§ 4.4(d), p. 554.)[7] Standing alone, the specific allegation that police had failed to disclose Rascal's status as a suspect in two pending homicide investigations was sufficient to satisfy the threshold standard entitling Mr. Sandoval to an evidentiary hearing.[8] Standing alone, the specific allegation that police failed to disclose their threat to shoot Rascal's brother was sufficient to satisfy the threshold standard. Standing alone, the specific allegation that police failed to disclose their interference with an attorney's effort to visit Rascal was sufficient to satisfy the

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[7] At a *Franks* evidentiary hearing concerning misrepresentations and/or omissions from an affidavit, "a higher burden of proof" applies than at the preliminary showing stage. At the evidentiary hearing, the accused must prove his/her allegations by a preponderance of the evidence. (*United States v. Tate* (4th Cir. 2008) 524 F.3d 449, 457.)

[8] The affiant in this case, Det. Steven F. Smith, was a member of the Homicide Detail of the Long Beach Police Department at the time he executed the affidavit. (1 CT 108.) The affidavit was submitted on May 1, 2000. (1 CT 106.) As to one of the undisclosed homicide investigations in which Rascal was a suspect, Mr. Sandoval's counsel submitted to the trial court a report by the Los Angeles County Sheriff's Department. (1 CT 122-131.) Rascal was the only suspect expressly named in that report; he was named by his real name and his gang moniker. (1 CT 122.) The homicide described in that report occurred on October 10, 1999, at a McDonalds restaurant in Lynwood. (1 CT 122; 3 RT 306.) The report concerning that homicide contains reference to a second, earlier homicide in which sheriff's department personnel believed Rascal was involved. (1 CT 103, 130.) With respect to that second homicide, which occurred on September 6, 1999, in Carson (1 CT 103, 130; 3 RT 306), Mr. Sandoval's counsel represented to the court that, on September 7, 1999, a sergeant in the Los Angeles County Sheriff's Department had asked a sergeant in the Long Beach Police Department for assistance in locating Rascal in connection with the sheriff department's homicide investigation. (1 CT 240-241; 3 RT 527.)

threshold standard. Altogether, Mr. Sandoval's proffer was more than sufficient to demonstrate his entitlement to an evidentiary hearing.

As noted in Mr. Sandoval's opening brief:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.

(AOB 106-107, quoting *Franks v. Delaware* (1978) 438 U.S. 154, 171.)

To the extent the challenge is based on omissions from the search warrant affidavit, the challenger must show "the omissions were material to the determination of probable cause." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.)[9] "Facts are deemed material for this purpose if their omission makes the affidavit 'substantially misleading[.]'" (*People v. Joubert* (1981) 118 Cal.App.3d 637, 650, quoting *People v. Kurland* (1980) 28 Cal.3d 376, 385.) When the defense makes this type of preliminary showing of materiality, the defense is entitled to a *Franks* hearing. (*Id.* at pp. 650-651.)

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[9] Probable cause to search exists when there is a "'substantial basis for . . . [concluding]' that a search would uncover evidence of wrongdoing." (*Illinois v. Gates* (1983) 462 U.S. 213, 236, quoting *Jones v. United States* (1960) 362 U.S. 257, 271.)

Mr. Sandoval made a sufficient showing under this standard to warrant a *Franks* evidentiary hearing. As noted above, the probable cause showing in the search warrant affidavit was predicated on Rascal's reliability. In challenging the sufficiency of that affidavit, Mr. Sandoval proffered substantial evidence that, due to misrepresentations and omissions, the affidavit did not portray an accurate picture of Rascal's credibility. The omission from a search warrant affidavit of information germane to an informant's credibility is a material omission that warrants a *Franks* hearing. (*In re Larry C.* (1982) 134 Cal.App.3d 62, 67-68.) Thus, a *Franks* hearing should have been conducted.[10]

The courts have recognized that statements such as those attributed to Rascal, implicating Mr. Sandoval, are suspect: "The arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." (*Lee v. Illinois* (1986) 476 U.S. 530, 541,

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[10] At that hearing, the People would have been confronted with the burden of seeking to prove the propriety or reasonableness of material omissions from the affidavit. (*People v. Kurland*, *supra*, 28 Cal.3d at p. 390; *People v. Joubert*, *supra*, 118 Cal.App.3d at p. 650.)

internal quotation marks omitted.)[11]

In an effort to deal with the suspect nature of statements such as those attributed to Rascal, the affiant did attempt to corroborate some of the information Rascal supplied to police: As revealed in the affidavit, Rascal's statement that he walked across Lime Avenue and that Mr. Sandoval then began shooting at an unmarked police vehicle (1 CT 112-113), is consistent with witness Jimmy Falconer's statement that he saw a Hispanic male walk or run across Lime Avenue and saw a Hispanic male shooting at the unmarked police vehicle. (1 CT 114-117.)

However, Mr. Falconer's description of the shooter was inconsistent with Det. Delfin's description of the shooter. Whereas the former said the shooter had

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[11] The Supreme Court has repeatedly recognized that the blame-shifting statements of an accomplice are "inherently unreliable." (*Lilly v. Virginia* (1999) 527 U.S. 116, 131 (plur. opn. of Stevens, J.) ["We have over the years spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants."], internal quotation marks and citation omitted.) "[W]hen one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect." (*Lee v. Illinois*, *supra*, 476 U.S. at p. 541.) Furthermore, the law has "create[d] a strong inference that information from police contacts is to be viewed with extreme caution. (*People v. Kurland*, *supra*, 28 Cal.3d at p. 392.) When the information comes from an informant, who may be involved in the criminal conduct in question, "[b]oth an issuing magistrate and a reviewing court must initially assume that [the] information ... is unreliable for purposes of probable cause." (*Ibid.*)

"a shaved head" (1 CT 114-115), the latter said the shooter had "a long style haircut." (1 CT 109.)

Moreover, Rascal's identification of Mr. Sandoval as the shooter was *uncorroborated*. The fact that Rascal may have accurately described some of his movements before the shooting sheds no light on whether he truthfully identified Mr. Sandoval as the shooter. For, as the Supreme Court of the United States has recognized, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature. (*Williamson v. United States* (1994) 512 U.S. 594, 599-600.)[12] Thus, on the critical subject of the credibility/reliability of Rascal's identification of Mr. Sandoval as the shooter, there is no corroboration.

With respect to that critical identification issue, police should have disclosed information in the affidavit that was germane to assessing Rascal's credibility, and hence any showing of probable cause based on Rascal's

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[12] Per the affidavit, Rascal's description of his involvement in the events in question was not overtly inculpatory. This is not surprising or uncommon. "Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements." (*Williamson v. United States*, *supra*, 512 U.S. at p. 600; see also *United States v. Hall*, (9th Cir. 1997) 113 F.3d 157, 159-160 [applying *Williamson* to conclude that co-participant's statements inculpating the defendant were insufficient to establish probable cause where co-participant had criminal history of dishonesty].)

statements. Indeed, the affidavit must disclose "information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present." (*People v. Kurland*, *supra*, 28 Cal.3d at p. 384.) In this regard, facts are material "if, because of their inherent probative force, there is a substantial probability they would have altered a reasonable magistrate's probable cause determination." (*Id.* at p. 385.)

> *[W]hen the affiant knows or should know of specific facts which bear adversely on the informant's probable accuracy in the particular case, those facts must be disclosed.* For example, if police have actually threatened or coerced the informant, or the informant bears a grudge against the defendant or is seeking to avoid or mitigate personal difficulties with the authorities, concrete evidence on those issues is material for purposes of the affidavit.

(*Id.* at p. 395, italics added.)

Thus, the affiant in this case should have disclosed, among other things, that Rascal was a suspect in two pending homicide investigations.[13] Indeed, Rascal's

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[13] "Any crime involving dishonesty necessarily has an adverse effect on an informant's credibility." (*United States v. Reeves* (9th Cir. 2000) 210 F.3d 1041, 1045.) Therefore, when an informant's criminal history includes crimes of dishonesty, additional evidence must be included in the affidavit "to bolster the informant's credibility or the reliability of the tip." (*Ibid.*) Otherwise, "an informant's criminal past involving dishonesty is fatal to the reliability of the informant's information, and his/her testimony cannot support probable cause." (*Ibid.*, citing *United States v. Meling* (9th Cir. 1995) 47 F.3d 1546, 1554-1555.) "If an informant's history of criminal acts involving dishonesty renders his/her statements unworthy of belief, probable cause must be analyzed without those statements." (*Id.* at p. 1044.) Of course, murder is a crime involving moral

status as a suspect in those two homicide cases gave him motive to lie about Mr. Sandoval's role in the murder of Detective Black. It was in his interest to deflect attention away from himself.

If the affiant is relying on an informant, the affidavit must recite "some of the underlying circumstances from which the officer concluded that the informant ... was 'credible' or his information reliable." (*Franks v. Delaware*, *supra*, 438 U.S. 154, 165.) The affidavit in this case contains no information upon which police could have deemed Rascal's identification of Mr. Sandoval as the shooter a credible identification. And, as noted, the affidavit did not disclose circumstances which cast doubt on Rascal's credibility, such as his status as a suspect in two pending homicide investigations, such as the alleged police threat to shoot Rascal's brother, and such as the alleged police interference with Rascal's access to counsel.

"When a search warrant is based solely on an informant's tip, as in this case, 'the proper analysis is whether probable cause exists from the totality of the circumstances to determine a sufficient level of reliability and basis of knowledge

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turpitude, and an individual who has been convicted of murder is subject to impeachment based upon that conviction. (*People v. Hinton* (2006) 37 Cal.4th 839, 888; *In re Kelley* (1990) 52 Cal.3d 487, 494.) These authorities demonstrate the significance of the affiant's omission to disclose Rascal's status as the only known suspect in two homicide investigations.

for the tip.'" (*United States v. Elliott* (9th Cir. 2003) 322 F.3d 710, 715, quoting *United States v. Bishop* (9th Cir. 2001) 264 F.3d 919, 924.) Necessarily then, the affiant's failure to disclose information germane to assessing Rascal's credibility is a legally significant omission. A *Franks* evidentiary hearing should have been conducted based on the misrepresentations and omissions as to which Mr. Sandoval's trial counsel adduced substantial evidence.

C. *Mr. Sandoval Is Entitled to a Full and Fair Hearing on His Fourth Amendment Claim.*

In this case, not only did Mr. Sandoval make a sufficient showing to warrant a *Franks* evidentiary hearing, but also the trial court improperly relied upon extrajudicial factfinding (its factfinding in a separate proceeding in which Mr. Sandoval was not a litigant) to resolve this issue against Mr. Sandoval. (AOB 109-111, 114-116.)[14] Thus, a remand is warranted for a full and fair hearing on

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[14] The Attorney General contends the trial court did not engage in improper extrajudicial credibility determinations. (RB 38-39.) However, in support of this contention, the Attorney General cites no authority and does not discuss the authorities cited in Mr. Sandoval's opening brief. (AOB 109-111, 114-116.) With respect to the underlying facts, the Attorney General ignores pertinent circumstances, including the fact that, in denying Mr. Sandoval's request for a *Franks* hearing, the trial court expressly found that Attorney Maria Puente-Portas had not testified credibly at the hearing on Rascal's motion to suppress. (3 RT 524.) This rather startling finding was legally significant, because Ms. Puente-Portas's testimony at Rascal's hearing that she had been denied access to Rascal supported Mr. Sandoval's request for a *Franks* evidentiary hearing. Indeed, the police did not disclose in their affidavit that they had turned away a lawyer who

Mr. Sandoval's Fourth Amendment claim.

II.

THE DEATH-QUALIFICATION PROCESS EMPLOYED TO SELECT THE JURY IN MR. SANDOVAL'S CASE WAS UNCONSTITUTIONAL.

As set forth in Mr. Sandoval's opening brief, the death-qualification process that the trial court employed to seat jurors in Mr. Sandoval's trial violated his jury trial right, his right to due process, his right to equal protection, and his right to be free from cruel and/or unusual punishment. (AOB 116-128.)

The Attorney General contends Mr. Sandoval did not preserve this claim for review because he did not object in the trial court to the constitutionality of the death-qualification process. (RB 42.) However, as noted in Mr. Sandoval's opening brief, the futility exception to the requirement of an objection in the trial court applies in this case. (AOB 128.) In light of this court's holdings that the death-qualification process is constitutional (*People v. Mills* (2010) 48 Cal.4th

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was trying to visit Rascal when the police were interrogating him. Not only was the trial court's finding concerning the purported lack of Attorney Puente-Portas' testimony rather startling, but also it constituted extrajudicial factfinding in Mr. Sandoval's case, because the finding was made on the basis of testimony in a hearing in which Mr. Sandoval was not a litigant.

158, 172-173; *People v. Jackson* (1996) 13 Cal.4th 1164, 1198),[15] it would have been futile for Mr. Sandoval to object in the trial court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [inferior courts are bound to follow this court's holdings]), and the lack of an objection does not preclude appellate review of the claim. (*People v. Boyette* (2002) 29 Cal.4th 381, 432. ["A defendant will be excused from the necessity of ... a timely objection ... if [it] would be futile."], internal quotation marks omitted.)

Respected jurists and commentators have expressed the view that the death-qualification process produces juries biased in favor of conviction. (*Baze v. Rees* (2008) 553 U.S. 35, 84 (opn. of Stevens, J., concurring in the judgment); Seltzer, et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571.) Thus, in the hopes that this view may eventually hold sway with a majority of the members of this court or the Supreme Court of the United States, Mr. Sandoval respectfully presents this claim.

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[15] As expressly noted in Mr. Sandoval's opening brief, Mr. Sandoval is mindful of this court's holdings concerning this issue. However, in light of the evolving nature of death penalty jurisprudence in this country, Mr. Sandoval respectfully presents this claim in order to preserve it for potential further review. (AOB 116-117, fn. 81.)

III.

BECAUSE THE RECORD DOES NOT DISCLOSE THAT THE JURY MUST HAVE BEEN AWARE MR. SANDOVAL ENTERED A NOT GUILTY PLEA, THE TRIAL COURT'S FAILURE TO EVER INFORM THE JURY HE HAD PLED NOT GUILTY CANNOT BE TREATED AS HARMLESS ERROR.

On February 16, 2001, Mr. Sandoval entered pleas of not guilty to all charges set forth against him in the indictment and denied all allegations in that accusatory pleading. (2 RT 37-38; 2 CT 497.) However, the trial court never informed the jury of Mr. Sandoval's denial of the charges and allegations.

The Attorney General contends Mr. Sandoval waived his right to have the indictment read to the jury when, after the jurors and alternates were sworn, his counsel expressed the belief that it was unnecessary for the court to read further from the indictment than the court already had. (RB 43-46; 5 RT 1060.) Assuming an enforceable waiver with respect to the reading of the indictment, any such waiver did not relieve the court of its duty to inform the jury that Mr. Sandoval had pled not guilty to the charges against him.

In pertinent part, Penal Code section 1093 provides:

> The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court:
>
> (a) If the accusatory pleading be for a felony, the clerk shall read it,

and state the plea of the defendant to the jury....

As noted in Mr. Sandoval's opening brief, the trial court never informed the jury that Mr. Sandoval pled not guilty to the charges against him. (AOB 131-132.) The Attorney General does not dispute this point, and the Attorney General does not claim that Mr. Sandoval waived his right to have the jury informed of his plea of not guilty.

The Attorney General does contend, however, that "[t]he failure ... to state a defendant's plea is not error[] [if] the record shows that the jury was aware of the nature of the charges and the defendant's response to those charges[,]" and that the jury in this case was aware of these circumstances. (RB 45.) In connection with analysis of this issue, Mr. Sandoval and the Attorney General have cited to the same case law — *People v. Sprague* (1879) 53 Cal. 491 and *People v. Twiggs* (1963) 223 Cal.App.2d 455. (AOB 132-133; RB 45.) These cases demonstrate that a trial court's failure to inform the jury of a defendant's not guilty plea to the charges against him is not reversible error if the record reveals "that the jury must have been aware" of the defendant's not guilty plea. (*Twiggs*, *supra*, 223 Cal.App.2d at p. 464, citing *Sprague*, *supra*, 53 Cal. at p. 494.)

While the Attorney General claims the jury must have been aware of Mr. Sandoval's not guilty plea to the charges against him (RB 45-46), the record does

not support this contention. Neither the trial court nor any of the trial attorneys ever informed the jury that Mr. Sandoval had denied all the charges and allegations leveled against him. Furthermore, in the opening statement presented by Mr. Sandoval's lead counsel in the guilt phase, counsel conceded certain aspects of Mr. Sandoval's culpability and noted that Mr. Sandoval had confessed. (6 RT 1101-1109.) In closing argument, defense counsel conceded that Mr. Sandoval was guilty of murder, and asked the jury to find that he was guilty of second degree murder rather than first degree murder. (10 RT 2045-2053.) Thus, as explained in Mr. Sandoval's opening brief, the fact that the trial court never informed the jury of Mr. Sandoval's not guilty plea cannot be treated as harmless error.

IV.

WHETHER DUE TO INSUFFICIENCY OR THE PROSECUTOR'S INVALID TRANSFERRED PREMEDITATION THEORY, THE FIRST DEGREE MURDER CONVICTION CANNOT STAND.

With premeditation and deliberation, Mr. Sandoval set out with fellow gang members to kill Toro in retaliation for a gang-related drive-by shooting. (2 CT 280-281, 287-289; 7 RT 1328.) However, intervening circumstances prevented Mr. Sandoval from carrying out his plan. Those intervening circumstances brought about a result different from what had been planned.

As Mr. Sandoval and his cohorts were setting up on Lime Avenue to attack Toro, Detectives Black and Delfin pulled onto the street. (8 RT 1565-1566.) Mr. Sandoval ducked down behind a car to avoid being seen by the detectives. (2 CT 295-297.) The detectives maneuvered toward Rascal. (2 CT 295-297; 9 RT 1763-1764, 1767, 1773-1775.) Mr. Sandoval rose up and began shooting at the detectives. (2 CT 295-297; 8 RT 1570-1575, 1718-1732; 9 RT 1764.) From the time he first saw the detectives until the time he opened fire, the detectives had driven the length of two houses. (2 CT 294; 8 RT 1567.)

Viewing this evidence in the light most favorable to the prosecution (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578), no rational factfinder could determine that Mr. Sandoval acted with premeditation and deliberation when he shot at the detectives, or that he perpetrated the crime by means lying in wait. By happenstance, the detectives arrived on the street when Mr. Sandoval and his fellow gang members were preparing to attack Toro. Mr. Sandoval saw the detectives, they drove two house lengths (2 CT 294; 8 RT 1567), and Mr. Sandoval acted on the impulse of the moment.

In an improper effort to convince the jury that Mr. Sandoval acted with premeditation and deliberation, the prosecutor suggested Mr. Sandoval's

premeditation and deliberation arose long before he arrived at Lime Avenue, that he went over to Lime Avenue in pursuance of a premeditated and deliberate plan to kill Toro, and that, at the last moment, the "target ... change[d][.]" (10 RT 2028, 2057-2059.) Thus, the prosecutor urged the jury to treat Mr. Sandoval's mental state concerning Toro as transferring to and becoming his mental state concerning the detectives. However, this transferred intent theory is untenable because Mr. Sandoval never got to the point where he actually aimed his gun and pulled the trigger at Toro. The transferred intent doctrine does no apply in the context of cases such as this, where the killer's plan to kill his intended target is interrupted by someone else before the killer attempts to strike the fatal blow at the intended target. (AOB 147-152, 159-161; *People v. Bland* (2002) 28 Cal.4th 313, 320-321 [the transferred intent doctrine extends liability when the killer's fatal blow is directed at the intended target but strikes someone else]; Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference* (2002) 36 U.S.F. L.Rev. 261, 326 ["Evidence that the defendant planned for another crime cannot, in itself, establish premeditation and deliberation to kill."].)

The Attorney General contends the prosecutor did not rely on a theory of transferred premeditation. (RB 46-48.) Although the Attorney General does not say so, the Attorney General is constrained to make this argument, because if the

prosecutor did advance a transferred premeditation theory, that theory was plainly invalid on the facts of this case. And, indeed, the record unmistakably reveals the prosecutor did advance a transferred premeditation theory. Specifically, the prosecutor argued to the jury:

- "The premeditation and deliberation in terms of this particular defendant started a long time before they ever got to Lime [Avenue]." (10 RT 2028.)

- "The intended target happened to change, but the premeditation and deliberation and intention to go over there and kill existed long before he got anywhere near Lime [Avenue]." (10 RT 2028.)

- "[T]he killing was ... a result of ... deliberat[ion] and premeditation.... [¶] What we're talking about is converting from Target A to Target B." (10 RT 2057.)

- "In going to Lime [Avenue][,] [l]ook at the willful, premeditated notion that caused him to be there." (10 RT 2058.)

- "Consider the gang meeting, and what they wrote down, what the gang meeting was about[,] when you consider premeditation and deliberation. [¶] Consider the fact that he had to load a weapon, and that they had a meeting for 15 to 30 minutes before they left Dairy Street to go effectuate a killing. That's premeditation and deliberation. [¶] Those are the things that accompanied this killing. Those processes didn't discard themselves because police officers came down the street. [¶] The fact of the matter is, the willful, deliberate[,] premeditated aspects of this crime all came into place and are satisfied long before the crime ever occurred." (10 RT 2059.)

These quotes from the prosecutor's argument to the jury, which are highlighted in Mr. Sandoval's opening brief (AOB 138, fn. 97; AOB 159-160), are

not mentioned in the Attorney General's brief. However, the quotes about Mr. Sandoval's premeditation and deliberation purportedly arising before he arrived at Lime Avenue and the target changing when the detectives turned onto the street are part and parcel of the prosecutor's invalid transferred premeditation theory. The prosecutor urged the jury to take the premeditation and deliberation that undisputably existed with respect to Mr. Sandoval's plan to kill Toro and to apply it / transfer it to the sudden, unplanned killing of the detectives.

The Attorney General notes that the prosecutor did present some argument to the jury that was not based upon a transferred premeditation theory. (RB 47-48.) However, "[w]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilty rested, the conviction cannot stand." (*People v. Perez* (2005) 35 Cal.4th 1219, 1233, internal quotation marks and brackets omitted.)[16]

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[16] "When, as here, the prosecutor premises his argument on an erroneous legal theory of guilt, the jury instructions do not clarify any possible misunderstanding, and the reviewing court cannot determine whether the jury predicated a guilty verdict on that erroneous theory, the judgment cannot stand." (*People v. Morales* (2001) 25 Cal.4th 34, 51 (dis. opn. of Brown, J.), citing *People v. Guiton* (1993) 4 Cal.4th 1116, 1128.) "[W]hen a prosecutor advances an erroneous theory of guilt that jury instructions fail to clarify, the result is legal error for which the reviewing court may reverse irrespective of a contemporaneous objection." (*Id.* at p. 54, fn. 2.)

The Attorney General presents a detailed, fact-bound argument that the evidence was sufficient to support a finding that Mr. Sandoval's murder of Detective Black was premeditated and deliberate and/or that it was carried out by means of lying in wait. (RB 49-62.) Unlike the prosecutor, however, the Attorney General makes this argument without urging an invalid transferred premeditation theory. Unlike the prosecutor, the Attorney General does not argue that any premeditation and deliberation concerning the killing of Detective Black arose before Mr. Sandoval arrived at Lime Avenue, or that, with respect to premeditation and deliberation, there was a conversion from Target A to Target B. The Attorney General's argument is limited to the facts in the admittedly "brief" interval of time between the arrival of the detectives on Lime Avenue and the shooting. (RB 52-53, 62.) The Attorney General argues that Mr. Sandoval's plan was "formed quickly." (RB 53.) This argument differs dramatically from the prosecutor's argument to the jury that Mr. Sandoval's "premeditation and deliberation ... existed long before he got anywhere near Lime [Avenue]." (10 RT 2028.)

Although the Attorney General aptly avoids making a transferred premeditation argument in defending the sufficiency of the evidence, the prosecutor did not avoid making such an argument to the jury. The prosecutor

specifically advanced that invalid theory in the trial court. Because there is no basis for determining from the record that the jury did not rely on the prosecutor's invalid transferred premeditation theory, the first degree murder conviction cannot stand. (*People v. Perez*, *supra*, 35 Cal.4th at p. 1233.)

V.

PREJUDICIAL ERROR OCCURRED WHEN THE PROSECUTOR PRESENTED POLICE "EXPERT" TESTIMONY CONCERNING MR. SANDOVAL'S MENTAL STATE AT THE TIME OF THE SHOOTING AND URGED THE JURY TO RELY ON THAT "EXPERT" TESTIMONY TO FIND THAT MR. SANDOVAL ACTED WITH PREMEDITATION AND DELIBERATION.

The Attorney General acknowledges "[a]n expert [witness] ... may not testify that an individual had specific knowledge or possessed a specific intent. (RB 65-66.) In derogation of this rule, the jury in this case heard gang expert testimony that, before heading over to Lime Avenue, Mr. Sandoval planned to shoot and kill any police who interfered with B.P.'s attack on Toro. (9 RT 1893-1894, 1897-1900.) Specifically, the jury heard gang expert testimony that Mr. Sandoval's role in the planned attack on Toro was to be the "back up person" armed with a powerful weapon (9 RT 1893), that he "strategically" assumed "a position of advantage[,]" from which he could provide cover fire against any police officers who "attempt[ed] to interfere" (9 RT 1893-1894), and that in the

event police interfered with the attack, it was his "duty to take them on and pin them down or kill them if possible." (9 RT 1899.) In argument to the jury, the prosecutor contended the foregoing evidence established that gang members like Mr. Sandoval "always consider law enforcement's potential presence at their shootings[,]" and that "they have practices and proceedings in place" to account for such possibilities. (10 RT 2054-2055.) Continuing on, he argued, "They do consider law enforcement's presence. They do bring long arms in order to fend off police and apprehension of their fellow gangsters." (10 RT 2055.) And, he urged the jury to consider the gang expert testimony "when you consider whether there's premeditation and deliberation." (10 RT 2059.) Thus, the jury was erroneously presented with expert testimony concerning Mr. Sandoval's mental state at the time of the shooting.[17]

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[17] The Attorney General cites *People v. Ward* (2005) 36 Cal.4th 186, in support of the proposition that the gang expert testimony in this case was permissible. (RB 66.) However, *Ward* is distinguishable from the instant case. In *Ward*, "[t]he substance of the [gang] experts' testimony, as given through their responses to hypothetical questions, related to [the] defendant's motivations for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges." (*Id.* at p. 210.) "This testimony was not tantamount to expressing an opinion as to [the] defendant's guilt." (*Ibid.*) By contrast, the expert testimony in the instant case was that Mr. Sandoval, as part of a preconceived plan, strategically positioned himself in a location from which he could shoot any police who showed up and interfered with the attack on Toro, and that he was duty bound to shoot and kill any such police. (9 RT 1893-1894, 1899.) Consistent with the purpose for which the testimony was adduced, the

A. The Assignment of Error Was Preserved

The Attorney General contends Mr. Sandoval's right to pursue this claim has been forfeited due to inadequate objections by his counsel in the trial court. (RB 64.) Not so.

Mr. Sandoval's trial attorneys repeatedly objected to expert testimony concerning his mental state at the time of the shooting. They did so before, during, and after the presentation of the offending evidence. (9 RT 1811-1814, 1843, 1899-1904.)

The prosecution presented gang expert testimony from two witnesses: Investigator Ignacio Lugo and Sergeant Richard Valdemar.

Investigator Lugo testified first. Before his testimony, Mr. Sandoval's trial counsel requested a hearing pursuant to Evidence Code section 402 in order to ascertain in advance the scope of his testimony before the jury. However, when the prosecutor, in response to this request, represented that Investigator Lugo's testimony was "just gonna be general stuff about Barrio Pobre and East Side Paramount[,]" defense counsel said no foundational hearing outside the presence of the jury would be necessary. (9 RT 1758-1759.) However, during the

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prosecutor urged the jury in closing argument to consider the testimony in finding Mr. Sandoval had acted with premeditation and deliberation. (10 RT 2054-2055, 2059.)

prosecutor's direct examination of the Investigator in the presence of the jury, the Investigator testified that Mr. Sandoval's role with the CAR-15 was to provide "cover" for his fellow gang members during their attack on Toro, and the Investigator testified that this was a "methodical," "planned out" event, in which Mr. Sandoval was to provide "cover fire against police" if they showed up. (9 RT 1814.) Defense counsel immediately objected, moved to strike the testimony, and requested a sidebar conference. (9 RT 1814.)

Investigator Lugo's testimony went way beyond the limited scope of testimony the prosecutor had said he was going to elicit from him. Following the sidebar conference, the trial court sustained the defense objection and ordered the jury to "disregard the statement about the police." (9 RT 1814.)

Sgt. Valdemar was the prosecution's second gang expert. Prior to his testimony in the presence of the jury, he testified in a foundational hearing pursuant to Evidence Code section 402. (RB 63, fn. 16.) In that foundational hearing, the sergeant testified that Mr. Sandoval's role was to provide cover for his fellow gang members by being "prepared to shoot police officers if they tried to interfere[.]" (9 RT 1833, 1838.) Counsel moved to exclude this testimony, characterizing it as "rank speculation" and contending that it lacked foundation. The trial court overruled the objection. (9 RT 1843.)

Then, in the presence of the jury, the sergeant gave the testimony in question. He testified that Mr. Sandoval was "the back up person," that he "strategically" assumed "a position of advantage[,]" from which he could provide cover fire against any police officers who "attempt[ed] to interfere...." (9 RT 1893-1894.) According to the sergeant, one of the reasons Mr. Sandoval had the powerful CAR-15 was that police might arrive and interfere with B.P.'s attack on Toro. (9 RT 1897-1898.) He testified that, in the event police arrived, it would be Mr. Sandoval's "duty to take them on and pin them down or kill them if possible." (9 RT 1899-1900.) Thereupon, defense counsel objected, and requested a sidebar conference. (9 RT 1900.) Defense counsel said the sergeant was "basically put[ting] into the jury's mind the intent of the defendant." Defense counsel pointed out, "He can't know that. It's beyond his expertise." (9 RT 1901.) Elaborating further on the objection, defense counsel said the prosecution and the sergeant were "trying to put into the mind of the jury that the defendant has some premeditation against the police...." (9 RT 1902.) This was improper, counsel stressed, because "it goes into the jury's province ... to determine whether it's a premeditated and deliberate[] murder." (9 RT 1903.) The trial court expressed "concern" about not wanting the sergeant to "get into anything that is the jury's province," such as "the mental state of the defendant." (9 RT 1905.) The court

then commented, "I think he's going beyond his expertise as a gang expert." (9 RT 1906.) The sidebar conference ended, and the court did not make any rulings or comments in the presence of the jury. (9 RT 1907.)

The foregoing chronology establishes that Mr. Sandoval's trial attorneys made repeated objections to the testimony in question. They objected on the very grounds that are pursued in this appeal. Hence, the assignment of error under consideration has not been forfeited.

B. The Error Was Prejudicial

As discussed in Mr. Sandoval's opening brief, the erroneous presentation of this evidence before the jury was prejudicial. (AOB 185-187.)

The fact that the prosecutor repeatedly urged the jury during closing argument to consider the inadmissible evidence in evaluating premeditation and deliberation (10 RT 2054-2055, 2059), is a circumstance that militates strongly against treating the error as harmless. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753 [recognizing the significance in harmless error analysis of "the State repeatedly emphasiz[ing] and argu[ing]" a subject that should not have been presented to the jury]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1487 [erroneous admission of evidence was prejudicial where "prosecutor heavily relied" on the evidence "during closing argument"]; *United States v. Serrano* (1st

Cir. 1989) 870 F.2d 1, 9 [no harmless error were "the government emphasized" the erroneously admitted evidence "in its closing arguments to the jury"].)

The type of error that occurred here "infringe[d] upon the jury's factfinding role[18] and affect[ed] the jury's deliberative process in ways that are, strictly speaking, not readily calculable." (*Neder v. United States* (1999) 527 U.S. 1, 18.) In *People v. Killebrew* (2002) 103 Cal.App.4th 644, which is discussed in Mr. Sandoval's opening brief and the Attorney General's brief (AOB 159, 172, 176-178, 182, 184, 186-187; RB 67), the court recognized that gang expert testimony concerning the mental state of gang member during criminal activity amounts to "an improper opinion" as to how the gang expert "believe[s] the case should be decided." (*Killebrew*, *supra*, at p. 658.) Because "the expert testimony of a law enforcement officer ... often carries an aura of special reliability and trustworthiness" (*United Sates v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172; see generally *People v. Housley* (1992) 6 Cal.App.4th 947, 957 ["juries may accord undue weight to an expert's opinion"]), the improper admission of such evidence is not readily susceptible to being treated as harmless.

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[18] As discussed above, the trial court expressed that Sgt. Valdemar's testimony was interfering with the "jury's province" to decide "the mental state of the defendant." (9 RT 1905.)

Additionally, during guilt phase deliberations, the jury sent out a note inquiring about the effect of a jury finding that Mr. Sandoval had acted without premeditation and deliberation. (10 RT 2082; 5 CT 1179.) This suggests the jury struggled with the issue of Mr. Sandoval's mental state, and it weighs against a finding of harmlessness. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["closeness of the case is also indicated by juror questions"]; *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1104.)

Furthermore, the prejudicial effect of this error was exacerbated by the trial court's erroneous failure to instruct the jurors that they could only rely on circumstantial evidence to conclude Mr. Sandoval acted with premeditation and deliberation if that was the only inference that could be drawn from the circumstantial evidence. (AOB 222-239; pp. 50-65, *infra*.)

In light of the foregoing, the trial court's improper admission of police "expert" testimony concerning Mr. Sandoval's mental state at the time of the shooting was not harmless error.

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VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE OF INFLAMMATORY NOTES WRITTEN BY RASCAL TO PROVE MR. SANDOVAL'S MENTAL STATE, DESPITE THE ABSENCE OF ANY EVIDENCE THAT MR. SANDOVAL WAS AWARE OF RASCAL'S NOTES.

Before E.S.P. gang members shot at B.P. gang members in an alleyway in Compton, which led B.P. gang members to seek to retaliate by attempting to attack/shoot Toro at his home in Long Beach, Rascal wrote some notes about B.P. members purportedly not killing enough people. (People's Exhibit 26.)[19] Although no evidence was presented that the content of Rascal's notes was ever shared with Mr. Sandoval, the prosecutor argued that Rascal's written remarks were relevant to the issue of premeditation in this case. (6 RT 1085-1086; 7 RT 1413-1415; 10 RT 2028.)[20] Based on this theory, the trial court allowed the

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[19] The notes were juvenile and profane. The notes consisted of remarks such as: "Taggers in the neighborhood, no straps, too much hanging out and not enough dead [mother fuckers][.]" "Get your ride on you bitch ass fools." (People's Exhibit 26; 9 RT 1889-1891.)

[20] The prosecutor made this argument both outside the presence of the jury and in the presence of the jury: In proceedings outside the presence of the jury, the prosecutor argued for the admissibility of Rascal's notes by contending that the notes "go[] strictly to premeditation for the crime." (6 RT 1085-1086.) Further, the prosecutor argued that Mr. Sandoval, "by his conduct of shooting a police officer, and trying to kill two of them, ... adopt[ed] exactly the state of mind which is stated in [the notes]." (6 RT 1153-1154; 7 RT 1413-1415.) In his

prosecutor to adduce evidence concerning Rascal's notes in the presence of the jury. The trial court admitted the notes pursuant to the hearsay exception for statements of coconspirators. (6 RT 1086, 1150-1151; 7 RT 1416-1417.)[21] This was error. It was prejudicial.

The Attorney General contends the trial court properly admitted Rascal's notes because "they were made by Rascal prior to Detective Black's murder while [Mr. Sandoval], Rascal, and other members of the Barrio Pobre gang were conspiring to commit various crimes, including murder." (RB 69.) The Attorney General observes that Rascal's notes were written "prior to the gang meeting" that took place at the Dairy Street residence. (RB 69.) Additionally, the Attorney General contends the evidence at trial "clearly established that following the meeting, [Mr. Sandoval] and others went to 'go hit ... East Side Paramount' in retaliation for an *earlier* drive-by shooting." (RB 69.)

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argument to the jury, the prosecutor suggested Mr. Sandoval's premeditation commenced "at the [gang] meeting when [B.P. members] were talking about not putting in enough work and not killing enough people." (10 RT 2028.) Although, as noted, there was no evidence that Mr. Sandoval or any other B.P. members discussed the contents of Rascal's notes at the meeting, this is what the prosecutor argued to the jury.

[21] After the prosecutor contended Rascal's notes were admissible to show premeditation on Mr. Sandoval's part (6 RT 1085-1086), the trial court stated the notes were "highly probative[.]" (6 RT 1086, 1150-1151; 7 RT 1416-1417.)

However, the drive-by shooting did not take place *before* the gang meeting at Dairy Street, as the Attorney General seems to suggest. Rather, it took place *after* the gang meeting.

The relevant chronology of events is simple and straightforward:

- Rascal writes the notes. (People's Exhibit 26; 7 RT 1303, 1398-1399, 1403-1404; 9 RT 1889-1891.)

- The B.P. gang meeting takes place at the Dairy Street residence in Long Beach in the early afternoon on Saturday, April 29, 2000. (6 RT 1158, 1222, 1236, 1250-1251; 7 RT 1305-1315; 9 RT 1858.) The meeting concludes at approximately 3:00 to 4:00 p.m. (7 RT 1318.)

- The E.S.P. drive-by shooting at B.P. gang members takes place at the alleyway in Compton. (7 RT 1318-1319; 9 RT 1858-1861; 10 RT 1969-1970; 2 CT 276-278.)

- B.P. gang members undertake an effort to retaliate against E.S.P. by going after Toro at his Long Beach residence. (6 RT 1093;[22] 7 RT 1328; 9 RT 1893; 2 CT 281-289.) This effort is underway by between approximately 8:30 and 10:30 p.m. (7 RT 1318-1324, 1328.)

The Attorney General also suggests that Rascal's notes "were discussed at the gang meeting at Dairy Street. (RB 71.)[23] However, the Attorney General does

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[22] On the first line of page 21 of Mr. Sandoval's opening brief, there is a citation to 10 RT 1093. This is mistaken; there is no 10 RT 1093; it should be 6 RT 1093.

[23] As noted in footnote 20, *ante*, the prosecutor also made this suggestion in his argument to the jury. (10 RT 2028.)

not offer any citation to the record in support of this assertion. (RB 71.) No citation to the record is possible concerning this subject, because, as noted in Mr. Sandoval's opening brief, no evidence was introduced at trial about what was discussed during the gang meeting, and no evidence was introduced that Rascal's notes were discussed during the gang meeting. (AOB 189-190 & fn. 112.) Indeed, as Mr. Sandoval's trial attorneys stressed in their objections to the notes being admitted, there was no evidence that Mr. Sandoval had even been cognizant of the notes or their contents. (6 RT 1148-1149.)

The trial court's admission of Rascal's notes was a glaring error. As a matter of common sense, notes written by one person do not prove the subsequent mental state of another person who is unaware of the notes. The law conforms to this common sense notion. (See *People v. Lebell* (1979) 89 Cal.App.3d 772, 779-780.)[24] The admission of Rascal's notes was error of constitutional magnitude because Mr. Sandoval had no opportunity to question Rascal about the notes and

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[24] In the *Lebell* case, which is cited in Mr. Sandoval's opening brief (AOB 201-202), the prosecution offered against the defendant an incriminating admission made by another individual. However, there was no evidence that the defendant had heard or had an opportunity to respond to the incriminating admission; there was only evidence that the defendant had been in the general vicinity at the time of the admission. Thus, there was no foundational relevance for admitting the evidence to show the defendant's mental state. (*People v. Lebell*, *supra*, 89 Cal.App.3d at pp. 799-780.)

whether the contents of the notes had ever been presented to Mr. Sandoval. (*United States v. Hall* (9th Cir. 2005) 419 F.3d 980, 985-986 [the accused "enjoys a due process right to confront witnesses against him"].)[25]

Finally, the Attorney General contends Mr. Sandoval was not prejudiced by the admission of Rascal's notes. The Attorney General bases this contention primarily on the strength of the evidence that Mr. Sandoval killed Detective Black. (RB 71-72.) The evidence that Mr. Sandoval was Detective Black's killer was strong; indeed, it was overwhelming and uncontested. However, the strength of that evidence is not germane to the prejudice inquiry at hand. The prejudice inquiry here is limited solely to the effect of the error on the jury's determination that Mr. Sandoval acted with premeditation and deliberation, i.e., the only issue contested in the guilt phase. The prosecution's evidence that Mr. Sandoval acted with premeditation and deliberation in shooting the detectives was not strong. It was circumstantial and it was highly problematic.

Furthermore, as discussed in Mr. Sandoval's opening brief, it is well-established that a prosecutor's emphasis on erroneously admitted evidence militates against a finding that the error is harmless. (AOB 206-207.) In this case,

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[25] As discussed in Mr. Sandoval's opening brief, the Due Process Clause regulates the admission of nontestimonial hearsay evidence such as Rascal's notes. (AOB 202-203.)

the prosecutor stressed Rascal's notes in his guilt phase opening statement and closing argument. (6 RT 1080, 1087-1090; 10 RT 2028.) The Attorney General's discussion of prejudice omits any reference to this principle.

Finally, the trial court's erroneous admission of Rascal's notes was one of a series of significant errors committed by the trial court with respect to matters pertaining to the jury's evaluation of circumstantial evidence relating to Mr. Sandoval's mental state.[26] And, the note that the jury sent out during deliberations, inquiring about the effect on their verdict of a finding of no premeditation (10 RT 2082; 5 CT 1179), indicates that the jury was struggling with the sufficiency of the prosecution's proof concerning Mr. Sandoval's mental state. Thus, individually and cumulatively, these errors pertaining to matters relating to the jury's evaluation of Mr. Sandoval's mental state were prejudicial.

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[26] As discussed in Mr. Sandoval's opening brief and throughout this reply brief, the trial court committed a number of errors that impacted the jury's evaluation of Mr. Sandoval's mental state. First, the court allowed the prosecution to present "expert" testimony concerning Mr. Sandoval's mental state. Second, the court allowed Rascal's notes to be presented as evidence of Mr. Sandoval's mental state. Third, the court refused to instruct the jury that circumstantial evidence can only support a finding of premeditation and deliberation if the evidence is not only consistent with that mental state but also inconsistent with the existence of any other mental state.

VII.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ALLOWING THE PROSECUTOR TO ADDUCE EVIDENCE THAT A PERIPHERAL WITNESS HAD BEEN THREATENED BY MEMBERS OF MR. SANDOVAL'S GANG, DESPITE THE ABSENCE OF ANY EVIDENCE THAT MR. SANDVOAL HAD ANY INVOLVEMENT IN THE THREAT.

Angela Estrada was a relatively unimportant witness in the guilt phase of Mr. Sandoval's trial. She testified that she had been present in residence where the B.P. meeting organized by Rascal took place on the day Detective Black was murdered — April 29, 2000. (6 RT 1158.) She did not know what was discussed during the meeting. (6 RT 1198.) She testified that she is a member of B.P., and she identified a number of B.P. members. (6 RT 1156-1157, 1162-1172, 1178-1179.) After Ms. Estrada testified that she had not told police she had seen any B.P. members with guns on the evening of April 29, 2000 (6 RT 1185-1186, 1189-1190), a detective testified that she had told him she had seen B.P. members, including Mr. Sandoval, with guns that evening. (6 RT 1207-1208.)

Ms. Estrada's testimony did not establish any key fact that was not established by other evidence. There was no dispute by the defense that the B.P. meeting organized by Rascal had taken place on April 29, 2000. Identification of key participants in the case was not an issue during the guilt phase. And, the

defense did not dispute that Mr. Sandoval had a gun that evening. In fact, the defense conceded in its guilt phase opening statement and closing argument that Mr. Sandoval had shot and killed Detective Black. (6 RT 1102-1104; 10 RT 2045-2050.)

However, during the prosecutor's direct examination of Ms. Estrada, evidence was adduced that Ms. Estrada had been threatened in connection with her testimony in this case. There was no evidence tying the threat to Mr. Sandoval directly. (6 RT 1159-1162, 1183-1187, 1206-1207.) However, the clear inference from the evidence concerning this subject was that the source of the threat was members of Mr. Sandoval's gang. As discussed in Mr. Sandoval's opening brief, the prosecutor insinuated the threat came from B.P. members by asking Ms. Estrada whether she had previously told him and detectives the threat was conveyed by B.P. (AOB 220; 6 RT 1161.) By "incorporat[ing] inadmissible evidence[,]" this line of questioning was "just as improper as the direct admission of such evidence." (*United States v. Sine* (9th Cir. 493 F.3d 1021, 1031; AOB 220.)

In light of the circumstances that Ms. Estrada was not a key witness, her credibility was not a material issue, and the threat was apparently issued by fellow gang members of Mr. Sandoval's, the trial court erred by admitting the threat

evidence.

"[T]his court has held that evidence of a third party's attempt to intimidate a witness is inadmissible against a defendant unless there is reason to believe the defendant was involved in the intimidation." (*People v. Abel* (2012) 53 Cal.4th 891, 924.) However, this court has also held that "evidence of a 'third party' threat may bear on the credibility of a witness, whether or not the threat is directly linked to the defendant." (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.) And, "evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible." (*Ibid.*, internal quotation marks omitted.)

Thus, in this context, "a trial court has discretion, within the limits of Evidence Code section 352, to permit the prosecution to introduce evidence supporting a witness's credibility on direct examination, particularly when the prosecution reasonably anticipates a defense attack on the credibility of that witness." (*Id.* at p. 1085.)

In the cases in which trial court determinations to admit third party threat evidence have been upheld, the threatened witnesses were key witnesses, whose credibility was at issue. (*Abel, supra*, 53 Cal.4th at p. 925 ["Ripple's credibility was a significant issue in this case. The evidence therefore had substantial

probative value."]; *Mendoza*, *supra*, 52 Cal.4th at p. 1085 ["Flores was the prosecution's key witness, and the credibility of her testimony was essential to establish the defendant's guilt...."].)

Based on the foregoing authorities, and in light of the peripheral significance and uncontroverted subjects about which Ms. Estrada testified, the admission of evidence that she had been threatened, together with the prosecutor's insinuation that the threat came from Mr. Sandoval's fellow gang members, was error. As discussed in Mr. Sandoval's opening brief, such evidence is, by its nature, prejudicial. (AOB 218-219.)

Although the trial court did instruct the jury in this case that there was no implication in the prosecutor's questions concerning threats to Ms. Estrada linking those threats to Mr. Sandoval (6 RT 1160-1161), the court did not instruct the jury to limit its consideration of the evidence to the witness's state of mind. (Compare *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368 ["The trial court correctly limited the [third party threat] evidence to 'the witness' state of mind, attitude, actions, bias, prejudice, lack or presence thereof,' and we presume the jury adhered to the trial court's limitations on this testimony.].) Thus, the trial court's instruction did not cure the error or mitigate its prejudicial effect.

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VIII.

THE TRIAL COURT PREJUDICIALLY ERRED BY DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION PURSUANT TO CALJIC NO. 2.01 OR CALJIC NO. 2.02 CONCERNING ASSESSMENT OF THE CIRCUMSTANTIAL EVIDENCE BEARING ON MR. SANDOVAL'S MENTAL STATE.

The law recognizes a distinction between direct and circumstantial evidence. Based upon the indirect nature of circumstantial evidence, the criminal law requires juries to exercise caution in relying on such evidence and bars juries from convicting defendants on the basis of circumstantial evidence that does not conclusively establish guilt. These principles apply in cases such as the instant case, where the only contested issue is the defendant's mental state. Of course, trial courts are required to instruct juries regarding these principles in order to guide their evaluation of circumstantial evidence.

A. Whether Mr. Sandoval Acted With Premeditation and Deliberation Was the Only Contested Issue in the Guilt Phase.

The sole theory on which the defense contested the prosecution's case in the guilt phase was that Mr. Sandoval did not act with premeditation and deliberation when he fired gunshots into the unmarked police vehicle occupied by Detectives Black and Delfin. (6 RT 1101-1104; 10 RT 1931, 2045-2050.) Although Mr. Sandoval stated in his confession that he shot at the detectives in the vehicle (2 CT

296), he did not state that he fired those shots with premeditation and deliberation. To the contrary, in his confession, he described a hasty, rash, impulsive act that was not the product of careful reflection. He told his interviewers that the unmarked police vehicle traveled the length of only two houses on a residential street from the time that he first saw the vehicle to the time he fired the shots. (2 CT 294.) When he saw the police vehicle maneuver toward Rascal, he "jumped off and ... started shooting at the officers." (2 CT 296.) By no means do those remarks constitute direct evidence that Mr. Sandoval acted with premeditation and deliberation. At most, the remarks and the other evidence in the case, i.e., evidence having only circumstantial relevance to mental state, gave rise to jury question as to whether he acted with premeditation and deliberation.[27]

Unsurprisingly, the prosecutor's argument to the jury concerning the issue of premeditation and deliberation was premised on circumstantial evidence.[28]

> This court has long held that when the prosecution's case rests substantially on circumstantial evidence, [the] trial court[] must give

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[27] If the Attorney General is correct that the prosecution's evidence met the sufficiency threshold with respect to the issue of premeditation and deliberation (RB 46-62), the evidence certainly did not establish the presence of premeditation and deliberation as a matter of law. Rather, the evidence did no more than present a question of fact for the jury to resolve concerning that issue.

[28] The prosecutor's reliance on circumstantial evidence in his closing argument is discussed in detail at pages 61-64, *infra*.

> an instruction embodying the principle that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

(*People v. Livingston* (2012) 53 Cal.4th 1145, 1167.)

Mr. Sandoval's trial attorneys requested the trial court to instruct the jury in accordance with this long established rule. (10 RT 1925-1926, 1931.) In support of the request, they explained that mental state was the "*only* issue" they were contesting in the guilt phase. (10 RT 1931, italics added.) In an effort to convince the trial court of the need for the instruction, defense counsel stressed that "[t]he gravamen of this case is circumstantial evidence...." (10 RT 1926.) Further, defense counsel noted that the prosecution's presentation of gang expert testimony concerning Mr. Sandoval's mental state constituted circumstantial evidence. (10 RT 1926-1927.) Nevertheless, the court refused the requested instruction. (10 RT 1926-1927.) Defense counsel interposed a constitutional objection to the court's ruling, noting that the ruling hampered the ability of the defense to effectively argue mental state. (10 RT 1931.)

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B. *The Attorney General Advances the Untenable Position that the Purported Existence of Premeditation and Deliberation Was Established by "Direct" Evidence.*

In this appeal, the Attorney General suggests the evidence of premeditation and deliberation adduced at trial was primarily direct,[29] rather than circumstantial.[30] (RB 79-80.) Thus, according to the Attorney General, the trial court properly declined to instruct the jury concerning the constraints applicable to the assessment of the sufficiency of circumstantial evidence to establish premeditation and deliberation. (RB 78-80.) The Attorney General's position is unsustainable.

As a general matter, and as a matter of common sense, evidence of a person's mental state is almost invariably circumstantial. Moreover, the relevant evidence in this case concerning Mr. Sandoval's mental state at the time of the shooting was in fact primarily, if not entirely, circumstantial. Although Mr. Sandoval's confession consisted of direct evidence that he shot at the detectives, it

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[29] Direct evidence is "evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." (Evid. Code, § 410.)

[30] "Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which [one] may logically and reasonably conclude the truth of the fact in question." (CALCRIM No. 223.)

did not consist of any direct evidence that his mental state was one of premeditation and deliberation. He did not say he acted with premeditation and deliberation. The evidence bearing on that issue was circumstantial.

Even if the record could be twisted and distorted to treat Mr. Sandoval's confession as a statement consisting of "direct" evidence of premeditation and deliberation, who is to say whether that "direct" evidence is to be believed? Determining the believability of an individual's statements about his/her mental state necessarily entails an assessment of the circumstances in which the statement is made. In other words, it is a determination that cannot be made without evaluating circumstantial evidence.

C. *Even in a Case Involving a Confession, the Evaluation of Whether a Defendant Acted with Premeditation and Deliberation Will Almost Inevitably Be Based on Consideration of Circumstantial Evidence.*

The trial court's failure to instruct the jury concerning the evaluation of circumstantial evidence concerning Mr. Sandoval's mental state was a conspicuous, significant, prejudicial error.

This court has repeatedly recognized that "'[e]vidence of a defendant's state of mind is almost inevitably circumstantial....'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27, quoting *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Beeman* (1984) 35 Cal.3d 547, 558-559; accord, *People v. Park* (2003) 112

Cal.App.4th 61, 68; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1436; *Gibson v. County of Washoe* (9th Cir. 2002) 290 F.3d 1175, 1190 ["direct evidence of a person's mental state rarely exists"].)

> Direct evidence of the mental state of the accused is rarely available except through his or her testimony. [And,] [t]he trier of fact is and must be free to disbelieve the testimony and to infer that the truth is otherwise when such an inference is supported by circumstantial evidence regarding the actions of the accused.

(*People v. Beeman, supra*, 35 Cal.3d at pp. 558-559.)[31]

"[C]riminal intent can rarely, if ever, be shown by statements or testimony of a defendant. We, therefore, have in this state a very common sense rule announced in section 21 of our Penal Code that 'The intent or intention is manifested by the circumstances connected with the offense.'" (*People v. Murphy*

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[31] "Generally, the question whether the defendant harbored the required intent must be inferred from the circumstances of the shooting." (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208, citing *People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.) "One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact." (*Lashley, supra*, 1 Cal.App.4th at pp. 945-946.) "[I]ntent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred." (*People v. Protor* (1959) 169 Cal.App.2d 269, 279; accord, *People v. Burnham* (1961) 194 Cal.App.2d 836, 841.) "Intent is in the mind; it is not the external realities to which intention refers." (*People v. Rojas* (1961) 55 Cal.2d 252, 257.)

(1943) 60 Cal.App.2d 762, 77-771.) Thus, "[i]n interpreting one's actions for the purpose of determining the intent, it is quite proper, and indeed often necessary, to consider the entire conduct of the individual before and after the particular act which is the subject of scrutiny." (*People v. Taylor* (1928) 88 Cal.App. 495, 500.)[32]

Although the inevitably circumstantial nature of mens rea evidence is discussed in Mr. Sandoval's opening brief (AOB 228-229), this actuality is not discussed in the Attorney General's brief.

Whether Mr. Sandoval's mental state included premeditation and deliberation was a question of fact for the jury to decide. (*People v. Bender* (1945) 27 Cal.2d 164, 178; *People v. Chew Sing Wing* (1891) 88 Cal. 268, 270 ["There is no question arising in a trial for murder more peculiarly or purely one of fact than the one whether the killing was done with deliberation and premeditation...."].) In order to facilitate the jury's resolution of that question of fact, it was incumbent upon the trial court to instruct the jury concerning the principles of law to be applied in making that determination. (*Bender*, *supra*, 27

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[32] "For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in case of poisoning, it carries with it an internal evidence of cool and deliberate malice." (*People v. Bender*, *supra*, 27 Cal.2d at pp. 177-178, internal quotation marks omitted.)

Cal.2d at p. 175 ["In a criminal case where circumstantial evidence is substantially relied upon for proof of guilt it is obvious that instructions on the general principles of law pertinent to such cases necessarily include adequate instructions on the rules governing the application of such evidence."], internal quotation marks omitted.)

In *People v. Hatchett* (1944) 63 Cal.App.2d 144, the defendant, who was charged with manslaughter, admitted shooting the decedent, but claimed it was in self-defense. (*Id.* at pp. 147-149, 151-152.) Notwithstanding the defendant's admission, the prosecution's evidence bearing upon the issue of the defendant's mental state was mostly circumstantial. (*Id.* at p. 152.) The trial court's failure to instruct the jury concerning circumstantial evidence, along with other instructional errors, necessitated reversal of the defendant's conviction. (*Id.* at pp. 152-156, 165.) In reaching this conclusion, the appellate court stressed that the "defendant had a right to an instruction on circumstantial evidence based upon her own theory of the case...." (*Id.* at p. 153.)[33] As noted above, the sole defense theory in the guilt phase was that Mr. Sandoval acted without premeditation and deliberation.

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[33] The *Hatchett* case is cited in Mr. Sandoval's opening brief (AOB 231, 235-236), but not mentioned in the Attorney General's brief.

He was entitled to a circumstantial evidence instruction on that theory.[34]

The mere fact that a defendant has confessed to a homicide does not mean that his/her mental state in the commission of the homicide is thereby established by direct evidence. (*Houston v. Dutton* (6th Cir. 1995) 50 F.3d 381, 383 ["Although it is possible that the killing could have occurred as the defendant stated in his confession, the circumstantial evidence supports an inference of premeditation and deliberation."]; *People v. Pullerson* (1899) 159 N.Y. 339, 344 [53 N.E. 1119, 1120] [stating in a case in which the defendant had confessed to killing the victim, that "[t]he only question that can arise out of these facts as to which there can be a possible doubt is as to whether there was that deliberation and premeditation on the part of the defendant which would constitute the crime of murder in the first degree"].)

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[34] The Attorney General's position that Mr. Sandoval's confession constituted direct evidence of premeditation and deliberation is essentially an implicit contention that the defense theory was frivolous, that there was no defense to the charges that Mr. Sandoval acted with premeditation and deliberation, and that the guilt phase amounted to little more than a slow plea. The record undermines this position. In fact, if the prosecution's evidence was not insufficient as a matter of law to support a finding of premeditation and deliberation, the interpretation of that evidence most favorable to the prosecution is that it gave rise to a circumstantial basis for inferring the presence of premeditation and deliberation.

1. The Attorney General's Reliance Upon Inapposite Authority

The Attorney General relies on *People v. Anderson* (2001) 25 Cal.4th 543, in support of the proposition that the trial court in the instant case properly declined to instruct the jury concerning the assessment of the sufficiency of circumstantial evidence. (RB 79-80.) However, *Anderson* is inapposite here. In *Anderson*, the defendant claimed the trial court's refusal to instruct the jury pursuant to CALJIC No. 2.01 affected the jury's consideration of factor (b) evidence — aggravating evidence that the defendant had committed a crime of violence in addition to those for which he was tried. (*Id.* at pp. 581-582.) In rejecting the contention, this court stressed that the evidence of the other violent crime, a murder, "was *not introduced to prove [the] defendant's 'guilt' of a charged crime,* but to demonstrate, as a circumstance in aggravation of the capital murders, that he had engaged in other violent criminal conduct." (*Id.* at p. 582, italics added.) This court held the trial court had properly declined to instruct the jury concerning the assessment of circumstantial evidence bearing on that aggravating circumstance because the prosecution had "relied primarily upon direct evidence, i.e., ... eyewitness testimony ..., to prove that [the] defendant committed [that] murder." (*Ibid.*)

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In cases such as *Anderson*, the question before the jury with respect to factor (b) evidence is whether the defendant has engaged in "criminal activity ... involv[ing] the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b).) In instructing a jury concerning the assessment of such evidence, the trial court is not even required "to instruct on the elements of 'other crimes'...." (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 324.)

Thus, *Anderson* provides no support to the Attorney General's position. In contrast to *Anderson*, the subject with respect to which the assessment of circumstantial evidence was at issue in the instant case was charged offenses, not mere factor (b) evidence. Whereas there was no need for the trial corut in *Anderson* to instruct the jury on the elements of the factor (b) offense (*Gonzales and Solilz*, *supra*, at p. 324), the trial court in the instant case was required to instruct the jury on the elements of the offenses with which Mr. Sandoval was charged. Those elements included Mr. Sandoval's mental state. In *Anderson*, it was simply unnecessary for the jury to pass on the defendant's mental state in connection with the factor (b) evidence. Thus, *Anderson* lends no support to the Attorney General's position that the trial judge in this case was not required to instruct the jury concerning the assessment of circumstantial evidence relating to

the mental state of charged offenses.

2. *The Prosecutor's Heavy Reliance on Circumstantial Evidence in His Argument to the Jury*

In the guilt phase of the instant case, the prosecutor's argument to the jury concerning premeditation and deliberation was premised primarily, if not entirely, on circumstantial evidence. The prosecutor's argument removes any doubt that Mr. Sandoval was entitled to an instruction concerning the jury's assessment of circumstantial evidence bearing on his mental state.

At the beginning of his argument to the jury, the prosecutor posed this question: "When did premeditation and deliberation start in this case?" He answered his own question by stating, "The premeditation and deliberation in terms of this particular defendant started a long time before they ever got to Lime [Avenue]. The intended target happened to have changed, but the premeditation and deliberation and intention to go over there and kill existed for long before he ever got anywhere near Lime [Avenue]." (10 RT 2028.)

Specifically, the prosecutor suggested the jurors could infer premeditation and deliberation from the facts that Mr. Sandoval loaded the gun he used before going over to Lime Avenue, got four armed friends together, drove over to Lime Avenue in two cars, and concealed himself beside a car "when he s[aw] the police

officers coming from two houses north...." (10 RT 2028-2029.) The prosecutor argued that Mr. Sandoval chose to shoot the police rather than letting them arrest Rascal, because he is a gangster who is loyal to his "herd." (10 RT 2029.)

The prosecutor also urged the jury to infer premeditation and deliberation from the testimony of a resident of Lime Avenue who had characterized the sound of the shots as "a very deliberate boom, boom, boom, boom...." (10 RT 2030-2031.) Further, the prosecutor urged the jury to infer premeditation and deliberation from the fact that Mr. Sandoval fired 28 shots. (10 RT 2031.)

In urging the jury to infer that Mr. Sandoval had time to make a "cold, calculated judgment" after seeing the unmarked police vehicle, the prosecutor stressed the circumstances that Mr. Sandoval saw two officers in the vehicle, saw what the officers were wearing, and noticed that the officers were not aware of his presence. (10 RT 2032.)

The prosecutor urged the jury to infer that this was not "a swift, random attack" carried out by any "gangster out on the street[,]" but rather that this was "a crime ... perpetrated by the upper level of Barrio Pobre...." (10 RT 2033.) The prosecutor stressed Mr. Sandoval's moniker, "Menace"; he said Mr. Sandoval's fellow gang members gave the gun with serious firepower to Mr. Sandoval because they knew that he would "take care of business." (10 RT 2034.)

Then, toward the end of his argument, the prosecutor said:

> And what I'm asking you to do is listen to what came in during this trial, listen to what planning and premeditation, the thought processes that went there. [¶] Don't ignore what [gang expert] Rich Valdemar said because [defense counsel] doesn't like it. Consider his experience and what he knows about gangs. [¶] Consider what the other expert, Ignacio Lugo, told you about gangs, Barrio Pobre, and how they get along with East Side Paramount and *what their thought processes are in terms of of carrying out crimes. Consider all that when you consider whether there's premeditation and deliberation.* [¶] Consider the gang meeting, and what they wrote down, what the meeting was about[,] when you consider premeditation and deliberation. [¶] Consider the fact that he had to load a weapon, and that they had a meeting for 15 to 30 minutes before they left Dairy Street to go effectuate a killing. That's premeditation and deliberation. [¶] *Those are the things that accompanied this killing.* Those processes didn't discard themselves because police officers came down the street. The fact of the matter is, the willful, deliberate[,] premeditated aspects of this crime all came into place and are satisfied long before the crime ever occurred.

(10 RT 2059, italics added.)

The prosecutor argued that it was a "willful, premeditated notion that caused" Mr. Sandoval to be at Lime Avenue. (10 RT 2058.)[35] Then, according to the prosecutor, Mr. Sandoval "sees the police. He knows his role. He knows what

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[35] The prosecutor even went so far as to argue: "Look at the defendant's phone book[,] when they're talking about x-ing out E.S.P. throughout the phone book. *This premeditation starts and is reflected in everything defendant does.* All of the graffiti you see through the video." (10 RT 2061, italics added.) The prosecutor did not expressly argue that Mr. Sandoval's premeditation began when he joined B.P. years earlier, but that appears to be the logical (or illogical) extension of the prosecutor's argument.

he's supposed to do. He's got all this premeditation and deliberation that caused him to load the firearm and be engaged in this in the first place." (10 RT 2063.)

Thus, over and over again, the prosecutor pointed to circumstances in the case from which he urged the jurors to infer the requisite mental state. He did not simply argue to the jury that Mr. Sandoval's confession constituted direct evidence of premeditation and deliberation. In other words, his argument in support of a finding of premeditation and deliberation was an argument based on circumstantial evidence.

D. The Instructional Omission Was Prejudicial.

The facts that mental state was the only contested issue in the guilt phase and that the prosecutor's argument concerning mental state was based on circumstantial evidence weigh heavily against a finding that the trial court's refusal to instruct the jury concerning the proper assessment of circumstantial evidence was harmless. (*People v. Berry* (1976) 18 Cal.3d 509, 518 ["Since this theory of provocation constitutes defendant's entire defense to the first count, we have no difficulty concluding that the failure to give such instruction was prejudicial error[.]"]; *People v. Ross* (2007) 155 Cal.App.4th 1033, 1057 [considering the prosecutor's argument to the jury in assessing the prejudicial effect of instructional error]; *United States v. Zuniga* (9th Cir. 1993) 989 F.2d

1109, 1111 ["failure to instruct ... on the defendant's theory of the case, where there is evidence to support such instruction, ... can never be considered harmless"].) Moreover, the fact-bound nature of the mental state inquiry is simply a question that should be left to a properly instructed jury in the first instance. Mr. Sandoval is entitled to have a meaningful jury trial on that issue.

IX.

THE SPECIAL CIRCUMSTANCE FINDINGS MUST BE SET ASIDE DUE TO THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY CONCERNING THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE RELEVANT TO THE JURY'S ASSESSMENT OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS.

For many of the same reasons that the trial court prejudicially erred by failing to instruct the jury concerning circumstantial evidence with respect to the charged offenses, the court's failure to instruct the jury concerning circumstantial evidence with respect to the special circumstance allegations was prejudicial error. (AOB 239-248.) Although trial courts do not need to give circumstantial evidence instructions concerning special circumstance allegations when such instructions have been given with respect to charged offenses (*People v. Hines* (1997) 15 Cal.4th 997, 1051), that exception is inapplicable here, as the court gave no circumstantial evidence instruction with respect to the charged offenses. The

special circumstance findings cannot stand.

For example, one of the special circumstance allegations in this case was that Mr. Sandoval's murder of Detective Black was committed in furtherance of criminal street gang activities. (2 CT 482-484.) A substantial portion of the prosecution's case consisted many different forms of evidence concerning gang activities in which Mr. Sandoval participated. Whether Mr. Sandoval contemplated advancing the purposes of his gang when he was shooting at Detective Black is a classic factual question that called upon the jury to draw inferences from the circumstantial evidence in the case. Due to the court's instructional omission, the jury was left to resolve this topic without appropriate guidance.

X.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING IN THIS CASE CANNOT BE UPHELD, BECAUSE THERE IS NO EVIDENCE OF THE REQUISITE SUBSTANTIAL PERIOD OF WATCHFUL WAITING.

As discussed in Mr. Sandoval's opening brief, this court set aside lying-in-wait special circumstance findings in *People v. Lewis* (2008) 43 Cal.4th 415, 507-509, and *People v. Carter* (2005) 36 Cal.4th 1215, 1261-1262. (AOB 254-256.) In both cases, this court found insufficient evidence of substantial periods of

watchful waiting.

The Attorney General does not cite the *Carter* case, and although the Attorney General cites *Lewis* in a footnote (RB 89, fn. 18), the Attorney General does not discuss the holding in *Lewis* concerning the insufficiency of the evidence in connection with the lying-in-wait special circumstance finding.

Lewis and *Carter* are controlling in the instant case. Indeed, this case involves a lack of a substantial period of watchful waiting coextensive with the lack of substantial periods of watchful waiting in those two cases. The relevant facts in *Lewis* and *Carter* are discussed in Mr. Sandoval's opening brief. (AOB 254-256.)

In this case, when Detectives Black and Delfin unexpectedly arrived on Lime Avenue, Mr. Sandoval ducked down. The prosecutor acknowledged that he did so "in order ... [to] not be seen by the police officers [who were] approach[ing] him." (10 RT 1934.) From the time that Mr. Sandoval first saw the officers until the time that he opened fire on them, the officers only drove the length of two residential homes. (2 CT 293-294, 317-318.) The jurors saw exhibits depicting the brief distance the detectives drove in that brief period of time. (AOB 254, fn. 144.) This evidence was insufficient as a matter of law to demonstrate the requisite *substantial* period of watchful waiting that is necessary to support a

lying-in-wait special circumstance finding.

The evidentiary showing necessary to support a lying-in-wait special circumstance finding is necessarily greater than the evidentiary showing necessary to support a first degree murder verdict on a lying in wait theory. (AOB 250-252; *People v. Ceja* (1993) 4 Cal.4th 1134, 1147 (conc. opn. of Kennard, J.); *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907-908.) The required evidentiary showing has to be greater in order to comport with the constitutionally-based narrowing function of special circumstances. (AOB 251, fn. 141.) Thus, even if this court determines that the prosecution's evidence was sufficient to support a first degree murder conviction on a lying in wait theory, there is no basis for a finding on this record that the evidence was sufficient to support a lying-in-wait special circumstance finding.

XI.

THE TRIAL COURT VIOLATED MR. SANDVOAL'S CONSTITUTIONAL AND STATUTORY RIGHTS BY CONDUCTING CRITICAL PROCEEDINGS OUT OF MR. SANDOVAL'S PRESENCE.

As discussed in Mr. Sandoval's opening brief, and as discussed in this brief, the only contested guilt phase issue was whether Mr. Sandoval acted with premeditation and deliberation when he shot at the detectives in the unmarked

police vehicle. During the jury's guilt phase deliberations, the jury sent a written question to the court concerning the subject of premeditation. (10 RT 2082; 5 CT 1179.) Thereupon, the trial court convened proceedings to formulate a response to the jury's question. The court conducted those proceedings in Mr. Sandoval's absence, albeit with the consent of Mr. Sandoval's trial counsel. (10 RT 2082-2083.)

Mr. Sandoval did *not* waive his right to be present during proceedings of this nature.

The Attorney General acknowledges noncompliance with the requirements of Penal Code section 977 on this point. (RB 97.) In the instant case, as in *People v. Romero* (2008) 44 Cal.4th 386, 417-419, the trial court improperly conducted proceedings concerning a jury question in the absence of the accused.

The relevant rule is clear and simple:

> A criminal defendant charged with a felony has a due process right under the Fifth and Fourteenth Amendments to the United States Constitution, as well as a right to confrontation under the Sixth Amendment, to be present at all critical stages of the trial.

(*Id.* at p. 418.)[36]

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[36] "An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part, insofar as the trial court's decision entails a measurement of the facts against the law." (*People v. Waidla* (2000) 22 Cal.4th 690, 741.)

The trial court's violation of this rule took place in the context of a proceeding pertaining to the only contested issue in the guilt phase. If the rule requiring the defendant's presence in all capital proceedings is a rule with any bite, and not just bark, the violation of the rule with respect to a proceeding involving the sole issue in the case, an issue of life or death, cannot be disregarded as harmless error.

XII.

A PENALTY PHASE RETRIAL FOLLOWING JUROR DEADLOCK IN THE ORIGINAL PENALTY PHASE TRIAL IS UNCONSTITUTIONAL.

As noted in Mr. Sandoval's opening brief, the majority of states in this country forbid a penalty phase retrial following juror deadlock in the original penalty phase trial. Those states call for automatic imposition of a life sentence in the event of juror deadlock on the question of penalty. (AOB 262-269.)

In the hopes that this court and/or the Supreme Court of the United States eventually adopt the majority rule as a constitutional imperative, or otherwise, Mr. Sandoval respectfully presents this claim here to preserve it for the future.

Out of the 24 death-qualified jurors who were asked to determine whether the death penalty is warranted in this case, five concluded that it is not. Nevertheless, Mr. Sandoval has now been sentenced to death. This unseemly and

troubling result would not have come to pass if California were with the majority of jurisdictions which impose life sentences following juror deadlock on the question of penalty.

Death is supposed to be different. But, death is not being treated much differently from penalties in non-capital criminal cases if it can be imposed following proceedings in which five out of 24 jurors have concluded that death is not warranted.

XIII.

WITHERSPOON-WITT ERROR NECESSITATES SETTING ASIDE THE DEATH JUDGMENT.

"[T]he group of '*Witherspoon*-excludables'[37] includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case...." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The burden of proving that a prospective juror is excludable for cause under *Witherspoon* rests with the party asserting the challenge. (*Wainwright v. Witt* (1985) 469 U.S. 412, 423

"In light of the gravity" of a juror's decision whether to impose the death penalty, this court has recognized that "for many members of society[,] their

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[37] *Witherspoon v. Illinois* (1968) 391 U.S. 510.

personal and conscientious views concerning the death penalty would make it very difficult ever to vote to impose the death penalty." (*People v. Stewart* (2004) 33 Cal.4th 425, 446, internal quotation marks omitted.) However, "a prospective who simply would find it very difficult ever to impose the death penalty, is entitled—indeed, duty bound—to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*Ibid.*, internal quotation marks omitted.)

Prospective juror D.M. was the type of juror this court described in *Stewart*. It would have been very difficult for him to vote to impose the death penalty, but there is no evidence that he was unwilling to follow the trial court's instructions and follow his oath as a juror. There is no evidence that he was substantially impaired.

Prospective juror D.M. is a supporter of the death penalty (15 RT 2992-2993; 49 Supp. I CT 14152-14154), who, during jury selection in this case, struggled when asked whether he would be able to return a death verdict if selected. In response to repeated questions as to whether he could vote to impose the death penalty, D.M. gave varying answers, including "yes," "I think so," and "I really don't know until I face that situation." (15 RT 2993-2998; 49 Supp. I CT 14154.) However, D.M. repeatedly stated during voir dire that he would listen to

the evidence, follow the court's instructions, serve as a fair and impartial juror, and consider the available penalty options. (15 RT 2993-2994, 2997-2998; 49 Supp. I CT 14145-14146, 14157.)

The Attorney General contends the trial court's decision to remove prospective juror D.M. for cause during jury selection was supported by substantial evidence, that the decision was based on a finding that D.M. was unable to make life versus death decisions, and that the trial court did not apply an erroneous legal standard in reaching its decision. (RB 99-104.) The Attorney General is mistaken.

A. Because the Trial Court Applied Erroneous Legal Standards, the Findings It Made in Deciding to Exclude D.M. Are Not Entitled to Deference.

The Attorney General contends the trial court applied proper legal standards in connection with its decision to exclude D.M., and that its decision is entitled to appellate deference. (RB 102.) The Attorney General is incorrect. The trial court applied two erroneous standards in its *Witherspoon/Witt* rulings. First, the court improperly equated equivocation with cause for removal. Second, it applied an improper double-standard — gauging defense challenges for cause by one standard and prosecution challenges for cause by another. Specifically, the court tolerated equivocation about ability to impose an LWOP sentence, but did not

tolerate equivocation about ability to impose a death sentence.[38]

1. Improperly Equating Equivocation With Cause for Removal

The trial court stated "when jurors equivocate ... that's a challenge for cause that's appropriate." (4 RT 814.) Like the trial court in *People v. Pearson* (2012) 53 Cal.4th 306,[39] the trial court in the instant case expressly relied on *People v. Guzman* (1988) 45 Cal.3d 915, for the proposition that "prospective jurors may be excused 'due to their equivocal views on capital punishment[.]'" (*Pearson, supra,* at p. 330; 4 RT 814.) Indeed, the trial court, citing to *Guzman* and other cases, stated, "The case law says that when jurors equivocate ... they can be excused for cause." (4 RT 814.) However, in *Pearson*, this court explained, "*Guzman* does not stand for the idea that a person is substantially impaired for jury service in a

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[38] Application of such a double-standard flies in the face of the purpose of *Witherspoon* and its progeny, viz., to prevent leaving a life or death decision to a "tribunal 'organized to return a verdict of death.'" (*People v. Garcia* (2011) 52 Cal.4th 706, 742, citing *Witherspoon, supra,* 391 U.S. at p. 521.) 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 considering all of the sentencing alternatives, including the death penalty where appropriate [citation], the juror is not disqualified by his of her failure to enthusiastically support capital punishment. (*People v. Pearson, supra,* 53 Cal.4th at p. 332, internal quotation marks and brackets omitted.)

[39] This court's relatively recent decision in *Pearson* is discussed in the Attorney General's brief. (RB 102-103.)

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." (*Pearson*, *supra*, at p. 331.)[40] Thus, in *Pearson*, this court held the trial court had proceeded on the basis of "an erroneous view of the law" when it excused a prospective juror due to "'equivocal' views on the merits of the death penalty...." (*Ibid.*) The trial court in the instant case proceeded on the basis of the very same "erroneous view of the law." (4 RT 814.)

Because the trial court applied this erroneous legal standard, its findings are not entitled to deference. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, fn. 10.) This is so because "[h]istorical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them." (*Rogers v. Richmond* (1961) 365 U.S. 534, 547.)

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[40] The rule this court rejected in *Pearson* is the very "rule" the prosecutor relied on in moving to exclude D.M. for cause: The prosecutor said, "I would make a motion based on his ambivalence." The trial court agreed, stating, "I think so too. I think he's too ambivalent one way or another." (15 RT 2998.)

2. Improper Double-Standard

Another reason for denial of deference to the trial court's findings in the *Witherspoon/Witt* context is the court's application of an improper double-standard. The double-standard applied by the trial court is discussed in Mr. Sandoval's opening brief. (AOB 305-317.) This subject is not mentioned in the Attorney General's brief.

Although this court has held *Witherspoon/Witt* challenges[41] are to be measured by the same standard regardless of whether they are directed at jurors perceived to be disposed to impose a death verdict or disposed to vote against death (*People v. Clark* (2011) 52 Cal.4th 856, 902 ["Trial courts should be evenhanded in their questions to prospective jurors during the death-qualification portion of the voir dire...."], internal quotation marks and brackets omitted; *People v. Lewis*, *supra*, 43 Cal.4th at p. 488), the trial court applied one standard to defense challenges (unfavorable to the defense) and a different standard to prosecution challenges (favorable to the prosecution). The court's application of this double-standard is demonstrated in detail in Mr. Sandoval's opening brief,

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[41] Such challenges are often referred to as *Witherspoon* challenges or *Witherspoon/Witt* challenges. To be precise, however, "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude[.]" (*Adams v. Texas* (1980) 448 U.S. 38, 47-48.)

where the standard applied by the court in refusing to grant three reverse-*Witherspoon* challenges made by the defense is contrasted with the standard applied by the court in granting the prosecution's *Witherspoon* challenge to D.M. (AOB 307-317.) Mr. Sandoval's showing of the trial court's application of this double-standard is unrebutted by the Attorney General.

B. The Record Discloses No Basis for Finding D.M. Was Substantially Impaired.

According to the Attorney General, the record contains substantial evidence that D.M.'s ability to fulfil his duties as a juror in a capital case was substantially impaired. (RB 103-104.) The Attorney General contends this is so, because "the majority" of D.M.'s answers to questions during voir dire concerning his ability to make the ultimate "life or death decision" were "equivocal." (RB 103-104.) The Attorney General's position is unsound.

In the answers on his juror questionnaire and in the answers he gave to questions during voir dire, D.M. never said he would be unable to vote for the death penalty. Rather, he expressed uncertainty about whether he would ultimately be able to do so, and said he probably would not know until the moment was upon him. When the question was put to him in various forms, he gave various answers, including "yes", "I think so", and "I really don't know until I face

that situation." (15 RT 2993-2998; 49 Supp. I CT 14154, 14158.) Although he questioned whether he "should even have the ability or power to decide life or death" (15 RT 2995), he steadfastly maintained he could and would listen to the evidence, follow the court's instructions, and conscientiously arrive at an appropriate verdict. (15 RT 2993-2994, 2997-2998; 49 Supp. I CT 14151, 14145-14146, 14159.)

"The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." (*Dutton v. Brown* (10th Cir. 1987) 812, 595 (en banc), citing *Adams v. Texas*, *supra*, 448 U.S. 38.) The record contains no substantial evidence that D.M. was not able to fulfil these duties. To the contrary.

D.M. indicated that he feels California should have the death penalty, that he supports the death penalty in most cases, and that he believes convicted murderers should be swiftly executed. (49 Supp. I CT 14154.) D.M. expressly indicated that he would not automatically vote for an LWOP sentence in this case, even though Mr. Sandoval was 18 at the time of the offense. (49 Supp. I CT 14155, 14158.) He has no conscientious objections to the death penalty. (49 Supp. I CT 14157.) Every time D.M. was asked whether he could follow the court's instructions, listen to the evidence, and select an appropriate verdict, D.M.

responded affirmatively. (15 RT 2993-2994, 2997-2998; 49 Supp. I CT 14151, 14145-14146, 14159.)

The burden of demonstrating *substantial* impairment rests with the State (*Morgan v. Illinois* (1992) 504 U.S. 719, 733; *Wainwirght v. Witt*, *supra*, 469 U.S. at p. 423.) However, the record in this case does not support a finding that the State satisfied its burden. To be sure, the record reveals equivocation on D.M.'s part about whether he could ultimately impose a death sentence. But equivocation does not constitute substantial evidence of substantial impairment. (*People v. Riccardi* (2012) 54 Cal.4th 758, 782 [substantial impairment not established merely because prospective juror stated, "'I'm afraid I could not feel right in imposing the death penalty on someone even though I feel it is [necessary] ... under some circumstances.'"]; *People v. Pearson*, *supra*, 53 Cal.4th at p. 331 [mere indefiniteness and equivocation does not establish substantial impairment]; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1268-1273 [*Witherspoon/Witt* violation where prospective juror was excused after giving answers on a questionnaire indicating she believed in the death penalty but vacillating between stating she would be able to impose a death sentence and stating she did not know whether she would b e able to do so]; *Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 955 [constitutional error occurred when two prospective

jurors were excluded because they vacillated between saying they did not believe they could vote to impose the death penalty and saying they might be able to], overruled on other grounds by *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1398-1399 (en banc).)

No controlling precedent stands for the proposition that a prospective juror's mere equivocation about his or her ability to return a death verdict constitutes substantial impairment. Yet, that is the rule the Attorney General urges this court to apply here.

The law requires a showing that leaves "the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 426.) Nothing in this record yields any such "definite impression." To the contrary, the record yields an indefinite impression.

The record also contains an example of another prospective juror sharing D.M.'s uncertain mindset concerning ultimate ability to vote to return a death verdict. The other prospective juror is a Deputy Attorney General who handles capital appeals. During voir dire, he said it is "doubt[ful" that "anyone can fully appreciate his or her ability" to vote to impose the death penalty "until actually asked to" do so. (35 Supp. I 10326; AOB 298-299.) No *Witherspoon/Witt*

challenge was made against that prospective juror.[42] D.M. was no more subject to removal for cause than this deputy attorney general. They both simply observed the unremarkable circumstance that they probably would not know whether they could vote to impose a death sentence until the arrival of the moment of truth. As the Supreme Court of the United States has recognized, prospective jurors "may not know how they will react when faced with imposing the death sentence...." (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 425.)

Finally, *Witherspoon* challenges call for "determinations of demeanor and credibility that are peculiarly within the trial judge's province." (*Uttecht v. Brown* (2007) 551 U.S. 1, 7.) In this case, however, the trial court's focus was misdirected. It was looking for equivocation as a ground for exclusion, rather than looking for substantial impairment. (4 RT 814.) Hence, the record and the findings of the trial court simply do not provide a substantial basis for upholding the trial court's exclusion of D.M.

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[42] Defense counsel sought to remove the prospective juror for cause based upon an asserted conflict of interest. However, the trial court denied that request. (15 RT 2966-2967.) Defense counsel thereafter exercised a peremptory challenge to remove the prospective juror / deputy attorney general. (16 RT 3312; 25 Supp. I CT 7482, 7488.)

XIV.

THE TRIAL COURT SHOULD HAVE GRANTED A MISTRIAL WHEN DETECTIVE DELFIN CALLED MR. SANDOVAL A "SON-OF-A-BITCH" FROM THE WITNESS STAND.

While testifying in the penalty phase retrial, Detective Delfin called Mr. Sandoval a "son of a bitch" in an outburst that the trial court characterized as "dramatic" and "emotional". (19 RT 3835-3837.) Immediately after the outburst, the trial judge cleared the courtroom and had the jury step into the jury room. (19 RT 3836.) The environment in the jury room was "very tense" and "emotional." (19 RT 3867, 3870.)

The Attorney General says it is "rather unsurprising" that Detective Delfin, while on the witness stand, called Mr. Sandoval a "son of a bitch",[43] and that situation was not "so inherently prejudicial" as to warrant a mistrial. (RB 108.)

With respect to the question of prejudice, the Attorney General does not discuss *Parker v. Gladden* (1966) 385 U.S. 363 (*per curiam*), which is discussed in Mr. Sandoval's opening brief. (AOB 323.) The facts of *Parker* are comparable

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[43] In light of the suffering and loss of life caused by Mr. Sandoval, the human emotion Det. Delfin experienced *is* understandable. However, that is not the issue in this appeal. The issue is the legal significance of the detective's outburst and its impact on the fairness of the proceedings. "A fair trial is required for every defendant, regardless of his apparent guilt or the magnitude of the crimes he may have committed." (*United States v. Ostrowsky* (7th Cir. 1974) 501 F.2d 318, 324.)

to the instant case. In *Parker*, a bailiff said to one juror that the defendant was a "wicked fellow" and was guilty. The remark was made in the presence of other jurors. The bailiff also made a remark to one juror that the Supreme Court would correct any errors. (*Parker*, *supra*, 385 U.S. at pp. 363-364.). As in the instant case, the State in *Parker* suggested that the accused did not suffer cognizable prejudice as a result of the bailiff's remarks. (*Id.* at p. 365.) The Supreme Court disagreed, explaining that the State's contention "overlook[ed] the fact that the official character of the bailiff — as an officer of the court as well as the State — beyond question carrie[d] great weight with a jury...." (*Ibid.*) The Court held that "the unauthorized conduct of the bailiff involves such a probability that prejudice will result that it is deemed inherently lacking in due process[.]" (*Ibid.*, internal quotation marks omitted.) Further, the Court stated that "it would be blinking reality not to recognize the extreme prejudice inherent in such statements that reached at least three members of the jury and one alternate member." (*Ibid.*, internal quotation marks omitted.)

In the instant case, *all* members of the jury heard Detective Delfin's remark. And, as in *Parker*, where one juror testified that she had been influenced by the

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bailiff's remarks (*ibid.*),[44] in the instant case, jurors testified in a subsequent juror misconduct investigation that they had been influenced by Detective Delfin's outburst. (19 RT 3867, 3870.)

Thus, the Attorney General's treatment of the issue at hand is at odds with the manner in which the Supreme Court of the United States treated a comparable issue in *Parker*.

Another case discussed in Mr. Sandoval's opening brief but not mentioned in the Attorney General's brief is *Stockton v. Virginia* (4th Cir. 1988) 852 F.2d 740. In that case, remarks analogous to those made in *Parker* and the instant case resulted in a grant of federal habeas relief.

The Attorney General suggests that three sentences from this court's decision in *People v. Cunningham* (2001) 25 Cal.4th 926, support a conclusion that Mr. Sandoval did not suffer any cognizable prejudice from Detective Delfin's outburst. (RB 108.) The following is the language from *Cunningham* on which the Attorney General relies:

> Defendant contends that the prosecutor improperly introduced a family photograph album of defendant into evidence and commented that defendant's label on one photograph of himself, "We are

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[44] The referenced juror in *Parker* testified that "she might have been influenced without realizing it." (*Parker v. Gladden*, *supra*, 385 U.S. at pp. 369-369 (dis. opn. of Harlan, J.).)

> protecting one sick son-of-a-bitch," was an accurate self-description. A timely objection and admonition would have cured any harm caused by the prosecutor's action in seeking to introduce this evidence and commenting in that fashion. [Citation.] In view of the admission of the album, the prosecutor's argument was within the permissible range of comment. (*People v. Thomas* [(1992)] 2 Cal. 4th 489, 537.)

(*Cunningham*, *supra*, at p. 1021.)[45]

The Attorney General also cites a series of authorities that stand for the proposition that "[p]rosecutorial argument may include opprobrious epithets warranted by the evidence." (*People v. Garcia*, *supra*, 52 Cal.4th at p. 759; RB 108-109.) "Where they are so supported, [this court has] condoned a wide range of epithets to describe the egregious nature of the defendant's conduct." (*Ibid.*)

The Attorney General does not contend that the record supports a finding that Mr. Sandoval is a "son of a bitch." And the epithet used by Detective Delfin did not describe the nature of Mr. Sandoval's conduct; rather, the detective used it

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[45] In *Thomas*, this court stated: "Defendant next contends that he was prejudiced by the prosecutor's use of the epithets 'mass murderer, rapist,' 'perverted murderous cancer,' and 'walking depraved cancer' in referring to defendant during closing arguments. Strictly speaking, the former label fit defendant, inasmuch as he had been convicted of rapes and two murders. The latter epithets are within the range of permissible comment regarding egregious conduct on defendant's part. (*People v. Sully* (1991) 53 Cal.3d 1195, 1248-1249.) Moreover, in light of the evidence adduced in the long trial of this case, they could not have carried such an emotional impact as to make it likely the jury's decision was rooted in passion rather than evidence." (*Thomas*, *supra*, at p. 537, parallel citations omitted.)

to describe Mr. Sandoval — the nature of Mr. Sandoval. Thus, *Garcia* and the decisions on which is relies do not support the Attorney General's position in this case.

> It is improper in the prosecution of persons charged with a crime for the representative of the state to apply offensive epithets to defendants or their witnesses, and to engage in vituperative characterizations of them. There is no reason, under any circumstances, at any time for a prosecuting attorney to be rude to a person on trial; it is a mark of incompetency to do so.

(*Green v. State* (Fla. App. 1983) 427 So.2d 1036, 1038; accord, *Walker v. State* (Fla. App. 1998) 710 So.2d 1029 ["We reverse defendant's convictions and remand for a new trial on the basis of the prosecutor's comments. The prosecutor described the defendant as 'repulsive', and argued to the jury that he 'has the face of a liar' and that he treated his wife like a dog."].)

The trial court should have granted a mistrial following Detective Delfin's emotional outburst from the witness stand. The remark was inherently prejudicial. (*Parker v. Gladden*, *supra*, 385 U.S. at p. 365.) It dehumanized Mr. Sandoval. It prevented a fair and reliable penalty determination. Independently, and in conjunction with the other transgressions in Mr. Sandoval's penalty-phase retrial, this transgression warrants relief.

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XV.

THE PRESUMPTION OF PREJUDICE TRIGGERED BY THE JUROR MISCONDUCT IS UNREBUTTED.

The Attorney General characterizes the gist of Mr. Sandoval's juror misconduct claim as a claim that he is entitled to relief "because several jurors overheard two of the alternate jurors discussing the case." (RB 110.) That characterization does not accurately represent the substance of Mr. Sandvoal's claim. Mr. Sandoval's juror misconduct claim is based on the evidence that jurors were discussing the case prior to its submission to them, jurors conducted pre-deliberation ballots, and/or one or more jurors read newspaper accounts regarding the case. (AOB 324-333.)

At the conclusion of proceedings on Thursday, April 3, 2003, the trial court informed the parties that Juror No. 11 had reported to the court clerk that he had heard two male alternate jurors discussing the case in the jury room when the jury was on break that day. (19 RT 3854.) The discussion Juror No. 11 overheard took place when the jury was on break immediately after Detective Delfin's outburst. (19 RT 3861-3862.)

At the outset of proceedings on the following day, April 4, 2003, Juror No. 11 confirmed he had reported to the court clerk that two male alternate jurors had

"definitely" been talking about the case in the jury room. (19 RT 3858-3859.) Juror No. 11 stated that one of the alternate jurors had said, "I can't believe this is happening. I think that it's not even. *The consensus is probably seven to five still.* I don't know what these people are thinking." (19 RT 3859, 3885, italics added.) Juror No. 11 explained that *the two male alternate jurors "were talking about who was voting for this and who was voting for that", i.e., "who was gonna vote for this penalty and who was gonna vote for that penalty.*" (19 RT 3862, 3884, italics added.)[46] After hearing these remarks, Juror No. 11 told Juror No. 7 that he needed to tell the clerk about what had just transpired. (19 RT 3861.) Juror No. 7 confirmed she had also heard two male alternate jurors "talking about the case...." (19 RT 3867-3869.) Juror No. 12 heard the alternate jurors talking, but did not hear what they said. (19 RT 3874.) Alternate Juror No. 3 acknowledged talking

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[46] The Attorney General says, "Juror No. 11 stated that the jurors were not discussing the facts of the case...." (RB 111.) The Attorney General's assertion is belied by the record. Juror No. 11 reported the following to the court: "We were in the room, and two of the jurors were talking about the case and how it was going." " ... [T]hey were definitely talking about it." "I heard one ask the other, 'What did the officer say?' And the response was the curse word." "And they went on to say that, 'I can't believe this is happening. I think that it's not even. The consensus is probably seven to five still. I don't know what these people are thinking.'" (19 RT 3859.) "I know I heard, '[I]t's seven to five.' So they were talking about who was voting for this and who was voting for that." (19 RT 3862.) Juror No. 11 heard the information regarding the seven to five split in the jury room, not from any other source. (19 RT 3884.)

to a fellow juror about Detective Delfin's outburst. (19 RT 3875-3879.)

Notwithstanding the foregoing, the Attorney General proclaims that "the alternate jurors were not 'discussing' the case." (RB 115.) The Attorney General does not explain the basis for this proclamation. The Attorney General does not explain how Juror No. 7's statement that the alternate jurors were "talking about the case" (19 RT 3867-3869), and Juror No. 11's statements that he heard the alternates discussing the seven-to-five consensus and "who was gonna vote for this penalty and who was gonna vote for that penalty" (19 RT 3859, 3862, 3884-3885), are consistent with the notion that "the alternate jurors were not 'discussing' the case." (RB 115.) Apparently, the Attorney General simply discounts these representations that Juror Nos. 7 and 11 made to the trial court.

The Attorney General also states, "Here, no juror or alternate juror received any outside information about the case, ... or shared improper information with any other juror or alternate juror." (RB 115.) However, as the trial court remarked after Juror No. 11's testimony, the juror comments about it still being "seven to five" "reflect[ed] in [the court's] mind that somebody has read one of the newspaper articles, because that information was in one of the newspaper articles the other day that the prior jury had hung seven to five." (19 RT 3863.) The trial court noted the split in the prior penalty phase was seven to five, and that this was

"a viable reference to what happened before." Specifically, the court noted these were "not just numbers our of the air." (19 RT 3888.)

The court then inquired individually of Juror Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, and 12, and Alternate Juror No. 2 as to whether any of them had heard any discussions in the jury room. (19 RT 3866, 3889-3895.) Juror Nos. 1, 2, 3, 5, 6, 8, 9, and 10, and Alternate Juror No. 2 said they did not hear any conversations. (19 RT 3866, 3889-3895.) Juror No. 4 heard some conversation, but did not recall what was said. (19 RT 3891-3892.)

At the conclusion of the trial court's inquiry of the jurors, troubling uncertainties were manifest. Juror No. 11's report to the court concerning a "consensus [of] ... seven to five" signified that the jurors were casting pre-deliberation ballots and/or that jurors were reading newspaper articles about the prior penalty phase, which ended in a seven-to-five deadlock. The trial court was correct that there were "not just numbers out of the air." (19 RT 3888.) However, the trial court never got to the bottom of the matter.

The upshot is that juror misconduct occurred. The misconduct consisted of juror discussions regarding the case, pre-deliberation balloting, and/or acquiring information about the case from extraneous sources. This misconduct is presumptively prejudicial. (*People v. McKinzie* (2012) 54 Cal.4th 1302-1347; *In*

re Price (2011) 51 Cal.4th 547, 559; *People v. Gamache* (2010) 48 Cal.4th 347, 397.) "[T]he prosecution must rebut the presumption by demonstrating there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (*Gamache*, *supra*, 48 Cal.4th at p. 397, internal quotation marks omitted.) Neither the arguments advanced by the Attorney General nor any evidence or argument presented in the trial court dispel the presumption of prejudice. Questions were left unresolved as to whether jurors engaged in pre-deliberation balloting and whether one or more of them acquired extrinsic information. Accordingly, the trial court should have granted Mr. Sandoval's mistrial motion. Mr. Sandoval is now entitled to appellate relief on this basis.

XVI.

MR. SANDOVAL SUFFERED UNFAIR PREJUDICE WHEN THE PROSECUTOR, IN VIOLATION OF A TRIAL COURT RULING, PRESENTED TO THE JURY EVIDENCE OF UNCHARGED SHOOTINGS MR. SANDOVAL APPARENTLY PERPETRATED WITH THE MURDER WEAPON.

The Attorney General acknowledges the trial court granted a defense motion to exclude evidence of Mr. Sandoval's reference, in his confession, to shooting other people with the same weapon used in the murder of Detective Black. (RB 118.) The Attorney General also acknowledges the prosecutor presented the jury in the penalty phase retrial with a transcript that quoted Ms. Sandoval's comment

about shooting other people. (RB 119.)

Nevertheless, the Attorney General contends Mr. Sandoval has forfeited the right to pursue this issue on appeal because "the record establishes that no objection was made on prosecutorial misconduct grounds." (RB 120-121.) The Attorney General's forfeiture argument is meritless. First of all, Mr. Sandoval's trial counsel sought and obtained a ruling excluding the evidence in question. (9 RT 1844-1846.) When the prosecutor transgressed that ruling by presenting to the jury copies of transcripts containing the excluded evidence, the damage to Mr. Sandoval was done. Nothing short of a mistrial could have cured the damage. Furthermore, the general rule that claims are not preserved for review in the absence of a timely objection does not apply when the failure to object or request an admonition would have been futile. (*People v. Thomas* (2012) 54 Cal.4th 908, 937.) The evidence regarding Mr. Sandoval admitting that he had shot other people with the murder weapon, which the trial court had already ruled inadmissible, was so damning that the jury could not possibly have been expected to disregard it, even though the trial court instructed them not to consider it. (*Bruton v. United States* (1968) 391 U.S. 123, 129; 21 RT 4289.) The trial court's recognition of the "highly prejudicial" nature of the shooting-other-people evidence was the very reason for its exclusion in the first instance. (2 RT 249-

250; 9 RT 1844-1846.)

Turning to the merits, the Attorney General cites *People v. Davis* (2009) 46 Cal.4th 539,[47] in an effort to support the proposition that the prosecutor's presentation to the jury of the transcript containing the excluded evidence did not constitute misconduct. (RB 121-122.) In *Davis*, the prosecutor elicited evidence that the trial court had excluded in a pretrial order. However, the evidence "did not inculpate [the] defendant...." (*Davis*, *supra*, 46 Cal.4th at p. 613.) Thus, the situation in *Davis* is a far cry from the situation in the case at bar. Whereas the order excluding evidence in *Davis* was breached with innocuous, non-inculpatory evidence, the order excluding evidence in the instant case was breached with damning evidence of a confession concerning uncharged shootings perpetrated by Mr. Sandoval with the very same gun used to kill Detective Black.

With respect to the improper presentation of this evidence to the jury, the Attorney General posits as "[m]ost important[]," the circumstance that the prosecutor accidentally allowed the jury to receive the evidence. (RB 122.) However, the intent of the prosecutor is of limited significance. As noted in Mr. Sandoval's opening brief, this court has explained that "[t]he focus of the inquiry

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[47] The Attorney General mistakenly cites *Davis* as appearing in volume 45 of the 4th Series of the Official California Reports. (RB 121.) It actually appears in volume 46.

is on the effect of the prosecutor's action on the defendant." (*People v. Hamilton* (2009) 45 Cal.4th 863, 920; AOB 335.) The damning effect of uncharged evidence that Mr. Sandoval had admitted shooting other people with the murder weapon is simply undeniable.

Having successfully fought to keep this devastating evidence from the jury, the failure of trial counsel to move for a mistrial once the evidence was mistakenly presented to the jury is inexplicable and necessarily ineffective. (AOB 340-341.) The trial court would have been constrained to grant a mistrial motion. Regardless of how blame is now allocated for the evidence getting to the jury, Mr. Sandoval is entitled to appellate relief. The jury's receipt of the evidence was irreparably prejudicial to Mr. Sandoval in the penalty phase retrial.

XVII.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS ARGUMENT TO THE JURY.

The prosecutor argued to the jury that Mr. Sandoval had his hair styled in a particular manner during trial in order to "deceive" the jury, and that he would change his hair style shortly after the jury's verdict. (23 RT 4605-4606, 4618, 4621.) The prosecutor also argued to the jury that the defense attorneys would present a series of bogus, pat arguments during their closing remarks (23 RT 4608-

4611), even though the same prosecutor and same defense attorneys handled Mr. Sandoval's first trial, and none of those arguments had been presented.

By making these baseless, extra-record arguments to the jury, the prosecutor committed prejudicial misconduct. (AOB 342-351.)

Mr. Sandoval did not testify, and his credibility was not at issue, except insofar as the prosecution relied on his credibility in connection with his confession. Under these circumstances, it was misconduct for the prosecutor to accuse Mr. Sandoval of lying to the jury. (AOB 349; *Floyd v. Meachum* (2d Cir. 1990) 907 F.2d 347, 354-355.) In arguing against a finding of prosecutorial misconduct on this point (RB 129-131), the Attorney General ignores the authorities cited in Mr. Sandoval's opening brief, which demonstrate that it is misconduct for a prosecutor to accuse a non-testifying defendant of lying to the jury.

The prosecutor's improper remarks occurred in a retrial. He forecasted the defense attorneys were going to make a series of specific, specious arguments. However, the defense attorneys had not made those arguments in the original trial. The prosecutor, who had also participated in that original trial, was obviously aware of that fact. Under these circumstances, it was improper for the prosecutor to argue to the jury that the defense attorneys were going to make arguments to the

jury that the prosecutor characterized as "ridiculous." (23 RT 4610-4611.) In attempting to justify the prosecutor's conduct, the Attorney General ignores that the prosecutor forecasted these "ridiculous" defense arguments in a retrial, following an original trial in which the "ridiculous" arguments had not been presented. (RB 131-132.)

As noted in Mr. Sandoval's opening brief, the prosecutor improperly portrayed Mr. Sandoval and his counsel as a team out to deceive the jury by means of false appearance and insincere ploys. This portrayal was not based on any evidence. However, the portrayal was damning. It wove in with the trial court's stern admonition to the jurors that they were "not allowed to accept" defense counsel's description of the actual effect of imposition of an LWOP sentence in this case. (23 RT 4678-4679.) The trial court and the prosecutor portrayed the defense team as unbelievable and unworthy of trust.

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XVIII.

MR. SANDOVAL'S CONSTITUTIONAL RIGHTS WERE PREJUDICIALLY VIOLATED WHEN THE PROSECUTOR GAVE AN AUDIO-VISUAL PRESENTATION FEATURING INSPIRATIONAL MUSIC, DEPICTING DETECTIVE BLACK IN HIS INFANCY AND EARLY CHILDHOOD, DISPLAYING DETECTIVE BLACK'S FLAG-DRAPED COFFIN, AND WHICH ULTIMATELY BROUGHT FIVE JURORS TO TEARS.

The audio-visual presentation the prosecutor gave to the jury during his argument in Mr. Sandoval's penalty phase retrial was emotional. It brought five OF the jurors to tears. (23 RT 4640; 6 CT 1506.) It was akin to a memorial service for Detective Black. It included photos of his flag-draped coffin at a community memorial service attended by thousands of individuals. (RB 133; 1/28/09 RT 2-3.) It included photos of Detective Black during his infancy and childhood years. (1/28/09 RT 2-3.) It included emotional, inspirational music.[48]

The Attorney General contends that presentation of the audio-visual montage to the jury was proper because it was only about six minutes long and was "factual" in nature. (RB 135-136.) However, the disc in the record is the

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[48] As the Attorney General notes, the audio visual "presentation is part of the record on appeal." (RB 133, fn. 23; 1/28/09 RT 2-3.) The audio and visual components of the presentation were originally on two separate discs — the audio on one disc and the visual on another. (1/28/09 RT 2-3.) After the trial, the prosecutor combined the audio and visual components on a single disc. The prosecutor, who is now a judge, uses the presentation in seminars. (1/28/09 RT 2-3.)

prosecutor's after-the-fact recreation of the presentation — the prosecutor's after-the-fact melding onto one disc of a presentation that had originally been set forth on two separate discs. (1/28/09 RT 2-3; 1 Supp. V CT 238.) The prosecutor's re-creation does not depict exactly what was presented to the jury. The video component of the presentation was in PowerPoint® format. (23 RT 4737-4738.) The video component of the presentation was a "court exhibit." (23 RT 4738.)

The Attorney General characterizes the music that accompanied the visual component of the presentation as "classical." (RB 135.) A portion of the musical accompaniment was from the album *Freedom*, by the artist Michael W. Smith. (23 RT 4738.)[49] At Mr. Smith's own website, the album is described as a "life soundtrack," a "full instrumental album", and "an intimate and inspiring glimpse at the spirit of one of Christian music's most loved musicians."[50] The music comprising the album is accurately described as inspirational, rather than

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[49] See <<en.wikipedia.org/wiki/Freedom_(Michael_W._Smith_album)>>. During a court proceeding on January 12, 2004, Mr. Sandoval's trial counsel submitted a copy of the *Freedom* CD to the court to "complete the record." The minute order for that proceeding notes that "songs 1 and 3" from the album were played for the jury. (1 Supp. IV CT 53.) And, in a proceeding on January 26, 2004, the court marked the CD as court's exhibit ZZZ. (1 Supp. IV CT 54; 1 Supp. V CT 109.)

[50] See <<www.michaelwsmith.com/disc.html?ddid=24>>.

classical.[51]

The prosecutor noted that the audio portion of the presentation was "run separately" from the video portion of the presentation. The defense described the musical accompaniment to the portion of the presentation depicting Mr. Sandoval as different from the portion accompanying the depiction of Detective Black. The music during the Sandoval portion of the presentation was "somber" and "heav[y]...." (23 RT 4699-4700.) Neither the court nor the prosecutor voiced any disagreement with this description.

The following images were depicted in the portion of the presentation concerning Detective Black:

- Detective Black as an infant.
- Detective Black as a toddler.
- Detective Black as an elementary school student.
- Detective Black as a Boy Scout.
- Detective Black as a boy, celebrating Christmas with his family.
- Detective Black as an adolescent.
- Detective Black at his high school graduation.

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[51] Some of the tracks of the album can be heard on YouTube: <<http://www.youtube.com/watch?v=yXvp_TAfcuY>>; <<http://www.youtube.com/watch?v=VuXXvW4eIuo>>.

- Detective Black as a Marine.
- Detective Black as a police officer.
- Detective Black as a groomsman at a friend's wedding.
- Detective Black dead on a hospital gurney, with blood soaked clothing.
- A close up shot of a gunshot wound to Detective Black's head.
- Detective Black's flag-draped coffin at his memorial service in Long Beach.
- Elaborate photographic details of the memorial service, including a man in a kilt playing bagpipes, an army tank, a gun salute, a multitude of United States and California flags, and dozens of floral arrangements.
- A breathtaking photograph of thousands of uniformed attendees at the memorial service.
- A photograph of a Los Angeles area freeway shut down and filled with nothing but hundreds of the marked police vehicles of the police officers attending the memorial service.
- A large electronic billboard reading "Godspeed Daryle" under an enormous United States Flag.
- Onlookers saluting.
- Attendees crying and consoling one another.

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Defense counsel objected to the presentation during the original penalty phase trial,[52] characterizing the presentation as a "professional grade audio visual show with music" and something "like a Hollywood production ... designed to inflame the passions of the jurors." As an alternative to excluding the entire presentation, defense counsel requested exclusion of the music. (13 RT 2635-2636.) The defense renewed its objection in the penalty phase retrial, and noted that, in a then-recent decision, the Texas Court of Criminal Appeals had set aside a death sentence based on a similar audio-visual presentation. (23 RT 4587-4588.) In the retrial, the defense characterized it as a "high-tech appeal to emotion." (23 RT 4699.)

The trial court allowed the prosecutor to give his audio-visual presentation in full. (23 RT 4587-4588, 4637-4639.)

The presentation was improper. It was emotional. It was prejudicial. It was not the type of presentation that had any proper place in a legal proceeding involving a life or death determination.

The presentation violated Mr. Sandoval's constitutional rights. Its constitutional infirmities were many:

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[52] The prosecutor stated that the audio-visual presentation he gave in the original penalty-phase trial is the same as the one he gave in the penalty-phase retrial. (23 RT 4738.)

In the retrial, the prosecutor informed the jury that the musical accompaniment had been selected by members of Detective Black's family. The defense objected to the prosecutor sharing this information with the jury. (23 RT 4637.)

"The use of music, an inherently emotional form of expression, in victim impact evidence, has been a concern to a number of courts." (*People v. Verdugo* (2010) 50 Cal.4th 263, 313 (opn. of Moreno, J., concurring in the judgment), citing *United States v. Sampson* (D.Mass. 2004) 335 F.Supp.2d 166, 191–193, and *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330.)

> Music rarely if ever has informational content that can contribute to a capital jury's sober and rational decision making. Its purpose and effect, generally, is to evoke an emotional response from the jury. Such emotional evocation, while suitable for a memorial tribute to the victim, is wholly inappropriate at the penalty phase of a capital trial, where the purpose is not to honor the victim but to decide whether the defendant should receive a death sentence.

(*Ibid.*)

A musical accompaniment to victim impact evidence has "nothing to do with defendant's character, culpability, or the circumstances of the offense, which are supposed to be the jury's sole concern during the penalty phase." (*Ibid.*)

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> The majority of courts allowing [victim impact evidence] to include music have been wrongly applying *Payne's* test[53] and underestimating music's effect on emotion. At the very least, music has a prejudicial effect on emotion[.] ... [S]tudies suggest that music even causes emotion. Studies done with mock-juries show that emotions affect decision-making. This means that using music during [victim impact evidence] is, by definition, undoubtedly prejudicial — it provides a tendency for jurors to make a decision based on something other than reason. The persuasive relationship between music and emotion establishes a high risk of prejudice and leaves no way to confirm whether a decision was reached through reason or emotion. This is enough to render the sentencing fundamentally unfair.

(E. Schroeder, *Comment: Sounds of Prejudice: Background Music During Victim Impact Statements* (2010) 58 Kan. L.Rev. 473, 504-505, fn. omitted.)

> In traditional documentaries, music is used to accentuate and underscore points. It provides an arch of energy that pushes through scenes and shots — it creates a mood. It picks up on the tempo, the speed of the cuts, the speed of the dialogue, the rhythm the movie puts the viewer in. Music has been used to serve the same purpose in victim impact videos. A musical soundtrack may even substitute for a spoken narration.

(R. Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?* (2010) 31 Cardozo L. Rev. 979, 993, fns. and internal quotation marks and brackets omitted.)

"Depending on the listener's perspective, music colors or taints the visual material that it accompanies by shaping that material's interpretation." (*Id.* at p.

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[53] *Payne v. Tennessee* (1991) 501 U.S. 808.

994.) "The choice of music used in victim impact videos is mostly employed to enhance or exaggerate the impact of the video." (*Ibid.*)

> Victim impact videos, particularly those that originated as memorial tributes, have a number of features that negate or limit their probative value in sentencing hearings. Rather than presenting evidence of the victims' individuality and the impact of their death on survivors, the videos fulfill the obligations of those survivors to remember and honor their loved ones. They tend to be idealistic in their treatment of the victim and idyllic in their treatment of family life. The narration tends to convey the optimism that accompanies the sharing of photographs, movies, and videos in the home setting. Moreover, victim impact videos tend to have musical soundtracks that are appropriate for memorial tributes, but not for evidence in a capital proceeding; the music is sentimental and may have little to do with the tastes or behavior of the victim. Although victim impact videos are intended to offset the impact of mitigation evidence introduced by the defendant, the comparison is misguided. Unlike the prosecution and the proponents of victim impact videos, the defense has little or no incentive to idealize family life or to hide family secrets.

(*Id.* at p. 1003.)

"[C]ourts have expressed disfavor for victim-impact videos that are too lengthy, depict childhood pictures of adult victims, or are accompanied by evocative music." (*State v. Hess* (2011) 207 N.J. 123, 157 [23 A.3d 373, 393].) In *Hess*, the New Jersey Supreme Court found that portions of a victim impact video, which included "music and ... photographs of the victim's childhood and of his tombstone" did "not project anything meaningful about the victim's life as it related to his family and others at the time of his death." (*Id.* at p. 159.) The court

held that those aspects of the video "should have been redacted ... because they contain little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions." (*Ibid.*)

> By failing to meaningfully evaluate defendants' claims against victim impact videos, courts set a precedent that victim impact videos are generally admissible and ignore the evidence's unique capacity to emotionally charge the jury and lead to an unconstitutional application of the death penalty. Thus, the time has come for the Supreme Court to provide the courts across the country with a clear rule prohibiting the admission of victim impact videotapes at a capital penalty trial.

(A. Harden, *Note: Drawing the Line at Pushing 'Play': Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials* (2011) 99 Ky. L.J. 845, 871, internal quotation marks and brackets omitted.)

In the instant case, the audio-visual presentation improperly played on the emotions of the jury. It literally brought almost half of the jurors to tears. (23 RT 4640; 6 CT 1506.) It involved emotional music selected by Detective Black's family. (23 RT 4637.) It depicted Detective Black during his infancy and early childhood. It depicted his flag-draped coffin at a memorial service. As the New Jersey Supreme Court recognized, such matters have "little to no probative value, but instead have the great capacity to unduly arouse or inflame emotions." (*State v. Hess*, *supra*, 23 A.3d at p. 393.)

In light of this improperly emotional presentation, and in light of the other prejudicial errors that occurred in Mr. Sandoval's penalty-phase retrial, the death judgment cannot stand.

XIX.

THE TRIAL COURT IMPERMISSIBLY UNDERCUT MR. SANDOVAL'S CONSTITUTIONAL RIGHT TO INFORM THE JURY DURING ARGUMENT THAT IMPOSITION OF AN LWOP SENTENCE WOULD RESULT IN MR. SANDOVAL NEVER GETTING OUT OF PRISON.

In Mr. Sandoval's original penalty phase, his counsel informed the jury during argument that an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison. (13 RT 2647.) The prosecutor did not object to counsel's comment. The jury deadlocked, with five jurors determining LWOP was the appropriate punishment. (13 RT 2725; 5 CT 1312.)

In Mr. Sandoval's penalty phase retrial, when his counsel informed the new jury that an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison, the prosecutor objected. (23 RT 4677-4678.) The court told the jury it was "not allowed to accept the statement that life without the possibility of parole means exactly what it is[,]" but rather that the jury was only to "assume" an LWOP sentence would result in Mr. Sandoval spending the rest of his life in prison. (23 RT 4678.) The jury returned a death verdict. (23 RT 4716-4717; 6

CT 1500, 1502-1503.)

The differing treatment of counsel's remarks concerning the effect of an LWOP sentence in the two penalty phase proceedings, together with the differing outcomes of the two proceedings, starkly reveals the impact of the trial court's refusal to simply allow counsel to argue that LWOP means LWOP in the penalty phase retrial.

A. Mr. Sandoval Is Entitled to Appellate Review of His Assignment of Error Concerning the Trial Court's Refusal to Let Him Argue that LWOP Means LWOP.

The Attorney General advances a strained argument that Mr. Sandoval's assignment of error concerning the trial court's refusal to allow him to argue LWOP means LWOP is not preserved for review. (RB 136, 138.) Specifically, the Attorney General claims Mr. Sandoval's trial counsel forfeited the claim by requesting the trial court to instruct the jury as it did. (RB 138.) However, the record plainly reveals the trial court thwarted counsel's effort to argue to the jury that LWOP means LWOP. Counsel argued that if the jury imposed an LWOP sentence, Mr. Sandoval would "never get out." The prosecutor objected. (23 RT 4677.) At sidebar, the court said, "I think the correct statement of the law is that you are to assume that it means that." The prosecutor said counsel's remark was a "lie[,]" because it did not account for the gubernatorial commutation power.

Defense counsel asked for the court to admonish the jury. The court then instructed the jury that it was "to assume life without the possibility of parole means life without the possibility of parole." Counsel then argued the jury was "to assume that that's what it means because that's what it does mean. It means that [Mr. Sandoval] will spend the rest of his life in ... prison." But, the court then interjected, "The jury is not allowed to accept the statement that life without the possibility of parole means exactly what it is. You're to assume that that's what it means." (23 RT 4678.)

Thus, counsel repeatedly attempted to advance an argument he was lawfully entitled to present to the jury. However, the court undermined the argument. In no sense has Mr. Sandoval forfeited his assignment of error concerning the court's refusal to allow him to argue LWOP means LWOP. Mr. Sandoval was not required to take an exception to the trial court's improper instruction and interference with closing argument. (Pen. Code, § 1259.) He is entitled to appellate review of the error, which affected his substantial rights. (*People v. Thomas* (2011) 52 Cal.4th 336, 361.)

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B. A Capital Defendant Has a Constitutional Right to Inform the Jury During Argument that LWOP Means LWOP.

The Supreme Court's decision in *Simmons v. South Carolina* (1994) 512 U.S. 154, established that when the prosecution in a capital case puts the defendant's future dangerousness at issue, the defendant has a due process right to inform the sentencing jury an LWOP sentence will result in him never getting out of prison. (*Id.* at pp.168-169 (plur. opn.); *id.* at p. 172 (conc. opn. of Souter, J.); *id.* at pp. 177-178 (opn. of O'Connor, J., concurring in the judgment).) In *Kelly v. South Carolina* (2002) 534 U.S. 246, the Court recognized that evidence in virtually all capital cases will provide a basis for inferring future dangerousness. (*Id.* at p. 254, fn. 4.)[54] Hence, per *Simmons* and *Kelly*, a capital defendant is virtually always entitled, as a matter of due process, to inform a sentencing jury he/she will never get out of prison if he/she is sentenced to life without the possibility of parole.

In his dissenting opinion in *Kelly v. South Carolina*, *supra*, 534 U.S. 246, Justice Thomas characterized the holding of the Court as a "sweeping rule[.]" (*Id.* at p. 262.)

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[54] In his dissenting opinion in *Kelly*, Chief Justice Rehnquist expressed agreement with this point, noting: "It is difficult to envision a capital sentencing hearing where the State presents no evidence from which a juror might make such an inference." (*Kelly*, *supra*, at p. 261.)

Although *Simmons* and *Kelly* are discussed extensively in Mr. Sandoval's opening brief (AOB 362-365, 369), they are not mentioned in the Attorney General's brief.

The Eighth Amendment "requires provision of 'accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die[.]'" (*Simmons v. South Carolina*, 512 U.S. at p. 172 (conc. opn. of Souter, J.), quoting *Gregg v. Georgia* (1976) 428 U.S. 153 (joint opinion of Stewart, Powell, and Stevens, JJ.) It "invalidates 'procedural rules that tend to diminish the reliability of the sentencing determination[.]" (*Ibid.*, quoting *Beck v. Alabama* (1980) 447 U.S. 625, 638.) *Simmons* and *Kelly* enforce this constitutional safeguard by allowing capital defendants to inform juries that LWOP means LWOP. (*People v. Duenas* (2012) 55 Cal.4th 1, 28 [recognizing the right, under *Simmons* and *Kelly*, to "adequately inform[] the jury that a defendant sentenced to life imprisonment without possibility of parole is ineligible for parole"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 666 ["Instructing jurors to take literally the words 'life without possibility of parole' serve[s] to impress upon them the seriousness of their decision and to overcome the common misperception that all life prisoners may eventually be paroled."], internal quotation marks in the original.)

Furthermore, as discussed in Mr. Sandoval's opening brief, this court explained in *People v. Kipp* (1998) 18 Cal.4th 349, that instructional language directing a jury to "*assume*" and LWOP sentence will "inexorably be carried out[,]" involves "qualified language [that] may unnecessarily raise questions in the jurors' minds." (*Id.* at p. 378, italics in the original; AOB 366.) Such an instruction need only be given "if there is a reason to believe the jury may have some concerns or misunderstanding in this regard." (*Kipp*, *supra*, at p. 378.) *Kipp* is not cited in the Attorney General's brief.

Despite the foregoing precedent, the Attorney General argues the trial court's interference with defense counsel's argument was proper. (RB 136, 139-140.) In support of this position, the Attorney General cites four cases: *People v. Abel*, *supra*, 53 Cal.4th 891, *People v. Musselwhite* (1998) 17 Cal.4th 1216, *People v. Gordon* (1990) 50 Cal.3d 1223,[55] and *People v. Thompson* (1988) 45 Cal.3d 86. (RB 139.) However, none of these cases support the Attorney General's position. Preliminarily, three of the cited decisions were handed down before *Kelly*, and two of them were handed down before *Simmons*. Moreover, in none of these cases did this court hold that a trial court may prevent a capital

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[55] *Gordon* was disapproved on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

defendant from arguing LWOP means LWOP. In *Abel*, the trial court commented during voir dire that it could not guarantee the jury's ultimate sentence would be carried out (*Abel*, *supra*, at p. 921), but there was no claim raised concerning any interference by the court with argument presented by counsel. In *Musselwhite*, which was decided in the interval between the issuance of the *Simmons* and *Kelly* decisions, this court distinguished the case from *Simmons*, because "the prosecution did not argue that [the] defendant's future dangerousness warranted the death penalty[,]" and this court stressed that defense counsel had argued to the jury, without interference from the trial court, "that [the] defendant 'will always be behind prison walls.'" (*Musselwhite*, *supra*, at p. 1271.) In *Gordon*, which was decided before *Simmons* and *Kelly*, this court held the defendant was not entitled to an instruction that an LWOP sentence would inexorably be carried out (*Gordon*, *supra*, at p. 1277), but there was no claim raised concerning any interference by the trial court with argument presented by counsel. Finally, in *Thompson*, which was also decided before *Simmons* and *Kelly*, this court reached the same decision it did in *Gordon* under similar circumstances. (*Thompson*, *supra*, at pp. 129-131.)

Thus, the Attorney General offers no meaningful authority in support of its position that the trial court properly interfered with Mr. Sandoval's argument to the jury that LWOP means LWOP. There is no such authority. To the contrary,

binding precedent from the Supreme Court of the United States and this court establish that a capital defendant like Mr. Sandoval is entitled to argue to the jury that LWOP means LWOP.

C. The Prejudicial Effect of the Constitutional Error is Manifest.

As discussed in detail in Mr. Sandoval's opening brief, the trial court's erroneous interference with Mr. Sandoval's argument concerning the meaning of an LWOP sentence was prejudicial. (AOB 373-375.) The Attorney General's brief contains no rejoinder to Mr. Sandoval's showing concerning the prejudicial impact of this error. This omission is telling.

First, because of the constitutional magnitude of the error, the Attorney General bears the burden of seeking to prove harmlessness. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The Attorney General does not even attempt to shoulder this burden.

Second, the fact that the original jury deadlocked 7-5 on the question of penalty militates against a finding of harmlessness. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 669 [stressing prior hung jury in rejecting the State's harmlessness contention]; *United States v. Paguio* (9th Cir. 1997) 114 F.3d 928, 935 ["We cannot characterize the error as harmless, because the hung jury at the first trial persuades us that the case was close...."].)

Third, the circumstance that the trial court did not erroneously interfere with counsel's argument concerning the meaning of LWOP in the original penalty phase weighs heavily against a finding of harmlessness with respect to the error in the penalty phase retrial, in light of the different outcomes of the two penalty phases .

Fourth, as discussed in Mr. Sandoval's opening brief, juries otherwise inclined to select life over death often opt for the latter if they come to believe that an LWOP sentence will result in eventual release. (AOB 374.)

The foregoing circumstances, together with Mr. Sandoval's youth at the time of the offense and the other errors during the penalty phase retrial, preclude a finding of harmlessness.

XX.

THE DEATH JUDGMENT IN THIS CASE MUST BE SET ASIDE BECAUSE OF THE TRIAL COURT'S ERRONEOUS FAILURE TO GRANT THE DEFENSE REQUEST TO INSTRUCT THE JURORS THAT SOME OF THEM COULD CONSIDER THE EFFECT OF A MITIGATING CIRCUMSTANCE EVEN IF THEY DID NOT ALL AGREE THAT THE MITIGATING CIRCUMSTANCE HAD BEEN ESTABLISHED.

The trial court instructed the jury: "In order to make a determination as to the penalty, all the 12 juror must agree." (23 RT 4702.)

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Mr. Sandoval's trial attorneys requested specific instructional language that would have prevented the possibility of any individual jurors interpreting the court's instructions as precluding them from considering mitigating circumstances that were not agreed to by all twelve members of the jury. (6 CT 1489; 23 RT 4583-4585.) The court should have given the requested instruction. It accurately states the law. The court erred by not giving the instruction. (23 RT 4583-4585.)

With respect to factor (b) aggravating evidence, the court specifically instructed the jurors that they did not need to unanimously agree on such evidence in order for individual jurors to consider the evidence as a factor in aggravation. (23 RT 4598-4599.) However, as noted, the court specifically refused the defense request for a comparable non-unanimity instruction concerning mitigating evidence. (23 RT 4583-4585.) Thus, pursuant to the maxim *expressio unius est exclusio alterius*, the court's charge to the jury suggested juror unanimity was a prerequisite to consideration of any mitigating evidence.[56, 57]

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[56] *People v. Aranda* (2012) 55 Cal.4th 342, 387 (conc. & dis. opn. of Kennard, J.) [applying the maxim *expressio unius est exclusio alterius* to interpret instructional language].

[57] As noted in Mr. Sandoval's opening brief, this court has specifically held that a trial court may properly instruct a jury that unanimity is not required for individual jurors to consider aggravating evidence. (AOB 379, fn. 198, citing *People v. Jennings* (1988) 46 Cal.3d 963, 988.) That rule is the corollary of the rule pursuant to which defense counsel unsuccessfully sought to have the trial

"If ... jurors believe that they must be unanimous in the decision about any specific mitigating factor, individual jurors may very well fail to consider mitigating factors that they would have considered had they been aware that unanimity was not required." (J. Luginbuhl & J. Howe, The Capital Jury Project: Discretion in Capital Sentencing Instructions: Guided or Misguided? (1995) 70 Ind. L.J. 1161, 1165.)

If "even *one*" member of a jury believes, based on the trial court's instructions, that he/she is barred from considering a mitigating circumstance because other jurors do not agree with him/her that the circumstance exists and is mitigating, "the Constitution forbids imposition of the death penalty" imposed by such a jury. (*Smith v. Spisak* (2010) 130 S.Ct. 676, 681-682, italics in the original, citing *Mills v. Maryland* (1988) 486 U.S. 367, 380, 384, and *McKoy v. North Carolina* (1990) 494 U.S. 433, 442-443; accord, *Abu-Jamal v. Secretary, Pennsylvania Department of Corrections* (3d Cir. 2011) 643 F.3d 370, 375 ["the Constitution proscribes imposition of the death penalty if members of the jury could reasonably belief they are precluded [by the trial court's instructions] from

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court instruct the jurors in this case. Although the trial court instructed the jury in this case concerning the lack of any need for unanimity concerning aggravating evidence, it did not instruct the jury concerning the lack of any need for unanimity concerning mitigating evidence. The lack of evenhandedness on this point is manifest.

considering mitigating evidence unless the jury unanimously agrees the mitigating circumstance has been proven to exist"].)[58]

Juror misperception that mitigating circumstances can only be considered if found unanimously violates the Constitution by "allow[ing] a holdout juror to prevent the other jurors from considering mitigating evidence." (*McKoy v. North Carolina*, *supra*, 494 U.S. at p. 438.)[59] "In fact, as *Mills* and *McKoy* hold, any requirement that mitigating factors must be found unanimously is incoherent." (*Davis v. Mitchell* (6th Cir. 2003) 318 F.3d 682, 688.)

> Thus, in order for Eighth Amendment law on mitigating factors to be coherent and capable of judicial administration without serious confusion, a capital jury must understand that, in the words of the Federal Death Penalty Act, "a finding with respect to a mitigating factor may be made by one or more members of the jury."

(*Ibid.*)

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[58] "In capital cases, 'the sentencer' may not ... be precluded from considering any mitigating evidence." (*Hitchcok v. Dugger* (1987) 481 U.S. 393, 394.)

[59] "[A] death sentence based upon a verdict by 11 jurors who would have relied on a given mitigating circumstance to spare a defendant's life, and a single holdout who blocked them from doing so, would surely be an egregious failure to express the public conscience accurately." (*Beard v. Banks* (2004) 542 U.S. 406, 424 (dis. opn. of Souter, J.); accord, *id.* at p. 420 (dis. opn. of Stevens, J.), *id.* at p. 419 (Opn. of the Court ["Imposition of the death penalty in these circumstances ... would be the height of arbitrariness."], internal quotation marks omitted.)

> The rule the Court set forth in *Mills* is based on two well-established principles. First, the Constitution forbids imposition of the death penalty if the sentencing judge or jury is precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. [Citations.] Second, the sentencing judge or jury may not refuse to consider or be precluded from considering "any relevant mitigating evidence. [Citations.]

(*Smith v. Spisak*, *supra*, 130 S.Ct. at pp. 681-682, internal quotation marks omitted.)

The Attorney General claims that the trial court did not err by declining the instruction requested by the defense, because, according to the Attorney General, it would have been redundant. The Attorney General contends the principle in question was adequately conveyed by other instructions given by the trial court, including CALJIC No. 8.87. (RB 140.)

None of the authorities cited by the Attorney General support the Attorney General's position on the facts of the instant case. Indeed, in none of the cases cited by the Attorney General is there any indication that jurors were instructed in the manner the jurors in the instant case were instructed. Specifically, in the cases cited by the Attorney General, there is no indication jurors were instructed they

did not need to unanimously agree on aggravating evidence.[60] In the instant case, however, because the jurors were specifically instructed unanimity was unnecessary with respect to aggravating evidence, the lack of any such non-unanimity instruction concerning mitigating evidence at least gave rise to a substantial risk that one or more jurors were left with the impression that unanimity was a prerequisite to consideration of mitigating evidence.

In *Mills*, the Supreme Court acknowledged that a constitutional "construction of the jury instructions and verdict form [was] plausible," (*Mills*, *supra*, 486 U.S. at p. 377), but remanded for a new penalty phase because there was "at least a substantial risk that the jury was misinformed," (*id.* at p. 381), and had interpreted its instructions to "preclude consideration of mitigating circumstances not found unanimously." (*Abu-Jamal*, *supra*, 643 F.3d at p. 365, citing *Mills*, *supra*, at p. 384.) For the reasons discussed above, there is a substantial risk one or more of the jurors in this case mistakenly believed unanimity was a prerequisite to consideration of mitigating evidence.

In Mr. Sandoval's penalty retrial, jurors were instructed a) to choose between the "two penalties" of death and LWOP, b) to "consider, take into

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[60] The Attorney General cites *People v. Lee* (2011) 51 Cal.4th 620, 655, *People v. Bunyard* (2009) 45 Cal.4th 836, 858, and *People v. Weaver* (2001) 26 Cal.4th 876, 988. (RB 141.)

account[,] and be guided by the applicable factors of aggravating and mitigating circumstances", and c) that "[i]n order to make a determination as to the penalty, all twelve jurors must agree." (23 RT 4599-4600; 6 CT 1472-1473.)

> Less than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction. The great majority of jurors — in excess of sixty percent in both life and death cases — erroneously believe that jurors must agree unanimously for a mitigating circumstance to support a vote against death.

(T. Eisenberg & M. Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 11.)

The jury in Mr. Sandoval's penalty phase retrial could have been easily and concisely instructed that the individual jurors did not need to unanimously agree on the existence of a mitigating factor before that factor could be considered by individual jurors. Mr. Sandoval's trial attorneys proposed such an instruction. There was no reason for the court not to give the instruction, because is accurately stated the law. Had the court given the instruction, the court could have limited the possibility of juror confusion concerning this subject.

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XXI.

WHEN A REVIEWING COURT APPLIES HARMLESS ERROR ANALYSIS TO ERRORS THAT OCCURRED IN THE PENALTY PHASE OF A CAPITAL TRIAL, THE WRONG ENTITY MAKES THE LIFE/DEATH DETERMINATION.

In capital cases such as the instant case, in which penalty phase errors occurred, a reviewing court cannot apply harmless error analysis without usurping the jury's function to choose between life and death.

"[A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 330.) "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." (*Ibid.*) Thus, application of appellate harmless error analysis with respect to a capital penalty phase trial may prove "extremely speculative or impossible." (*Clemons v. Mississippi*, *supra*, 494 U.S. at p. 754.) "[U]nlike the guilt determination, the sentencing function is inherently moral and normative, not factual ... and, hence, not susceptible to a burden-of-proof quantification." (*People v. Tully* (2012) 54 Cal.4th 952, 1068, internal quotation marks omitted.)

The jury in Mr. Sandoval's penalty phase retrial was instructed that, in determining whether to impose a life or death sentence, it was "free to assign

whatever moral or sympathetic value" it deemed appropriate to the evidence. (23 RT 4600.) It was instructed to determine "which penalty is appropriate by considering the totality" of the evidence. (23 RT 4600.) The jury was instructed that it could consider "mercy" or "pity" in selecting the penalty. (23 RT 4601.)[61] Given the intangible, ethereal context for the jury's decision making established by these instructions, it is impossible to determine the role errors may had on the jury's selection of penalty. Because the jury was left with unfettered discretion to impose a life sentence, based on notions such as morality, sympathy, mercy, and/or pity, no appellate court can meaningfully quantify or measure the effect of an error on such a decision making process. Thus, it is impossible to deem any error(s) harmless in such a context. A reviewing court could only endeavor to substitute itself in place of the jury or members of the jury. Such a process necessarily supplants the jury's role in the capital sentencing process.

Although the Attorney General's suggests that reviewing courts have the capacity to apply harmless error analysis to penalty phase errors (RB 142), the Attorney General does not suggest how reviewing courts can perform that function

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[61] "Emotions can ... be powerful, and sometimes their power can overwhelm or 'unhinge' our faculty of reason." (S. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing* (1996) 81 Cornell L.Rev. 989, 1043.) Of course, "we commonly associate mercy with emotion...." (*Id.* at p. 1042.)

without arrogating the role of the jury to make the ultimate choice between life and death. In fact, no appellate court can say whether or how a given penalty phase error may have impacted a jury's, or an individual juror's, decision to extend or withhold mercy in a given case. "Divining the effect of" certain errors and irregularities "on a sentencer's determination whether death is an appropriate sentence is thus more in the province of soothsayers than appellate judges." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 265.)

XXII.

THE DEATH PENALTY IS UNCONSTITUTIONAL.

State-sponsored executions violate the Constitutions of the United States and California. This court has held otherwise. Mr. Sandoval respectfully raises the issue in order to preserve it for further review.

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CONCLUSION

For the foregoing reasons, Mr. Sandoval respectfully requests this court to reverse the judgment of the superior court.

Dated: December 18, 2012

Respectfully Submitted,

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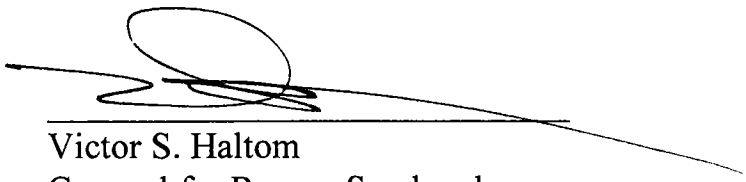
WORD COUNT CERTIFICATE

This appellant's reply brief complies with the word-count limit set forth in Rule 8.630(b)(1)(C) of the Rules of Court, as this brief contains 28,179 words, per the word-count function of the word-processing program on which this brief was created, Word Perfect X6.

Dated: December 18, 2012



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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the instant action; my business is 428 J Street, Suite 350, Sacramento, CA 95814.

On the date below, I served the following document(s):

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