IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JOSE LUPERCIO CASARES,

Defendant and Appellant.

Case No. S025748

(Tulare Superior Ct. No. 027503)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Tulare

HONORABLE DAVID L. ALLEN, JUDGE

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b).)

STATEMENT OF THE CASE

By amended information filed in Tulare County Superior Court case number 27503, appellant JOSE LUPERCIO CASARES was charged in count one with the murder (Pen. Code, § 187, subd. (a)) of Guadalupe Sanchez on March 30, 1989. As to this count it was further alleged that the murder was committed while lying-in-wait within the meaning of Penal Code section 190.2, subdivision (a)(15).[1] (2RT:361-362.)[2] [3] Count two

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

[2] The information upon which appellant was tried is not contained in (continued...)

alleged that, on the same date as Sanchez was killed, appellant attempted the willful, deliberate and premeditated murder of Alvaro Lopez. (§§ 664/187, subd. (a).) (2RT:362.)

As to both counts one and two, it was further alleged that appellant personally used a firearm within the meaning of section 1203.06, subdivision (a)(1) and section 12022.5, and also causing the above offense to become a serious felony pursuant to section 1192.7, subdivision (c)(8). (2RT:361-362.) As to count two, it was alleged that appellant intentionally and personally inflicted great bodily injury against Lopez within the meaning of section 12022.7 and also causing the offense to be a serious felony within the meaning of section 1192.7, subdivision (c)(8). (2RT:362-363.)

It was further alleged that appellant committed two crimes on April 8, 1989: Count three charged appellant with carrying a concealed firearm

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[2](...continued)
the Clerk's Transcript on Appeal, and could not be located for inclusion in the record. The prosecutor read the information into the record, and those citations are used above to set forth the instant charges. (2RT:361-364.) The record reflects that the prosecutor proceeded to trial against appellant by amending a prior felony complaint that had been filed on May 24, 1989, which charged both appellant and former codefendant Ruben Contreras with the instant charges as well as additional charges which were dropped against appellant prior to his trial. (2SUPPCT:36-44; 2RT:358-359.) Contreras' case was severed from appellant's on May 13, 1991. (3CT:672-674.)

[3] "CT" and "RT" refer, respectively, to the clerk's and reporter's transcripts on appeal. "1SUPPCT," "2SUPPCT" and "3SUPPCT" refer respectively to the first, second and third clerk's supplemental transcript on appeal.

within the meaning of section 12025, subdivision (b)[4] and count four alleged appellant possessed cocaine in violation of Health and Safety Code section 11350. (2RT:363-364.)

On July 12, 1991, appellant moved to limit the admissibility of other criminal activity during the penalty phase of trial. (3CT:804-851.) The motions filed sought to exclude incidents in aggravation as supported by insufficient evidence under *People v. Phillips* (1985) 41 Cal.3d 29, 68. (3CT:806-813 [incidents 2A, 2E, 2F]; 3CT:814-826 [incident 2C]; 3CT:827-839 [incident 2D]. 3CT:840-851 [incident 2E].) On September 4, 1991, the People filed a responses to these motions. (4CT:919-926 [incidents 2A, 2E, and 2F]; 4CT:889-897 [incident 2E]; 4CT:898-909 [incident 2C]; 4CT927-931 [incident 2D].)

On September 10, 1991, a hearing was held on several of the *Phillips* motions. (1RT:126-148.) At this hearing, trial counsel limited one component of his challenges against incidents 2C, 2D, and 2E— the challenge of insufficient evidence of possession—to incident 2C. (1RT:130-131.) At the hearing, the trial court denied appellant's challenge to the admissibility of incidents 2C, 2D, and 2E. (1RT:146-147; 4CT:946.) A further hearing relating to the *Phillips* motions was held on November 12, 1991. (8RT:1859-1882.) At this hearing, trial counsel withdrew the remaining *Phillips* motions relating to incidents 2A and 2F. (8RT:1861-1862.)

On July 12, 1991, the same date as the filing of the *Phillips* motions, appellant also filed two motions seeking to suppress evidence relating to

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[4] Appellant waived his right to a jury trial on the allegations of three prior felony convictions, so the prosecutor did not read those allegations into the record. (2RT:352-358, 363-364.)

incidents 2C and 2D. (3CT:784-795 [incident 2C]; 3CT:827-839) [incident 2D].) On July 23, 1991, the prosecution filed its opposition to the motion to suppress relating to incident 2D. (3CT:852-858.) On August 22, 1991, the prosecution filed its response to the motion to suppress relating to incident 2C. (3CT:863-877.)

On September 9, 1991, a hearing was held on appellant's motion to exclude evidence relating incident 2D. (1RT:1-54.)

On September 10, 1991 a hearing was held regarding appellant's motion to suppress evidence relating to incident 2C. (1RT:55-95.) The same day, the trial court issued a ruling denying appellant's motion to suppress evidence relating to incident 2D. (4CT:947-951.)

On September 16, 1991, the trial court denied appellant's motion to suppress evidence relating to incident 2C. (4CT:961.)

Voir dire of prospective jurors began on October 7, 1991. (4CT:970-971.) The jury was sworn on October 17, 1991. (4CT:1008-1009.) Guilt phase deliberations began on November 5, 1991. (4CT:1048.) On November 6, 1991, the jury found defendant guilty on all counts, found true the lying-in-wait special circumstance and found true all other special allegations except it rejected the allegation that appellant personally inflicted great bodily injury upon Lopez. (4CT:1124-1129, 1131-1132.)

The penalty phase began on November 13, 1991. (4CT:1135.) Deliberations commenced on November 15, 1991. (4CT:1149.) The jury returned a verdict of death on November 20, 1991. (5CT:1192.)

Appellant's motion to modify the verdict (§ 190.4) was denied on March 13, 1992 (5CT:1228-1232) and appellant was sentenced to death; sentences on all remaining counts were stayed pursuant to section 654. (5CT:1226-1227, 1235-1241.)

INTRODUCTION

The facts adduced at trial are not amenable to a clear and coherent reading, so they will be briefly summarized here.

In March, 1989, appellant sometimes stayed at a house at 202 ½ Sweet Street in Visalia. That house was occupied by sisters Maria Contreras, Alicia Lupercio and her husband Fidel, and the women's brother, one-time codefendant in this case, Ruben Contreras. Gilbert Galaviz also stayed there with Maria.

Across town, Guadalupe Sanchez was living with his wife, Hidalia, along with Hidalia's brother, Alvaro Lopez and Lopez's girlfriend Maria Vasquez. Sanchez was the cousin of a known drug trafficker, Abundio Burciaga, known by other monikers, including "El Tereque." Burciaga was living with Gracie Mendez. Lopez worked for Burciaga prior to the homicides, but was fired for stealing drugs from him.

According to one version of events by Lopez, on the day of the homicide, Sanchez and Lopez were driving in Sanchez's car when Lopez saw appellant, whom he had met in the county jail. Appellant told Sanchez that he had a buyer for $1650 worth of cocaine. After Sanchez obtained the cocaine from Burciaga, appellant and Ruben Contreras directed Sanchez and Lopez to drive to a location to meet the buyer, at which point appellant shot Sanchez and Contreras stabbed Lopez after robbing them of the drugs. According to Galaviz, appellant and Contreras returned home that night bloodied and Contreras told him that he [or they] killed a pig.

According to Maria Contreras, it was Galaviz who came home blooded that night. Mendez said that she heard Burciaga admit that he put a hit on Lopez for stealing from him and that Sanchez was killed by mistake. Galaviz said that Contreras was involved in the stabbing. Several people

testified that appellant was with them at the time of the homicides, drinking and playing cards. Another of the Contreras sisters, Delia, picked appellant and Contreras up the next morning for appellant's court date.

Galaviz implicated appellant about 10 days after the killing, when he was arrested for petty theft and gave a false name in hopes of escaping detection on felony warrants. Maria Contreras said that a day or two after the homicide Galaviz sold a gun to appellant that looked like the murder weapon. When appellant was arrested after being implicated by Galaviz, the murder weapon and some cocaine were found in appellant's possession.

Lopez denied for years that the shooting was the result of a drug deal gone bad, and instead told police that Sanchez picked up two hitchhikers who then shot Sanchez, stabbed Lopez and took the car. He identified appellant, whom he already knew, from a photographic line-up, after staring at the area of the line-up which included the photograph of both appellant and Galaviz. At the time of appellant's trial, Galaviz was in prison for another murder. His sister, Joann, overheard Galaviz and his wife, Helen, fighting about a murder in Visalia in which he was involved.

No latent fingerprint lifts taken from the car were matched to appellant, only to Contreras. Two experienced Sheriff's deputies could not match appellant's fingerprints to prints found in blood in the car, but one expert from Fresno claimed some of the found prints matched appellant's. Eyewitness accounts conflicted on the descriptions of the perpetrators as well as the number of men and vehicles involved in the crime.

Twenty-three years after the homicide, through no fault of his own, appellant remains on death row. Not only might he be innocent, but testimony regarding his low IQ makes it doubtful he would even be eligible for the death penalty today. And, as will be shown below, assuming

arguendo appellant's guilt, it is not the type of crime for which the death penalty is legally appropriate or warranted.

STATEMENT OF FACTS

A. The Guilt Phase

1. The Percipient Witnesses' Conflicting Reports

In the late afternoon of March 30, 1989, 8-year old Kevin Faulkner was a passenger in a car being driven east-bound by John Northcutt on Avenue 328 in Visalia when Kevin saw a man with his head resting against the back of the front seat of a tan car parked along the side of the road; a door to the car was open and although the interior light of the car was on, he could not tell if the man was alive or dead. (4RT:800-801, 806, 834-835.) Kevin also saw two people fighting by the rear of the parked car – one was stabbing or punching the other; another man near the rear of the car was watching the fighting. (4RT:800-801, 839-840.) One of men he saw fighting was wearing a white T-shirt and had white or very light-colored hair. (4RT:840, 844-845.) Kevin called Northcutt's attention to the men on the south side of the road, and Northcutt saw a man slumped over behind the wheel, two Hispanic men scuffling and another man standing near the right front headlight of the parked car. (4RT:801-802.) Northcutt believed there was another car or two at that location, but he could not describe them. (4RT:802.) Northcutt continued driving away in his blue Toyota pick-up; the word "Toyota" was written in white against the blue tailgate of his truck. (4RT:800, 804.)

Millie Meek was in her home at 12670 Avenue 328 when she heard two gunshots; she looked out of her window but did not see anything; then she saw two Hispanic men or boys running to a parked car. (4RT:808-811.) She thought they were fighting, but then they threw something out of the

car. (4RT:809.) The man who drove the car away had long dark hair that he kept pushing out of his eyes. (4RT:821.)

Otis Meek, Millie's husband, saw a car that looked like the victim's parked about 80 feet away. (6RT:1269-1270.) He saw two "Mexican boys" outside of the car running toward the back of the car. (6RT:1270-1271.) The driver's door was opened, and they got in the car and left with the lights out. (*Ibid.*) They drove east to Avenue 127 and turned the lights on as they turned south. (*Ibid.*) Right after that, a pick-up pulled up on the south side of Avenue 328 and parked. (6RT:1271.) The pick-up pulled up about 200 feet west of the victim's car just as the victim's car was pulling out. (*Ibid.*) One of the two young males he saw had long black hair down to his shoulders. (6RT:1273.)

David McGovern was driving on Avenue 328 from the store on Road 124 toward his home on Road 127. (6RT:1274.) He saw someone he knew walking down the road; the next thing he saw was a car parked with a flat tire; a little after that, he saw what looked like a large dead animal at the side of the road, but realized it was not an animal when the lights from a house illuminated it. (6RT:1275.) He turned on Road 127 and saw a light-colored-car parked on the corner of Road 127 and Avenue 328. (6RT:1275-1276.) He saw two Mexican males; the driver had what looked like blood on his face. (6RT:1276.) As he passed the car, he saw in his rear view mirror that one of men got out of the car and walked to the trunk. (6RT:1276.)

Paul Stacey was sitting in his backyard at Avenue 328 near Road 127 when he heard a pop, and after a brief pause, several more pops. (4RT:824.) He walked out to Avenue 328 and looked down the road and saw a car driving east down the south shoulder of the road with its lights

out. (4RT:825.) The car turned on Road 127, did a U-turn and stopped at the side of the road; a person got out of the passenger side of the car and opened up the trunk. (*Ibid.*) When the car door opened, the interior light went on, and he saw there were two men in the car. (4RT:826.) Stacey then went into his house, retrieved his gun and got into his car. (4RT:825, 828.) He then saw the car going back down the shoulder from the same place it had originally come from. After it passed him it went further and turned on its lights. Stacey drove a little past where the car had originally come from and turned around; he then saw a body in the road. (4RT:828.) He drove home and called 911, and then returned to wait with the body. (4RT:828-830.)

Roy McCreary was running down Avenue 328 when he ran into a fight.[5] (4RT:856-857.) He was about 30-40 yards away when he saw muzzle flashes of a gun near two parked vehicles which were facing east; he then backed into some bushes because he thought he was being shot at. (4RT:857-858, 860, 867-870.) One of the vehicles was a buck-skinned colored Toyota pick-up that had "Toyota" written in black lettering on its tailgate. (4RT:862, 870, 964-965.) It was parked in front of a white car, which he assumed was the victims' car. (4RT:860, 867-868; Defendant's Exhibit A.) There was one gunshot, and then three or four more after that. (4RT:863.) It seemed like the first shot came from over the top of the white car on the driver's side, shooting downward over the windshield. (4RT:868-869.) In previous testimony he said that the shots came from the

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[5] When the shooting occurred McCreary was closest to a brown Plymouth Duster with a flat tire that he had seen earlier in the day. (4RT:858, 862.) After the police left, the owner of that car came and fixed the tire and took the car. (4RT:862.)

front of the pick-up. (4RT:870.) After the shots, everyone jumped into the cars and took off. (4RT:859.) McCreary had difficulty recalling if he saw people standing outside of the buck-skinned pick-up, but he did see someone close its door. (4RT:869-870.) It seemed like there were two people in each car. (4RT:864.) He could not see anyone's face because it happened so fast. (4RT:859.) He saw the pick-up and the car leave, traveling in the same direction; he then saw an injured man who stumbled across the road and fell into a bush; McCreary ran to him, saw that he was hurt badly, and tried to keep him alive by keeping him awake. (4RT:860, 872.) McCreary got up from the man when another car drove by and he asked the driver to call for help; he was informed that had already been done. (4RT:861.) He did not know what happened to the pick-up and the car after they drove off, because his attention was focused on the injured man. (4RT:863-864.) The injured man was later identified as Alvaro Lopez. (5RT:1028.)

The body of Guadalupe Sanchez was found laying face up in a residential area on the south side of Avenue 328; nearby were three expended shell casings and a bloody butcher knife. (4RT:742-745, 781.) Around the palm of his left hand was his watch. (4RT:744-745; People's Exhibit No. 4, admitted for identification.) He had a gunshot wound to his right eye; one or two more shell casings were found under his body. (4RT:750.) Sanchez died from a single through-and-through, close-range gunshot wound to the head. (4RT:923-935.) The path of the bullet was from left to right and back to front in a downward direction, which describes only the relation of the head to the bullet track. (4RT:941.) The exact position of the gun and the head when the wound was inflicted cannot be determined by the wound path, as the position of each can be moved in

multiple ways and still result in the same wound path. (4RT:941.) Blood analysis for alcohol was negative, though it was likely that any alcohol consumed just prior to death would not have been metabolized; a drug screen was positive. (4RT:935-936, 939, 943.)

Sanchez's blood-soaked car was discovered early the next morning near railroad tracks at Houston and Bridge Streets in Visalia.[6] (4RT:751, 888-894.) The windshield contained a bullet hole; blood was also found on the exterior of the car on the passenger side. (4RT:753.) An unused nine millimeter bullet was found in the left rear passenger area and a nine millimeter shell casing was found underneath the carport of the right front passenger seat. (4RT:794, 896 975.) A black hat with Harley-Davidson wings was found underneath the front passenger door. (4RT:795-796, 890.) Gunshot residue was found on the left side of the back of the driver's headrest. (4RT:768-770; 907-915.)

A forensic expert with the Fresno Regional Laboratory of the Department of Justice looked at the hole in the windshield of Sanchez's car and opined that a bullet fired from the left side of the headrest inside the car caused the hole, suggesting that the assailant was left-handed.[7] (5RT:1065-1069.) He testified that blood spatter inside the car showed signs of struggle therein and that most of the blood smears would dry within an hour, though pooled blood would take a long time to dry. (5RT:1070-1075, 1088.)

2. Alvaro Lopez Lies to Police About What Happened

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[6] The car was found 200-250 yards as the crow flies from 202 ½ Sweet Street, Visalia, or three to four city blocks. (4RT:751, 784.)

[7] Appellant is right-handed. (7RT:1636.)

Lopez was treated at Kaweah Delta hospital with multiple stab wounds to the chest, abdomen and face, as well as a gunshot wound to the right arm. (5RT:1028.) Detective Juan Morales questioned Lopez in the emergency room there shortly after the homicide; Lopez said the perpetrators were hitchhikers – two Hispanic males, possibly from Mexico. (4RT:888, 898, 963; 6RT:1305.)

Detective Pinon questioned Lopez in the hospital the next day. (4RT:770; 6RT:1305-1306.) Lopez told him that the perpetrators were hitchhikers whom he had never seen before: two Mexican males, one 25 years old with a mustache wearing a white shirt, and the other 20 years old wearing a checkered shirt, Levis and a jean jacket. (4RT:771, 788-789; 6RT:1306-1307.)

On April 6, 1989, Lopez told Detective Pinon a different version of that story. He said that he and Sanchez stopped at the Family Market to buy some beer and came across two Mexican men standing in front of the store: he said the person who shot him was 5'6"-5'7" tall, about 160-170 pounds with short, combed-back black hair, a full mustache and a small patch of hair under his chin; the knife-wielding man was about 5'10" and with a medium build, with black hair parted on the left side. (4RT:772, 789-791; 6RT:1307-1309.) Lopez denied being involved in drug sales. (4RT:791; 6RT:1311.) Lopez stated that he heard the slide of a weapon being pulled and then turned and saw a small automatic weapon in one of the suspect's hands, then stretched out his arm and knocked it from the man. (6RT:1310.) At trial he testified that "[t]hat's what happened." (*Ibid.*)

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3. Galaviz Is Freed From Jail After Implicating Appellant, Who Is Arrested for the Murder of Sanchez

In early April, 1989, Gilbert Galaviz was in jail under an assumed name on a petty theft charge. (5RT:1156, 1170-1171.) At the time of the crime, he had been staying at the same residence as appellant and Ruben Contreras, along with Contreras' sisters. (7RT:1491-1492.) Upon his arrest Galaviz immediately contacted the Sheriff's Office and told them he had information regarding the instant homicide; Galaviz was awaiting sentencing on another case and he wanted to get out of jail before the felony warrant on that case was discovered by authorities. (5RT:1157-1158, 1171.) He gave law enforcement information linking appellant and Ruben Contreras to the killing, and he was released on his own recognizance. (*Ibid.*)

Based on the information provided by Galaviz, appellant was arrested on April 8, 1989. (4RT:874-879.) A handgun later identified to be the murder weapon was found underneath appellant when he was arrested. (4RT:879; 5RT:1076-1083.) Two small containers of cocaine and $395 were recovered from his person. (4RT:882-885; 5RT:1084-1086.)

4. Photographic Show-Ups: Witnesses Identify Galaviz, as Well as Appellant, as the Shooter

On April 9, 1989, after the arrest of appellant and Contreras, while Lopez was still in the hospital, Detective Morales showed Lopez a photographic line-up that contained the photograph of appellant in spot number three; on the same line in spot number two was a photograph of Gilbert Galaviz. (4RT:853, 946-954; People Exhibit No. 57 [mug show-up].) Lopez did not identify anyone from the photographic show-up, but Morales believed Lopez was withholding information because his gaze

seemed to focus on the upper right portion of the line-up. (4RT:948-950.) Morales then left the room and told Lopez's girlfriend that he believed that Lopez was holding back information and she went in and talked to Lopez. (4RT:950-951.) Thereafter Morales returned to Lopez and told him that the suspects were in custody (4RT:960-961); Lopez then identified the photograph of appellant as the person who shot Sanchez. (4RT:952-953; 6RT:1310.) Lopez continued to deny that there was any planned drug deal. (4RT:953.)

About a week after the homicide, Detective Pinon showed Millie Meek a photographic line-up containing six photographs. After observing the photos for three minutes, although unable to positively identify appellant, she made a tentative identification of appellant, stating that he looked like the driver "from the eyebrows down," but that the hair was not the hair she had seen. (4RT:847-851, 855) At trial, she described the hair of the individual driving the car as "shoulder length." (4RT:821.) When Detective Morales showed her the photographic line-up on April 9, 1989, which included Galaviz in position two and appellant in position three, she picked out photograph number one as having "similar characteristics" of the person she saw that night. (4RT:961-962.) At trial, she picked out Gilbert Galaviz and the person in photograph number one as looking similar to the man she saw. (4RT:820-821, 853; People's Exhibit No. 57.)

On the date of the homicide, Ruben Contreras was 19 years old (4RT:797) and appellant was 32 years old. (1CT:47.)[8] According to Detective Pinon, at the time of the homicides appellant had a small, slim

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[8] Detective Pinon guessed incorrectly that appellant was 34 years old at the time of his arrest. (4RT:797.)

build, about 5'6" tall and 135 pounds. (4RT:785.) Appellant's hair was cut short, out of his eyes, and he had a mustache with no beard. (People's Exhibit Nos. 66-68.)

5. Two Local Fingerprint Experts Do Not Match Appellant's Fingerprints to Any Found in the Victim's Car; One Regional Expert Disagrees

Tulare County Deputy Sheriff Brian Johnson matched three latent lifts found in Sanchez's car to Contreras; none of the latent lifts from the car matched appellant's fingerprints. (5RT:1012, 1020.) Both he and his supervisor, Sergeant Vernon Hensley reviewed the photographs of the patent prints and determined that the patent prints were "unusable" – that is, there were insufficient points to make a comparison to appellant's prints. (5RT:1008-1013, 1020, 1022, 1024; 7RT:1599-1602; People's Exhibits Nos. 75 and 76.) Hensley had over 30 years experience in the Tulare County Sheriff's Department Crime Laboratory and Johnson had 18 years of experience there. (5RT:1009-1010; 7RT:1600, 1605.)

Richard Kinney was a latent print analyst with the Fresno Regional Laboratory of the Department of Justice who compared the same latent prints with all the lift cards as the Tulare County Sheriffs had done, and confirmed all of the matches and eliminations of the Sheriffs. (5RT:1033, 1040-1041.) With regard to patent prints, he testified to the possibility that the ridge structure will be reversed and that an ending ridge will appear to be a bifurcation and that a bifurcation will be appear to be an ending ridge. (5RT:1037-1038.) This requires an examiner to "flip-flop" the image in their minds at that point, "keeping in mind because of the neatness of the pattern of blood that is being transferred, not on all of the finger but possibly just a portion thereof, you may start with an ending ridge bifurcation true example, and then you may flip-flop and go the other way

and vice versa." (5RT:1038, 1050.) Depending on the pressure, the image may flip on one half of the print and not flip on the other half, and this is where there is often confusion by examiners. (5RT:1053.) This "flip-flopping" is a process that most examiners are uncomfortable with, but not he, because he reviews so many prints. (5RT:1038, 1048.) He used a magnifying glass to examine the photographs of the patent prints found in the car and matched at least ten characteristics of the prints with the exemplars of appellant. (5RT:1041-1050, 1059-1061; People's Exhibit Nos. 75 and 76.)

6. The Drug Dealings of Alvaro Lopez, Guadalupe Sanchez and Abundio Burciaga

Gracie Mendez was living with cocaine dealer Abundio Burciaga in 1989; she also knew Alvaro Lopez, who was living with his sister Hidalia, and her boyfriend, Guadalupe Sanchez. (6RT:1123-1127.) Sanchez was Burciaga's cousin. (5RT:1142.) Lopez worked for Burciaga for at least two years prior to the homicide of Sanchez, and continued to sell drugs for a year after that (though not necessarily for Burciaga), while the case against appellant was pending.[9] (5RT:1123-1124, 1135.) Burciaga would go to Los Angeles at least once a week to get four to five thousand dollars worth of cocaine, and Lopez often went with him. (5RT:1125-1127, 1136.) Lopez would also buy drugs in Los Angeles for Burciaga and bring them back. (5RT:1136.) Burciaga fired Lopez because Lopez was stealing from Burciaga. (5RT:1128, 1137.) Burciaga went by the alias Isidrio Diaz and the moniker "El Tereque." (7RT:1526-1527.)

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[9] At the time of trial, Burciaga was in Mexico. (5RT:1146.)

On March 30, 1989, Lopez and Sanchez went to Burciaga's house and Burciaga gave them a brown bag with about five thousand dollars in it. (5RT:1130-1133, 1136.) Sanchez asked Burciaga for money or drugs. (5RT:1142.) Sanchez was nervous, and Lopez was trying to get Sanchez to go through with it, calling him a chicken. (5RT:1133, 1142.)

After hearing that Sanchez was killed, Burciaga told Mendez that he or "they" meant for Lopez to be killed, not Sanchez, and that a mistake was made; on another occasion Burciaga told her that a man called "El Capitan" had ordered the killing. (5RT:1141-1150.) Burciaga visited Lopez in the hospital prior to any identification of Casares by Lopez. (5RT:1032, 1143-1144; 6RT:1316-17.)

Former Siete de Copas bartender Enedina Castro testified that Lopez and a man known to her only as "El Tereque" knew each other and patronized the bar. (7RT:1513.) She identified photographs of Gilbert Galaviz as someone else who patronized the bar, but denied that she saw Lopez and Galaviz together or that she saw Galaviz with El Tereque. (7RT:1519-1522-1524.) Another bartender there, Carman Alvarez, testified that she heard comments about El Tereque dealing drugs, not Lopez. (7RT:1529.) Defense investigator Dan Wells testified that, contrary to their trial testimony, Castro had told him that Lopez was a known drug dealer in the area and that Alvarez had told him she had seen Galaviz in the bar on more than one occasion. (7RT:1517, 1531-1534.)

7. A Man In a Tan Pick-up Stakes Out the Victims' Home

Alvaro Lopez's sister, Hidalia, testified that she and Sanchez had moved from Washington state, where Sanchez had worked in the fields, to Tulare County in October, 1988; Sanchez never worked in Tulare County.

(6RT:1227, 1235.) Lopez moved in with them in December, 1988; he was not employed. (6RT:1230.) On the date of the homicide, they had run out of money and Hidalia was receiving welfare and food stamps; however, she bought the car in which Sanchez was shot about a month prior to his death. (6RT:1228-1229, 1236.) Antonio Burciaga and Sanchez were cousins. (6RT:1230-1231.) She did not know if Sanchez or Lopez dealt drugs. (6RT:1233-1234.) She did not know if Lopez worked for Burciaga, but friends would come by and pick him up. (6RT:1236.)

On March 30, 1989, Sanchez and Lopez seemed nervous because they did not have money for lunch. (6RT:1232.) She saw a Mexican man, about 30 years old with a beard, in a tan pick-up parked near her house; he was watching her house. (6RT:1239-1240.) The pick-up left at some point that day, but came back and the man continued to watch the house. (6RT:1240-1242.) Lopez's then-girlfriend, Maria Vasquez, was also living at the home at the time and also saw the man in the pick-up watching the house. (6Rt 1395-1396.) Hidalia reported this to police when she was informed that Sanchez had been killed. (6RT:1243.) After the homicide, Hidalia and Maria twice saw the same man driving the same pick-up, this time it followed Hidalia around and another time it followed her to Farmersville. (6RT:1243-1245, 133, 1404.) Hidalia and Maria both testified at Contreras' trial that one of the times it followed her around was when Lopez was released from the hospital. (6RT:1244.) They gave the license plate of the truck to police; its registered owner was the brother of Enrique Mayorga; Mayorga said he would sometimes park the truck at various locations to eat lunch by himself, but denied staking out Hidalia's house or following anyone to Farmersville. (7RT:1628-1629, 1636-1638; People's Exhibit Nos. 70, 71 and 72.)

Shortly after the instant homicide Maria told police that she suspected that Lopez was dealing drugs because he always carried large amounts of money, despite the fact that he was not working, and he was always meeting friends at bars and other people's houses. (7RT:1622-1623.)

8. Galaviz Returns Home Blood-Stained After the Homicide; Appellant Was Elsewhere

Four witnesses testified that appellant was with them drinking and playing cards at an apartment north of Visalia at the time of the homicide. (6RT:1408-1421, 1425-1432, 1433-1440, 1452-1453, 1462-1463, 1465-1466; 7RT:1623-1624.) Appellant said he did not want to drink too much because he had to go to court the next day. (6RT:1411, 1418, 1427, 1432, 1435; 7RT:1624-1625-1626.)

Maria Contreras, the then-girlfriend of Galaviz, was living at 202 ½ Sweet Street on the day of the homicide with her sister, Alicia Lupercio and Alicia's husband Fidel, as well as with Maria's brother, former codefendant Ruben Contreras; Galaviz and appellant also stayed there. (Appended 7RT:722, 746, 1096-1097; 7RT:1491-1492.) Maria left the Sweet Street house at about 3:00 p.m. on March 30 and went shopping at the mall with her daughter, returning at about 9:00 p.m. (Appended 7RT:723, 1099.)[10] When she left, appellant, Ruben and Galaviz were all outside the residence.

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[10] Maria Contreras was declared unavailable as a witness. (6RT:1359-1371.) Excerpts from her testimony from the preliminary hearing and the trial of Ruben Contreras were read to the jury. The excerpts are contained as an attachment in the rear of volume seven of the reporter's transcript on appeal. The page citations to her testimony reflect the reporter's transcript pages from those appended transcripts.

(Appended 7RT:1100a.)[11] She went to bed shortly after she returned; she shared a bed with Galaviz but he did not come home all night. (Appended 7RT:722-723, 731, 1101b-1101.) When he returned at about 10:00-11:00 a.m. the next morning, he was holding his shirt in his hands and his pants were blood-stained. (Appended 7RT:723-725, 728, 735, 743, 1097, 1103) When she asked him where the blood came from, he told her it was from a dog fight; when she questioned him further, he told her that he "killed a pig." (Appended 7RT:745.) She then stopped asking about it because she expected him to continue with the "smart remarks." (*Ibid.*) Galaviz asked her to get rid of the clothes for him. (Appended 7RT:724, 1098.) When she offered to wash them, he said he wanted her to get rid of them; after she declined to do so, he took the clothes and she never saw those clothes again. (Appended 7RT:724-725, 1098, 1109-1113.) She did not notice if appellant or Contreras were at the house when she returned that night or if they were there the next morning when she awoke. (Appended 7RT:730, 733, 738-739, 1103.) Alicia said that appellant and Contreras left the house at about 4:00 p.m. and returned home at about 10:00 p.m.; she did not notice blood on their clothes or person. (7RT:1626-1627.)

Alicia Lupercio testified that she was nervous and could recall telling police that appellant and Contreras left the house at about 4:00 p.m. on the night of the homicides and returned at 10:00 p.m., leaving Galaviz working on his car at the house, and that she did not see blood on either appellant or Contreras when they returned (7RT:1494-1498.)

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[11] There are two pages labeled "1100" in the appended RT; appellant refers to the first one as "1100a" and the second one as "1100b."

When appellant and Contreras were arrested for murder, Maria still did not think that Galaviz was involved in the homicide because he was always getting into fights, and it was not unusual for him to come home with blood on him. (Appended 7RT:744.) She continued her relationship with Galaviz until he was "picked up" in 1989. (Appended 7RT:1114-1115.)

Contreras's sister, Delia, went into the Sweet Street house where appellant and Contreras were sleeping at 7:00 a.m. on March 31, 1989; Galaviz was not in his bedroom. (6RT:1441-1445, 1448-1450.) She woke appellant and Contreras up and took them to court. (6RT:1442-1443, 1448, 1458, 1469.)

9. Convicted Murderer Gilbert Galaviz Shifts Blame to Appellant

Convicted killer Gilbert Galaviz testified that he was serving 25 to life in state prison for a killing he committed after the instant homicide. (5RT:1155-1156.)[12] Galaviz first implicated appellant in this crime so that he could get out of jail on a petty theft charge before jail personnel learned that he had an outstanding warrant for failing to appear at sentencing on a felony case; he knew that he could get a prison sentence on the petty theft because he had a prior offense.[13] (5RT:1157-1158, 1174, 1216.) Galaviz

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[12] Galaviz was in prison for stabbing someone to death with a knife in Shafter, California. (7RT:1538-1539.) He was also involved in at least two other shootings in California and he had spent time in jails in Visalia, Lardo and Bakersfield before he testified in appellant's trial. (7RT:1542-1543, 1569-1570.)

[13] Galaviz had other prior felony convictions: attempted grand theft in 1982; two counts of burglary in 1983; and he was awaiting sentencing on a burglary conviction when he was arrested for petty theft. (6RT:1172-

(continued...)

did in fact receive a favorable release after he implicated appellant in this case. (6RT:1176.)

On March 30, 1989 Galaviz was living[14] at 202 ½ Sweet Street in Visalia with Maria Lupercio Contreras , Alicia Contreras, Ruben Contreras and appellant.[15] (5RT:1155, 1171.) That day, Galaviz saw appellant cleaning a gun at about 2:00 p.m. (5RT:1162.) At about 5:30 p.m. he saw appellant and Ruben Contreras get into a car that looked like the victim's car. (5RT:1159, 1184.) The two were supposed to sell the gun that appellant had cleaned earlier. (5RT:1208.) However, at the Contreras trial, Galaviz testified that only Contreras was picked up the first time the car came to the house. (5RT:1198-1199.) Appellant and Contreras returned to the house about an hour later. (5RT:1163, 1184.) Galaviz saw both appellant and Contreras leave again in the same car with the same two men that were in the car the first time; Casares got into the rear seat on the driver's side and Contreras got into the rear seat on the passenger's side. (5RT:1163, 1184.) Galaviz did not know the two men who were in the car. (5RT:1184-1185.) Contreras had a kitchen knife and appellant had a gun that looked like the murder weapon. (5RT:1160-1162, 1182, 11185.) He thought that appellant was wearing a hat with a Harley Davidson symbol that looked like the one that was found under the victim's car; he told an

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[13](...continued)
1174.)

[14] Galaviz had moved in about two or three weeks prior to the homicide; appellant had another place to live and appellant was "in and out" of the Sweet Street home. (5RT:1219-1220.)

[15] Galaviz did not recall testifying at the preliminary hearing that appellant was not living at that location on March 30, 1989. (5RT:1205.)

officer that Contreras was also wearing a black hat when he left the second time. (5RT:1165, 1191.)

Shortly after appellant and Contreras left, Galaviz took the kids to a park and returned home about an hour later; Alicia and Maria were home when he returned. (5RT:1185.) About an hour after that, he went to bed. (4RT:1185.)

Appellant and Contreras returned to the house at about 8:30 p.m.[16] that night; Alicia got up and let them in because the door was locked. (5RT:1166, 1192.) Galaviz did not recall reporting to a police officer that he let appellant and Contreras in the door. (5RT:1204.) Neither appellant nor Contreras owned a car. (5RT:1186.) Galaviz and Maria, who were asleep in one of the bedrooms, woke up when appellant and Contreras walked through the bedroom to get to the bathroom; Maria's sister Alicia also woke up. (5RT:1167, 1187.) Galaviz testified that Casares had some blood on the clothes of his upper body and that he saw appellant wash his hands and change his clothes; Galaviz was impeached with his preliminary hearing testimony that he saw blood on Contreras but not on appellant. (5RT:1187-1188, 1197.) When asked about the blood, Galaviz testified that both appellant and Contreras said that they had "killed a pig;" however, he was impeached with his testimony from the preliminary hearing and the Contreras trial that it was Contreras alone who said that. (5RT:1167-1168, 1194-1196.) Then Galaviz saw appellant clean the gun in the bedroom. (5RT:1192-1193.) Either appellant or Contreras offered Galaviz some cocaine, but Galaviz declined. (5RT:1168, 1170, 1193.) Galaviz could not

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[16] Galaviz did not have a wrist watch nor a clock nearby. (5RT:1221.)

recall testifying at the preliminary hearing that he took some cocaine when offered it and used it the next day. (5RT:1193-1194.)

In March, 1989 Galaviz had a mustache, was 5' 6" tall and weighed 130 pounds. (5RT:1200-1201.) He could not recall if his hair was long at that time. (5RT:1201.) Galaviz denied that he asked Contreras and appellant to go to the victim's car and retrieve a knife for him. (5RT:1201.) He denied that he ever admitted to anyone that he was involved in the instant crimes. (5RT:1201.) Galaviz denied that he ever owned a gun in his life. (5RT:1183.) He denied that he was in possession of the murder weapon on March 30, 1989 and that he later attempted to and did sell the weapon. (5RT:1202.) He testified that he did not know Antonio Burciaga and denied that Contreras asked him to help kill Sanchez and Lopez. (5RT:1202.) Galaviz denied that, at the time of the crime, he knew anyone who owned a tan Toyota pick-up truck. (5RT:1202.) He denied that he was not at 202 ½ Sweet Street until about 11:00 p.m. on the night of the homicide. (5RT:1203.) Galaviz received threats prior to his testimony, but denied he was having problems in prison because he was a "snitch." (5RT:1223-1224.)

A few months after the instant homicide, Galaviz told Lolly Lopez[17] that he was sitting in the back seat of a car when Alejandra's son, Ruben Contreras, shot a man in the back of the head in Visalia over drugs and money. (7RT:1546-1552, 1567-1568, 1613-1615.)

Galaviz's sister, Joann, overheard Galaviz and a woman arguing over a murder where Galaviz stabbed someone to death in Shafter.

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[17] Trial witnesses Lolly Lopez, Estella Galaviz (a.k.a. Helen Lopez) and Maria Vasquez are sisters. (7RT:1570.)

(7RT:1535-1538.) Joann denied telling defense investigator Wells that she heard a woman named Helen fighting with Galaviz because Galaviz took Helen along when he, upon request by someone, shot a man in Visalia. (*Ibid.*) Joann was interviewed by representatives of the District Attorney's office after she spoke with Wells, and she said the detectives cleared up her confusion. (7RT:1542-1545.) Wells testified that prior to trial he discussed three separate crimes committed by Galaviz with Joann – the murder in which he stabbed a man and for which he was sent to prison, a shooting in Fresno, and the killing in Visalia. (7RT:1577-1582.) Wells testified that Joann was not confused when she told him that Helen was upset with Galaviz because he had gotten Helen involved in a murder in Visalia where he shot a man whom he did not know because he was asked to do so by someone else. (7RT:1584-1585.) Joann told Wells to talk to Helen Lopez as she would have information about the shooting, and Joann was hoping not to have to be involved in the case herself. (7RT:1586-1587.)

Gilbert Galaviz's wife, Estella Galaviz, formerly went by the name of Helen Lopez. (7RT:1500, 1505.) Estella denied that she was with Galaviz when he shot and killed a man in Visalia; denied that Galaviz admitted he shot the man at the request of someone else; denied that she and Galaviz argued about the shooting in front of Joann; and denied that she told Joann anything about a killing committed by Galaviz in Visalia – rather she heard Galaviz and Joann argue over a killing that had happened in Shafter. (7RT:1504-1505, 1639-1642.)

10. Gilbert Galaviz Sells His Gun

Galaviz owned a gun that looked like the murder weapon. (Appended 7RT:726.) After the homicide he told his girlfriend that he had

money because he sold the gun to appellant on April 1, 1989. (Appended RT:725-728, 739, 745.)

In the Spring of 1989 Severa De La Rosa knew Gilbert Galaviz, but not appellant. (6RT:1375.) Galaviz was known to carry guns. (6RT:1378, 1445-1447.) According ot Delia Contreras, Galaviz tried to sell one to appellant at Patterson Tract a few days before the homicide. (6RT:1467-1468.) On April 1, 1989 at the Circle K in Visalia, De La Rosa saw Galaviz with a white man in a small light brown Toyota truck; Galaviz tried to sell De La Rosa a gun that looked like the murder weapon in this case, but she refused to make that purchase.[18] (5RT:1377-1381, 1385, 1391; 7RT:1606-1608; 1618-1619.) Galaviz often fenced stolen goods. (5RT:1385-1386.) He also shot De La Rosa's nephew several years prior to the instant trial. (6RT:1386-1387.)

11. Alvaro Lopez Changes His Story Again; He Testifies About a Drug Deal Gone Bad

After lying under oath that the homicide was not drug related, Lopez changed his story a few months before appellant's trial. (6RT:1311.) He testified that on March 30, 1989, he and Sanchez were driving around and Lopez saw appellant; appellant told Lopez that he had a friend who wanted three ounces of cocaine. (6RT:1257, 1289-1290, 1295.) Lopez, who had been fired by Burciaga, had to rely on Sanchez to get the drugs.[19]

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[18] On rebuttal, Galaviz denied: (1) telling Lolly Lopez that he and Contreras shot a man in the Patterson Tract in March, 1989; (2) trying to sell De La Rosa a gun after the homicides; (3) arguing with his sister Joann about a killing; and (4) telling Estella Galaviz anything he knew about a killing by Casares or Contreras. (7RT:1633-1635.)

[19] Lopez had been shot early in 1989 and had not worked between (continued...)

(6RT:1257.) The profit on the deal was going to be $150. (6RT:1284.) They left and Sanchez told Lopez he could get the drugs; so they went back to appellant and assured him that they could get it. (6RT:1290-1291.) Sanchez dropped Lopez off at their home and he left in Hidalia's car, returning with three ounces of cocaine.[20] (6RT:1258, 1292.) Sanchez picked Lopez back up and at about 7 p.m. they drove again to appellant's home; appellant told them they were going to the friend's house. (6RT:1258, 1292-1293.) Appellant got in the back seat behind the driver, Sanchez, and Contreras got in the back seat behind Lopez. (6RT:1259.)

The four men drove to a store on Highway 63; appellant said the friend lived in the house next to the store. (6RT:1259, 1296.) They parked the car in front of the store and appellant got out and walked to the house. (6RT:1260, 1296.) Sanchez and Lopez went into the store and Sanchez bought two beers; Sanchez finished his and Lopez was still drinking when appellant came back to the car. (6RT:1260, 1296-1297.) Appellant said that the buyer had visitors and that he would be waiting for them up the road. (6RT:1260-1261.)

Sanchez turned right on Avenue 328 and drove the car a very short distance[21] before he pulled the car over to the side of the road and put it in

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[19](...continued)
that shooting and March 30, 1989. (6RT:1288.)

[20] Lopez denied that he and Sanchez went to Burciaga's house to pick up the drugs or that they went to Burciaga's house earlier that day to pick up a larger sum of money. (6RT:1293-1294.)

[21] The distance from the corner of Highway 63, the location of the market (CA-63 N/Rd 124/N Dinuba Blvd.), to the location the body was found, in front of 12642 Avenue 328 (Municipal Court CT:4) was .3 miles,
(continued...)

park with the motor running. (6RT:1262, 1299.) Appellant immediately put the gun to Sanchez's head and told Contreras to "secure" Lopez; and Contreras put a knife to the right side of Lopez's throat. (6RT:1263.) Appellant then told Sanchez to give them the drugs. (6RT:1263.) Sanchez leaned over and took the cocaine out from under the seat and handed it over his right shoulder to appellant. (6RT:1299-1300.) Lopez testified that "He gave it to him and he shot him. He grabbed it and pulled." (6RT:1263.) The prosecutor's examination of Lopez continued:

Q. He pulled what?

A. The pistol.

Mr. Thommen: I'm sorry. Could I have that last answer read back.

(Whereupon the questions were read back by the reporter.)

By Mr. Leddy:

Q. Are you referring to a particular part of the pistol?

A. The head.

(6RT:1264.) Lopez testified that "pulling the pistol" in Spanish means to pull the trigger and fire. (6RT:1318-1320.) Lopez denied that Sanchez pulled the gun with his hand (6RT:1300), but he was impeached with his testimony from Contreras' trial which he also testified that "he grabbed the hand and pulled the pistol." (6RT:1321-1322.)

Appellant yelled at Contreras to slash Lopez's throat, but Lopez held Contreras' hand. (6RT:1321-1322, 1324) Lopez heard a shot and Sanchez's head rolled over and hit him on the shoulder. (6RT:1326.) When Lopez released Contreras' hand it knocked into the pistol.

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[21](...continued)
a distance that can be traveled in approximately 30 seconds by car. (<http://maps.google.com>.)

(6RT:1264-1265.) Lopez opened the car door and heard two more shots; he was shot twice in the left arm. (6RT:1264, 1324-1326.) When Lopez got out of the car, Contreras started stabbing him. (6RT:1265.) Lopez fell with the knife after being stabbed 17 times. (6RT:1265.) He was shot at about three times while he was down, but not hit. (6RT:1266.) He got up because he thought they would run over him and he ran across the road. (6RT:1279-1280.) A man carrying a flashlight saw him there and he was taken to Kaweah Delta Hospital where he had surgery. (6RT:1280.) He remained in the hospital for about two weeks. (6RT:1281.)

Lopez testified that he did not immediately identify appellant as the perpetrator because he wanted to exact his own revenge. (6RT:1282.) Evangelina Alvalos visited Lopez while he was still gravely ill in the hospital and told him that if he was going to die, he should tell the truth; he then asked her to call the detectives back into the room. (6RT:1327-1328.)

Lopez denied that he ever sold drugs for Burciaga or that he stole money from Burciaga while working for him. (6RT:1313-1315.) Lopez denied that the attack was the result of a hit on Lopez arranged by Burciaga or that Burciaga visited Lopez in the hospital and told him that he had better identify appellant as the shooter. (6RT:1316-1317.)

B. Penalty Phase Evidence

By court trial, appellant was found to have been convicted of two prior felonies, a robbery and possession for sale of narcotics; the trial court modified the jury's verdict on count III to reflect the conviction was for the offense of being a felon in the possession of a concealed weapon. (People's Exhibit Nos. 97 and 98.) (RT:1886-1888.)

1. The Prosecution's Case in Aggravation

When appellant was 16 years old, his father kidnaped a 12-year-old girl, Rosa Baca Chavez, from a ranch nearby their home in Mexico and kept her captive for five months. (9RT:1953-1956, 1964.) She testified to the following: Appellant did not want the girl to be kidnaped, but he did not defend her because he was afraid of his father. (9RT:1979.) His father forced appellant, under threat of death, to have sex with her numerous times, while the father watched.[22] (9RT:1957-1961, 1972-1975, 1977.) If appellant could not get an erection and was unable to have sex with the her, his father would humiliate appellant and threaten him. (9RT:1981.) The father also had sex with her seven times during her captivity. (9RT:1976.) Appellant's father regularly beat appellant's mother to the point of near death. (9RT:1986.) His father threatened to kill everybody in the household. (9RT:1987.)

In 1979, appellant and two other men were in or around a car parked in a shopping center parking lot in the early morning before the stores had opened. As another car containing only the driver went by, appellant retrieved a .22 caliber rifle from the back seat of the car and shot two times at the passing car, from a distance of about 50 yards. No one was injured. Appellant surrendered to a law enforcement officer, who witnessed the shooting, without incident. (9RT:1943-1952.)

In 1980, appellant was one of three men involved in a store robbery in which at least one of the perpetrators threatened a victim with a gun and in which the victims were tied up, though there was no evidence that

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[22] The prosecution impeached Baca Chavez with testimony from Detective Pinon that, when he interviewed her in 1989, she did not tell him that appellant's father forced him to have sex with her while he watched. (10RT:2189-2190.)

appellant possessed a gun or tied up the victims. (9RT:1988-2002.) Appellant pled guilty to one count of robbery. (People's Exhibit No. 97.)

In 1984 appellant was convicted of one count of possession of narcotics for sale. (People's Exhibit No. 98.) Also in 1984, appellant was searched and found to be carrying a .22 caliber handgun. He was arrested without incident. (9RT:1911-1914.)

In 1987, keys discovered in appellant's possession belonged to a car found to contain narcotics and a handgun. Law enforcement had seen appellant in the car before, but never driving it. The weapon was found under the driver's seat. (9RT:1915-1925.)

In 1989, a semiautomatic handgun and ammunition was found next to the driver's seat in a parked van appellant was sitting in; the van did not belong to appellant. (9RT:1925-1935.)

2. The Defense Case in Mitigation

Appellant's sister testified that their father frequently hit appellant and that the father beat their mother daily; he also hung their mother by the neck from the rafter until she passed out. (9RT:2135-2139.) The father once also hung appellant's sister by the rafter because he thought she was pregnant. (9RT:2139, 2142.) His sister was present when their father ordered appellant, in front of his mother and other family members to "make Rosa [Baca] his" – that is, he would force appellant against his will to have sex with Baca, and if he could not do it, the father would beat and belittle him. (9RT:2139-2140.)

Appellant's cousin witnessed appellant's father beat appellant, once to the point of unconsciousness. (9RT:2145.) Appellant was very afraid of his father and would have gone with the father to take Baca because he was too afraid to not comply with his father's demands. (9RT:2147.)

Appellant's uncle saw the father strike appellant very hard with pieces of wood and whatever he could find. (9RT:2152.) Appellant worked very hard in the fields, starting at the age of five. (9RT:2146, 2152.)

Psychologist Richard A. Blak, Ph.D. testified that he reviewed various documents supplied to the defense and that he evaluated appellant through Art Martinez, a Spanish-speaking licensed clinical social worker. They administered two tests, the Wechsler Adult Intelligence Scale Revised and the Millon Clinical Multiaxial Inventory. Appellant has an I.Q. in the 70-75 range (9RT:2067); has suffered from chronic depression and generalized anxiety disorder[23] since childhood as a result of the severe abuse and victimization at the hands of his father; has several underlying personality disorders; and as an adult, he abused alcohol and drugs. (9RT:2018-2134.) Dr. Blak opined that appellant was suffering from the same mental disorders in March, 1989, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of those mental disorders. (9RT:2051.)

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[23] This according to the Diagnostic and Statistical Manual of Mental Disorders, III-R. (9RT:2034.)

I.
THE STATE FAILED TO ADDUCE SUFFICIENT EVIDENCE TO SUPPORT THE FIRST DEGREE MURDER CONVICTION

A. Introduction

The only theory of first-degree murder on which the jury was instructed was premeditation and deliberation. (4CT:1083-1084; CALJIC No. 820.) To convict appellant of that offense, the prosecution was required to prove the elements of premeditation and deliberation beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) As will be shown below, that burden was not met. The evidence was not sufficient to support a rational inference – as opposed to speculation – that the shooting of Sanchez was product of the kind of "careful thought and weighing of considerations" necessary to constitute deliberation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) Appellant's conviction of the first degree murder of Sanchez thus violates the due process and jury-trial clauses of the state and federal Constitutions, a fortiori, fails to pass muster under the heightened reliability requirement that governs capital judgments (*Beck v. Alabama* (1980) 447 U.S. 625, 637), and must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 309; *People v. Johnson* (1980) 26 Cal. 3d 557, 578; U.S. Const., 5th, 6th, 8th, & 14th Amends; Calif. Const., art. I, §§ 7(a), 15, 16 & 17.)

B. Standard of Review

"[T]he relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.) "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the

evidence in a light most favorable to respondent. . . .' [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. . . . First, we must resolve the issue in the light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*. . . ." (*People v. Johnson, supra*, 26 Cal.3d at pp. 576-577, italics in original.)

"Evidence, to be 'substantial' must be 'of ponderable legal significance ... reasonable in nature, credible, and of solid value.' [Citations.]" (*People v. Johnson, supra*, 26 Cal.3d at p. 576.) Due process is violated unless the record discloses evidence so "substantial ... that a reasonable trier of fact could find" each element established "beyond a reasonable doubt." (*Id.* at p. 578; *People v. Koontz* (2002) 27 Cal.4th 1041, 1078 ; *Jackson v. Virginia, supra*, 443 U.S. at p. 309.) If the evidence in support of the convictions is not "of ponderable legal significance . . . reasonable in nature, credible and of solid value," (*Johnson, supra*, 26 Cal.3d at p. 576), it is the responsibility of the reviewing court to set aside the verdicts, for, as the United States Supreme Court recognized in *Jackson v. Virginia, supra*, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." (443 U.S. at p. 317.)

Only if a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., Amends. 5th, 6th, 8th, & 14th; Cal. Const., art. I, §§ 1, 7, 15,

16 & 17; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402.)

This Court has cautioned that, in reviewing a first-degree murder conviction, a court may not conclude that a reasonable juror properly could have inferred premeditation and deliberation in reliance on "highly ambiguous" evidence. (*People v. Anderson* (1968) 70 Cal.2d 15, 31.) Rather, the court must be able to point to a "*reasonable foundation* for [such] an inference. . . ." (*Id.* at p. 25, italics in original.) "'Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof.' [Citation.]" (*Id.* at p. 24; accord, *People v. Velasquez* (1980) 26 Cal.3d 425, 435.) If a juror had to rely on "speculation, supposition, surmise, conjecture, or guess work" to make a finding, the finding would be constitutionally inadequate. (*People v. Morris* (1988) 46 Cal.3d 1, 19 overruled on other grounds by *In re Sassounian* (1995) 9 Cal.4th 535; see *People v. Garceau* (1993) 6 Cal.4th 140, 179 [impliedly agreeing that if "the probative value of ... testimony hinge[s] upon unreasonable speculation," its admission "abridg[es the defendant's] right to due process"].)

The question here is whether "reasonable . . . , credible, and . . . solid" evidence supported the jury's findings that the killing of Sanchez with a single gunshot was deliberate and premeditated.[24] In order to answer

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[24] The fact that defense counsel did not formally challenge the sufficiency of the evidence of premeditation and deliberation does not preclude appellant from challenging the defect in this Court. "[I]ssues of sufficiency-of-the-evidence are never waived." (*People v. Neal* (1993) 19 Cal.App.4th 1114, 1122.)

the question, it is necessary to understand the mental states connoted by those terms.

C. Due Process, Statutory History, And Elementary Principles of Statutory Construction Require That The Mens Rea for First-Degree Intentional Murder Be Clearly Distinguished From That Necessary for Second-Degree Intentional Murder

1. Deliberation and Premeditation: Legislative Intent and Due Process

The first murder statute enacted in California followed the common law model: there was but one category of murder, for which there was but one penalty – death. (Stats. 1850, ch. 99, §§ 19-21, p. 231.) In 1856, the common law classification was abandoned in favor of the Pennsylvania model, dividing murder into two degrees. (Stats. 1856, ch. 134, § 2, p. 219.) The purpose of the division was to reserve the death penalty only for those murders involving the greatest "degree of atrociousness." (Revised Laws of the State of California - Penal Code (Sacramento 1871) § 189, Code Commissioners' Note, pp. 47-48 ["Revised Laws (1871)"].) As this Court has emphasized, therefore, in construing Penal Code section 189, it is important to recognize that the phrase, "deliberate and premeditated killing," was intended from its inception as a description of a state of mind so culpable that it authorized the State to "put . . . a person to his death." (*People v. Bender* (1945) 27 Cal.2d 164, 185, overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101.)

The legislative history has led this Court to distill several related principles from the construction of section 189.[25]

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[25] When the offenses alleged in this case were committed in 1989, (continued...)

First, the statute embodies a legislative presumption that a murder is of the second degree. A defendant can only be convicted of deliberate and premeditated murder if the prosecution overcomes the presumption by proof beyond a reasonable doubt of the additional elements. (*People v. Anderson, supra*, 70 Cal.2d at p. 25; accord, *People v. Martinez* (1987) 193 Cal.App.3d 364, 369; *People v. Rowland* (1982) 134 Cal.App.3d 1, 9.)

Second, since section 189 first identifies particularized methods of killing as first-degree murders (e.g., killing by poison and torture) and then provides that a first-degree murder is also committed "by any other kind of willful, deliberate, and premeditated killing," elementary principles of statutory construction compel the conclusion that the legislature intended that the category of deliberate and premeditated killings be reserved for those "equal [in] cruelty and aggravation" to killings by poison and torture. (*People v. Sanchez* (1864) 24 Cal. 17, 24; *People v. Thomas* (1945) 25 Cal.2d 880, 899-900; *People v. Holt* (1944) 25 Cal.2d 59, 70, 87, 90-91;

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[25](...continued)
section 189 read as follows:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, "lying-in-wait", torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree. [Definitions of "destructive device" and "explosive" omitted.] To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

People v. Fields (1950) 99 Cal.App.2d 10, 13; accord, Revised Laws (1871), *supra*, Code Commissioners' Note, at p. 48.)

The third principle derived directly from the statutory language goes to the heart of this case. The legislature has established that the mens rea of second-degree murder is express malice and has equated the latter with intent to kill. (Pen. Code, §§ 187-188.) Consequently, as this Court has repeatedly held:

> [T]he legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill.

(*People v. Anderson, supra*, 70 Cal.2d at p. 26; accord, *People v. Koontz, supra*, 27 Cal.4th at p. 1080; *People v. Wolff* (1964) 61 Cal.2d 795, 821 overruled by statute on other grounds as stated by *People v. Bloom* (1989) 48 Cal.3d 1194; *People v. Caldwell* (1955) 43 Cal.2d 856, 869; *People v. Thomas, supra*, 25 Cal.2d 880, 898.) Thus, one who formulates in his mind a specific intent to kill and then acts on it has committed a second-degree murder. Intentional first-degree murder requires something more: "the intent to kill must be the result of deliberate premeditation." (*People v. Sanchez, supra*, 24 Cal. at p. 30.) Maintaining a clear distinction between the states of mind necessary for conviction of first and second degree intentional murder is not simply a matter of logic or statutory construction. It is a requisite of due process. (See, e.g., *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109 [due process requires clarity in the penal statutes that "policemen, judges, and juries" must enforce]; *United States v. Lesina* (9th Cir.1987) 833 F.2d 156, 159 [blurring of distinction between mens rea necessary for implied-malice murder and involuntary manslaughter violates due process].) Such clarity is necessary so that a

jury's verdict-choices – as well as the punishment that hinges on those choices – are based on reason and are not the result of arbitrary and random decision making. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428 (*Godfrey*) [failure of state to provide jury with "clear and objective standards" creates an unacceptable "risk of wholly arbitrary and capricious action"]; *Maynard v. Cartwright* (1988) 486 U.S. 356, 362 [same].)

The statutory distinction between intentional murder that is not the product of premeditation and deliberation (second-degree) and intentional murder that is (first-degree) is meant to be "clear and objective" as required by *Godfrey*. As this Court has held, "the legislature meant to give the words 'deliberate' and 'premeditate' . . . their common, well-known dictionary meaning." (*People v. Bender, supra*, 27 Cal.2d at p. 183; accord, *People v. Anderson, supra*, 70 Cal.2d at p. 26.) As used in section 189, therefore:

> The word . . . "deliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a deliberate judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; . . . Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; . . . slow in action; unhurried; . . . Characterized by reflection; dispassionate; not rash." . . .
>
> The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against, to consider maturely; reflect upon; ponder; as, to deliberate a question . . . to weigh the arguments for and against a proposed course of action." . . . "Deliberation means careful consideration and examination of the reasons for and against a choice or measure." [Citation.]

(*People v. Thomas, supra*, 25 Cal.2d at pp. 898-899; *People v. Bender, supra*, 27 Cal.2d at p. 183.)

The verb "premeditate" means "[t]o think on, and revolve in the mind, beforehand; to contrive and design previously." (*Ibid.*) The foregoing definitions were the controlling ones at the time of the crime for which appellant was convicted. (*People v. Velasquez, supra*, 26 Cal.3d at p. 435; *People v. Anderson, supra*, 70 Cal.2d at p. 26; *People v. Martinez, supra*, 193 Cal.App.3d at p. 369; *People v. Rowland, supra*, 134 Cal.App.3d at p. 7; 4CT:1083-1084; CALJIC No. 8.20 (5th ed. 1988).)

The amount of reflection that must precede or follow the decision to kill in order to elevate a second degree murder to a deliberate and premeditated murder has not been precisely quantified. As this Court has long recognized, however, if the amount of time in which deliberation and premeditation may take place is shrunk too much, this would make a nullity of the intent of section 189 to draw a cognizable distinction between capital and non-capital murders. Thus, in *People v. Bender, supra*, 27 Cal.2d at p. 182, the Court, finding insufficient evidence of premeditation and deliberation, held "If . . . an act is deliberate and premeditated even though it be executed in the very moment it is conceived, with absolutely 'no appreciable' time for consideration - then it is difficult to see wherein there is any field for the classification of second-degree murder."[26]

Similarly, in *People v. Carmen* (1951) 36 Cal.2d 768, 777, the trial judge instructed the jury that "[th]ere need be . . . no considerable space of

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[26] In *Bender*, the defendant murdered his wife in a quarrel. While thedefendant hid the body and wrote several notes after the fact showing presence of mind, this Court reduced the conviction to second-degree murder – the jury simply had no evidence by which to determine the murder had been premeditated as opposed to the result of a tempestuous, jealous quarrel. (27 Cal.2d at pp. 179-180.)

time devoted to deliberation or between the formation of the intent to kill and the act of killing." This Court reversed:

> The word "considerable," used as an adjective, means "Worthy of consideration; of importance or consequence." [Citation.] The instruction as given leaves no ground for the classification of murder of the second-degree.[27]

(Accord, *Bullock v. United States* (D.C. Cir. 1941) 122 F.2d 213, 213-214 ["To speak of premeditation and deliberation which are instantaneous, or which take no appreciable time, is a contradiction in terms. It deprives the statutory requirement of all meaning and destroys the statutory distinction between first and second-degree murder."]; 2 LaFave and Scott, Substantive Criminal Law (1986), sec. 7.7(a), p. 237 [*Bullock* position "[t]he better view"]; (Justice) Cardozo, Law and Literature (1931) 99-101 [arguing that when premeditation and deliberation "is measured by the lapse of seconds," the "dividing line" between first and second degree murder becomes "obscure" and that the resulting confusion has improperly sent "scores of men . . . to their death"]; *Austin v. United States* (D.C. Cir. 1967) 382 F.2d 129, 136-137 overruled on other grounds by *United States v. Foster* (D.C.Cir.1986) (en banc) 783 F.2d 1082 ["the 'appreciable time' element is . . . necessary . . . to establish deliberation" and instructing a jury in such language "is a meaningful way to convey . . . the core meaning of premeditation and deliberation . . . ." Instructing a jury that the process of deliberation may only last "seconds" is "to blur . . . the critical difference between impulsive and deliberate killings"]; *United States v. Chagra* (W.D.

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[27] In *Carmen*, the defendant had threatened to kill the victim one to two hours earlier in the evening and had driven at least 45 minutes to get his shotgun before the killing occurred. (36 Cal.2d at pp. 770-771.)

Tex. 1986) 638 F.Supp. 1389, 1400 ["appreciable period of time" required]; see also *Fisher v. United States* (1945) 328 U.S. 463, 470 [affirming instructions because they "emphasized . . . the necessary time element"].)[28]

In short, the question presented here is whether there was "reasonable . . . , credible, and solid" evidence from which the jury could conclude not only that the perpetrator formed the intent to kill but did so "as a result of careful thought and weighing of considerations; . . . [and] carried on coolly and steadily . . . according to a preconceived design." (*People v. Bender, supra*, 27 Cal.2d at p. 183.)

2. Evidence From Which Premeditation and Deliberation May Be Inferred

Considerable case law has been devoted to identifying the sort of evidence that permits a jury to infer the kind of cold-blooded reflection that transforms a crime from second-degree intentional murder to that "degree of atrociousness" sufficient to make the perpetrator eligible for death.

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[28] This Court has said that "cold, calculated judgment may be arrived at quickly. . . ." (*People v. Velasquez, supra*, 26 Cal.3d at p. 435, quoting *People v. Thomas, supra*, 25 Cal.2d at p. 900.) If "quickly"connotes that premeditation and deliberation may occur in less than an "appreciable" or "considerable" amount of time, then, as discussed below, it defines the mens rea for first degree murder in a way that contradicts the authorities cited in the text and violates due process. "Quickly" is a relative term, however. It is used in *Thomas* soon after the opinion has defined deliberation as "slow in action" and "unhurried." (25 Cal.2d. at p. 898.) For purposes of this argument, appellant assumes that, under California law, premeditation and deliberation require an "appreciable" or "considerable" amount of time and that California law is thus compatible with due process. (Cf. *People v. Mayfield, supra,* 14 Ca1.4th at p. 767 [the true test of whether a defendant has premeditated and deliberated a crime "is . . . the extent of the reflection"].)

(Revised Laws (1871), *supra*, Note at pp. 47-48; *People v. Bender, supra,* 27 Cal.2d p. at 185.)

In *People v. Koontz, supra*, this Court reiterated the analysis originally set forth in *People v. Anderson*:

> Anderson identified three factors commonly present in cases of premeditated murder: "(1) [F]acts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)."

(*Koontz, supra*, 27 Cal.4th at p. 1081; *Anderson, supra*, 70 Cal.2 at pp. 26-27.)

The Court has cautioned that the "*Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*Koontz, supra*, 27 Cal.4th at p. 1081.) For example, albeit one not pertinent to this case, a defendant's post-offense statements may provide direct evidence of his thought processes at the time of the killing. (See *People v. Mayfield, supra*, 14 Cal. 4th at p. 768 [defendant's tape-recorded admissions that he took a gun away from the victim prior to shooting was consistent with preexisting intent to

kill].) There also may be cases in which the manner of killing – such as the shooting of a prone victim – so unequivocally indicates planning and reflection that it can show premeditation and deliberation on its own. (*People v. Hawkins* (1995) 10 Cal. 4th 920, 956-957, overruled on other grounds by *People v. Lasko, supra,* 23 Cal.4th 101.)[29]

Those qualifications aside, *Anderson* has stood the test of time. With that in mind, appellant will now discuss all such evidence that was presented to the jury, as well as any other evidence that might be deemed indicative of premeditation and deliberation.

D. Substantial Evidence Did Not Support a Rational Inference – as Opposed to Speculation – That Sanchez Was Killed Following a Process of Premeditation and Deliberation

As stated above, an unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson, supra,* 70 Cal.2d 15 at p. 25.) In order to support a finding that the murder is first degree, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid.*; see also *In re Winship* (1970) 397 U.S. 358, 362-363; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].) The People must show that the killing was deliberate (i.e., the result of a careful weighing of considerations) and premeditated (i.e., thought of in advance). Deliberate

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[29] *Anderson* had indicated that manner-of-killing evidence had to be accompanied by planning or motive evidence and that the only kind of evidence that could show premeditation and deliberation on its own was "extremely strong evidence of planning." (70 Cal.2d at p. 27; accord, *People v. Bloom* (1989) 48 Cal.3d 1194, 1209.)

and premeditated murder arises out of a cold, calculated judgment, rather than a rash impulse. (*People v. Anderson, supra*, 70 Cal.2d 15 at p. 25.)

Appellant also contends that the trial court erred in providing an instruction to the jury on the theory of premeditated and deliberate first degree murder. That issue, however, is essentially the same as that stated above; whether there is sufficient evidence to support the first degree murder conviction. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138, fn. 1.) Whether the appellate issue is framed as insufficient evidence to support a conviction, or insufficient evidence to warrant the giving of an instruction, this Court must determine whether there was substantial evidence to support the jury verdict. Appellant's first degree murder conviction violated the state and federal constitutional guarantees of due process as to both issues. For the sake of brevity, appellant will only discuss the issue as a question of the sufficiency of the evidence to support the conviction, but challenges the conviction on both legal grounds.

This Court has noted that, while it is true that the prosecutor's argument is not evidence and that the jury may consider theories other than those put forth in the argument, it is also true that the prosecution theory is a logical place to look for an explanation for a finding of premeditation. (*People v. Perez* (1992) 2 Cal.4th 1117, 1162; see also *id.* at p. 1144, dis. opn. of Mosk, J.) The record here does not contain substantial evidence of planning activity, motive to kill, or an exacting method of execution. Rather, the evidence reveals a rash, impulsive act that occurred over the struggle for the gun, as well as the absence of any of the factors discussed in *Anderson*.

1. Insufficient Evidence of Planning

Planning activity – "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing" (*People v. Anderson, supra*, 70 Cal.2d at p. 27) – is the most important of the three *Anderson* guidelines. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) The prosecutor's theory of a "plan" is based upon an assumption followed by speculation. The prosecution argued the following evidence supported a theory that appellant and Contreras had a "plan" to kill Sanchez and Lopez after they took the drugs:

> Now, this really brings us to another point, which I think points very clearly to premeditation and to the fact that this was a crime of "lying-in-wait". And that is if you, you know, accept, to begin with, merely arguendo, if we could put it that way, it's a nice term we use, if you actually start out by assuming that these people planned to kill the people when they took the money, kill the victims, then you have to ask yourself, "Why would that be so?"

(8RT:1658-1659.) So, rather than argue that the jury determine facts that demonstrate planning activity, as it was required to do, the prosecution asked the jury to assume that appellant and Contreras planned to kill, and work from that assumption. Working from that unsupported assumption, the prosecution argued that they planned to kill the victims because they needed to use their car as the get-away vehicle without the risk of the victims reporting the theft to law enforcement. (8RT:1659.) The prosecution asserted that if they drove to a remote area for the theft, the victims would become suspicious, so appellant made up a story about meeting a buyer on Highway 63 and had Sanchez stop in the middle of a residential area. (8RT:1659-1660.) The prosecution further baldly asserted

that the buyer did not exist, and that "once there was a decision made to leave the scene in the victim's car, the only way that could possibly happen would be if neither victim were able" to seek help from nearby residents, that is, if they were disabled or dead. (8RT:1660.) "So that therefore in order to leave the scene with the goods, check out the car and see if maybe there was something more in it, they had to have planned what they were going to do. They simply had to have known in advance that they were going to do this . . . ." (8RT:1660-1661.)

The prosecution further argued that Lopez's testimony that appellant told Contreras to "secure him" followed by Contreras' immediately stabbing Lopez evidenced a "scheme and a plan" from the beginning and that "[i]t could not be an impetuous gesture. They had to figure out how they were going to leave that scene with the substance that they had taken from the victim. They had to do that. They had to have figured it out beforehand."[30] (8RT:1678.)

In rebuttal the prosecution continued adding layers of speculation to its theory, arguing that while there was no direct evidence that the killing was planned, there was circumstantial evidence of appellant arming himself with a gun and circumstantial evidence of "somebody having set up the victims and set them up from the beginning." (8RT:1765-1766.) "The very fact that they shot one and intended to kill -- plainly intended to kill the other, you know, let's [sic] you know to begin with that, in fact, they had -- if they had -- let's put it this way. They had no reason to do it, they would

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[30] Contreras' acquittal of the conspiracy to commit murder charge and the jury's rejection of the lying-in-wait special circumstance in his case belie the prosecutor's argument in the instant case. (1RT:150.)

not have done it. If they had a reason to do it, they would have had to have thought that reason out at some time." (8RT:1766.)

> But when you get down to it, if you look at the scheme of things and the way they went down, you take it step by step, you go through the fact that they armed themselves, you go through the fact, you know, they made this stop supposedly to see somebody who was going to buy three ounces of cocaine, but nobody saw them -- nobody saw them at all unless, in fact, the defendant did, in any case, neither -- at this point, and from here on out, of course, you're never going to know if that person existed. But I suggest to you that there is a reasonable inference that no such person did exist, that that person is a product of the scheme and the plan which was devised to begin with.

(8RT:1766-1767.)

The speculated facts argued by the prosecution do not constitute planning activity. The prosecution blurred the distinction between intent to kill and deliberate and premeditated murder when it argued that shooting of Sanchez and the stabbing of Lopez demonstrated the intent to kill both of them. (8RT:1766.) Intent to kill does not equal premeditation. First degree murder requires a premeditated *and* deliberate intent. (*People v. Bender*, *supra*, 27 Cal.2d 164 at p. 181.)

The basic premise of the prosecution's argument, that appellant must have planned to kill because stealing the car as a means of egress from the crime risked being reported to the police (8RT:1659), was flawed in several fundamental respects. Initially, the entire argument is circular: it presumes a plan to rob formed prior to the trip to sell the drugs, which was precisely what the prosecution was attempting to prove. If no plan to rob had been formed in advance, the need for a car to escape from the robbery would also not have arisen in the mind of appellant leading to an inference of premeditation.

Perhaps more importantly, the risk that was allegedly so obvious to appellant as to support a finding of premeditation was almost impossible to accept: that two drug dealers would report to the police that they had been robbed of a vehicle during an attempted narcotics transaction. Even more far-fetched is the idea that – in order to avoid the supposed risk of being reported to police for auto and drug theft by the drug dealing victims – appellant instead chose to murder Sanchez in front of no less than seven witnesses.

A defendant's actions just prior to the murder are often utilized to demonstrate the steps taken toward the act of killing the victim. Examples of planning activity have included the fact that defendant did not park his car in the victim's driveway, he surreptitiously entered her house, and he obtained a knife from the kitchen before attacking her as she entered (*People v. Perez*, *supra*, 2 Cal.4th at p. 1126); defendant's act of retrieving the murder weapon from the garage (*People v. Wharton* (1991) 53 Cal.3d 522, 547); defendant's actions before crashing through living room window of victim's house demonstrate he planned his entry. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

Here, there are no comparable actions by appellant. While appellant and Contreras armed themselves before getting into the car with Sanchez and Lopez, it is not uncommon for those about to engage in drug sales to be armed. (See *Austin v. United States*, *supra*, 382 F.2d 129, 139 [use of weapon to kill "not probative of premeditation and deliberation because [defendant] did not procure it specifically for that purpose but rather carried it about with him as a matter of course"]; *In re Gray* (2007) 151 Cal.App.4th 379, 410 [defendant's "act of going out to his car while armed to drive to his brother's house does not constitute evidence of

premeditation"].) While bringing a loaded handgun may indicate that appellant "considered the possibility of a violent encounter," it does not constitute sufficient evidence, standing alone, of the type of "extremely strong" evidence of planning upon which a finding of premeditation and deliberation can stand without additional evidence. (Compare with *People v. Lee* (2011) 51 Cal.4th 620, 666 [carrying a loaded handgun along with extra ammunition supports reasonable inference that defendant considered the possibility of homicide at the outset]; *People v. Manriquez* (2006) 37 Cal.4th 547, 577-578 [after defendant forcibly was removed from a bar on repeated occasions, defendant threatened to return with a firearm, did so, and fired two gunshots at close range to the victim's chest]; *People v. Thomas* (1992) 2 Cal.4th 489, 517 [defendant returned to car to retrieve a rifle and ammunition; rifle had to be hand-loaded to fire the second shot]; *People v. Gallego* (1990) 52 Cal.3d 115, 190 [defendant announced his intention before arming himself upon embarking on search for victims].)

And contrary to the prosecution's argument, the fact that Sanchez was shot in the middle of a residential area in front of numerous eye witnesses instead of in a remote area just up the road from the killing strongly militates against a finding that the killing was planned. Rather, a killing committed in an isolated or secluded setting suggests a premeditated plan designed to avoid detection. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237 and cases cited therein.) Conversely, a killing that occurs in a populated area suggests an unconsidered or rash impulse killing – exactly what occurred in this case.

The prosecution postulated that the killing had to happen where it did or else the victims would become suspicious if they were driven to a

remote area. (8RT:1659-1660.) However, there was, and is, a very unpopulated area just a quarter mile up the road from the residential area where the killing took place, which would have taken about 30 seconds to drive.[31] Since they did not have to drive very long to get to an area where there would have been no witnesses, they could have easily done so without alarming the victims, had the killing been planned.

Moreover, contrary to the prosecutor's argument, drug transactions commonly take place out of public view in secluded areas rather than in full view of a bevy of suburbanites. (See, e.g., *Whiting v. United States* (1963) 321 F.2d 72, 76 [narcotic transactions are type of crime committed in secret]; *United States v. Plescia* (1991) 773 F.Supp. 1068, 1073 [narcotic transactions often occur out of public view]; *People v. Rundle* (2008) 43 Cal.4th 76, 98, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390 [defendant and victim went to a remote location to smoke marijuana in order to avoid being detected].)

It is difficult to contemplate how any argument would better fit the definition of "mere conjecture, surmise, or suspicion" than the circular argument that "they had to have planned it" and "if they had no reason to do it, they would not have done it." As this Court held in *People v. Moore* (2011) 51 Cal.4th 386, 406, "That an event *could* have happened does not by itself support a support a deduction or inference that it did happen. . . . Jurors should not be invited to build narrative theories of a capital crime on speculation." (Italics in original.) That is exactly what the prosecutor did in this case, when he asked the jury to assume that appellant intended to kill

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[31] <https://maps.google.com.> [distance .4 miles east of 12642 Ave. 328, Visalia, CA]; see also Clerk's Transcript on Appeal, Municipal Court File:6-7, 15.)

and rob at the outset, and then based his theory of first-degree premeditated murder[32] on that speculative scenario. (See also *People v. Pearson* (2012) 53 Cal.4th 306, 319 [use finding insufficient where it was argued that use could be inferred from other criminal acts, as to do so "would go beyond deduction to speculation."])

The prosecution's case for deliberate and premeditated murder was based on unsupported assertions and circular reasoning rather than reasonable inferences based on the evidence. The prosecution's evidence of planning was nothing more than sheer speculation, and "speculation is not substantial evidence." (*People v. Killebrew* (2002) 103 Cal.App. 4th 644, 661; disapproved on another ground by *People v. Xue Vang* (2011) 52 Cal.4th 1038.) Rather, the evidence shows the killing was the product of "an unconsidered or rash impulse hastily executed," a manner which, by definition, is contrary to the meaning of premeditated and deliberate murder. (*People v. Anderson, supra*, 70 Cal.2d at p. 27, quoting *People v. Thomas, supra,* 25 Cal.2d 880 at p. 898 ["deliberate" means characterized by reflection; dispassionate; not rash].)

2. Insufficient Evidence of Motive Consistent With Planning and Deliberation

Motive evidence consistent with planning and deliberation was similarly lacking. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*Anderson, supra,* 70 Cal.2d at pp. 26-27.) Under the *Anderson* analysis, such motive evidence, *alone*, is *insufficient* to support a finding of premeditation and deliberation. It must

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[32] The prosecution's theory of the lying-in-wait special circumstance was also based on the same speculation. (See Argument II, *post.*)

be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*Id.* at pp. 26-27.)

There was no evidence that appellant possessed the kind of motive to kill contemplated by *Anderson* to support a finding of premeditation and deliberation. The prosecution argued appellant and Contreras wanted to steal the drugs and that they killed the victims in order to use the car as a get-away vehicle and to escape undetected from the robbery, which was committed in a residential neighborhood. (8RT:1658-1659.) This motive theory is contradicted by the record, given that the prosecution presented numerous eyewitnesses to the homicide and its aftermath. (See, e.g., Statement of Facts, *ante*.) Rather, nothing but speculation refutes the conclusion that at some point after leaving the market, after appellant learned that the buyer he had set up was not going to come through, that appellant decided to take the drugs.[33]

According to Lopez, the four drove less than a quarter of a mile down the road, a driving distance of less then 30 seconds, into a residential neighborhood before appellant instructed Sanchez to pull over. Appellant

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[33] It is appellant's unequivocal contention on appeal that he was not present at the scene of crime. To the extent that there is any discussion of a robbery perpetrated by appellant, it is not intended as a concession of appellant's presence. Even assuming an evidentiary basis for the conclusion appellant was present, nothing in this brief is intended as a concession that the evidence establishes beyond a reasonable doubt that drugs were taken from the victims. Indeed, Lopez himself denied for years any connection to drug dealing or that drugs had anything to do with this crime. (6RT:1311.)

immediately demanded the drugs, and Sanchez reached down under the seat and handed them back to appellant. It can be inferred from the physical evidence as well as the testimony of Lopez that Sanchez attempted to grab the gun appellant was holding, and was shot. There remains no substantial evidence that appellant possessed a motive to kill, as opposed to rob, Sanchez.

Moreover, even assuming arguendo that there was evidence that appellant was motivated to kill Sanchez, there was no evidence of prior planning or manner of killing, required by *Anderson* in addition to motive, to support a finding of premeditation and deliberation. (*Anderson, supra*, 70 Cal.2d at pp. 26-27.) The killing exemplifies a "mere unconsidered or rash impulse hastily executed." (*Id.* at p. 27.)

3. Insufficient Evidence of a "Particular and Exacting" Manner of Killing

This Court in *Anderson* described the manner-of-killing factor as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

The manner in which Sanchez was shot and Lopez was stabbed strongly militates against a finding of premeditation and deliberation. Rather than being calm and exacting, the incident had all the earmarks of a shooting that occurred during the struggle for the gun and that the stabbing and shooting of Lopez flowed frantically thereafter. Lopez testified that appellant held the gun at Sanchez's head and demanded the drugs. Sanchez

retrieved them from under his seat, and handed them back to appellant with his right hand. Lopez, testifying through an interpreter, said that next "he pulled the pistol." There was much debate about the meaning of this phrase, and to whom the "he" referred. The prosecution dismissed the literal meaning of the interpreter's translation of what Lopez said as an "inadvertence in the language" that should not be interpreted literally. He argued simply, "Actually, we know and we've heard that 'pulled the gun' means to pull the trigger." (8RT:1767.) However, the evidence shows otherwise. Sanchez was shot once, with the bullet entering the left rear of his head. (4RT:923-935, 941.) Gunshot residue was found on the left side of the driver's head rest. (4RT:768-770; 907-915.) Detective Pinon testified regarding People's Exhibit No. 4, a photograph of Sanchez's left hand. (4RT:744-745.) His wrist watch was pulled up off of his wrist to the mid-palm area. (*Ibid.*) Lopez testified that when he said "he pulled the pistol," he was referring specifically to the head of the pistol, and not the trigger. (6RT:1264.) This evidence, rather than speculation and questionable translation, shows that there was a struggle – that when Sanchez handed back the drugs to appellant with his right hand, he used his left hand in an attempt to wrest the gun from appellant, and that he lost that struggle. In short, appellant's actions do not suggest that he "killed as the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra*, 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26; cf. *People v. Lee, supra*, 51 Cal.4th 620 at p. 666 [evidence that defendant announced intention to "straighten out" victim, forcibly removed her from car, had a conversation with victim, restrained her, pulled out a gun and fired at her head, then fired

six more shots into her head showed manner of killing was consistent with a premeditated and deliberate intent to kill]; *People v. Welch* (1999) 20 Cal.4th 701, 759 [evidence defendant "straddled [the victim's body] after he had shot her once and shot her again" supported finding that manner of killing was consistent with premeditated and deliberate murder]; *People v. Jennings* (2010) 50 Cal.4th 616, 646 [evidence that victim was systematically starved and continuously abused, and a potentially lethal dose of medication was deliberately administered showed manner of killing was consistent with a preconceived design to kill]; *People v. Brady* (2010) 50 Cal.4th 547, 565 [evidence that defendant approached prone victim, stopped over him and then aimed showed a "calculated design to ensure death rather than an unconsidered explosion of violence" [citation omitted].)

The attack on Lopez was chaotic – he was shot at and stabbed multiple times but still escaped, which strongly suggests the lack of any "exact" manner of killing. The victim's car had to be turned around and driven right back through the crime scene and past multiple eyewitnesses. It is not reasonable to infer from these facts an "exact" manner of killing as contemplated in *Anderson.*

While this Court has held that a single gunshot fired from a gun placed against the victim's head in an "execution-style manner" supports a finding of premeditation and deliberation, that is true only when there is no evidence of a struggle. (*People v. Romero* (2008) 44 Cal.4th 386, 401 [citations omitted].) Here, evidence of a struggle negates the inference that the manner of the killing showed the killing was premeditated and deliberate. Regardless, the fact that the victim in this case was shot in the back of the head was the result not of the fact that this was an "execution-

style" slaying, but of the fact that appellant happened to be sitting in the back seat of the car. The only place appellant could have shot Sanchez was from behind.

In sum, there is simply no evidence that is reasonable, credible and of solid value to support a finding that Sanchez's killing was deliberate and premeditated first degree murder. Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding of a premeditated and deliberated killing. The only reasonable interpretation of the evidence presented at trial is that the killing resulted from an unconsidered or rash impulse, or was the result of a struggle for the gun. The first degree murder conviction cannot be upheld on the prosecution's theory of premeditated and deliberate murder.

If this Court upholds the first degree murder verdict in this case, then appellant submits that this Court's precedent violates due process and Eighth Amendment principles in that this Court's frequent reliance of the "great rapidity" with which thoughts may ripen into a premeditated and deliberated intent to kill, coupled with the Court's recent interpretation of the *Anderson* factors, have collapsed any meaningful distinction between first and second degree murder. (Mounts, Premeditation and Deliberation in California: Returning to a Distinction Without a Difference (2002) 36 U.S.F. L.Rev. 261, 327-328.) (Contra *People v. Solomon* (2010) 49 Cal.4th 792, 812-813.)

II.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF LYING-IN-WAIT; AS APPLIED TO THIS CASE, THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS VAGUE AND OVERBROAD

A. Introduction

As discussed above, due process requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. The reasonable doubt standard is fully applicable to special circumstance proceedings. In addition, a criminal defendant's rights to a fair trial and to reliable guilt and penalty determinations under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs are also violated when criminal sanctions are imposed based on legally insufficient proof.

This Court has never put its imprimatur on any lying-in-wait special circumstance case like this one, where the evidence of premeditation and deliberation was weak, where the evidence failed to show that the concealment of purpose was murderous, where the evidence showed the legally relevant period of watching and waiting occurred in a few seconds, and where the victim was not surprised by the attack. This case is qualitatively different from any other case in which this Court has upheld a sufficiency challenge on appeal to a lying-in-wait special circumstance; if this Court denies appellant's sufficiency challenge, then the special circumstance is unconstitutional in the abstract and as applied to this case. Argument III and Argument XI, *post*, are incorporated by reference as if set forth fully herein.

An analysis of this Court's precedent shows that strong evidence of premeditation and deliberation compensates for a paucity of evidence of one or more elements of the "lying-in-wait" special circumstance. The evidence in this case has no such strong showing of premeditation and deliberation to buttress the paucity and/or absence of evidence of each element of that special in this case. Argument I, *ante*, is incorporated by reference as if fully set forth herein. Viewing the evidence in the light most favorable to the prosecution, the facts do not support the special circumstance. The special circumstance finding must be reversed and appellant's death sentence must be vacated; retrial on the lying-in-wait special circumstance is barred. (*People v. Lewis* (2008) 43 Cal.4th 415, 515 (*Lewis*), citing *Burks v. United States* (1977) 437 U.S. 1, 18 and *People v. Hatch* (2000) 22 Cal.4th 260, 271.)

B. Summary of Proceedings Below

At the close of the prosecution's evidence at the guilt phase, appellant moved pursuant to section 1118.1 to strike the "lying-in-wait" special circumstance for insufficient evidence. Appellant argued that precedent required evidence of a prior intent to kill as well as a concealment of purpose. He argued that there was no evidence of an intent to murder by surprise prior to getting in the car with the victim; appellant was armed because a drug deal was planned and it was common for participants in a drug deal to be armed in order to protect themselves. (6RT:1333-1341.)

Appellant also argued that, based on Lopez's description of events, there was no evidence of a substantial period of watching and waiting for the opportune time to act. (6RT:1341-1342.)

Finally, appellant argued that one cannot tell whether the defendant did anything "immediately thereafter" in the absence of some showing of

purpose, and, alternatively, the victims were not "unsuspecting" nor taken by surprise given evidence that both Sanchez and Lopez were extremely nervous that day. (6RT:1342-1343.) Appellant argued that his interpretation of the requirements of the "lying-in-wait" special circumstance were consistent with precedent and required, at the risk of "open[ing] it up so you can take just about any kind of situation where [or add [sic] after were] some unsuspecting person is killed and call that "lying-in-wait"." (6RT: 1342-1345.)

The prosecution argued that precedent did not require an articulated statement of intent to commit the act prior to the concealment of purpose and that circumstantial evidence showed that appellant had a plan to kill: both appellant and Contreras were armed; Galaviz's testimony that appellant said they had killed a pig but that the other one got away evidenced a plan to kill prior to the homicide; the ruse used to get Sanchez to drive down the road to wait for the buyer to meet them; appellant and Contreras needed the car to get away; and appellant and Contreras were very nervous when they returned home constituted evidence that they did not contemplate a survivor and were concerned about getting caught. (6RT:1347-1355.)

Appellant countered that evidence of a plan is counter-indicated because: the crime happened in a residential area; the evidence showed that appellant told Sanchez to stop along the side of the road, not that appellant directed Sanchez to go there; and the crime was poorly executed. (6RT:1353-1354, 1356-1358.)

The court denied appellant's section 1118.1 motion. (4CT:1029-1031.) Citing to *People v. Morales* (1989) 48 Cal.3d 527 (*Morales*), the court held there existed "substantial evidence to support a finding that a

factual matrix exists sufficiently distinct from an ordinary premeditated murder to justify submitting this special circumstance to the jury for determination," ruling as follows:

> There is reasonable and credible evidence that Casares armed himself with a gun and the co-defendant, Contreras hid a kitchen knife in his pants before they entered the back seat of the vehicle driven by Sanchez. The alleged purpose of their meeting with Sanchez and Lopez was to effectuate a sale of cocaine. A reasonable inference that can be drawn from this evidence is that Casares and Contreras intended to rob Sanchez and Lopez or that they intended to kill them. In any event, they concealed the fact that they carried weapons until the fatal moment of their attack against Sanchez and Lopez. The evidence clearly shows a substantial period of time passed while Casares and Contreras sat in the back seat of the automobile watching and waiting for an opportune time to act. According to Lopez, they acted in concert; Casares suddenly holding a gun to the head of Sanchez, while Contreras immediately thereafter pressed a knife to the throat of Lopez. This concerted action by Casares and Contreras is solid evidence of a plan by them to carry out their criminal act at an opportune time and place.
>
> Their purpose was not disclosed to the victims until Casares held a gun to Sanchez' head and demanded the cocaine. The car was driven several miles and made two stops before Casares made his surprise attack on Sanchez. By placing themselves in the back seat, Casares and Contreras commanded a position of advantage that facilitated their surprise attack on the unsuspecting victims. Hence, the elements of waiting, watching and secrecy all were present.
>
> The final requirement for murder by means of "lying-in-wait", is one which occurs so immediately following a period of watching and waiting that there can be no lapse in the culpable state of mind between the homicide and the period of watchful waiting. *People v. Berberena* 209 [1989] Cal.App.3d 1099, 1107, citing *People vs. Edelbacher* 47 [1989] Cal.3d 983, 1021. In the instant case, Casares drew his gun, held it to Sanchez' head and demanded the cocaine. It was immediately handed back to him by Sanchez who was shot at that very moment by Casares. It can be argued that the period of

> watchful waiting and concealment of purpose ended when Casares made known his plan to rob Sanchez by holding a gun to his head. But the killing of Sanchez so close in time to Casares' disclosure of his intent to rob, bespeaks a continuous and unbroken plan to wait, watch, rob and kill. See *People v. Tuthill* [1947] 31 Cal 2d 92.

(4CT:1029-1031.)

In his closing argument, the prosecutor argued that appellant and Contreras concealed their purpose "behind a facade of friendliness," that the "substantial period of waiting" began when the two armed themselves and left their residence in the victim's car. (8RT:1686-1687.) The prosecution further argued that the attack immediately followed the "lying-in-wait" and that it was a surprise because "[t]here is simply no question that when you have somebody with a gun behind you and he draws that gun, you know, and fires it, you know, you don't even have an opportunity to be surprised." (8RT:1688.)

As it will be shown below, the evidence that the homicide of Sanchez was committed while lying-in-wait was legally insufficient as to each of the three elements of the special circumstance. In any event, the insufficiency of the evidence as to any one of the elements requires reversal of the special circumstance finding. (*People v. Ochoa* (1998) 19 Cal.4th 353 at pp. 413-414.)

C. Whether Considered at the Time the Motion to Dismiss Was Made or Following the Defense Case, the Evidence Was Legally Insufficient to Support the Lying-In-Wait Special Circumstance

"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence in support of a conviction, that is, 'whether from the evidence, including all

reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the crime charged.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 139, fn. 13.) The question "is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1024.) The sufficiency of the evidence is tested at the point the motion is made. (§ 1118.1; *People v. Shirley* (1982) 31 Cal.3d 18, 70-71.) The question is one of law, subject to independent review. (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.)

This Court has held, "[i]n reviewing a claim that there was insufficient evidence of the special circumstances to find them true, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*People v. Ochoa*, *supra*, internal quotes and citation omitted; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 790 [sufficiency of the evidence of a special circumstance finding is reviewed under the same test applied to a conviction].) Reviewed in the light most favorable to the judgment, "the record must contain reasonable and credible evidence of solid value," such that a reasonable trier of fact could find the special circumstance to be true. (*People v. Stevens* (2008) 41 Cal.4th 182, 201 (*Stevens*), quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The question of whether a lying-in-wait special circumstance has occurred "is often a difficult one which must be made on a case-by-case basis, scrutinizing all of the surrounding circumstances." (*People v. Morales, supra,* 48 Cal.3d at pp. 557-558.) At the time of the instant capital crime, it required "an intentional murder, committed under circumstances

which include: (1) a physical concealment or concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at pp. 554-555, 557; see *People v. Carpenter* (1997) 15 Cal.4th 312, 388 (*Carpenter*); § 190.2, former subd. (a)(15); 5CT:1092-1093 [CALJIC 8.81.15 (1989 Revision)].)

Appellant will show, in turn, the failure of evidence, whether considered at the time of the section 1118.1 motion or following the defense case, as to each of these elements.

Appellant also contends that the trial court erred in providing an instruction to the jury on the lying-in-wait special circumstance. That issue, however, is essentially the same as that stated above; whether there is sufficient evidence to support the true special circumstance finding. (See *People v. Ceja* (1993) 4 Cal.4th 1134, 1138, fn. 1 [to decide the issue of whether the trial court should have instructed on lying-in-wait as a theory of first degree murder reviewing court must determine whether there was substantial evidence to support a jury verdict].) Whether the appellate issue is framed as insufficient evidence to support a conviction, or insufficient evidence to warrant the giving of an instruction, this Court must determine whether there was substantial evidence to support the jury verdict. The true finding of the lying-in-wait special circumstance violated appellant's state and federal constitutional guarantees of due process as to both issues. For the sake of brevity, appellant will only discuss the issue as a question of the sufficiency of the evidence to support the conviction, but challenges the conviction on both legal grounds.

1. There Was Insufficient Evidence That Appellant Concealed a Deadly Purpose

While lying-in-wait applies to those who did not physically conceal themselves from their victims, the law does require that the defendant conceal his or her true intent to kill so that he or she can take the victim by surprise from a position of advantage. (*Morales*, *supra*, 48 Cal.3d at p. 555.)[34] "A concealment of purpose suffices if it is combined with a surprise

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[34] On a national level, the special circumstance alleged in this case is an outlier in allowing "concealment of purpose" to suffice as an element of the special circumstance, as opposed to actual concealment of presence from the victim. Only three other states include murder by "lying-in-wait" as an "aggravating" or "special" death qualifying circumstance. H. Mitchell Caldwell, The Prostitution of "Lying-in-Wait" (2003) 57 U. Miami L. Rev. 311, 324 & fn.91; see also Colo. Rev. Stat. § 16-11-103(5)(f) Ind. Code Ann.§ 35-50-2-9(A)(3); Mont. Code Ann. § 46-18-303(4) (2001); see also *People v. Webster* (1991) 54 Cal.3d 411, 467-468 (conc. & dis. opn. of Broussard, J., ["Of the 35 other states imposing the death penalty, only 3 treat "lying-in-wait" as either a special circumstance or an aggravating factor. [Citations] . . . [A]t most two other states would permit imposition of the death penalty for murders falling under the *Morales* criteria; at least forty-seven states would not"); cf. *Thacker v. State* (1990), Ind., 556 N.E.2d 1315, 1325 ["We . . . construe this statutory aggravator as intending to identify as deserving consideration for the penalty of death those who engage in conduct constituting watching, waiting and concealment with the intent to kill, and then choosing to participate in the ambush upon arrival of the intended victim."].) Although Montana has not engaged in detailed construction of its "lying-in-wait" aggravator, the only cases in which it has applied its "lying-in-wait" eligibility factor contain overwhelming evidence of lengthy waiting, planning and premeditation. (See *State v. Dawson* (1988) 233 Mont. 345, 358 [761 P.2d 352, 360] [evidence of "lying-in-wait" sufficient where when defendant approached victim in the parking lot "he had already laid out tape and gags on a bed in his room. He approached her carrying a duffel bag from which the muzzle of a gun protruded."]; *Fitzpatrick v. State* (1981) 194 Mont. 310, 332 [crime contemplated "well in advance of the events which led to the killing of [victim], and []

(continued...)

attack on an unsuspecting victim from a position of advantage." (*People v. Edwards* (1991) 54 Cal.3d 787, 825 (*Edwards*), citing *Morales*, *supra*, 48 Cal.3d at pp. 555, 557 and *People v. Webster* (1991) 54 Cal.3d 411, 448 (*Webster*).) The concealed purpose referred to is a murderous one rather than some other purpose. Indeed, as this Court has stated, "[t]he factor[] of concealing murderous intent" is one of the "hallmark[s]" of murder by "lying-in-wait". (*Stevens, supra,* 41 Cal.4th at p. 201, quoting *People v. Hardy* (1992) 2 Cal.4th 86, 164 (*Hardy*).)

There must be sufficient evidence that the defendant concealed an intent to kill the victim at the time he was watching and waiting for the victim. (See e.g., *Stevens*, *supra*, 41 Cal.4th at p. 203 [sufficient evidence to establish that defendant "concealed his deadly purpose"]; *People v. Jurado* (2006) 38 Cal.4th 72, 119 (*Jurado*) [sufficient evidence that defendant concealed from victim his "purpose to kill her"]; *People v. Moon* (2005) 37 Cal.4th 1, 22 (*Moon*) [defendant concealed his purpose such that the "victim could not have anticipated defendant's deadly intentions"]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150 (*Gutierrez*) [sufficient evidence that defendant concealed "his true murderous intentions"]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 500 (*Hillhouse*) [sufficient evidence

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[34](...continued)
immediately before the robbery petitioner sat in his car watching the Safeway Store and then the drive-in bank, waiting for the victim."].) Following Broussard's dissenting opinion in *Webster* surveyed the field, the Colorado courts have explained that "lying-in-wait" is "widely understood" to mean that the "the killer conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) Thus, California may be alone in the nation in allowing concealment of purpose to support a death penalty verdict.

where defendant concealed his intent to kill until he struck victim]; *People v. Gurule* (2002) 28 Cal.4th 557, 631 (*Gurule*) [defendant's concealment of "deadly purpose" was obvious from the evidence]; *Carpenter, supra,* 15 Cal.4th at p. 389 [where defendant lies in wait intending to rape and then kill the elements of the "lying-in-wait" are met]; *People v. Sims* (1993) 5 Cal.4th 405, 433 (*Sims*) [substantial evidence that defendant concealed purpose to rob and kill]; *Hardy, supra,* 2 Cal.4th at p. 164 ["the jury could reasonably conclude defendants concealed their murderous intention"].)

In his case, appellant did not conceal his presence to the victim. Appellant will now show the qualitative difference between the cases in which this Court has found sufficient evidence of concealment of purpose, i.e., the intent to kill, and the instant case.

This Court has rejected sufficiency challenges regarding the evidence of the concealment of murderous intent element of the lying-in-wait special circumstance in cases in which evidence of another homicide or attempted homicide were introduced to show intent to kill in the homicide in which a lying-wait-special circumstance was alleged. For example, in *Carpenter*, this Court held that Carpenter's intent to kill – as opposed to rape – the victim was supported in part by uncharged crimes in which he both raped and killed. (*Carpenter, supra*, 15 Cal.4th at pp. 378, 389.)

Similarly, in *Stevens*, this court found sufficient evidence of the defendant's intent to kill a driver he shot on a freeway when the killing occurred seconds after the defendant shot at, but did not kill, another driver on the freeway in the same manner. (*Stevens, supra*, 41 Cal.4th at pp. 187-189.) Stevens was convicted of killing four people and wounding six during a series of random highway shootings. (*Ibid.*) This Court held that

these facts were sufficient to establish the element of concealment of purpose – i.e., intent to kill. (*Id.* at p. 203.)

And in *Moon*, the defendant first killed his former girlfriend, Melitta, in her home, after she broke off the relationship contrary to his wishes. The lying-in-wait special circumstance was found true as to his second victim, Melitta's mother, who came home shortly after Melitta's death. The Court found concealment of intent to kill Melitta's mother within the meaning of the lying-in-wait special circumstance was supported by the prior killing of Melitta and because the defendant concealed his presence and then killed her mother shortly thereafter, in the exact same manner as he killed Melitta. (*Moon, supra*, 37 Cal.4th at pp. 22-23.)

In contrast to these cases, in the instant case there was no evidence that appellant had committed another homicide or attempted homicide before the instant crimes. Further, this Court sustained the lying-in-wait special circumstance in *Moon* as to Melitta's mother in part because appellant concealed not only his purpose, but his presence to his victim, while he waited for her to get to the top of the stairs, where he pushed her down without speaking to her. (*Moon, supra*, 37 Cal.4th at p. 22.) There was no such concealment of appellant's person, and appellant's purpose – to rob – was announced to his victim when he demanded the drugs from the victim at gunpoint.

In cases that do not involve evidence of other homicides or attempted homicides, this Court has found sufficient evidence of concealment of purpose within the meaning of the lying-in-wait special circumstance when there was evidence of a pre-crime demonstration, either explicitly or demonstratively, of the intent to kill. For example, in *Jurado*, the defendant borrowed a cord from a friend and then wrapped it around his

own neck, yanked, and said "It will do." The victim was then lured to an isolated area in a car driven by an accomplice. The defendant sat in the back and strangled the victim with the borrowed cord in an area suitable for disposing of the body without any witnesses. Defendant had a motive to kill the victim, as he was concerned that she would warn a potential murder victim of defendant's plan to kill him. (*Jurado, supra*, 38 Cal.4th at pp. 82-88.) This Court held these facts provided sufficient evidence that defendant concealed his intent to kill the victim. (*Id.* at p. 119.)

In *Hillhouse*, the defendant announced to his brother his plan to kill the victim before driving the victim to a remote area where, while the victim was urinating, Hillhouse stabbed him to death and dumped his body. (*Hillhouse, supra*, 27 Cal.4th at pp. 480-481.) This Court affirmed the lying-in-wait special circumstance in part by finding that Hillhouse revealed his intent to kill to his brother prior to committing the crime, and that he concealed that purpose from the victim. (*Id.* at p. 500.)

As in *Gutierrez* and *Hillhouse*, a pre-announced plan to kill as well as to rob the victim was also extant in *Gurule, supra*, 28 Cal.4th at pp. 585-586, and a number of other cases in which this Court affirmed a lying-in-wait special circumstance finding. (See, e.g., *Hardy, supra*, 2 Cal.4th at p. 164 [defendant conceded pre-arranged plan to kill, challenged only the watching and waiting component of the lying-in-wait special circumstance]; *Morales, supra*, 48 Cal.3d at p. 541 [before the killing defendant told a third party of his intent to strangle the victim]; *Webster, supra*, 54 Cal.3d at pp. 424-425, 448; *Gutierrez, supra*, 28 Cal.4th at pp. 1107-1109 [defendant stole firearms, waited in a car for hours for his estranged wife and her lover to come home before donning a mask, informed his cohort of his murderous intentions, barged into the home and killed the lover]; *People v. Cruz*

(2008) 44 Cal.4th 636, 679-680 [defendant and another verbally agreed to shoot officer from backseat of patrol car when time was opportune].)

In contrast to these cases, no evidence exists regarding any pre-existing intent to kill, as opposed to rob, the victim in this case. Once again in this case, there was no evidence that appellant planned to kill Sanchez. There exists no evidence of a statement by appellant, before the crime, to kill Sanchez. Appellant's possession of a handgun does not bespeak an intent to kill, as it is not uncommon for people involved in the sale of illegal narcotics to be armed. The fact that appellant carried a gun when a drug sale was to take place does not, in and of itself, exhibit an intent to kill those involved in the sale. In fact, appellant's alleged directive to Contreras to "secure" Lopez connotes an attempt to strong-arm rob the victims and contradicts an intent to kill in this case, for if the plan was to kill Lopez appellant would have said "kill him" rather than "secure him." The alleged post-crime statement of "we killed a pig" reveals not pre-existing intent to kill, but rather portrays an after-the-fact justification for a robbery gone bad.

For all the foregoing reasons, appellant submits there is no substantial evidence in the record that appellant possessed an intent to kill, as opposed to rob, Sanchez and concealed that purpose from him. The failure of proof as to this element of the lying-in-wait special circumstance requires reversal of the true finding of the special circumstance and appellant's death judgment.

2. There Was No Substantial Period of Watchful Waiting For an Opportune Time to Attack

The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he

acts out of rash impulse. (See *Moon, supra,* 37 Cal.4th at p. 24.) As with the element of concealment, the waiting period is intrinsically connected to a murderous intent; it necessarily involves waiting for an opportune time to attack the victim, not merely to act in accord with some other purpose. (See, e.g., *id.* at p. 22 [defendant "waited and watched for an opportune moment to attack" victim]; *People v. Michaels* (2002) 28 Cal.4th 486, 516 ["[w]aiting and watching until a victim falls asleep before attacking is a typical scenario of a murder by means of "lying-in-wait""]; *Hillhouse, supra*, 27 Cal.4th at pp. 500-501 [substantial period of watching and waiting for opportune time to attack from position of advantage]; *Edwards, supra,* 54 Cal.3d at p. 825 ["jury could reasonably infer defendant waited and watched until [victims] reached the place of maximum vulnerability before shooting"]; *People v. Ruiz* (1988) 44 Cal.3d 589, 615 ["[f]rom such evidence, the jury reasonably could infer that defendant watched and waited until his victims were sleeping and helpless before executing them"]; *People v. Mendoza* (2011) 52 Cal.4th 1056 [challenge to sufficiency of evidence of watching and waiting element rejected when defendant knew that under the terms of his parole he faced over two years in a correctional institution for his possession of a gun, when officer pulled up defendant ignored his friends' suggestions to simply flee the scene, officer indicated he would conduct a weapons search, defendant acted as if he were complying with officer's direction to sit down on the curb, defendant maneuvered himself to a position of advantage over the unsuspecting officer and drew the gun while standing behind his girlfriend, and defendant pushed girlfriend aside and shot officer in the face].)

In addition, at the time of appellant's trial, the lying-in-wait special circumstance required that the murder must have occurred after a

"substantial" period of watchful waiting (*Morales, supra*, 48 Cal.3d at p. 557) and without any "cognizable interruption" following the period of "lying-in-wait". (*Id.* at p. 558; *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011 (*Domino*).) The victim's death must follow in a continuous flow from the concealment and watchful waiting. (*People v. Michaels* (2002) 28 Cal. 4th 486, 517; see also *People v. Michaels, supra,* 28 Cal.4th at pp. 516-517 [half hour spent hiding outside apartment for victim to fall asleep does not constitute cognizable interruption since the victim was killed in an uninterrupted flow of events from the time defendant moved from hiding place]; *People v. Combs* (2004) 34 Cal.4th 821, 852-854.)

In the instant case, the prosecution argued to the jury that the "watching and waiting" component of the special circumstance began when appellant left the house and got into Sanchez's car, and continued right up until the time Sanchez was shot. (8RT:1686-1687.) The trial court denied appellant's section 1118.1 motion to dismiss the special circumstance, finding in part that the "evidence clearly shows a substantial period of time passed while Casares and Contreras sat in the back seat of the automobile . . . ¶ The car was driven several miles and made two stops before Casares made his surprise attack on Sanchez." (4CT:1029-1031.)

However, there was a cognizable interruption – appellant and Contreras and Sanchez and Lopez went their separate ways at the store parking lot – appellant went to a nearby house and Contreras stayed in the car while Sanchez and Lopez went into the store, by themselves, and bought beer and then drank the beer. The interruption continued long enough for both the purchasing of the beer and its imbibing to take place. Under these circumstances, the argument that the watching and waiting began at the

time appellant and Contreras entered Sanchez's car is legally incorrect, and legally insufficient to support the "substantial period of watching and waiting" required for the lying-in-wait special circumstance. By law, the period of watching and waiting began, at the earliest, only when the four were again together in Sanchez's car.

This case is materially different from *People v. Combs* (2004) 34 Cal.4th 821 (*Combs*), in which this Court rejected a sufficiency challenge to a lying-in-wait special circumstance where the defendant claimed there had been a cognizable interruption in the course of events. In *Combs*, defendant confessed that he and friend, Purcell, planned to rob and kill the victim. To that end, he devised a ruse about needing a ride to a campsite to meet a fictitious friend. Using this ruse, he tricked the victim into giving him and his friend a ride. Defendant sat in the backseat holding cords that he had obtained earlier, waiting for an opportune time to strangle the victim. When they reached the canyon, defendant saw a trailer and pretended that it belonged to his friend. The three started walking towards the trailer, but instead returned to the car and drove to the trailer after defendant saw that a road led to it. As the victim drove to the trailer, defendant, who was again seated in the backseat behind her, removed the electrical cord from his pocket and wrapped it around his wrists. After the victim parked the car, defendant—from his position of advantage—surprised her by placing the electrical cord over her head and strangled her. (*Combs, supra*, 34 Cal.4th 830-832, 852-854.)

In contrast, with regard to the cognizable interruption, the victims in this case went their separate ways, unaccompanied by either appellant or Contreras, when they went into the store, bought some beer, and drank it. There is no evidence that appellant or Contreras saw the victims during this

period, much less were they "watchfully waiting" for them.[35] And while the prosecution argued appellant pretended go to the house of a potential buyer for the drugs, and then used a ruse to get Sanchez to go down the road a bit to meet that buyer, there is simply no evidence of such a ruse aside from the prosecution's conclusory allegation that no buyer had ever existed. (See *People v. Stevens*, *supra*, 41 Cal.4th 182 at p. 214 (conc. opn. of Werdeger, J.) [upholding "lying-in-wait" where "[t]his case, . . . involves active deceit as to purpose–a misrepresentation or ruse that lulls the victim into a false sense of security"].) In *Combs*, the defendant confessed to his plan to kill and to his trickery in carrying out that plan. There is no evidence of such a

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[35] In *Sims, supra*, 5 Ca.4th at p. 433, this Court denied a challenge that the "watching and waiting" component of the lying-in-wait special circumstance was not extant because the defendant did not actually watch the victim, in what it called a "textbook example" of a lying-in-wait special circumstance. There, the defendant, who was a disgruntled ex-employee of the Domino's Pizza chain, and his cohort purchased a clothesline and knife, then rented a motel room, telephoned a Domino's Pizza parlor, and lured the victim to the motel room on the pretext of ordering a pizza. They waited for the victim in the motel room, overpowered him upon his arrival, carefully bound him with the clothesline, gagged him, and left him either dead or to drown in a bathtub full of water. The defendant contended that although the evidence supported a finding that he his cohort waited for the victim in the motel room, there was no evidence they were "watching" him during the period of waiting. This Court disagreed, holding that although there was no evidence to suggest that the defendant was watching the victim as he left the pizza parlor and drove to the motel, there was "substantial evidence that defendant, after placing the pizza order by telephone, was waiting in his motel room and was "watchful," i.e., alert and vigilant in anticipation of [the victim's] arrival so that defendant could take him by surprise. The special circumstance element of 'watchful' waiting therefore was satisfied." (*Ibid.*) However, this case not a "textbook example" of a classic ambush situation described in *Sims*, as there was no evidence here that appellant possessed a murderous purpose.

ruse in this case - only speculation. Indeed, if the plan from the beginning was to pull over on the side of the highway and assassinate the victims on a public street in front of numerous witnesses, there was no need to stop and check the apartment first, leaving the intended victims with an opportunity to escape.

Thus, since there is no substantial evidence that the sale was a ruse from the beginning, the only legally arguable period of watching and waiting began in this case was when the three rejoined Contreras in the car and appellant informed Sanchez and Lopez that the buyer would meet them down the road and they drove .3 miles, a distance covered by car in less than 30 seconds.[36] Appellant has argued above that there was no evidence that he intended to kill Sanchez, as opposed to rob him, during this period. Appellant further argues that the relevant period of watching and waiting was not "substantial" within the meaning of the special circumstance allegation.

This Court has held that the period of watching and waiting need not continue for any particular length of time, "provided that the duration is such as to show a state of mind equivalent to premeditation or deliberation." (*Sims, supra*, 5 Cal.4th at pp. 433-434.) This Court has never fixed a minimum time period for this requirement. Indeed, " '[t]he precise period of time is ... not critical,' " so long as the period of watchful waiting is " 'substantial.' " (*People v. Moon, supra*, 37 Cal.4th at p. 23 ["a few minutes

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[36] The distance from the corner of Highway 63, the location of the market (CA-63 N/Rd 124/N Dinuba Blvd.), to the location the body was found, in front of 12642 Avenue 328 (Municipal Court CT:4) was .3 miles, a distance that can be traveled in approximately 30 seconds by car. (<http://maps.google.com>.)

can suffice"]; see *People v. Edwards* (1991) 54 Cal.3d 787, 825–826 [wait was "a matter of minutes"].) Seconds, however, does not a "substantial" period make, not within the meaning of the statute applicable at the time of the instant homicide. In this case, there was a cognizable interruption in any arguable period of watching and waiting when appellant went to a nearby house and Sanchez and Lopez left Contreras in the car while they entered the store, bought beer for themselves, and drank it. Therefore, the legally relevant time period in this case was seconds, not minutes.

Appellant is aware of no case in which a sufficiency challenge to the lying-in-wait special circumstance has been upheld where the period of time has been so short, and where there is no pre-homicide expression of intent to kill, evidenced by words or actions, which would negate any inference the killing was the result of rash impulse. (Compare *Jurado*, supra, 38 Cal.4th at p. 120 [amount of time to drive two to three miles substantial within the meaning of the lying-in-wait special circumstance]; *People v. Cruz* (2008) 44 Cal.4th 636, 680 [the lying-in-wait special circumstance upheld where victim drove two to three miles before the attack]; *People v. Lewis* (2008) 43 Cal.4th 415, 510 [period of time it took victim to open parked car door and "do something" is "not insubstantial" in case involving other homicide with same modis operandi]; *Stevens, supra*, 41 Cal.4th at pp. 201-203 [time it took to drive ahead on a highway, pull alongside a car, signal to another driver to slow down and shoot the driver not insubstantial when defendant had, moments before, shot at a second driver using the same modis operandi]; *Moon, supra*, 37 Cal.4th 1, 23-24 [Court doubts defendant's account that he waited 90 seconds for victim was accurate; more likely that, after killing his first victim, he waited longer than that for the second victim to arrive home]; *People v. Mendoza, supra*, 52 Cal.4th at

p. 1074 [only a few minutes elapsed between the time officer pulled up in his car and the time of the shooting; however, a rational jury could find that defendant, who was carrying a gun in knowing violation of his parole conditions, decided at or near the outset of the encounter that he would kill the officer rather than face a certain return to custody].)

There must be a qualitative, as opposed to simply a temporal, difference between the evidence sufficient to establish the "watching and waiting" element of the lying-in-wait special circumstance and ordinary deliberate and premeditated murder, or the special circumstance would be unconstitutional, for reasons stated in Argument III, *post*. While this Court has said that, in deciding issues of sufficiency of evidence, "comparison with other cases is of limited utility, since each case necessarily depends on its own facts" (*People v. Thomas* (1992) 2 Cal.4th 489, 516), comparing this case to other cases in which the evidence of "lying-in-wait" has been found to be sufficient is nevertheless instructive as in those cases there is always more evidence of premeditation and deliberation than found in this case. There is always some pre-homicide statement or actions, other than simply being armed, that indicate the intent to kill the victim. There is no such evidence in this case; thus, the "lying-in-wait" special fails as the state failed to adduce sufficient evidence of the "watching and waiting" element as defined by this Court's jurisprudence.

3. There Was No Surprise Attack Immediately after a Period of Watching and Waiting

Cases which have found lying-in-wait murder or special circumstances have included the following scenarios, all of which involve surprise: (1) a surprise attack from behind (*People v. Jurado*, *supra*, 38 Cal.4th 72; *People v. Combs* (2004) 34 Cal.4th 821; *People v. Nakahara*

(2003) 30 Cal.4th 705; *People v. Roberts* (1992) 2 Cal.4th 271; *People v. Morales*, *supra*, 48 Cal.3d 527); (2) an attack while the victim is asleep (*People v. Cole, supra,* 33 Cal.4th 1158; *People v. Michaels, supra,* 28 Cal.4th 486; *People v. Hardy, supra,* 2 Cal.4th 86; *People v. Ruiz*, *supra*, 44 Cal.3d 589); (3) an attack from hidden position (*People v. Stanley, supra,* 10 Cal.4th 764; *People v. Edelbacher* (1989) 47 Cal.3d 983); (4) a surprise attack after victim is lured to a location (*People v. Bonilla*, *supra*, 41 Cal.4th 313; *People v. Sims, supra*, 5 Cal.4th 405; *People v. Webster, supra,* 54 Cal.3d 411); and (5) a sudden attack without warning (*People v. Stevens, supra,* 41 Cal.4th 203; *People v. Moon, supra*, 37 Cal.4th 1; *People v. Gutierrez*, *supra*, 28 Cal.4th 1083; *People v. Hillhouse*, *supra*, 27 Cal.4th 469; *People v. Carpenter*, *supra*, 15 Cal.4th 312; *People v. Edwards*, *supra,* 54 Cal.3d 787.)

This case again does not fit into any of these categories. As in *Lewis*, there was no evidence that the victim was surprised. The Court in *Lewis* held that "the evidence suggests that each victim must have been aware of being in grave danger long before getting killed." (*People v. Lewis, supra*, 43 Cal.4th at p. 515.) One of the victims was forced into a dumpster and pleaded for his life before being shot. Another tried to escape, "an indication that she feared for her life." A third victim said she knew she was going to be killed and challenged the defendant to kill her. (*Ibid.*)

As discussed above, in this case, Sanchez was certainly aware that he was in danger for his life. According to Lopez, appellant held a gun to Sanchez's head and demanded the drugs. So Sanchez knew appellant had the gun. Sanchez reached down under his seat, took the drugs and handed them to appellant. Then Lopez testified that "he pulled the pistol."

Sanchez's watch was pulled up from his wrist to his hand, further corroborating the interpretation that Sanchez decided to grab the gun from appellant.

In denying appellant's motion to dismiss the special circumstance, the trial court acknowledged that "the period of watchful waiting and concealment of purpose ended when Casares made known his plan to rob Sanchez by holding a gun to his head." (4CT:1031.) Thus, the trial court acknowledged the shooting was not a surprise and not without warning. Indeed, the violence could hardly be a surprise to the drug dealing victims. Drug deals are inherently dangerous activities often accompanied by violence. Unsurprisingly, Sanchez was nervous before he undertook the drug deal in which he was killed. (5RT:1133, 1142.)

The evil which concealment of purpose "lying-in-wait" is meant to address is the situation in which a perpetrator lulls his unsuspecting victim into a "false sense of security" prior to a surprise attack. (See *People v. Stevens*, *supra*, 41 Cal.4th 182 at p. 203.) This is because "[t]hose who conceal from the victim their intent to kill by deceit or ruse could reasonably be regarded as more culpable than those who do not do so." (*Id.* at p. 214 (conc. opn. of Werdeger, J.). Here, the victim was a drug dealer understandably nervous that he was engaging in dangerous and illegal conduct, not an innocent and unsuspecting casualty of surprise violence. In short, there was insufficient evidence that the ultimate lethal act was a surprise to Sanchez.

D. The Lying-in-Wait Special Circumstance Cannot Be Applied to the Facts of This Case Without Making It Unconstitutionally Vague and Overbroad

As argued below, the lying-in-wait special circumstance is unconstitutional because it fails to provide the narrowing function required by the Eighth Amendment and fails to ensure that there is a meaningful basis for distinguishing those cases in which the death penalty is imposed from those in which it is not. (See Argument III, *post*, incorporated by reference herein.) In addition to appellant's challenge to the constitutionality of this special circumstance as written, appellant also contends that it cannot apply to the facts of this case consistent with these principles. For in order for this Court to find that there is sufficient evidence in this case to sustain the lying-in-wait special circumstance, it would have to find that the required element of concealment of purpose does not have to be a murderous one, that a substantial period of watching and waiting can occur in a few seconds and where evidence of premeditation and deliberation is weak, and that the victim does not have to be a surprised by the attack.

Such a construction of the lying-in-wait special circumstance would fail to "genuinely narrow the class of persons eligible for the death penalty" or "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) Thus, if this Court were to find sufficient evidence to sustain the special circumstance in this case it would violate appellant's Eighth and Fourteenth Amendment rights.

Appellant is aware that this Court has rejected the argument that an appellant's "actions were not of the same character as those found to

constitute "lying-in-wait" in other cases" by holding that the differences were "[n]o matter. Because each case necessarily depends on its own facts, and because defendant's conduct clearly satisfied each of the lying-in-wait requirements, the attempt to contrast this case with others falls short." (*People v. Mendoza, supra*, 52 Cal.4th at p.1075, citing *People v. Thomas* (1992) 2 Cal.4th 489, 516.) However, when a death eligibility factor cannot be sufficiently defined and applied in this Court's jurisprudence other than to say, "it depends on the circumstances," then that factor has lost its legitimacy as a death qualifying event.

E. Conclusion

In *People v. Combs* (2004) 34 Cal.4th 821, Justice Kennard noted that in the years between 1993 and the *Combs* decision in 2004, there were over 150 death penalty cases decided by this Court, in none of which lying-in-wait was the only special circumstance found true by the jury; Justice Kennard observed this fact "may well reflect a view that lying-in-wait should not be the sole basis for imposing the death penalty." (*Id.* at p. 869, (conc. opn. of Kennard, J.) Historically, "lying-in-wait" was "perceived as a particularly cowardly form of murder—hence the opprobrium heaped on the western villain who killed from ambush. And in earlier, more religious times, special scorn was reserved for those who murdered victims in a fashion intended to deprive them of the opportunity for reflection and contrition." (*Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 314, fn. 5, disapproved on other ground in *People v. Morales* (1989) 48 Cal.3d 527.) To quote Justice Moreno in his dissenting opinion in *Stevens, supra*:

> Whether we still share with the medieval Normans that special repugnance for lying-in-wait murder as originally conceived—an ambush assassination that involves physical concealment and a substantial period of watching and waiting—there is nothing to

> indicate that ordinary murder by surprise, the lying-in-wait special circumstance as construed by this Court, has been historically, or is regarded currently, as an especially heinous form of murder.

(41 Cal.4th at p. 223, dis. opn. of Moreno, J.) It is difficult to conceive that in today's society a killing between drug dealers struggling for illegal contraband would be considered an especially heinous form of murder.

Appellant knows of only two other cases decided since the death penalty was reinstituted in California in 1978 in which death sentences were affirmed and in which "lying-in-wait" was the only special circumstance allegation found true by the jury. (See *Edwards, supra*, 54 Cal.3d at p. 803-804; *Jurado, supra*, 38 Cal.4th at pp. 82-88.) In both *Jurado* and *Edwards*, the defendant's actions prior to the killing manifested an unambiguous intent to kill. (*Ibid.*) That is simply not present in this case.

Appellant acknowledges that several decisions of this Court may be interpreted, wrongly, to hold that the singular act of "waiting for an opportune time to launch a surprise attack from the backseat of a vehicle against the driver or front seat passenger can constitute [sufficient evidence of the] "lying-in-wait" special circumstance]." (*People v. Cruz* (2008) 44 Cal.4th 636, 680, citing *Jurado, supra,* 38 Cal.4th at p. 119; *Combs, supra,* 34 Cal.4th at p. 853; *Morales, supra*, 48 Cal.3d at p. 554.) However, as discussed above, in each *Cruz, Jurado, Combs* and *Morales* there was an admission by the defendant of his intent to kill the victim prior to the killing. There was no such evidence in this case.

This case is not a death case. As the prosecutor acknowledged in his opening statement to the jury, this is "just an ordinary everyday type of murder." (4RT:709.) The evidence does not support the sole special circumstance charged and found true by the jury. This Court must strike the

lying-in-wait special circumstance and appellant's death judgment must be reversed. Retrial on the lying-in-wait special circumstance is barred. (*Lewis, supra,* 43 Cal.4th at p. 515, citations omitted.)

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III.

THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE WHICH IT IS NOT

A. Introduction

"To avoid th[e] constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens, supra,* 462 U.S. at p. 876.) Under California law, the "special circumstances" enumerated in section 190.2 "perform the same constitutionally required 'narrowing function' as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Godfrey v. Georgia, supra,* 446 U.S. at p. 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)

B. The Lying-in-Wait Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants

Murder "perpetrated by means of . . . "lying-in-wait"" is murder of the first degree. (§ 189.) A defendant convicted of first-degree murder in California is rendered death eligible if a special circumstance is found. (See § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he defendant intentionally killed the victim while "lying-in-wait"." (Former § 190.2, subd. (a)(15).) The Court has described the lying-in-wait special circumstance as only "slightly different" from lying-in-wait first-degree murder (*People v. Hillhouse, supra,* 27 Cal.4th at p. 500; *People v. Carpenter, supra,* 15 Cal.4th 312, 388; *People v. Ceja, supra,* 4 Cal.4th at p. 1140, fn. 2), with the special circumstance requiring an intentional murder that occurs during a period "which includes (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage[.]" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149, quoting *People v. Morales, supra,* 48 Cal.3d 527, 557.)

1. There Is No Distinction Between the "Lying-in-Wait" Special Circumstance and Premeditated and Deliberate Murder

Although the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, the Court's construction of this prong has precluded such a narrowing function. As this Court has held, "the lying-in-wait special circumstance requires no fixed, quantitative minimum

time, but the "lying-in-wait" must continue for long enough to premeditate and deliberate, conceal one's purpose, and wait and watch for an opportune moment to attack." (*People v. Bonilla, supra,* 41 Cal.4th at p. 333, citing *People v. Sims, supra,* 5 Cal.4th at p. 433-434.) The victim need not be the object of the "watching" in order for this special circumstance to apply, as a period of "watchful waiting" for the arrival of the victim will satisfy this requirement. (*Sims, supra,* 5 Cal.4th at p. 433.) And, this "watchful waiting" may occur in the knowing presence of the victim (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558), or where the defendant reveals his presence to the victim. (See, e.g., *People v. Carpenter, supra,* 15 Cal.4th 312, 388-389.) This Court's expansive conception of "lying-in-wait" "threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*People v. Stevens*, *supra,* 42 Cal.4th at p. 213 (conc. opn. of Werdegar, J.).) In particular, the Court's holding in *Sims*, that the period of watchful waiting be no more than the time required for premeditation and deliberation, undercutting the requirement that this period be "substantial," resulted in a construction of the special circumstance that renders it indistinguishable from premeditated and deliberate first degree murder. (See *id.* at p. 219 (conc. and dis. opn. of Moreno, J.) & pp. 214-216 (conc. and dis. opn. of Kennard, J.).)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first-degree murder under the lying-in-wait special circumstance from other premeditated murders. The Court has, however, also adopted an expansive construction of the first prong of the lying-in-

wait special circumstance (concealment of purpose), and its case law has construed the meaning of lying-in-wait to include not only killing in ambush, but also murder in which the killer's purpose was concealed. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *id.* at p. 557 [noting concealment of purpose is characteristic of many "routine" murders].)

As for the final prong (a surprise attack from a position of advantage), it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. As Justice Mosk noted:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J).)[37]

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[37] See also Osterman & Heidenreich, *"Lying-in-Wait": A General Circumstance* (1996) 30 U.S.F. L.Rev. 1249, 1274: "Most of the time a victim is attacked when vulnerable, is unaware of the killer's intention, and is taken by surprise. How is this substantially different from other types of intentional killings? This question is particularly difficult to answer when one recalls that the actual period of "lying-in-wait" need not include 'watching,' the killing need not occur simultaneously with the "lying-in-wait" phase, and it will not matter if the defendant converses or argues with the victim, or even if there were warnings just prior to the attack."

In light of the broad interpretation that the Court has given to the lying-in-wait special circumstance, the class of first-degree murders to whom this special circumstance applies is enormous. (See, e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman, supra,* 408 U.S. 238.

2. There Is No Difference Between "Lying-in-Wait" Murder and Lying-in-Wait Special Circumstance

Appellant is aware that this Court has repeatedly rejected the contention that the special circumstance of "lying-in-wait" is unconstitutional because there is no significant distinction between the theory of first degree murder by "lying-in-wait" and the special circumstance of "lying-in-wait", and that the special circumstance therefore fails to meaningfully narrow death eligibility as required by the Eighth Amendment. (See, e.g., *People v. Gutierrez, supra,* 28 Cal.4th at p. 1148 [citations omitted].) Appellant requests that this Court revisit the issue in light of the facts and circumstances of this case.

This Court in *People v. Moon, supra,* 37 Cal.4th 1, 22, relying on its earlier decision in *People v. Carpenter, supra,* 15 Cal.4th 312, noted the "slightly different" requirements of lying-in-wait first degree murder and the lying-in-wait special circumstance. In discussing the difference between the two, the Court has noted that there are two factors that are supposed to differentiate them: (1) the special circumstance requires an intent to kill; and (2) the murder must be done while "lying-in-wait" rather

than by means of "lying-in-wait". (See *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.)

This Court has held that what distinguishes lying-in-wait murder from the special circumstance is that "'[m]urder by means of "lying-in-wait" requires only a wanton and reckless intent to inflict injury likely to cause death[,]" while the special circumstance requires "'an intentional murder'" that "'take[s] place during the period of concealment and watchful waiting[.]'" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that "murder by means of "lying-in-wait" requires only a wanton and reckless intent to inflict injury likely to cause death." Moreover, adding intent to kill as an element of the special circumstance is an illusory distinction. If the other factors for "lying-in-wait" are met, including watchful waiting and concealment of a murderous purpose, it is hard to imagine how the killing can occur without the defendant having an intent to kill.

According to this Court, "lying-in-wait" as a theory of murder is "the functional equivalent of proof of premeditation, deliberation and intent to kill." (*People v. Ruiz, supra,* 44 Cal.3d at p. 614.) Therefore, "a showing of "lying-in-wait" obviates the necessity of separately proving premeditation and deliberation . . . ." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) However, as pointed out by the dissenting judge in *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 313 (dis. opn. of McDonald, J.):

> If by definition "lying-in-wait" as a theory of murder is the equivalent of an intent to kill, and "lying-in-wait" is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent

> to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires only implied malice appears incorrect because the concept of "lying-in-wait" is the functional equivalent of the intent to kill.

In addition, California juries instructed on lying-in-wait first degree murder are told the murder must be "immediately preceded by "lying-in-wait"" (CALJIC 8.25), thereby indicating, as does the special circumstance, that there can be no "clear interruption separating the period of "lying-in-wait" from the period during which the killing takes place[.]" (CALJIC No. 8.81.15.) Thus, while this Court may interpret the special circumstance differently than lying-in-wait first degree murder, California juries, and particularly appellant's jury, are not provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon, supra,* 29 F.3d at pp. 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them"].)

Furthermore, the element of immediacy of the killing, the purported distinguishing feature of the special circumstance, has been weakened by cases which have held that the murder need not occur while "lying-in-wait" as long as there is a continuous flow of events after the concealment and watchful waiting end. (See, e.g., *People v. Morales*, 48 Cal.3d at p. 558; *People v. Michaels, supra,* 28 Cal.4th at p. 517.)

In sum, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first-degree murder. This special circumstance therefore violates the Eighth Amendment's narrowing requirement.

Indeed, although the vast majority of states now have capital punishment statutes, only three states other than California use "lying-in-wait" as a basis for a capital defendant's death eligibility: Colorado, Indiana and Montana. (See Osterman & Heidenreich, *supra,* 30 U.S.F. L.Rev. at p. 1276.) Notably, the construction of the Indiana provision is considerably narrower than the construction of the California statute, as it requires watching, waiting and concealment, then ambush upon the arrival of the intended victim. (*Thacker v. State* (Ind. 1990) 556 N.E.2d 1315, 1325.) Colorado similarly limits its "lying-in-wait or ambush" aggravating factor to situations where a defendant "conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) While there are few cases interpreting the Montana aggravating factor, its scope is necessarily limited by the state law requirement of proportionality review, which prevents imposition of death sentences on less culpable defendants. (See Mont.Code.Ann. § 46-18-310.)[38]

C. The Lying-in-Wait Special Circumstance Fails To Meaningfully Distinguish Death-Eligible Defendants from Those Not Death-Eligible

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[38] It is not surprising that the lying-in-wait special circumstance fails to narrow since it is not clear that it was ever meant to. It became a special circumstance as part of the Briggs Initiative which, according to the ballot proposition arguments, was intended to make the death penalty applicable to all murderers. (See Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1307.)

The Eighth Amendment demands more than mere narrowing of the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. For example, a death penalty statute could attempt to achieve the Eighth Amendment narrowing requirement by restricting death eligibility to only those murderers whose victims were between the ages of 20 and 22. However, such an eligibility requirement would be unconstitutional in that it fails to meaningfully distinguish, on the basis of comparative culpability, between those who can be sentenced to death and those who cannot. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech* (1993) 507 U.S. 463, 474; see also *United States v. Cheely*, *supra*, 36 F.3d at p. 1445 ("[n]arrowing is not an end in itself, and not just any narrowing will suffice"].)

The lying-in-wait special circumstance, as interpreted by this Court, fails to provide the requisite meaningful distinction between murderers. There is simply no reason to believe that murders committed by "lying-in-wait" are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of the Court have long recognized this fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Stevens, supra,* 41 Cal.4th at p. 213 (conc. opn. of Werdegar, J. ["the concept of "lying-in-wait" threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have merely committed first degree premeditated murder"); *id.* at p. 224-225 (conc. and dis. opn. of Moreno, J. ["the lying-in-wait special circumstance .

. . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"]; see also *People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.); *People v. Webster, supra,* 54 Cal.3d at pp. 461-462 (conc. and dis. opn. of Mosk, J.); *id.* at p. 466 (conc. and dis. opn. of Broussard, J.); *People v. Ceja*, *supra*, 4 Cal.4th at p. 1147 (conc. opn. of Kennard, J.); but see *People v. Jurado,* 38 Cal.4th at pp. 145-147 (conc. opn. of Kennard, J.).)

It is particularly revealing that, as stated above, almost no other state has included lying-in-wait murder as the type of heinous killing deserving of eligibility for the ultimate sanction of death, a clear indication of the lack of "societal consensus that a murder while "lying-in-wait" is more heinous than an ordinary murder, and thus more deserving of the death penalty." (*People v. Webster*, *supra*, 54 Cal.3d at p. 467 (conc. and dis. opn. of Broussard, J.).)

The lying-in-wait special circumstance, and the death sentence predicated upon it, must be reversed.

D. The Lying-In-Wait Special Circumstance Is Overbroad As Applied to This Case

For the Court to sustain the lying-in-wait special circumstance in this case, it would have to find that find that the required element of concealment of purpose does not have to be a murderous one, that a substantial period of watching and waiting can occur in a few seconds and where evidence of premeditation and deliberation is nonexistent, and that the victim does not have to be a surprised by the attack. Appellant submits that, as applied to his case, the lying-in-wait special circumstance is unconstitutionally overbroad in that it fails to provide a meaningful basis

for narrowing the class of murders for which the penalty of death may be imposed. This Court must reverse true finding of the special circumstance and the judgment of death against appellant.

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IV.

THE LYING-IN-WAIT INSTRUCTIONS OMITTED KEY ELEMENTS OF THE SPECIAL CIRCUMSTANCE, AND WERE ERRONEOUS, INTERNALLY INCONSISTENT, AND CONFUSING

A. Introduction

The jury was given the then-standard CALJIC instruction on the lying-in-wait special circumstance.[39] This instruction was not only

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[39] CALJIC No. 8.81.15 (5th ed. 1989 rev.) reads as follows: To find that the special circumstance, referred to in these instructions as murder while lying-in-wait, is true, each of the following facts must be proved: 1. The defendant intentionally killed the victim, and 2. The murder was committed while the defendant was lying- in- wait. The term "while "lying-in-wait"" within the meaning of the law of special circumstances is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence]. The lying-in-wait need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation. Thus, for a killing to be perpetrated while "lying-in-wait", both the concealment and watchful waiting as well as the killing must occur during the same time period, or in an uninterrupted attack commencing no later than the moment concealment ends. If there is a clear interruption separating the period of "lying-in-wait" from the period during which the killing takes place, so that there is neither an immediate killing nor a continuous flow of the uninterrupted lethal events, the special circumstance is not proved. [A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while "lying-in-wait" has been established.] (4CT:1092-1093.) The words "premeditation" and "deliberation" were defined in CALJIC No. 8.20.

(continued...)

confusing and contradictory, but it failed to explain to the jury that the key elements of the special circumstance – concealment of purpose and watchful waiting for a time to act – referred to a concealed intent to kill and waiting for a time to launch a lethal attack. The instruction also failed to explain to the jury the meaning of "cognizable interruption" as it relates to the relevant period of "watchful waiting" in this case.

The instruction as applied in this case is constitutionally flawed, violating appellant's rights to due process, a fair trial, and to an individualized, non-arbitrary and reliable determination of the appropriate sentence as protected by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogs.

B. The Instructions Failed To Inform the Jury That the Concealed Purpose Must Be To Kill the Victim and That the Act for Which the Defendant Was Watching and Waiting Must Be a Lethal Attack

CALJIC No. 8.81.15 contains a fatal flaw under the circumstances of this case: It did not explain that the required concealment of purpose must be an intent to kill and that the act for which the defendant is watching and waiting must be the lethal attack. While in other cases this may not have been problematic because there is often no issue as to whether or not the concealed purpose at the time of watchful waiting was to kill the victim, in this case, the failure of the instructions to clarify the nature of the defendant's concealed purpose and the act upon which the defendant was waiting requires reversal.

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[39](...continued)
(4CT:1083-1084.)

As discussed above, the evidence shows that appellant and Contreras armed themselves before getting into Sanchez's car to facilitate a sale of three ounces of cocaine in Sanchez's possession. There exists no evidence other than the fact that appellant and Contreras were armed to prove that they intended to kill – as opposed to rob – and to infer an intent to rob, it must also be assumed that they were armed for a nefarious purpose rather than just for protection during a drug deal.

Based on this scenario, supported by the evidence, there was no "lying-in-wait" because appellant did not conceal a murderous intent when he got into the car with Sanchez, and he was only watching and waiting for an opportune time to rob him. However, based on the standard CALJIC No. 8.81.15 instruction, the jury could have found appellant guilty of the lying-in-wait special circumstance.

CALJIC No. 8.81.15 states that each of the following facts must be true: (1) the defendant intentionally killed the victim; and (2) the murder was committed while the defendant was "lying-in-wait". (4CT:1092.) Thus, at the start of the instruction, intent to kill is given as a factor independent from "lying-in-wait". The instruction goes on to define "lying-in-wait" "as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise even though the victim is aware of the murderer's presence." (*Ibid.*) At the conclusion of the instruction, the jury is told that "when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a

position of advantage, the special circumstance of murder while "lying-in-wait" has been established." (4CT:1093.)

The instruction does not explain that the "act" is one designed to kill the victim, that the concealed purpose is to kill the victim or that it is a lethal attack which must take the person by surprise by secret design. Therefore, even assuming the jury could find that appellant intended to kill Sanchez by the fact that he put a gun to his head, nothing in this instruction would tell the jury that the defendant's concealed purpose must be to kill – rather than to rob.

The instruction also states that the "lying-in-wait" "need not continue for any particular period of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation." (4CT:1092.) However, the jury would not necessarily understand that the premeditation and deliberation referred to was in contemplation of a murder. Later in the instruction, premeditation is defined as "considered beforehand" and deliberation is defined as "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed cause of conduct." (4CT:1083.) This does nothing to inform the jury that it is the murder that must be considered beforehand or as the result of careful thought. The jury, therefore could have found there was premeditation and deliberation – but for a non-murderous purpose.

The instruction also states that the concealment and watchful waiting "as well as the killing must occur during the same time period" and that a "clear interruption separating the "lying-in-wait" from the period during which the killing takes place" would result in a failure of proof of the special circumstance. (4CT:1092.)

The instruction also failed to inform the jury that the "cognizable interruption" in this case – when appellant left the car and walked to a nearby house while Sanchez and Lopez went into a store by themselves and bought beer – legally tolled the "period of watchful waiting" such that the relevant time period for this element began not from when the four left Sweet Street in Sanchez's car, but when they all returned to the vehicle and drove down Avenue 328.

In sum, appellant's jury would not understand that in order to find murder while "lying-in-wait" it would have to find that appellant intended to kill Sanchez as opposed to rob him, and that the period of watchful waiting began only when they returned to the car after separating. As described above, there was insufficient evidence to support such a theory. The only way the jury reasonably could have found appellant guilty beyond a reasonable doubt of first degree murder under a lying-in-wait theory and make a true finding of the lying-in-wait special circumstance was because the instructions failed to properly advise the jury of the required elements.

C. The Instructional Errors Violated Appellant's Constitutional Rights and Were Prejudicial

In *People v. Castillo* (1997) 16 Cal.4th 1009, this Court recognized that misleading instructions "implicate the court's duty to give legally correct instructions. Even if the court has no sua sponte duty to instruct on a particular legal point, when it does choose to instruct, it must do so correctly." (*Id.* at p. 1015.) Here, the court violated that duty, and the instructions so misled and confused the jury and omitted key elements that the instructions violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to due process of law, a fair trial

and an individualized, reliable and non-arbitrary determination of eligibility for the death penalty and the appropriate sentence.

The Fifth and Fourteenth Amendment guarantees that no one will be deprived of liberty without due process of law, and the Sixth Amendment guarantee of a trial by jury, "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 509-510, citing *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 277-278; see also *People v. Flood* (1998) 18 Cal.4th 470, 491.) Thus, a jury verdict based on instructions that relieve the prosecution of its burden of proving beyond a reasonable doubt each element of the charged crime and allow the jury to convict without properly finding the facts supporting each element of that crime is federal constitutional error, and the *Chapman* test for reversible error applies. (*Sullivan, supra,* 508 U.S. at pp. 277-278; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Flood, supra,* 18 Cal.4th at pp. 479-480, 491; *People v. Kobrin* (1995) 11 Cal.4th 416, 422-423 & fn. 4.)

In addition, a vaguely worded criminal statute violates the due process clause of the Fourteenth Amendment. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453.) As this Court explained, "'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" (*People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 801, quoting *Lanzetta v. New Jersey, supra,* 306 U.S. at p. 453.) Furthermore, "'[a] statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by courts called upon to apply it.'" (*Id.* at p. 801,

quoting *People v. McCaughan* (1957) 49 Cal.2d 409, 414.) "The generally accepted criterion [for determining the existence of a due process violation] is whether the terms of the challenged statute are 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" (*Engert, supra,* 31 Cal.3d at p. 801 [citation].)

In addition, a failure to adequately instruct on the elements of a special circumstance allegation, as was done here, may also violate the Eighth Amendment. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) That amendment requires that "a jury's discretion be sufficiently channeled to allow for a principled distinction between the subset of murders for which the sentence of death may be imposed and the majority of murders which are not subject to the death penalty." (*Ibid.*, citing *Zant v. Stephens, supra,* 462 U.S. at pp. 876-877 and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428-429.) Moreover, a special circumstance that is vague will fail to adequately inform the jury what it must find to impose the death penalty, and as a result, will leave the jury with the kind of open-ended discretion that leads to an arbitrary death sentence. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) Put differently, if a jury is not adequately informed of the elements that must exist in order for it to find a special circumstance true, the special circumstance may fail to provide a principled basis for distinguishing capital murder from any other murder. (*Wade v. Calderon, supra*, 29 F.3d at pp. 1321-1322.)

The instructional errors described herein require reversal unless the errors "surely" did not contribute to the verdict. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.) Appellant argued above that there was insufficient evidence to sustain the first degree murder conviction based on premeditation and deliberation and the lying-in-wait special circumstance.

Even if this Court disagrees, it certainly cannot be said that there was strong evidence of the elements of "lying-in-wait", namely, concealment of purpose, a substantial period of watchful waiting for an opportune time to attack, and the lack of a cognizable interruption in the lethal events leading to a surprise attack. Although the prosecutor posited certain theories in this regard in an effort to support his theory of "lying-in-wait", they were based on speculation and misconstruction of the law rather than evidence. It is at least as likely that there was a struggle for the gun after appellant demanded the drugs at gunpoint which resulted in the victim's death, rather than a pre-planned surprise attack. Under such a scenario, the jury could have found premeditated and deliberate murder as well as the lying-in-wait special circumstance based on the delivered instructions even though the homicide would not have occurred by means of or while "lying-in-wait".

In short, the People cannot establish beyond a reasonable doubt that the jury's first degree murder conviction based on premeditation and deliberation or "lying-in-wait" or the special circumstance finding would have been imposed absent these instructional errors or that the errors "surely" did not contribute to those verdicts. (*Sullivan, supra*, 508 U.S. at p. 279).

Because a legally erroneous theory of conviction (based on the lying-in-wait instruction and the prosecution's argument) was presented to the jury, reversal is required because this Court cannot determine based on the trial record that the conviction actually, if not solely, rests on a legally proper theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.)

Under any appropriate standard of review, appellant was prejudicially deprived of his Sixth, Eighth and Fourteenth Amendment

rights. The first degree murder verdict, the lying-in-wait special circumstance and the death sentence must be reversed.

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V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RESTRICTING THE CROSS-EXAMINATION OF THE PROSECUTION'S KEY WITNESS ON MATTERS RELEVANT TO HIS CREDIBILITY

The trial court erroneously precluded the cross-examination of Gilbert Galaviz regarding conduct underlying his murder conviction. Galaviz was a key witness for the prosecution whom the defense proffered as the perpetrator of the instant crimes rather than appellant. The precluded areas of cross-examination were directly relevant to his credibility as well as evidence of his motive to fabricate. The court's rulings denied appellant his federal and state constitutional rights to confrontation, to present a defense, to a fair trial, to due process of law and to a reliable determination of guilt and judgment of death in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.)

A. Proceedings Below

Gilbert Galaviz testified that appellant and Contreras left the Sweet Street house on the day of the homicide and got into Sanchez's car armed with a gun and a knife, respectively. (5RT:1160-1163, 1182-1185.) Galaviz testified when they returned to the house they were bloody, and when asked what had occurred, appellant said, "We killed a pig." (5RT:1167-1168.) Galaviz also testified that, at the time of trial, he had been convicted of murder and was serving a sentence of 25 years to life. (5RT:1155-1156.)

On cross-examination, defense counsel asked Galaviz if he used a knife to commit the murder for which he was convicted. (5RT:1172.) The prosecution objected on the ground that facts underlying the conviction

were not relevant. (*Ibid.*) The trial court sustained the objection without explication. Defense counsel asked no more questions in that vein. (*Ibid.*)

B. The Trial Court's Restrictions on Cross-Examination of Gilbert Galaviz Prejudicially Violated Appellant's Rights Under State Law and the State And Federal Constitutions

Under the Confrontation Clause, a defendant has a right to an opportunity for effective cross-examination "designed to show a prototypical form of bias on the part of the witness." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.) Cross-examination of a witness is the principal means by which a defendant's right to confront the witnesses against him is secured. (*Davis v. Alaska* (1974) 415 U.S. at pp. 315-316.) The right to cross-examination is considered to be even more important when the witness to be examined is the key witness in a criminal prosecution. (*People v. Murphy* (1963) 59 Cal.2d 818, 831; *United States v. Brown* (5th Cir. 1977) 546 F.2d 166, 170.)

Not every restriction of cross-examination amounts to a constitutional violation, and the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. (See *Delaware v. Van Arsdall*, 475 U.S. at pp. 678-679.)

However, although the extent of cross-examination is within the trial court's discretion, the right to cross-examine in a relevant area is not. "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) For the purpose of attacking the credibility of a witness, it may be shown by the examination of

the witness or by the record of the judgment that he has been convicted of a felony involving moral turpitude. (*People v. Castro* (1985) 38 Cal.3d 301, 316; Evid. Code, § 788.) Murder is a crime of moral turpitude. (*In re Kirschke* (1976) 16 Cal.3d 902, 903-904.) When a prior conviction is proffered to impeach a witness under Evidence Code section 788, the evidence of prior felony convictions is restricted to the name or type of crime and the date and place of conviction. (*People v. Schader* (1969) 71 Cal.2d 761, 773; *People v. Smith* (1966) 63 Cal.2d 779, 790; *People v. Terry* (1974) 38 Cal.App.3d 432, 446.) However, a witness may be examined regarding the circumstances underlying a felony conviction if the facts are relevant under Evidence Code section 780.[40] (See *People v. Allen*

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[40] Evidence Code section 780 provides:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.
(b) The character of his testimony.
(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
(d) The extent of his opportunity to perceive any matter about which he testifies.
(e) His character for honesty or veracity or their opposites.
(f) The existence or nonexistence of a bias, interest, or other motive.
(g) A statement previously made by him that is consistent with his testimony at the hearing.
(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
(I) The existence or nonexistence of any fact testified to by him.
(j) His attitude toward the action in which he testifies or toward the giving

(continued...)

(1986) 42 Cal.3d 1222, 1267-1270 [cross-examination of facts underlying felony conviction proper if relevant under Evidence Code section 780.)

Cross-examination in any particular area is sufficient to satisfy the Sixth Amendment when the defendant has been allowed the opportunity to ask "'whether [the witness] was biased' but also 'to make a record from which to argue why [the witness] might have been biased'" or otherwise unreliable. (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; accord *People v. Boehm* (1969) 270 Cal.App.2d 13, 21; *United States v. Schoneberg* (9th Cir. 2005) 396 F.3d 1036, 1042; *United States v. Elliot* (5th Cir. 1978) 571 F.2d 880, 908.) "It is the essence of a fair trial that reasonable latitude be given the cross-examiner." (*Alford v. United States* (1931) 282 U.S. 687, 692.) When a court precludes cross-examination in a particular area, the defendant's constitutional rights have been violated. (See, e.g., *United States v. Valentine* (10th Cir.1983) 706 F.2d 282, 287-288; *United States v. Brown*, *supra*, 546 F.2d at p. 169.)

Where the defendant can show the prohibited cross-examination would have produced "a significantly different impression of [the witness's] credibility" (*id.* at p. 680), the court's exercise of its discretion in this regard violates the Sixth Amendment and the California Constitution. (See *People v. Frye* (1998) 18 Cal.4th 894, 946.)

A seminal United States Supreme Court regarding confrontation rights is instructive. In *Davis v. Alaska*, the United States Supreme Court held that the defendant in a burglary case had a constitutional right to cross-examine a crucial prosecution witness about a juvenile burglary

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[40](...continued)
of testimony.
(k) His admission of untruthfulness.

adjudication for which the witness was on probation, notwithstanding a state rule making evidence of juvenile adjudications inadmissible. These adjudications were relevant to credibility to show undue pressure because of the witness's vulnerable status as a probationer and because of the witness's possible concern that he might be a suspect in the crimes for which the defendant was being tried. (*Davis v. Alaska, supra,* 415 U.S. 308, 317-318.) The Court emphasized that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," adding that the juvenile's testimony "provided 'a crucial link in the proof . . . of [the defendant's] act.'" (*Id.* at p. 317 (citation omitted). "In this setting," the Court concluded, ". . . the [Sixth Amendment] right of confrontation is paramount to the State's policy of protecting a juvenile offender." (*Id.* at p. 319.)

In the instant case, the trial court erroneously ruled that the facts underlying Galaviz's conviction of murder were irrelevant. That Galaviz used a knife to kill another man was relevant to the jury's determination as to whether Galaviz was a perpetrator in this case, in which one of the victims was attacked with knife. The fact that Galaviz used a knife in another homicide, given appellant's contention at trial that Galaviz was a perpetrator here, was also relevant to Galaviz's motive for testifying against appellant in this case – i.e., to shift blame away from himself. Given the circumstances of the crime adduced at trial, the trial court's ruling that the facts underlying Galaviz's conviction was clearly erroneous.

The prosecution cannot sustain its burden of proving the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) This was a close and contested case. Appellant presented numerous alibi witness. The prosecution's star witnesses had serious

credibility problems – Lopez lied many times about this crime and his own criminal activity. Galaviz was a convicted murderer and was himself a likely perpetrator of the instant crime. Testimony regarding whether appellant's fingerprints were found in the vehicle was inconsistent. The prosecutor argued that former codefendant Contreras was an apprentice killer mentored by appellant to kill Lopez with a knife. (5RT:1670, 1678.) Had appellant been permitted to cross-examine Galaviz on his prior use of a knife to kill a man, not only would the prosecution's argument in this regard would have been seriously undercut, but the testimony would have supported appellant's defense that Galaviz, and not he, was one of the perpetrators of the instant crime. Appellant's conviction must be reversed.

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VI.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (4CT:1055-1056, 1064-1065, 1067-1068, 1083-1084.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship*, *supra*, 397 U.S. at p. 364), and thereby deprived defendant appellant of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, 15-16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) They also violated the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because these instructions violated the federal Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for

this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.[41]

A. The Instruction on Circumstantial Evidence – CALJIC No. 2.01 – Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given CALJIC No. 2.01, addressing the relationship between the reasonable doubt requirement and circumstantial evidence. (4CT:1055-1056 [CALJIC No. 2.01; sufficiency of circumstantial evidence – generally].) This instruction advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (4CT:1056.) The instruction thus informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17).[42]

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[41] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions will also be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents those claims here.

[42] Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

First, the instruction compelled the jury to find appellant guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (4CT:1056.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than that constitutionally mandated.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when the inference appeared "reasonable." The instructions thus created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even if explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the instruction given here, which required the jury to presume all elements of the crimes

supported by a reasonable interpretation of the circumstantial evidence unless appellant produced a reasonable interpretation of that evidence pointing to his innocence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instruction, the jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

The prosecutor's closing argument included just such an interpretation of the instructions when it argued that it was not reasonable to believe that a buyer for Sanchez's cocaine was going to meet the foursome up the road; the prosecution argued that the only reasonable interpretation of the evidence was that the buyer was a ruse created by appellant in order to get the victims to a place where they could be killed. (6RT:1660.) The prosecutor specifically argued to the jury that there existed no reasonable inferences pointing to innocence. (8RT:1788.) Given the circumstances of the case and the argument of the prosecutor, the instruction wrongfully and prejudicially shifted the burden of proof to appellant.

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave four other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.2 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), and 8.20 (deliberate and premeditated murder). (4CT:1064-1065, 1067, 1083-1084.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (4CT:1064.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be

proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22, regarding the weighing of conflicting testimony (4CT:1065), specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard."

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (4CT:1067), erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (4CT:1083-1084.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." This was a close and contested case. Appellant presented numerous alibi witness. The prosecution's star witnesses had serious credibility problems – Lopez lied many times about this crime and his own criminal activity. Galaviz was a convicted murderer and was himself a likely perpetrator of the instant crime. Testimony regarding whether appellant's fingerprints were found in the vehicle conflicted. In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt

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

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

(4CT:1068.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive – to steal the drugs from Sanchez –

and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. However, due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive to the primary issue in this case. Assuming arguendo the jury rejected appellant's alibi defense, the issue remained as to

whether appellant shot Sanchez with premeditation and deliberation. The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It did not tell the jury that the same evidence could establish a mental state in which appellant did not premeditate, deliberate or harbor malice. (Cf. *People v. Martinez* (1984) 157 Cal.App.3d 660, 669.) It thereby put a thumb on the scales in preference for the prosecution's view of the evidence.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection and a reliable determination of guilt, sanity and penalty. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Winship, supra,* 397 U.S. at p. 364.)

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the

defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, (1991) 53 Cal.3d 334 at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."].)

Furthermore, nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

E. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined. The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana* (1990) 498 U.S.39, 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment must be reversed in its entirety.

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VII.

INSUFFICIENT EVIDENCE SUPPORTED THE EVIDENCE IN AGGRAVATION INTRODUCED UNDER FACTOR (B); REVERSAL OF APPELLANT'S DEATH SENTENCE IS REQUIRED

The prosecution presented in its notice of aggravation six instances of prior unadjudicated criminal conduct which it hoped to introduce under Penal Code section 190.2(b). (See 1CT:122-124.) Because the evidence supporting these instances of alleged misconduct was either legally or factually insufficient to qualify as factor (b) evidence, appellant's penalty phase trial was rendered unfair and appellant's sentence must be overturned.

A. Because The Prosecution's Star Penalty Phase Witness Testified That Appellant Was the Victim of Horrific Sexual Abuse By His Father And Acting At All Times Under Threat of Death, There Was Insufficient Evidence to Support Incident in Aggravation 2F, the Kidnaping and Repeated Rape of Rosa Baca

Appellant's father, Jose Casares, Sr. was a vicious and abominable man who, among other things, repeatedly beat his wife and children into unconsciousness, constantly threatened to kill family members, and on various occasions strung his wife and daughter from the ceiling by a noose until they passed out. He also kidnaped, repeatedly raped, and forced his son to rape, a twelve-year-old girl named Rosa Baca. In the words of the trial court after hearing the evidence, "the jury pretty well knows that [Jose Casares, Sr.] was a cruel and sadistic man . . . with his family and with the defendant." (9RT:2150.) The prosecution used this tragic abuse to sentence appellant to death.

The prosecution had hoped to prove in aggravation that appellant had voluntarily participated in the kidnap and repeated rape of Rosa Baca. However, Baca—the prosecution's own witness—ultimately testified unequivocally that, when appellant was a young teenager, his father kidnaped her, raped her, and repeatedly *forced* appellant to rape her under threat of death. A clearer case for duress could not have been made—and was made here by the prosecution's own witness, no less. Nonetheless, the jury was allowed to speculate that, contrary to the evidence, the prosecution's witness was testifying falsely and that, on some unidentified occasions, appellant raped Baca of his own volition absent coercion by his sadistic father. In the words of the prosecution, "conceding that the father had a capacity, the power to force the actions that could be enforced, I find it hard to believe that – although she was our witness, I find it hard to believe that Rosa Baca, who could describe this whole situation to you and to tell you that . . . in each and everyone of those occasions Daddy was there and saying, 'Do it.'" (10RT:2211-2212.)

The prosecution's theory, beyond absurdly contending that its own witness was lying to protect a capital defendant who had previously raped her, encouraged the jury to fabricate from whole cloth instances in which the defendant had voluntarily engaged in the sexual crimes perpetrated by his father. Because there was no evidence whatsoever to support the prosecution's unfounded theory, the jury should have never been allowed to consider this incident as aggravating. Because of the inflammatory nature of the prosecution's description of an otherwise wholly mitigating event, the failure to exclude this evidence from the jury's consideration of aggravating evidence warrants reversal of appellant's death sentence.

1. Relevant Procedural History

In its notice of aggravation, the prosecution indicated it would attempt to prove under Penal Code 190.3(b) that appellant participated in the "kidnapping and repeated rapes of 14 year old Rosa Mendez Baca." (1CT:124.)[43] Appellant moved in limine to exclude the incident as supported by insufficient evidence under *People v. Phillips* (1985) 41 Cal.3d 29, 68, because the kidnapping and rapes were "forced upon [appellant] by his father with threats of physical harm." (3CT:806, 808.) The prosecution's response to this motion argued that "the account as reported by the victim can leave no question that defendant acted with his father. He may claim he was coerced by his father, but that is a defense the jury may chose to disbelieve." (4CT:922.) Trial counsel later withdrew the *Phillips* motion because, based on his re-examination of the report of Baca's original statements to law enforcement, he believed that there would be sufficient evidence to present the issue to the jury. (8RT:1861-1862.)

In its opening statement at penalty, the prosecution argued that "while the defendant will undoubtedly claim that he was coerced into these acts by his father, he was clearly at least a ready participant in all of the acts that were involved and that resulted in the victimization of this young woman." (9RT:1902.) However, as the hearing unfolded, appellant's description of events—a nightmarish story of sexual and physical abuse by his father in which both he and Baca were victims—was wholly corroborated during the penalty phase by Baca and other witnesses. (See

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[43] Baca testified that the rapes actually occurred when she was twelve. (9RT:1953.)

post.) Trial counsel later moved to modify the verdict under section 190.4(e) because the trial had adduced "uncontroverted evidence from Rosa Baca herself, [which] showed that defendant was forced by his father to assist in the kidnapping and in having sexual relations with her." (5CT:1210.) This motion was denied without mention of the Baca incident. (5CT:1226-1227.)

2. Under Factor (b), The Eighth Amendment, and Due Process, a Jury Cannot Consider Evidence of Involuntary Sexual Conduct in Aggravation Where a Rational Trier of Fact Could Not Have Found the Essential Elements of a Voluntary Crime Beyond a Reasonable Doubt

Because of the requirement of reasonable-doubt instructions for proof of uncharged crimes at the penalty phase (see *People v. Robertson* (1982) 33 Cal.3d 21, 53-55), the trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, and *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Thus, a jury can hear testimony regarding prior criminal conduct under factor (b) where "the jury could conclude the defendant was not acting [under a legal justification] and was therefore guilty. . . . " (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 588.)

Neither the state or federal constitutions nor the California death penalty scheme itself requires that a jury make "written findings regarding aggravating factors." (*People v. Lewis* (2008) 43 Cal.4th 415, 533.) Therefore, the record does not explicitly disclose whether the jury ultimately found individual incidents aggravating under factor (b) as alleged

and argued by the prosecution. However, when there is insufficient evidence to support an aggravating factor, even though the Court cannot *know* that any of the jurors found the factor to be true, the Court must "presume that at least one did so. Otherwise, [the Court] would run an unacceptable risk of rejecting a potentially meritorious claim by gratuitously denying the existence of its factual predicate." (*People v. Clair* (1992) 2 Cal.4th 629, 680.)

Criminal defendants can claim duress when there exist "threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (Pen. Code, § 26.) Thus, duress excuses criminal conduct "where the actor [is] under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law." (*People v. Heath* (1989) 207 Cal.App.3d 892, 899; see also *People v. Perez* (1973) 9 Cal.3d 651, 657 ["the fine distinction between fear of danger to life and fear of great bodily harm is unrealistic"]; LaFave 2 Subst. Crim. L. § 9.7 (2d ed.) ["It is generally held that, as to those crimes which are excused by duress, the duress must consist of threatening conduct which produces in the defendant (1) a reasonable fear of (2) immediate (or imminent) (3) death or serious bodily harm"].) Under California law, the defendant is "required merely to raise a reasonable doubt as to the underlying facts" to establish the defense of duress. (*People v. Mower* (2002) 28 Cal.4th 457, 479 & fn. 7; *see also People v. Graham* (1976) 57 Cal.App.3d 238, 240.)

Only if there exists a "well-established circumstance in the case which may reasonably be regarded as incompatible with the theory of the defense that the [crime] was justifiable" may the jury find that a defendant's

conduct is unlawful. (*People v. Acosta* (1955) 45 Cal.2d 538, 541-542.) Stated differently, where "[t]he proof of the prosecution showed a case of justification and there is nothing in any of the other evidence which . . . tends to contradict or dispute [the defense] version of the affair" the evidence establishes the defense as a matter of law and it is therefore not a crime. (*People v. Collins* (1961) 189 Cal.App.2d 575, 591-593 [reversing murder conviction where record established claimed self-defense]; see also *People v. Mercer* (1962) 210 Cal.App.2d 153, 162 [conviction reversed where prosecution "produced no evidence which can reasonably be viewed as incompatible" with self-defense justification]; cf. *People v. Cain* (1995) 10 Cal.4th 1, 74 [incident in aggravation under factor (b) need not be stricken where evidence was sufficient to overcome claimed self-defense].) Because no rational trier of fact could have found beyond a reasonable doubt that appellant was anything but a victim of the grotesque abuse by his father, the jury should not have been allowed to consider the Baca incident in aggravation under factor (b).

The legal insufficiency of the prosecution theory of the Baca rapes also rendered the presentation of the incident to the jury as aggravation a violation of due process and the Eighth Amendment. The law "is settled that the due process clause of the Fourteenth Amendment prohibits the states from 'attach[ing] the aggravating label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . *or to conduct that actually should militate in favor of a lesser penalty. . . .*" (*People v. Benson* (1990) 52 Cal.3d 754, 801, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 885, emphasis added.) It also bars use of decision making processes "that may be understood to incorporate such 'mislabeling' and thereby threaten arbitrary and capricious results." (*Ibid.*;

see also Robinson v. Schriro (9th Cir. 2010) 595 F.3d 1086, 1103 [recognizing that in certain circumstances, insufficiency of evidence supporting aggravating factors can constitute independent due process or Eighth Amendment violations].)

Furthermore, under the Eighth Amendment the state may not impose the death penalty "on the basis of a defendant's non-violent, consensual or involuntary sexual conduct." (*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1309, disapproved on another ground by *Lambright v. Stewart* (9th Cir. 1999) 191 F.3d 1181 [reversing death sentence where penalty decision relied in part on allegedly aggravating evidence that defendant's father forced defendant and his retarded older brother to have sex with his mother while the father watched].)

Here, because the evidence supported only the finding that both Baca and appellant were victims of the violent and sadistic conduct of appellant's father, the jury's decision making process was fatally infected by its consideration of otherwise highly mitigating evidence as aggravating.

3. The Uncontroverted Facts Concerning the Prior Abuse Suffered By Appellant and His Family At the Hands of His Father

Appellant suffered and witnessed extraordinary abuse beginning very early in his life at the hands of his father, Jose Casares, Sr. (9RT:2026.) The uncontroverted testimony regarding the severe abuse of appellant and his family members by his father was presented through the testimony of defense expert Dr. Richard Blak (9RT:2017-2135), appellant's sister Maria Delores Lupercio Casares (9RT:2135), appellant's cousin Antonio Lupercio Navarro (9RT:2144-2148), appellant's uncle Alfredo Navarro (9RT:2150-

2154) and was corroborated by prosecution witnesses Rosa Baca (9RT:1953-1983) and Detective Pinon (10RT:2189-92.)

Dr. Richard Blak testified that his investigative sources, including reports of law enforcement, interviews with appellant, and interviews with defense investigators each corroborated one another concerning the level of terror, beatings and general physical abuse that occurred in the Casares household. (9RT:2065; see also 9RT:1986 [testimony of Rosa Baca that appellant's father abused the entire family] 9RT:2147, 2151 [testimony of Antonio Navarro]; 9RT:2136 [testimony of Maria Delores Lupercio Casares]; 9RT:2150 [testimony of Maria DeJesus Casares DeReyna].)[44]

According to Dr. Blak, appellant's father had appellant working the fields planting crops at age five, and if his father was ever displeased with his work, he beat appellant with a fist, a stick, or anything else that was available. (9RT:2031, 2116-2117.) The beatings were exceedingly severe. For example, one of appellant's cousins, Antonio Lupercio Navarro, who also worked in the fields with appellant, witnessed Jose Casares, Sr. beat his son into unconsciousness. (9RT:2145.) He never witnessed appellant stand up to or resist his father in any way. (9RT:2145-2146.) Appellant's uncle, Alfredo Navarro, observed appellant's father beating him very hard with firewood and seriously injuring him. (9RT:2152.)

The repeated beatings of appellant were sufficiently severe that, as a young child, appellant's only psychological defense was to dissociate from the experience because he did not possess the intellectual or emotional

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[44] Although testimony regarding the vicious abuse suffered by appellant and his family at the hands of his father was often unspecific as to time, it all occurred during appellant's childhood, prior to his father's murder when appellant was still a teenager. (9RT:2117.)

resources available to tolerate the repeated assaults. (9RT:2066.) Appellant's capacity to compensate for this trauma was complicated by the fact that he was borderline mentally retarded, with an I.Q. score in the 70-75 range and with intellectual functioning below that of a 6th grade level. (9RT:2067, 2075.)

Appellant's mother, Amelia Casares, was also frequently the subject of severe physical abuse. On one occasion, she was beaten because she failed to obtain permission from her husband to take a bath. (9RT:2031.) On another occasion, appellant's father suspected that one of his daughters had a romantic encounter. (9RT:2116.) After tying his daughter up with her wrists over her head, appellant's father proceeded to beat appellant's mother and then to beat appellant so severely that he was incapacitated and was forced to leave the house to recuperate with neighbors. (*Ibid.*) Dr. Blak testified that this abuse rose to a "level of terror" within the Casares household that endured throughout the sensitive period of appellant's childhood development. (*Ibid.*; 9RT:2039.)

Prosecution witness Rosa Baca confirmed the viciousness of the abuse suffered by appellant, his mother, and the rest of his family. Jose Casares, Sr. would threaten to kill everyone in the family. (9RT:1987.) He would beat his wife for lengthy periods; he would beat her until she passed out and then he would beat her further after she regained consciousness. (9RT:1986.) He beat his wife so severely that he almost killed her and so frequently that she never had the opportunity to recover from her wounds. (*Ibid.*)

According to the testimony of Maria Delores Lupercio Casares, appellant's sister, appellant was beaten frequently, as were his brothers, sisters and his mother. (9RT:2136.) Appellant's father beat his mother

daily, and sometimes hung her by the neck on a rope from the ceiling. (9RT:2138.) He would leave her hanging from the ceiling until she passed out. (9 RT:2138-2139.). Appellant's mother constantly had lacerations on her back from the beatings, which were never fully healed. (*Ibid.*) On one occasion, appellant's father severely beat another one of appellant's sisters, Amelia, and proceeded to hang her by the neck from the ceiling, as he often did to her mother. (9RT:2139.) He did this because she had become overweight and, falsely suspecting that she was pregnant, appellant's father hoped this form of torture would extract a confession. (9RT:2142.) Appellant, who lived with the family in a single room house, witnessed this horrific abuse. (9RT:1985-1987 9RT:2139.)

Unsurprisingly, appellant was terrified of his abusive father. (See, e.g., 9RT:1975; 9RT:2145, 2147, 10RT:2152.)

4. The Testimony of Victim and Prosecution Witness Rosa Baca Concerning The Kidnaping and Rapes Perpetrated by Appellant's Father

According to Baca, her ordeal began at the age of twelve, when Jose Casares, Sr., came over to her house and told her, repeatedly, that she would become his daughter-in-law. (9RT:1954-1955, 1969.) According to Baca, the incident occurred in 1972, which would make appellant approximately fifteen or sixteen years old. (9RT:1964; 1CT:47.) Soon after appellant's father told Baca she would marry his son, appellant spoke with Baca about the possibility of her becoming his girlfriend, which she rejected. (9RT:1954-1955, 1969.) This did not appear to upset appellant. (9RT:1969.)

Two months later, seven men, some armed, arrived at Baca's sister's home, where Baca was staying. (9RT:1955, 1958.) Appellant and his

mother was with them, as well as other family members, though Baca did not recall seeing appellant armed. (9RT:1955, 1969.) Appellant's father was armed. (9RT:1970.)

Baca was then abducted and taken to Jose Casares, Sr.'s home, where she stayed for five months. (9RT:1956.) When she first arrived there, she was taken to a banana orchard, where appellant's father ordered appellant not to let her escape or he would kill him. (9RT:1975.) Baca nonetheless immediately attempted to escape, but aborted her effort when appellant's father shot at her while she fled. (9RT:1975; 9RT:2141) After that, Baca was never left alone with appellant. (9RT:1975-1976.)

While Baca was held at Jose Casares, Sr.'s home, appellant did "exactly what his father would tell him to do." (9RT:1956.) This included having sex with Baca at his father's command, though Baca was unable to recount the precise the number of times. (9RT:1957.) Appellant's father also repeatedly raped Baca. (9RT:1976.)

Toward the beginning of her stay, Jose Casares, Sr. ordered appellant to rape Baca in front of his mother, but appellant was unable to maintain an erection, because he was so afraid. (9RT:1981.) Appellant's father threatened him and humiliated him. (9RT:1981.)

During the rapes, appellant's father was always present. (9RT:1959-1960.) The father ordered each instance of sexual assault by his son. (9RT:1961, 1972.) And each time, Jose Casares, Sr. threatened Baca with death if she did not comply. (9RT:1983.) Baca personally witnessed appellant's father threaten to kill appellant several times if he did not do as he was ordered. (9RT:1972.) Appellant did not rape Baca by overpowering her with physical force, because she and appellant would submit to Jose Casares, Sr.'s orders without struggle. (9RT:1963, 1973.) Other than the

forced intercourse, appellant never hurt or abused Baca in any way while she was held at his home. (9RT:1973.) In fact, he informed her that he never wanted her to be kidnaped. (9RT:1978-1979.) Appellant explained to Baca that the only reason he did not defend her was that he was afraid that his father was going to kill him. (9RT:1980.) Jose Casares, Sr. repeatedly threaten to kill appellant, Baca, and others with a knife or a machete. (9RT:1974-1975.)

According to Baca, appellant was being forced to enter into sexual relations with her in the same way she was being forced to enter into sexual relations with him. (9RT:1974.)

Ultimately, Baca was rescued when her brother arrived and freed her by shooting Jose Casares, Sr. to death. (9RT:1963-1964.) After that time, Baca never communicated with appellant again. (9RT:1980.)

5. Corroborating Testimony of Maria Delores Lupercio Casares and Other Family Members

Appellant's sister, Maria Delores Lupercio Casares, witnessed the sexual abuse perpetrated against Baca because the entire family slept in one room, next to an open hallway where her parents slept. (9RT:2140, 2142.) Maria Casares testified that, although appellant did not want to, her father would order his son to rape Baca and forced his mother to watch the rapes as they occurred. (9RT:2140.) This happened on more than one occasion. (*Ibid.*)

Maria Casares also corroborated Baca's testimony regarding appellant being unable to maintain an erection due to his fear, and the subsequent mistreatment by his father when he was unable to consummate the initial rape. (9RT:2140.) She added that this happened on more than one occasion and that appellant's father also beat appellant for his failure to

successfully consummate his rape of Baca. (*Ibid.*) She also noted that appellant's father always had a shotgun in the home. (9RT:2141.)

According to appellant's cousin, Antonio Lupercio Navarro, appellant did not voluntarily attend the kidnaping of Baca, but was there only because of his fear of his father. (9RT:2147.)

6. Rebuttal Testimony of Detective Pinon

In rebuttal, the prosecution called one witness, Detective Pinon. Pinon testified that—roughly two years prior to the penalty phase hearing—he had interviewed Baca concerning the kidnaping and sexual abuse she had endured for approximately an hour or ninety minutes. (10RT:2189.) Pinon stated that, during this interview, Baca did not mention the whereabouts of appellant's father during the rapes by appellant or that his father had been present each time appellant had raped her. (10RT:2190.) Baca *did* tell Pinon that appellant's father instigated the kidnaping and that she had sex with appellant because Jose Casares, Sr. had threatened to kill her if she did not. (10RT:2191.) Baca had also told Pinon 1) that she was threatened by the father on a daily basis, 2) that appellant's father had almost killed her when she tried to escape, and 3) that she was told by appellant's father that if she left, he would kill her. (10RT:2192.)

During her direct testimony, the prosecution confronted Baca about her failure to inform Detective Pinon that appellant's father was present and ordered each sexual assault. She explained "I don't recall that those questions were asked, but I always told him that the father was always having to do with it." (9RT:1962-1963.) Baca, like appellant, was completely uneducated, having never attended school prior to the incident. (9RT:1982.)

7. Because The Uncontroverted Evidence Demonstrated That Appellant's Conduct Was Involuntary and Established Appellant's Justification of Duress, There Was Insufficient Evidence To Establish a Criminal Act Under Factor (b)

"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." [Citations.] (*People v. Green* (1980) 27 Cal.3d 1, 55, 164 Cal.Rptr. 1, 609 P.2d 468, disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826.) If there does exist "substantial evidence incompatible with the theory of [e]xcuse or mitigation, the jury may consider all the evidence and determine whether the act amounted to unlawful [conduct]. [Citations]" (*People v. Ross* (1979) 92 Cal.App.3d 391, 400.)

As noted above, the justification of duress is established when there exists threatening conduct which produces in the defendant (1) a reasonable fear of (2) imminent (3) death or serious bodily harm." (Pen. Code, § 26; LaFave 2 Subst. Crim. L., *supra*, § 9.7; (*People v. Heath*, *supra*, 207 Cal.App.3d 892 at p. 899.) Here, the uncontroverted testimony of the prosecution's own witness established each element of the defense.

During the rapes, appellant's father was always present, (9RT:1959-1960), and he ordered each instance of sexual assault. (9RT:1961, 1972.) Each time, Jose Casares, Sr. threatened Baca with death if she did not comply, (9RT:1983), and appellant's father threatened to kill appellant several times if he did not follow orders. (9RT:1972.) Baca—who was the

witness in the best position to assess the immediate threats to appellant if he failed to comply with his father's orders—confirmed appellant was being forced to conduct sex acts with her in the same way she was being forced to with him, (9RT:1974) which, according to her testimony, was under threat of death. (9RT:1983.)

Appellant's father had previously inflicted serious bodily injury on both appellant and his family members by repeatedly beating and strangling them into unconsciousness. (9RT:1986; 9RT:2145.) He was armed with both a gun and a machete, which he used to repeatedly to threaten to kill and to attempt to kill anyone who defied his capricious and sadistic edicts. (9RT:1974-1975; 9RT:2141.) In short, everyone in the Casares household was under threat of imminent serious bodily injury if they dared to challenge appellant's father, a man whom the prosecution itself characterized as "palpably evil." (10RT:2212.) Every witness, both prosecution and defense, confirmed these facts. (*See People v. Collins*, *supra*, 189 Cal.App.2d 575 at pp. 591-592 ["There was no evidence disproving the claim of self-defense. On the contrary, the only other evidence harmonizes with defendant's version"].)

Indeed, the prosecution *conceded* during closing argument that appellant had not instigated the kidnap or rapes himself (9RT:2209-2010) and that appellant's father "had the power to force the actions" of appellant, i.e. his involvement in the sexual assaults which Baca related. (10RT:2211.)

These circumstances bear remarkable similarity to the equally disturbing facts discussed in *Beam v. Paskett*, *supra*. 3 F.3d 1301. In *Beam*, in support of its determinations regarding several aggravating factors, including future dangerousness, an Idaho trial court found that the

defendant had "a long history of deviant sexual behavior, including incest, homosexuality, and abnormal sexual relationships with women both older and younger than the defendant." (*State v. Beam* (Idaho 1988) 766 P.2d 678, 700.) On federal habeas review, the Ninth Circuit explained that the defendant had actually been the *victim* of gross sexual abuse similar to that suffered by appellant here. (*See Beam v. Paskett, supra.* 3 F.3d 1301 at p. 1308 & fn. 6 ["According to the presentence report, Beam's father forced Beam and his retarded older brother to have sex with Beam's mother while Beam's father watched. If anyone refused, Beam's father would beat the recalcitrant party"].) After reiterating that defendant was the "victim of abusive sexual conduct and not an abuser himself" the Ninth Circuit held that victims of sexual abuse may "not be further punished by making their misfortune the basis for their subsequent execution" and reversed the flawed future dangerousness aggravator and the sentence based on the trial court's reliance on the defendant's abuse. (*Id.* at p.1310-1312.)[45]

In this case, just as in *Beam*, the Eighth Amendment does not permit appellant to be sent to his death based upon criminal acts in which his abusive father forced him to engage. Even if the jury could somehow have hypothesized that the elements of duress were not met, the evidence at trial unequivocally demonstrated that appellant's sexual conduct was "forced" or "involuntary" as those terms were construed in *Beam.* (*Id.* at p. 1310; cf. 9RT:1902 [arguing that appellant was at least a "ready participant" in the rapes].)

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[45] The Ninth Circuit also held that the trial court improperly relied on the defendant's homosexuality and other consensual sexual acts, not relevant here. *Beam v. Paskett, supra*, 3 F.3d 1301, at 1309-1310.)

The prosecution's sole argument against the tragic mitigation evidence presented by Baca was to attack the credibility of its *own* witness—in order to suggest that there existed other incidents, not reported in evidence, in which appellant raped Baca absent the coercion of his father. (10RT:2210-2212.)

The prosecutor pointed to four facts which it felt undercut the credibility of Baca's testimony that appellant's participation in *each* instance of rape was coerced: (1) that she had not told Detective Pinon that appellant's father was present for every rape (10RT:2210-2211); (2) that appellant had at one point prior to the rapes requested that she be his girlfriend and had been rebuffed (10RT:2211); (3) that appellant had failed to warn Baca of his father's plan to kidnap and rape her prior to the incident itself (10RT:2212); and (4) testimony from appellant's expert Dr. Blak concerning his "intuitive sense" of appellant's voluntary involvement in the rapes. (*Ibid.*) From these facts, the prosecution asked the jury to speculate that, despite Baca's contrary testimony, there may have been instances when appellant raped Baca of his own volition:

> I find it hard to believe that Rosa Baca, who could describe this whole situation to you and to tell you that the defendant essentially raped her more times than – I think that's approximately the interpretation, as I understood it. He raped her innumerable times; that, in fact, in each and everyone of those occasions Daddy was there and saying, "Do it."
>
> I find that -- you will have to decide whether or not that stretches your notion of credibility or not.

(10RT:2211-2212.)

The argument that a rape victim who had not seen her assailant in almost two decades was lying to assist him falls within the realm of the

frivolous. The evidence cited by the prosecution was simply insufficient to ground this wild conjecture in substantial evidence.

Most importantly, *there was simply no evidence that appellant raped Baca outside the presence of his father's death threats.* (Cf. 9RT:1959-1961, 1972.) Thus, the prosecution's entire theory, an invitation to the jurors to manufacture such an encounter in their imagination was unanchored in evidence and could not support the requisite finding of criminality under factor (b). (*See In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5 ["A reasonable inference, . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.'"].)

That Baca had not explicitly told Detective Pinon that appellant's father had ordered his son to commit every rape provided no basis to speculate that appellant did in fact rape her without his father's violent coercion. As a preliminary matter, Baca did not provide Detective Pinon with this information because she was not asked. (9RT:1962-1963.) If Detective Pinon had inquired, he would have learned that the entire family lived in a one room house where the forced intercourse between appellant and Baca occurred, (9RT:1983-1984), that the father forced appellant's family members to watch the assaults, (9RT:1981, 2140), and that after allowing Baca to attempt an escape immediately after her capture, appellant was never left alone with her even for a minute. (9RT:1975.)

Moreover, although Baca did not expressly state to Detective Pinon that appellant's father was directly supervising the sexual assaults, she did tell him that she had sex with appellant because his father had threatened to

kill her if she did not, which he did daily and every time she was raped. (9RT:1983, 10RT:2191.) Such a threat would require appellant's father's presence immediately prior to the rape, a distinction without significant difference to the facts relayed at trial.

The remaining facts cited by the prosecution are likewise insufficient to prove that appellant acted criminally. That appellant had requested that Baca become his girlfriend voluntarily is simply insufficient to support a chain of inferences that he later raped Baca absent coercion of his father, particularly in light of Baca's contrary testimony. The vast majority of teenagers whose amorous interests are rebuffed do not resort to rape, nor does appellant's initial interest in Baca negate the frequent death threats leveled by appellant's father against Baca and other members of the Casares family. (9RT:1987, 10RT:2191; (*Cf. People v. Collins*, *supra*, 189 Cal.App.2d at p. 591 [the fact that defendant had engaged in sexual intercourse with decedent on previous occasions did not negate his claimed fear of sexual assault on the occasion in question].)

That appellant had not warned Baca of the impending kidnap—which the prosecution conceded was instigated by the father (9RT:2209-2010)—is likewise irrelevant. There is no evidence that appellant even *knew* that Baca was to be kidnaped, much less that he had the capacity to warn her or to prevent the plans of his maniacal father.

Finally, the prosecution's reliance upon the testimony of Dr. Blak—that his "intuitive sense" was that there were occasions when appellant initiated sexual contact with Baca on his own (see 10RT:2212-2213 [prosecution argument] 9RT:2104-21055 [testimony of Dr. Blak])—is similarly without basis in substantial evidence. Dr. Blak testified that he had no evidence from appellant himself as to whether he

voluntarily initiated sexual encounters with Baca absent coercion by his father and also testified that he was unaware of Baca's testimony that appellant had been coerced. (9RT:2133.) Instead, he based his testimony on a review of Detective Pinon's police report with Baca, which her testimony revealed was fatally incomplete. (9RT:2134) In other words, Blak's "intuition" was not based on substantial evidence and was purely misguided speculation based on his incomplete understanding of events. (*See In re Lawrence* (2008) 44 Cal.4th 1181, 1213 ["hunch or intuition" does not qualify as competent evidence].)

8. Allowing the Jury to Consider Strongly Mitigating Evidence as Highly Inflammatory Aggravation Warrants Reversal of the Sentence

Normally, error in the admission of evidence under section 190.3, factor (b) is reversible if "there is a reasonable possibility it affected the verdict, a standard that is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Lancaster* (2007) 41 Cal.4th 50, 94.) However, the Supreme Court has held that due process "requires a defendant's death sentence to be set aside" if the jury considers factors that authorize it to draw adverse inferences from "conduct that actually should militate in favor of a lesser penalty." (*Brown v. Sanders* (2006) 546 U.S. 212, 219, quoting *Zant v. Stephens*, *supra*, 462 U.S. at p. 885; see also *Barclay v. Florida* (1983) 463 U.S. 939, 968 (conc. opn. of Stevens, J. [invalidated aggravating circumstance does not necessarily invalidate sentence where "none of the invalid aggravating circumstances is supported by erroneous or misleading information"].) Thus, in *Beam v. Paskett*, *supra*. 3 F.3d 1301, the Ninth Circuit found that the single factual finding characterizing involuntary and

consensual sexual activity as aggravating infected the entire decision making process and invalidated the death sentence even where the trial court had explicitly found that "any one of the aggravating circumstances . . . outweighs the mitigating circumstances." (*Id.* at pp. 1311-1312.) Therefore, automatic reversal of the sentence is warranted.

In this case, even if the "reasonable probability" standard is applied, allowing the jury to construe the Baca rape as aggravating based on pure speculation unquestionably could have tipped the scales and caused a juror to vote for death.

First, the murder itself—though shocking and deplorable as all murders are—was in essence a killing during the course of an attempted illegal narcotics transaction. While all murders are unquestionably serious, the regrettably routine violence which often occurs during drug sales is not itself the most heinous form of killing eligible for the death penalty. (See *United States v. Caro* (4th Cir. 2010) 597 F.3d 608, 645 (dis. opn. of Gregory, J.) [noting that death sentences in Virginia were declining because prosecutors were "not seeking death for drug-related murders-apparently because they do not view these offenders as the worst of the worst"]; see also *Baxter v. Thomas* (11th Cir. 1995) 45 F.3d 1501, 1515 [failure to present substantial mitigating evidence warranted reversal of penalty where aggravation was supported by single pecuniary gain aggravating circumstance and killing "did not involve the sexual abuse or kidnaping common to other death penalty cases"].)

Second, the penalty here was supported by a single special circumstance, which as argued elsewhere, see, Arguments II, III & XI, was both supported by insufficient evidence and is unconstitutionally overbroad, disproportionate, and arbitrarily applied. Even assuming that this Court

finds the evidence sufficient to pass statutory and constitutional muster, the undeniably legitimate concerns regarding the breadth of lying-in-wait special circumstance detract from the aggravating force of this evidence. (See *People v. Stevens* (2007) 41 Cal.4th 182, 213-214 (conc. opn. of Werdegar, J.; *id* at p. 214-216 (conc. & dis. opn. of Kennard, J.), *id.* at pp. 216-226 (conc. and dis. opn. of Moreno, J.) Indeed, in the history of the California death penalty, the number of cases supported by a single "lying-in-wait" special circumstance could be counted on one hand. (See *People v. Combs* (2004) 34 Cal.4th 821, 869 (conc. opn. of Kennard, J.) [noting that case was the first in over 150 death penalty cases decided by the Supreme Court in which "lying-in-wait" was the only special circumstance found true by the jury].) At most, the only thing separating the case at bar from a non-special circumstance murder was a few seconds of waiting while the vehicle traveled a third of a mile down the road. (See Argument II, *ante*.)

Third, there existed a strong case in mitigation. As the testimony of Baca herself graphically illustrated, there was powerful mitigation evidence in the form of sickening abuse by appellant's father, a man described as "sadistic" and "palpably evil" by both the trial court and the prosecution. (9RT:2150; 10RT:2212.) This Court itself has proclaimed that childhood trauma can be powerful mitigating evidence. (*In re Lucas* (2004) 33 Cal.4th 682, 729.) Perhaps more importantly, the error in this case allowed the powerful mitigation of appellant's own victimization to be held against him in a dangerously prejudicial fashion. (*Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 139 [noting that sex crimes against children may be "highly inflammatory"and likely to prejudice a jury against any defendant].) Moreover, there was also evidence of appellant's borderline mental retardation (9RT:2067, 2075), which may prohibit the imposition of

the death penalty in this case altogether and at the very least is the form of significant mental deficit that the Supreme Court has recognized as "inherently mitigating." (*Tennard v. Dretke* (2004) 542 U.S. 274, 287.)

Finally, circumstantial evidence from the penalty phase deliberations also indicates that the jury struggled on the issue of punishment. The jury deliberated on the issue of penalty over the course of four days, with an intervening weekend to reflect (4CT:1149-1152; 5CT:1192), while the evidentiary portion of the prosecution and defense penalty cases encompassed only two partial days, with testimony encompassing four additional pages of reporter's transcript on a third day. (4CT:1135 -1138; 4CT:1149; 10RT:2189-2192.) Thus, not only is the length of the deliberation indicative of a close case (see *In re Martin* (1987) 44 Cal.3d 1, 51 [collecting cases]; *Hamilton v. Vasquez* (9th Cir. 1994) 17 F.3d 1149, 1163 [three days of deliberations indicates a close case]), the disparity in the quantity of evidence adduced at penalty and the period of deliberation confirms that there was dispute as to the outcome. (*People v. Martinez* (1995) 11 Cal.4th 434, 452 [reversal ordered where the length of the jury deliberations exceeded the length of the evidentiary phase of the trial]; cf. *People v. Cooper* (1991) 53 Cal.3d 771, 837 [lengthy deliberations provided "much weaker" evidence of close case where guilt phase of capital trial "lasted over three months"].)

A note sent from the jury, inquiring about the practical effect of a life without possibility of parole sentence, also corroborated the closeness of the case. (4CT:1148.) By inquiring about the alternate punishment from the outset, the jury negated the possibility that they simply spent the four days of deliberation reviewing each item of evidence adduced at penalty. (Cf. *Clark v. Moran* (1st Cir. 1991) 942 F.2d 24, 32-33 [where jury heard

sixteen days of testimony, three day deliberation "likely indicated a diligent and conscientious attempt to evaluate the evidence, to verify the testimony of different witnesses and to come to a careful and reasoned decision"].)

In sum, the aggravation case was relatively weak, the mitigation strong, and the jury quite understandably struggled with delivering its verdict. It is unquestionable that allowing the jury to consider the Baca incident under factor (b) prejudiced appellant.

B. The Evidence Presented In Support of Incident in Aggravation 2A Was Insufficient to Establish Criminal Conduct Under Factor (b)

The evidence presented by the prosecution to support incident in aggravation 2A (the "Tulare shooting") was insufficient for reasons legally and factually similar to the insufficiency of the Baca incident (see Argument VII.A, ante.), though depending more upon the failure of the prosecution to contradict the defense theory in any way than upon the prosecution's corroboration of the defense theory.

According to appellant's statement to police, the Tulare shooting related to an encounter between appellant and two men in a car who repeatedly drove by appellant, shouting racial slurs and threatening him with physical harm. On their penultimate pass, one of the passengers in the vehicle told appellant "I have a gun and I can kill you" or "I've got a gun, and I can kill you if I want to." (9RT:1999-2001.) Defendant, fearful of a lethal attack, armed himself and, when the vehicle returned and one of the passengers gesticulated at him, inviting a physical altercation, appellant shot at the car's tires to frighten away the occupants.

Critically, the prosecution presented no evidence or argument whatsoever to contradict appellant's self-defense justification. Although

the jury is not bound to accept appellant's statements to police as true, there must exist *some* substantial evidence "incompatible with the theory of [e]xcuse or mitigation" upon which the jury may rely to reject the claim of self-defense. (See *People v. Ross, supra*, 92 Cal.App.3d 391, 400; see also *People v. Collins, supra*, 189 Cal.App.2d 575 at p. 591-592 [reversing conviction where "proof of the prosecution showed a case of justification and there is nothing in any of the other evidence which [] tends to contradict or dispute defendant's version of the affair."]; *People v. Estrada* (1923) 60 Cal.App. 477, 483 [accord].) Here, the prosecution presented no evidence or argument incompatible with appellant's version of events. Instead, the prosecution *conceded* prior to the penalty phase trial that the evidence was insufficient to establish the crime enumerated in its notice of aggravation, attempted murder. (8RT:1860.) The prosecution indicated that it would instead attempt to prove assault with a deadly weapon. (8RT:1860-1861.) But without presenting substantial evidence upon which the jury could base a finding rejecting the claimed self-defense justification, the prosecution failed to establish criminal conduct upon which the factor (b) finding could be based.

1. Relevant Procedural History

In its notice of aggravation, the prosecution indicated it would attempt to prove under Penal Code 190.3(b) that, on August 9, 1979, appellant participated in the crime of attempted murder and shooting into a dwelling house in the county of Tulare. (1CT:122.) Trial counsel moved in limine for a *Phillips* hearing on the sufficiency of the evidence underlying incident 2A and other incidents in aggravation. (3CT:805-806.) On September 4, 1991, the People filed a response to this motion. (4CT:919-926.) The prosecution later conceded that it could not prove the specific

intent for attempted murder and informed the court that it would allege the incident as an assault under Penal Code 245 or a "drive-by shooting" at an occupied vehicle. (8RT:1860-1861; see also 9RT:1907 [prosecution's opening argument].) Ultimately, trial counsel withdrew his request for a *Phillips* hearing, opting instead to challenge the facts before the jury. (8RT:1861.)

2. Prosecution Witness Testimony

The prosecution called two witnesses in support of the Tulare shooting: Officer Rush Mayberry and Officer Thomas Munoz of the Tulare County Police Department.

The facts adduced from Mayberry regarding this incident were as follows: After midnight on August 8, 1979, Mayberry was parked facing north on the intersection of Pratt and Inyo Avenue, across the street from a little shopping center. (9RT:1943.) He observed three vehicles, two parked and one moving, across the street in the parking lot of the shopping center. (*Ibid*; see also P. Ex. 96 [diagram of location].) The two parked cars formed an "L" in the northeast corner of the parking lot. (9RT:1945.) As the white car passed the two parked vehicles, appellant went to the back seat of one of the vehicles, retrieved a rifle, and shot twice at the vehicle passing by. (*Ibid.*) He then returned the rifle to the trunk of the vehicle. (9RT:1947.)

At the time of the shots, the white vehicle was moving slowly west as though the occupants "were looking" for something. (9RT:1951; see also P. Ex. 96.) It was about three or four ten-foot-wide parking spaces away from the parked cars when it was fired upon. (9RT:1952.) Mayberry was 150 to 225 feet from the shooting. (9RT:1952.)

Mayberry radioed that shots had been fired and responded to the scene and arrested two other individuals and appellant, who had already placed the gun back in the rear seat of the car and was standing in front. (9RT:1947.) After the arrests, the victim drove back and identified himself. (*Ibid.*) Mayberry found a dent in the lower portion of the trunk of the white vehicle and the lower left-hand corner of the bumper, where a bullet had struck it. (9RT:1949.)

Munoz testified that he acted as an interpreter for the detective who interrogated appellant at 10 a.m. the following morning. (9RT:1997.) When interviewed, appellant informed police that he had been drinking, though because of the delay between the interview and the incident, Munoz testified it would have been impossible for him to tell whether appellant was intoxicated at the time of the incident. (9RT:1997-1998.)

Appellant told police that he acted in self-defense, that he believed that the individuals had a gun in the vehicle, and that he had shot twice at the vehicle meaning to hit the tires in an effort to defend himself. (9RT:1997.) Appellant explained that before he shot at the white vehicle that evening it had driven by three times and that the people in the car were calling him racial slurs like "wetback" and "son of a bitch," and were making threats of bodily harm. (9RT:1999.) After these threats, one of the individuals had exited the white vehicle, walked up to appellant, and said "I have a gun and I can kill you" (9RT:1998) or "I've got a gun, and I can kill you if I want to." (9RT:1999-2001.) After appellant was threatened in this manner, he took a rifle from the trunk of his vehicle and placed it in the front seat of his vehicle and then waited with the two people with whom he had been speaking. (9RT:2001.) On the white vehicle's final return, appellant saw one of its occupants motion for him to come to the vehicle to

engage in a confrontation, at which point appellant fired at the tires of the vehicle as it passed him to defend himself. (9RT:2001-2002.)

The prosecution provided no closing argument with respect to the Tulare shooting. In opening argument, the prosecution describe the incident as follows:

> in 1979, we have a situation where the defendant was involved in a shooting at a vehicle, and the victim in that case a Mr. Macias, who for whatever reason caught the attention of the defendant, and the defendant fired two shots. There was definitely a bullet hole in the vehicle. My recollection of this is that, in fact, the shots were fired from a distance of about 12 feet away from the car, and the defendant was immediately taken into custody by a Tulare County officer who happened to be at the scene. The defendant essentially said, well, he really didn't intend to hurt anybody. But anyway, there again, we have the situation of a use of a gun.

(9RT:1907-1908.) Defense counsel argued that, because appellant's version of events was totally uncontroverted by the prosecution, the jury should accept that appellant was acting in self-defense. (10RT:2229-2231.)

3. Under Factor (b), a Jury Cannot Consider Evidence in Aggravation Unless a Rational Trier of Fact Could Have Found the Essential Elements of a Crime Beyond a Reasonable Doubt

As explained above with respect to the Baca incident, see Argument VII.A.2, *ante*, evidence of other criminal activity under factor (b) "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d 29 at p. 72.) The trial court may not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Boyd, supra*, 38 Cal.3d 762 at p. 778.) Thus, a jury can hear testimony regarding prior criminal conduct

under factor (b) where "the jury could conclude the defendant was not acting in self-defense and was therefore guilty of criminal assault." (*People v. Tuilaepa*, *supra*, 4 Cal.4th 569 at p. 588; *cf. People v. Cain, supra*, 10 Cal.4th 1 at p. 74 [incident in aggravation under factor (b) need not be stricken where evidence was sufficient to overcome claimed self-defense].)

Here, the prosecution adduced no evidence which contradicted appellant's claimed self-defense justification. To the contrary, the prosecution conceded that there was no evidence from which the jury could infer a specific intent to shoot the victims themselves. (9RT:1860.) In its only discussion of the incident, the prosecution ascribed no motivation other than self-defense to appellant, stating that the alleged victim Macias "for whatever reason caught the attention of the defendant." (8RT:1907.) The only evidence of this crucial fact—"whatever the reason"—that was presented at trial was that the alleged victims were threatening to harm and, ultimately to kill, appellant. (See *People v. Collins*, *supra*, 189 Cal.App.2d 575 at p. 590 ["There was no evidence of any motive other than self-defense. There was no evidence of an intent to kill, or of flight, or of anything indicating a consciousness of guilt"].) Appellant was entitled to use reasonable force, in this case shooting at the car's tires (9RT:2001-2002), to defend himself from the threats of death leveled at him by the alleged victims. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.)

Because no rational trier of fact could have found beyond a reasonable doubt that appellant was guilty of an assault with a deadly weapon, there was insufficient evidence to support this incident of factor (b).

4. The Insufficiency of the Evidence Underlying Incident 2A Requires Reversal

Error in the admission of evidence under section 190.3, factor (b) is reversible if "there is a reasonable possibility it affected the verdict, a standard that is "essentially the same as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24." (*People v. Lancaster*, *supra*, 41 Cal.4th 50 at p. 94.)

For the reasons explained in Argument VII.A.8, *ante*, it is evident that the jury struggled over its penalty phase decision in a close case with very strong mitigation evidence. As a result, any diminution of the evidence in aggravation would have a reasonable possibility of affecting the verdict. However, allowing the jury to consider the Tulare shooting despite the insufficiency of the evidence was particularly prejudicial for several reasons.

First and most obviously, the incident, which the prosecutor characterized as an assault with a deadly weapon, (8RT:1861), was, aside from the Baca rapes, one of the two most serious factor (b) crimes alleged.

Second, the Tulare shooting was critical to the prosecution's repeated narrative in aggravation that there existed a "series of events which involved the defendant either in the possession of a gun . . .or, in fact, the use of gun . . . where he was a – an actual participant in a criminal act." (9RT:1902; see also 9RT:1908-1909 ["if all those guns were available, you would be walking into a jury room where, in fact, there would be at least a half a dozen guns stacked on the table in the jury room"]; 9RT:1928 [statement by prosecution that "I think they [the jury] have a right to understand that, in fact, this defendant has been, you know, armed or had weapons, you know, within close proximity to where he was about every

time somebody's made contact with him."].) In fact, the factor (b) gun evidence consisted almost solely of evidence that defendant, a felon, was found illegally in possession of firearms. (See *People v. Bacon* (2010) 50 Cal.4th 1082, 1126-27 (illegal possession of a firearm "is not, in every circumstance, an act committed with actual or implied force or violence"].)

Finally, the evidence of the Tulare shooting tainted the jury's consideration of whether the nonviolent possession charges introduced in aggravation nonetheless constituted implied threats of violence. Because the evidence supporting the implied threat of violence from these incidents was itself extraordinarily weak, (see Argument VII.C, *ante*.), the admission of incident 2A, had a cross-contaminating effect which increased the aggravating nature of other factor (b) crimes. Therefore, the erroneous submission of this incident to the jury requires reversal of the sentence.

C. Because Mere Possession of a Firearm Does Not Itself Constitute an Act Committed With Actual or Implied Force or Violence, and Because Even Possession Was Not Established in This Case, the Trial Court's Admission of Evidence of Appellant's Alleged Gun Possession Was Insufficient to Constitute Factor (b) Evidence

On July 12, 1991, Casares filed several motions in limine under Evidence Code section 402 seeking a hearing regarding the admissibility of six instances of "other criminal activity" that the prosecution listed in its notice of intent to introduce in aggravation. (3CT:804-813, 814-826, 827-839, 840-851.) Fully half of this factor (b) evidence—incidents 2C ["Strawberry Street incident"] , 2D ["Circle K incident"], and 2E ["Arrow Motel incident"]—consisted of alleged acts of illegal gun possession by appellant unrelated to any actual violence or threats thereof. Appellant made similar arguments with respect to each of these incidents.

First, appellant argued there was insufficient evidence that he possessed the weapons in question. (3CT:817-818 [incident 2C], 830-831 [incident 2D].)[46] Second, appellant argued that even were there sufficient evidence of knowing possession, the illegal possession of a firearm in his case did not qualify as an activity involving the "use or attempted use of force or violence or the express or implied threat to use force or violence" under factor (b). (3CT:818-821 [incident 2C], 832-834 [incident 2D], 842-845 [2E].) On September 14, 1991, the prosecution filed its responses. (4CT:919-926 [incidents 2A, 2E, and 2F].)

The trial court held two hearings at which testimony relating to the gun possession incidents was presented: one on September 9, 1991 (1RT:3-54 [relating to incident 2D), and another on September 10, 1991, (1RT:55-95 [relating to incident 2C].) Argument on the *Phillips* motions relating to all three gun possession incidents was also heard on September 10, 1991. (1RT:126-147 [relating to 2C, 2D and 2E].)

Although noting that this was a "close case," the trial court held that if the prosecution could establish "actual or constructive possession, [that would] give[] rise to an assumption there was an implied threat of violence." (1RT:146-147.) Discussing incident 2C, the court reasoned as follows:

> Handguns or most handguns, unless they're clearly for competition like a target pistol, have one purpose. That is either offensive use or

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[46] Based upon prior rulings by the court finding admissible evidence that was ultimately not introduced at the penalty hearing, trial counsel limited his argument that there was insufficient evidence of possession to incident 2C. (1RT:130-131.) Appellant herein challenges the sufficiency of the evidence of knowing possession regarding both incidents 2C and incident 2D.

> defensive use to shoot at somebody. Carrying one around in a car in a position where this gun was found I think can give rise to a reasonable assumption that its purpose involved implied use of violence in the future, some undetermined time point.
>
> Again, it may be a question of fact whether the jury accepts that. I'm not – I don't think simply allowing that evidence to come before the jury, if it gets to a penalty phase, make it per se evidence that the jury has to accept it. I still think that they have a function to decide whether this is a factor that they should consider in the penalty phase.
>
> I believe the evidence that the district attorney will be able to offer regarding this, the gun, its whereabouts, when and where it was found and where the defendant was found in proximity to it was enough to get that to the jury, and for him to argue it constitutes an implied threat of violence . . .

(1RT:147.)

The court provided no further discussion of the other incidents and, based upon the above analysis, denied the motions. (1RT:147-148; see also 4CT:946.) There were several errors associated with the admission of the factor (b) gun possession evidence.

First, with respect to incident 2C and 2D, because the prosecution failed to prove actual or constructive possession either at the *Phillips* hearing or at trial, the admission of the evidence under factor (b) was error.

Second, the trial court erred when it submitted to the jury the issue of whether the crimes constituted an "implied threat to use force or violence" without making the legal determination itself. (1RT:147 [whether incidents involved implied threat of force a "question of fact" which "they [the jury] have a function to decide"].) This Court has held that the issue of whether factor (b) evidence involves the "implied threat to use force or violence" is to be decided by the trial court prior to submission to the jury, and that the

pertinent instructions in fact *direct* the jury to conclude that the crimes are necessarily those constituting implied threats of force or violence. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Because the trial court never made the requisite determination that the crimes qualified for consideration under factor (b), the evidence must be stricken.

Third, as to incidents 2C, 2D, and 2E, the trial court's ruling that a jury may consider illegal weapon possession under factor (b) due to the implied use of violence at some "undetermined time point" in the future is erroneous. Because there was no evidence presented showing that any of the weapons at issue in these incidents were intended for imminent actual or implied threats, they should not have been admitted under factor (b).

The improper introduction of factor (b) evidence at the penalty phase also violated the Eighth and Fourteenth Amendments by undermining the reliability of the jury's death verdict and violating appellant's state law liberty interests (see, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [a death sentence based upon "materially inaccurate" information may violate the Eighth and Fourteenth Amendments]; *Robinson v. Schriro* (9th Cir. 2010) 595 F.3d 1086, 1103 [recognizing that in certain circumstances, insufficiency of evidence supporting aggravating factors can constitute independent due process or Eighth Amendment violations]); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295 [state trial court's misapplication of its capital sentencing statute implicates the Eighth Amendment's prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth Amendment].)

1. Relevant Facts Adduced At the Pretrial Hearings and At Penalty Regarding Incident in Aggravation 2C

During the pretrial hearing held on September 10, 1991 regarding incident 2C, three witnesses testified: Visalia Police Department officers Ed Lynn, Rory Vadnais, and David Jarrett. (1RT:55-95.) The subject of the hearing was a search executed on February 18, 1987 at 101 Strawberry Street that turned up a small .45 caliber Derringer pistol under the driver's seat of a 1974 black Monte Carlo parked on Strawberry Street. (*Ibid.*)

Lynn testified that on the date of the search warrant, he arrived with several officers at an apartment located at 101 Strawberry Street in Visalia. (1RT:55-58.) There he found appellant and, parked on the street in front of the apartment, the black Monte Carlo. (1RT:58.) He had seen appellant parked in the car outside the apartment approximately three times before, including seated in the driver's seat. (1RT:59.) When Lynn conducted a pat-down search of appellant, he felt a set of keys in his left front pocket. (1RT:59-60.) Appellant was asked through an interpreter whether he owned any vehicles and he responded that he did not. (1RT:60.) When asked about the Monte Carlo parked on Strawberry Street, appellant responded that it was not his vehicle. (1RT:61.)

Vadnais assisted in the search of appellant that produced the keys, which Vadnais confirmed were the keys to the Monte Carlo by using them to open the vehicle. (1RT:66.) He noted that the car was not parked in the spaces dedicated to tenants of the building. (1RT: 67.)

Jarrett searched the vehicle after it was unlocked by Vadnais. (1RT:69.) He discovered a gun and some narcotics in the vehicle under the driver's seat. (*Ibid.*)

During the penalty phase trial, Lynn provided testimony similar his pretrial testimony: namely that he had searched appellant at Strawberry Street and discovered the keys to the Monte Carlo. (9RT:1916-1917.) Lynn stated that he had seen appellant in the car on "a couple of occasions" some days or weeks prior to the search, and that appellant had not been driving the vehicle at the time he had seen him, but Lynn failed to specify where in the car he had previously seen appellant. (9RT:1917, 1920-1921.) As at the prior hearing, Lynn testified at the penalty phase that appellant had told him that the Monte Carlo was not his car, but at the penalty phase Lynn added that appellant had further explained that he had not been driving the vehicle that day. (9RT:1921.) Lynn himself had "no idea" whether appellant had been driving the Monte Carlo on the day of the search. (9RT:1917.) Lynn also testified that he saw the plastic baggies of narcotics recovered from the car, which were contained in a piece of brown paper. (9RT:1920.)

During the penalty phase, Jarrett testified that he had performed a search of the vehicle after it had been opened by Vadnais and found the gun under the driver's seat. (9RT:1923.)

2. Relevant Facts Adduced at the Pretrial Hearings and At Penalty Regarding Incident in Aggravation 2D

During the pretrial hearing held on September 9, 1991 regarding incident 2D two witness testified: Visalia Police Department officer Michael Stowe and defense investigator Danny Wells. (1RT:5-27, 38-40 [Stowe testimony]; 1RT:27-38 [Wells testimony].) The subject of the hearing was a *Terry* stop and subsequent search of a van conducted on

March 6, 1989 in a Circle K parking lot that turned up a loaded semiautomatic weapon. (*Ibid.*)

Stowe testified that on the evening of the search at about 10:16 p.m. he saw a van parked on the north side of the Circle K lot in a poorly lit area, in an area that did not have demarcated parking stalls. (1RT:6-7, 14; see also People's Exhibit 1 In Limine [diagram of Circle K lot].) The car was approximately six to eight feet from the store, which had lights in an awning facing West. (1RT:17-18.) Although there was less light on the north side of the store, there were lights on the intersection where the Circle K was located and Officer Stowe was able to see the car as he drove by. (1RT:19-20.)

The car was pointed West, towards Dinuba Street and the front of the store. (1RT:17.) Officer Stowe "responded to and been made aware of thefts from this store where subjects w[ould] exit to the north and sometimes leave in vehicles." (1RT:9.) Because of his knowledge of prior thefts from that Circle K, and the fact that the car was parked in a less well-lit portion of the lot and not immediately next to the store in the marked spaces, he stopped to investigate the car and its occupants because of the "possibility there may be some type of crime in progress." (1RT:9-10.)

Had the parking spaces in front of the store been filled, however, his suspicion would not have been aroused and he would not have investigated because a "vehicle doing ordinary business in that area would have to park somewhere." (1RT:10.) Officer Stowe had not been present when the vehicle parked and had no idea whether the other spaces had been filled at the time. (1RT:19.)

Officer Stowe pulled in behind the vehicle, and approached appellant to investigate. (1RT:11.) Appellant told the officer he did not have

identification, but provided the vehicle registration and explained he was not the registered owner of the car, which was owned by his friend's uncle. (1RT:11-12.) At approximately the same time, appellant's companion returned from the Circle K carrying a bag and police questioned him and ran a database check on him. (1RT:20-21.)

The store was contacted by a second officer to determine whether appellant's companion had stolen anything, which he had not. (1RT:21.) Although there was no indication that a robbery was in progress at this point, Stowe felt he "had an obligation to continue the contact since [he] had a subject with no identification with a vehicle that he said was not his." (1RT:21.)

Stowe was having difficulty communicating because appellant spoke "very limited" English. (1RT:11-12.) Stowe then asked appellant, in English, to get out of the car. (1RT:12.)

Appellant identified himself as Jose Rojas with a birth date of August 25, 1956, but claimed that his identification was at home. (1RT:15-16.) After appellant exited the car and was frisked, Stowe engaged in a search of appellant's person, subsequently ruled unlawful, and discovered over one thousand dollars in cash. (1RT:13; 4CT:947-951.) Stowe searched appellant's pockets because "with that many papers in his pocket, I thought there may be some indication that, as I said, he is either concealing [identification] from me or due to communication, or that he forgot was there." (1RT:23-24.)

At that point, Stowe was in "continuing wonderment" of "a person with such a large amount of money, a vehicle that did not belong to him, with no identification." (1RT:24.)

A search for the name provided by appellant through the Department of Motor Vehicles database came up empty. (1RT:15.) Stowe asked appellant if there were any weapons or identification in the vehicle, which appellant denied. (1RT:16.) Stowe then requested, in English, permission to search the car, to which appellant allegedly consented, after appellant reiterated that it was not his car. (1RT:12-13, 16.)

Stowe then began a search of the van, and discovered a handgun to the right side of the driver's bucket seat at the floor board, between the transmission and the driver's side bucket seat. (1RT:14-15, 26.)

Wells testified about the lighting conditions and layout of the Circle K parking lot. (1RT:27-38.)

At penalty phase, Stowe[47] offered similar testimony. (9RT:1925-1935.) He testified that after stopping to investigate and searching appellant's vehicle, he found a loaded semi-automatic weapon and ammunition. (9RT:1925-1927; see also P. Ex. 94, 95.) The gun was found to the right of the driver's bucket seat on the floorboard. (9RT:1929-30.) Stowe also testified that appellant offered no resistance to his subsequent arrest, appellant made no threats of any kind at any point during the encounter, and that he had confirmed appellant's statement that the vehicle was not registered to appellant. (9RT:1934.) Finally, he explained that the van in which the gun was found had a "big hump" between the driver and passenger's seats and that the weapon was "stuffed down between the seat and the hump." (9RT:1935.)

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[47] Officer Stowe's last name was spelled differently at the penalty phase and pretrial hearings. (1RT:5; 9RT1925.) In this brief, he will be referred to as "Stowe."

3. Relevant Facts Adduced At the Penalty Phase Trial Regarding Incident in Aggravation 2E

Rory Vadnais testified at the penalty phase regarding incident in aggravation 2E (the "Arrow motel incident") in which, appellant was discovered on August 25, 1984, at the Arrow Motel with a loaded .22 caliber EIG revolver in his pocket. (9RT:1912-1914; 1CT:124.) Vadnais testified that he saw appellant at the Arrow motel, arrested him on an unidentified charge, and noticed a bulge in his pocket, which after a search revealed itself to be a loaded .22 caliber revolver. (9RT:1912-1913.) He also testified that appellant did not resist or threaten him with the gun in any way. (9RT:1914.)

4. Because the Prosecution Failed to Prove With Substantial Evidence Appellant's Knowing Possession of the Weapons Referenced in Incident 2C and 2D Beyond a Reasonable Doubt, the Admission of These Incidents Under Factor (b) Was Error

The law "makes the matter of knowledge in relation to defendant's awareness of the presence of the object a basic element of the offense of possession." (*People v. Gory* (1946) 28 Cal.2d 450, 454.) Thus, "proof of opportunity of access to a place where [contraband is] found, without more, will not support a finding of unlawful possession." (*People v. Redrick* (1961) 55 Cal.2d 282, 285 [summarizing cases in which evidence of narcotics possession was insufficient]; *People v. Boddie* (1969) 274 Cal.App.2d 408, 411 ["mere presence at the scene of the crime, standing alone, is not sufficient to justify a conviction"].)

In the case at hand, there was insufficient evidence to establish that appellant knew of the presence of the weapons in either the Circle K incident or in the Strawberry Street incident.

With regard to both incidents, it was uncontradicted that appellant was not the registered owner of the vehicles in question. (1RT:11; 9RT:1934 [Circle K incident]; 9RT:1921 [Strawberry Street Incident]; see also 4CT:899 [prosecution briefing indicating appellant was not registered owner of Strawberry Street vehicle].) With regard to the Strawberry Street incident, investigating officer Lynn conceded that he had "no idea" whether appellant had even been driving the car in which the gun had been found on the day the gun was seized. (9RT:1917.) Although Lynn testified that he had seen appellant in the car on a "couple of occasions," he admitted that appellant had not been driving the car at the time he had seen him and *did not even specify whether appellant merely a passenger on those occasions.* (9RT:1917,1920-1921.) There was no evidence establishing that appellant had exclusive access to the vehicle found at Strawberry Street, or negating the obvious inference that the registered owner of the vehicle had access, or that appellant had any knowledge of the gun secreted beneath the driver's seat of the vehicle. The same is true of the gun found stuffed down by the floorboard next to the front seat during the Circle K incident, with the additional ambiguity that police identified another occupant returning to the vehicle. (9RT:1934; see also 1RT:20-21.)

This case is factually similar to three cases in which evidence of knowing possession was found insufficient in light of the defendant's lack of exclusive access to the location of the illegal item: *People v. Boddie*, *supra*, 274 Cal.App.2d 408, *People v. Antista* (1954) 129 Cal.App.2d 47 and *People v. Bledsoe* (1946) 75 Cal.App.2d 862.

In *Boddie*, a police officer observed a vehicle in which the defendant was a front seat passenger driving erratically and pulled it over. (274 Cal.App.2d 408, at p. 410.) At that time, the driver reached under the front

passenger's seat and removed two yellow balloons, which he swallowed. (*Ibid.*) The defendant exited the vehicle and stood on the sidewalk, obviously swaying. (*Ibid.*) After a search, a third balloon containing heroin was recovered from the glove compartment. (*Id.* at pp. 410, 412.)

An expert testified that the driver and defendant were under the influence of narcotics, probably heroin, and that the defendant had fresh injection scabs on his arm. (*Ibid.*) The registered owner of the car was awaiting separate charges of heroin possession and would have testified that he loaned the car to the driver shortly before the arrest. (*Ibid.*) The court explained that there was insufficient evidence of knowledge to sustain a charge of possession:

> In our case we have no evidence of unusual conduct, of admissions or contradictory statements by defendant. There was no evidence as to how long he had been in the car, or his purpose for being therein. In short, all we have is evidence that defendant, while under the influence of narcotics, was a passenger in an automobile being driven by a person also under the influence of narcotics, in which car narcotics were found in the glove compartment. We conclude that there was insufficient evidence, direct and circumstantial, to establish that defendant had knowledge of the presence of the narcotics, an essential element to the charge of possession.

People v. Boddie, *supra*, 274 Cal.App.2d 408, at p. 411-412.

Substituting a weapon for balloons of heroin in the case at bar, appellant was not found sitting above the seat in the Monte Carlo in which two guns were found nor in front of the glove compartment where a third gun was found. The prosecution did not even adduce evidence that appellant was *in* the car containing the weapon on the day the weapon was recovered from the black Monte Carlo, much less evidence suggesting that appellant had *used* a weapon on the day in question, as had the heroin user in *Boddie*. Although appellant was found in the van at the Circle K, mere

presence in the vehicle, without more, is insufficient to demonstrate knowing possession. (*Id.* at p. 411.)

In *People v. Antista*, *supra*, 129 Cal.App.2d 47 a police officer went to the defendant's home and found the codefendant and another man sitting on the sofa alongside her. (*Id.* at p. 48.) The officer searched the apartment and found marijuana in a cupboard in the living room and also in a Band-Aid package in an unused bedroom or storeroom. (*Ibid.*) The defendant arrived shortly thereafter and denied knowledge of the marijuana. (*Ibid.*) The court concluded there was insufficient evidence of knowledge:

> It may be that evidence that defendant had substantially exclusive access to the apartment would have been sufficient. The evidence of the state established that others, also, had access. It may be that a false explanation of the presence of the marihuana, or conflicting statements of the defendant, would have been sufficient. If the substance had been found in the personal effects of the defendant that would have been a potent circumstance indicating knowledge of its presence, ownership and control. Such is the nature of the circumstantial evidence found in many of the cases. But we believe no precedent will be found for the affirmance of a conviction in the absence of some comparable circumstances. We hold that if it is established that one accused of possession returned to his apartment, or to his automobile, and found it occupied by a user of narcotics, and a narcotic was found in it, and if there is no evidence that it was there before that time, the fact of its presence, without any other fact or circumstance of an incriminating nature, is legally insufficient to prove a charge of possession.

(*Id.* at p. 53.)

Here, similarly, there was no evidence that appellant gave conflicting statements about the weapon, that the weapon was found among his personal effects, or that he had "exclusive access" to either automobile in which the guns were found. As noted above, the fact that defendant was

not the registered owner of either vehicle was uncontested by the prosecution. Although the registered owner of the Monte Carlo was never identified, the fact that the officer's investigating the crime did not dispute appellant's contention that he was not the owner is strong evidence of the truth of appellant's statement. (See 4CT:899 [prosecution briefing indicating appellant was not registered owner of Strawberry Street vehicle].) Yet the prosecution failed to put on any evidence regarding the owner of the vehicle. A strikingly similar failure of proof was discussed in *People v. Bledsoe, supra*, 75 Cal.App.2d 862.

In *Bledsoe*, the defendant reported his car stolen to police, who later learned that the car was used in several robberies. (*Id.* at p. 863.) The next morning, the defendant claimed that he had found the car parked near where he had left it. (*Id.*) When police stopped the defendant in his car along with a passenger to inquire about the robberies, they searched the vehicle and found a package of marijuana cigarettes on the right hand side of the front seat stuffed down alongside the cushion. (*Id.*) The court found insufficient evidence of knowing possession.

The court explained: "The respondent rests the case upon the failure of the appellant to call other witnesses to substantiate his testimony, and upon the inference, which in this case is a mere suspicion, that, because the appellant had in his possession the key to the car, he must have had 'possession' of the narcotic." (*Id.* at p. 863-864.) Conceding that the defendant's report to the police "seems highly fantastic" the court nonetheless found that the state had failed to disprove the essential elements of the defendant's story, *i.e.* had failed to call the other occupants of the vehicle and have them deny knowledge of the contraband. (*Id.*)

In the case at bar, appellant denied being the registered owner of the Monte Carlo and van, and the police surely had easy access to records establishing this fact. Nonetheless, the prosecution failed to present any evidence rebutting the possibility that the registered owner had placed the weapon in the car. Instead, they relied upon evidence that appellant possessed the key to the vehicle. (*Cf. Bledsoe*, *supra*, 75 Cal.App.2d 862, at p.863-864 [possession of keys insufficient to establish knowing possession of items inside vehicle].) In the Strawberry Street incident, unlike the defendants in both *Bledsoe* and *People v. Boddie*, *supra*, 274 Cal.App.2d 408, appellant was not even found in the car. And, as in *Boddie* and *Bledsoe*, the weapons in both incidents were not found in plain view, but "stuffed down between the seat and the hump" of the van on the floorboard, (9RT:1935) and under the seat of the Monte Carlo (1RT:69), respectively.

The prosecution's sole argument was that while there was a "possibility, of course" that it was in fact the registered owners of the vehicles who possessed the guns, this was unlikely because appellant had twice been found with access to a vehicle that contained a gun and "I think common sense tells you that it's the kind of thing that a person, you know, is simply ordinarily not going to do. They're ordinarily not going to be so careless to, you know, just casually leave their gun that they have, you know, in the vehicle and let somebody else whom they know drive off with it. . . . You know, who put it there? I have no idea, you know. But, I mean, common sense tells us we pretty well know that somebody didn't just happen to leave their gun there." (10RT:2205-2206.)

But this is precisely the logic rejected in *People v. Boddie*, *supra*, 274 Cal.App.2d 408, in which the intoxicated defendant was found to have "approximately 13 fresh scab formations on his arm, one puncture having

fresh dried blood on it." (*Id.* at p. 410.) The question is not whether a defendant may have possessed illegal items in the past—even the recent past as the heroin user in *Boddie* obviously did—but whether the defendant knowingly possessed the contraband at issue at the time of the alleged offense. Although past incidents are certainly relevant, they are not alone sufficient to establish beyond a reasonable doubt knowing possession of contraband in an area for which a suspect lacks exclusive access. (*Cf. People v. Torres* (1950) 98 Cal.App.2d 189, 192-193 [prior incident involving marijuana possession in conjunction with misleading and contradictory statements made by defendants to the arresting and investigating officers sufficient to prove knowledge]; *People v. Antista*, *supra*, 129 Cal.App.2d 47 49-51 [distinguishing *Torres* and other cases where exclusive access is not established].)

Upon the proof adduced at the penalty phase, there was insufficient evidence to find beyond a reasonable doubt that defendant knowingly possessed the guns in question. Therefore, these incidents should not have been admitted for consideration under factor (b).

5. Because Illegal Possession of a Weapon Is Not Categorically a Crime Involving a Threat of Violence Under Factor (b), the Trial Court Abused Its Discretion by admitting Incidents in Aggravation C, D, & E Without Making the Requisite Determination That the Incidents Involved the Implied Threat of Violence

"Factor (b) of section 190.3 permits the introduction of evidence of '[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.'" (*People v. Michaels* (2002) 28

Cal.4th 486, 535, citing Code § 190.3) A trial court's decision to admit evidence of a defendant's prior criminal activity under factor (b) is reviewed under the abuse of discretion standard. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

> Possession of a firearm is not, in every circumstance, an act committed with actual or implied force or violence. [Citation omitted.] The factual circumstances surrounding the possession, however, may indicate an implied threat of violence. [Citation.] "In a series of cases ... [citations], we have held that the possession of a weapon in a custodial setting—where possession of any weapon is illegal—'involve[s] an implied threat of violence even when there is no evidence defendant used or displayed it in a provocative or threatening manner.'" [Citation.] "Even in a *noncustodial* setting, illegal possession of potentially dangerous weapons may 'show [ ] an implied intention to put the weapons to unlawful use,' rendering the evidence admissible pursuant to section 190.3 factor (b)." [Citation.]

(*People v. Bacon* (2010) 50 Cal.4th 1082, 1126-1127.)

While the question of whether the acts occurred is a factual matter for the jury, "the *characterization* of those acts as involving an express or implied use of force or violence, or threat thereof, [is] a legal matter properly decided by the court." (*People v. Nakahara* (2003) 30 Cal.4th 705, 720 [emphasis in original].) In contravention to the rule annunciated in *Nakahara*, the trial court improperly submitted the issue of whether the conduct at issue constituted an implied threat of violence to the jury without making the threshold determination itself, stating

> Carrying [a gun] around in a car in a position where this gun was found I think can give rise to a reasonable assumption that its purpose involved implied use of violence in the future, some undetermined time point.
>
> Again, it may be a *question of fact* whether the jury accepts that. I'm not – I don't think simply allowing that evidence to come before the jury, if it gets to a penalty phase, make it per

> se evidence that the jury has to accept it. I still think that *they have a function to decide* whether this is a factor that they should consider in the penalty phase.

(1RT:147, italics added.)

As this Court recognized in *Nakahara*, the instructions for the jury's consideration of factor (b) evidence direct the jury to conclude that the conduct, if proved, constitute an actual or implied threat of violence. (*See People v. Nakahara, supra*, 30 Cal.4th at 720 [instructions properly directed the jury to conclude that possession of shank in prison constituted an implied threat of violence]; see CALJIC 8.87; 5CT:1172.) Thus, neither the court nor the jury has made any finding that the conduct in question *did* constitute an implied threat of violence.

Although the determination of whether to admit evidence under factor (b) is reviewed for abuse of discretion, (*People v. Smithey, supra*, 20 Cal.4th 936, at p. 991), here the trial court improperly submitted to the jury—with instructions that presumed an affirmative answer—the question of whether the conduct constituted an implied threat of violence. Both the trial court's failure to exercise discretion and its issuance of a ruling premised upon an error of law necessarily constituted abuses of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180.)

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a. Because the Determination of Whether the Conduct At Issue Constituted an Implied Threat of Violence Involved Factual Questions Turning on the Credibility of Prosecution Witnesses, This Court Cannot Cure the Error Without Striking the Incidents Of Aggravation At Issue

Where an issue committed to the discretion of the trial court "is not really a classic question of law, but is one of fact that, because of its character, is nevertheless committed to judicial determination," it is "particularly inappropriate" for an appellate court to "decide that issue independently if it turns on witness credibility." (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1394 [question of validity of liquidated damages].) The determination of whether the factor (b) evidence involving appellant's weapon possession constituted an implied threat of violence is precisely such a factual question which is inappropriate for this Court to resolve on appeal.

In determining whether an individual instance of illegal weapon possession constitutes an implied threat of violence the trial court inquiry is centered upon "factual circumstances surrounding the possession." (*People v. Bacon, supra*, 50 Cal.4th 1082, 1127.) In other words, it is not a purely legal determination, but an examination of all of the pertinent facts. In this case, there was an evidentiary hearing regarding both incidents in aggravation 2C and 2D, in which the officers involved testified. (1RT:3-54, 126-147.) With regard to the Circle K incident, for instance, a defense investigator testified at length in an effort to attack the credibility of Officer Stowe about the allegedly "poor lighting"of the place where appellant parked which triggered the initial investigation into what Stowe feared

might be a robbery. (1RT:6, 9-10, 27-38.) It is not the province of this Court to weigh the credibility of such conflicting evidence on appeal and determine the factual question which the trial court mistakenly overlooked. The trial court was free to believe or disbelieve some or all of the officer's testimony which bore on the ultimate determination of whether the incidents involved an implied threat of violence. Instead, it mistakenly submitted the issue for jury determination. Therefore, the factor (b) evidence relating to appellant's weapons possession must be stricken.

b. Because the Trial Court Suggested That a Reasonable Jury Could Have Made a Determination That the Conduct At Issue Did Not Constitute an Implied Threat of Violence, the Error Was Prejudicial

The improper submission of an issue to the jury instead of the trial court is state law error subject to review under the *Watson* standard. (*Beasley v. Wells Fargo Bank* (1991) 235 Cal.App.3d 1383, 1397 [*Watson* test applied where trial court erred in submitting an equitable issue to the jury]; *People v. Collins* (2001) 26 Cal.4th 297, 313 [although invalid waiver of right to jury right is subject to automatic reversal, improper determination of issues by court instead of jury triggers *Watson* standard when issues do not implicate right to jury trial].)

Normally, it is difficult to ascertain the prejudice when a decision committed to the trial court is erroneously submitted to the jury. (*Beasley v. Wells Fargo Bank, supra*, 235 Cal.App.3d at 1397.) Here, however, the trial court stated on the record that the issue was a "pretty close case" (1RT:146) and that it would be a "question of fact whether the jury accepts [the prosecution argument]." (See 1RT:146-148.) Given that the trial court suggested that it was a "close case" and that multiple interpretations of the

evidence were possible, it is "reasonably probable" that the court might have excluded the evidence if it had properly determined the issue itself. Therefore, the question of prejudice turns on whether the incidents, if excluded, would have affected the outcome of the penalty phase.

As explained above, see Argument VII.B.5, *ante*, the individual weapon possession charges were critical to the repeated prosecution refrain that appellant had a propensity for violent and threatening behavior. (See 9RT:1902,1908-1909, 1928; see also *People v. Wright* (1990) 52 Cal.3d 367, 432 ["The purpose of factor (b) is to show the defendant's propensity for violence"].) Even the exclusion of a single incident would undercut a theory that depended more on the *repetition* of incidents of weapons possession than on the evidence of actual violence or threats that these incidents reflected. Indeed, at least half of the incidents in aggravation involved no explicit violence or threats of violence.

Absent the repetitious weapons possession charges, the jury was left with a borderline mentally retarded defendant who was the victim of horrific childhood abuse. His crime was a murder and attempted murder of two drug dealers during an attempted score. The case was a close one in which the jury debated the effects of a life sentence at the very beginning of a lengthy deliberation. Any of the aggravating evidence may have tipped the scale towards life. The error therefore warrants reversal.

6. Allowing Weapons Possession Charges to Be Introduced Under Factor (b) for Possible Threat at Some "Undetermined Time Point" in the Future Was Erroneous

Aside and apart from the trial court's error in submitting the determination of the whether the factor (b) weapons possession charges involved an implicit threat of violence to the jury, the trial court also erred

in allowing the evidence based on its belief that the evidence allowed a "reasonable assumption" that the weapons would be used in an implicitly threatening manner at some "undetermined time point" in the future.

As noted above, the trial court explained its admission of the weapons possession charges based upon its logic that "[h]andguns or most handguns, unless they're clearly for competition like a target pistol, have one purpose. That is either offensive use or defensive use to shoot at somebody" and thus "[c]arrying one around in a car in a position where this gun was found I think can give rise to a reasonable assumption that its purpose involved implied use of violence in the future, some undetermined time point." (1RT:147.)

The trial court was correct that *all* guns may be used offensively or defensively and also correct that all handguns contain the potential for future violence at some "undetermined time point" in the future. However, to apply this logic to the weapons possession charges in this case would violate this Court's explicit holding that not all acts of weapons possession are categorically a crime of violence. (*People v. Bacon*, *supra*, 50 Cal.4th 1082 at p. 1126.) Nor did the trial court's reference to "where this gun was found" (1RT:147)—an apparent reference to the location of the handgun under the seat of the Monte Carlo in Strawberry Street incident—add any limiting factual principle. Surely, a gun that was found under the seat of a friend's car posed a *diminished* potential threat in comparison with a gun that was immediately accessible on appellant's person. If the facts detailed in the Strawberry Street incident are sufficient to sustain a factor (b) finding, it strains the imagination to construct a circumstance of weapons possession that would *not* qualify as involving an implicit threat of violence. Therefore, the trial court's flawed reasoning – that *any* handgun

possessed for purposes other than hunting or sport poses a potential implicit threat of violence at some "undetermined time point" – was an abuse of discretion.

This Court has recently sanctioned the admission under factor (b) of weapons possession charges outside of the prison or jail contexts in three cases: *People v. Elliott* (2012) 53 Cal.4th 535, 587, *People v. Dykes* (2009) 46 Cal.4th 731, 778, and *People v. Bacon, supra*, 50 Cal.4th 1082, 1126-1127. Allowing factor (b) to encompass the facts of this case would expand the scope of all of these decisions and essentially overrule the holding of *Dykes* that not all weapons possession charges qualify as implicit threats of violence under factor (b).

In *Elliot,* the Court held firearm possession involved a threat of violence because the defendant reached for the pocket containing the gun while being arrested, saying that he was going to show identification (*People v. Elliott, supra,* 53 Cal.4th 535 at p. 587.) In contrast, the uncontroverted testimony in this case showed that appellant made no threatening motions when the weapons at issue were recovered nor did he exhibit any signs of resisting arrest or threatening to use the weapons in any way. (See 9RT:1914 [Arrow Motel incident]; 1934 [Circle K incident]; 9RT:1915-22 [Strawberry Street Incident].)

In *Dykes*, the gun possession charge was allowed under factor (b) because the "possession in a public place of a loaded, cocked, semiautomatic weapon with a chambered round, concealed in a large glove and ready to fire" could be considered as carrying an implied threat of violence. (*People v. Dykes, supra*, 46 Cal.4th 731, 778.) Here there was no evidence that any of the guns were cocked, suggesting an intention for immediate use. (See 9R T:1913, 9RT:1924; 1930.) Although two of the

three guns were found loaded (*ibid.*), the gun found during the Strawberry Street was not even immediately accessible. Similarly, the possible "threat" existing during the Circle K incident, apparently the potential robbery of the Circle K, was dispelled when the appellant's passenger returned from the store with a bag of non-stolen items. (1RT:21.)

Nor does the fact that a gun is loaded or unloaded offer an obvious limiting principle under the test imposed by the trial court. Under the trial court's "undetermined [future] time point" reasoning, it would always be possible to load a weapon prior to a subsequent implied threat. Perhaps more importantly, even an *unloaded* firearm can be used to make an implied—or even express threat of violence. However, here there was nothing but sheer speculation to suggest that appellant intended an immediate threat using the weapons in question.

In *People v. Bacon*, *supra*, 50 Cal.4th 1082, this Court held that the "criminal character of defendant's possession of a loaded firearm, at a time when he was subject to parole searches in Arizona, is sufficient to permit a jury to view his possession as an implied threat of violence." (*Id.* at p. 1127.) Here, there was no evidence introduced during the penalty phase that the appellant was on parole or subject to search conditions during the weapons possession incidents at issue. Moreover, the broad definition of "implied threat" given in *Bacon* was clearly related to the facts underlying the parole search condition, which resulted from the defendant's prior killing. (*Id.* at p. 1099.)

Finally, the analysis in *Bacon* highlighted this Court's restricted power to constrain factor (b) evidence under the deferential standard of review: "[t]he question of factor (b) admissibility does not turn on whether constructive custody is identical for all legal purposes to actual custody.

Rather, *the question here is whether the trial court abused its discretion in ruling that the circumstances of defendant's gun possession while under constructive custody* involved a threat of violence under factor (b)." (*People v. Bacon, supra*, 50 Cal.4th 1082 at p. 1127.) Here, the trial court abused its discretion in failing to exercise it in the first place and instead submitting the issue to the jury. It further abused its discretion by applying an improper legal analysis to the "implied threat" question. Thus, at a minimum, the trial court's extraordinarily broad reasoning cannot be glossed over by deferring to its broad discretion. If this Court is to uphold the gun possession charge in this case, it must surely uphold the admission of illegal gun possession charges in *every* case.

Instead, this Court should introduce a limiting principle in its factor (b) analysis of noncustodial criminal weapons possession charges: there must be some evidence of an *imminent* express or implied threat of violence. Because there was no such immediate threat in this case, and because the trial court relied upon the speculative "undetermined time point" at which such a threat could occur, the admission of Incidents 2C, 2D, and 2E under factor (b) was error.

For the reasons discussed in Arguments VII.B.5 and VII.C.5.b, each one of the weapons possession charges were important to the prosecution's theory that appellant was a violent man due to his repeated unlawful possession of weapons. Even the exclusion of a single incident of possession would have diminished the force of this presentation, which was based on a handful of incidents. In light of the closeness of the case, there is a reasonable probability that exclusion of any of the incidents, and a fortiori all three, would have resulted in a more favorable outcome. Therefore, the error warrants reversal.

VIII.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTIONS TO EXCLUDE EVIDENCE ASSOCIATED WITH INCIDENTS IN AGGRAVATION 2C AND 2D AND THEREBY VIOLATED HIS FOURTH AMENDMENT RIGHTS

Appellant filed two motions seeking to exclude evidence of incidents of gun possession based on Fourth Amendment violations. (3CT:784-795 [motion to suppress evidence relating to Incident 2C or "Strawberry Street incident"]; 3CT: 827-839) [motion to suppress evidence relating to Incident 2D or "Circle K incident"].) The first motion argued that the search of the vehicle parked on Strawberry Street from which the gun was recovered exceeded the scope of a warrant issued for the search of a residence unconnected to appellant which included "vehicles on said property." (See 3CT:794-795 [motion]) The second motion argued that there was insufficient cause to detain and search appellant and his vehicle parked in the Circle K lot. (See 3CT:779-782.)

With regard to the Strawberry Street incident, the trial court initially and correctly agreed with trial counsel's argument that the prosecution could not "have it both ways"—simultaneously arguing that appellant was in possession of the vehicle and therefore in constructive possession of the gun within it, but also arguing that because appellant denied that he owned the vehicle he waived any possessory rights in the vehicle and therefore lacked a legitimate expectation of privacy in the vehicle necessary to object to its warrantless search. (1RT:89.) However, in a subsequent two sentence order, the trial court reversed course, holding that appellant lacked

Fourth Amendment "standing."[48] (4CT:961.) Because the trial court's order was legally incorrect and because the search quite obviously exceeded the scope of the warrant for the apartment, the evidence should have been suppressed due to the Fourth Amendment violation.

With regard to the Circle K incident, the court held that the investigating officer had reasonable suspicion to detain appellant based on the fact that he was 1) parked outside of the demarcated spaces in an allegedly "poorly lit" portion of the Circle K parking lot six feet away from the building and 2) the Circle K had recently been the subject of robberies which caused him suspicion of the parking position. (4CT:947-951.) This ruling was also erroneous. Regardless of the officer's questionable claims about "poor lighting," parking six to eight feet from a Circle K, which like countless convenience stores had been subject to robberies, does not subject citizens to detention and pat down searches.

The trial court *correctly* held that the subsequent warrantless search of appellant's person was unlawful. (*Ibid.*) Nonetheless, the trial court held that appellant, a Spanish speaker with whom the investigating officer had great difficulty communicating, gave valid consent to the search the vehicle subsequent to the unlawful search of his person. (*Ibid.*) Because the immediate proximity between the unconstitutional search of appellant and the alleged consent rendered the consent invalid, the subsequent search was

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[48] Subsequent to the trial court's ruling on the suppression motion in this case, this Court observed in *People v. Ayala* (2000) 23 Cal.4th 225, 254, footnote 3, 96 Cal.Rptr.2d 682, 1 P.3d 3 that "[i]n the future, ... mention of 'standing' should be avoided when analyzing a Fourth Amendment claim. [Citation.]"

unconstitutional. Therefore, the evidence should have been suppressed due to a violation of the Fourth Amendment

A. The Trial Court Erroneously Admitted the Fruits of the Illegal Search At Strawberry Street

As noted above, appellant moved to exclude the evidence of the alleged weapon possession incident at Strawberry Street. (3CT:784-795) One basis of the motion was that the search of the vehicle parked on Strawberry Street from which the gun was recovered plainly exceeded the scope of a warrant. (See 3CT:794-795.) The prosecution's opposition (3CT:863-877) argued that appellant had no legitimate expectation of privacy because he informed police that he was not the registered owner of the car for which he possessed keys. (3CT:874-875.)

On September 10, 1991, a hearing on the motion was held. (1RT:55-95.) The pertinent facts adduced at the hearing are delineated above. (See, section VII.C.1., *ante*.) The critical facts for the purposes of the suppression motion were as follows: The warrant was issued for the search of an apartment with no specified connection to appellant and for undescribed vehicles "on the property." (People's Ex. 1 at In Limine Hearing [warrant and affidavit].) Neither appellant nor his vehicle was named or described in the warrant. (*Ibid.*) Appellant's car was parked on a public street in front of the apartment complex, which, as conceded by the investigating officer, was not "on the property" as specified in the warrant. (1RT:62, 64.) Indeed, at the preliminary hearing which arose from the Strawberry Street incident, the prosecution apparently conceded that the search exceeded the scope of the warrant. (See 3CT:794.)[49]

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[49] The reference to this prosecutorial concession was made in (continued...)

Police conducted a search of appellant's person and recovered car keys from his jacket pocket. (1RT:60.) When asked through an interpreter whether he owned any vehicles, appellant told police he did not. (1RT60.) When asked about the Monte Carlo specifically, appellant told police that he was not the owner. (1RT60-61.) However, investigating officer Lynn had seen appellant in the driver's seat of the car approximately three times before. (1RT:59.)[50] No consent to search the vehicle was obtained, but the vehicle was searched and a gun was recovered from underneath the driver's seat. (1RT:69.)

The trial court held that appellant lacked "standing" to contest the search of the vehicle which the prosecution claimed he was using at the time. (4CT:961) The trial court's ruling on the issue of legitimate expectation of privacy was erroneous. Because the police unquestionably exceeded the scope of the warrant in searching the vehicle, the evidence should have been excluded.

1. Absent a Total Disclaimer of Any Possessory Interest, an Individual With Such an Interest Has Standing to Object to a Search

The trial court's two sentence order finding appellant lacked a reasonable expectation of privacy in the Monte Carlo cited two cases: *People v. Dasilva* (1989) 207 Cal.App.3d 43, 49 and *Rakas v. Illinois*

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[49](...continued)
appellant's motion, citing as an attachment the preliminary hearing transcript in question. (See 3CT:794.) The referenced transcript itself was lost and is no longer part of the record. (3SuppCT:716.)

[50] According to one of the prosecution's motions, the Monte Carlo was registered to another individual not present at the scene of the search. (4CT:899.)

(1978) 439 U.S. 128, 140. (4CT:961.) Under *Rakas*, to show a legitimate expectation of privacy in a vehicle there must be a showing of a property or a possessory interest in the automobile. (*Rakas v. Illinois* , *supra,* 439 U.S. 128, at p. 148; *People v. Jenkins* (2000) 22 Cal.4th 900, 972.) While the defendant "has the burden of persuasion on the issue of his or her privacy expectations, this burden can be met by the prosecution's evidence." (*People v. Dees* (1990) 221 Cal.App.3d 588, 595.) Even if not the owner, an individual in lawful possession of a vehicle and exercising control over it has a legitimate expectation of privacy therein. (*People v. Leonard* (1987) 197 Cal.App.3d 235, 239.)

As the prosecution itself argued in defending the sufficiency of evidence of possession: "[p]ossession of the keys to a car parked in front of an apartment of which defendant was an occupant raises an inference he is the possessor [sic] the car. That inference is buttressed by Agent Lynn's frequent observation of defendant as sole occupant of the car in the same block where the apartment subject to search was located." (4CT:899 see also 1RT:137-139 [prosecution argument on motion].)

Because the evidence at the hearing supported the finding that appellant had lawful possession of the vehicle, it supported the legal conclusion that he had a legitimate expectation of privacy in the car's contents. In fact, this is precisely what the trial court originally indicated in the following exchange during argument on the motion:

> THOMMEN: The DA indicated the fact he said it wasn't his car, it precludes him from being able to assert the privilege. I don't think the DA can on one hand claim he possessed that gun, he had the keys in his pocket, and was seen in the car, that he possessed that gun, and then disallow his standing to attack the search that retrieved that weapon. I think it is a situation he can't have it both ways.

> THE COURT: I don't either. We have evidence, number one, the defendant has been seen at least three times driving the car around town presuming possibly assuming possibly he is the owner, or if he's not, he's got the right to drive it which might give him some authority to say it can be searched or not searched. He has the keys to the car at that time they're taken from him, and then he says well, it is not my car. I'm not sure whether that will fly.

(1RT:89.)

The only indication for why the trial court reversed course is its citation of *People v. Dasilva*, *supra*, 207 Cal.App.3d 43. (4CT:961.) In *Dasilva*, the driver of a vehicle gave the police permission to search the trunk and said that he knew nothing about certain containers inside the trunk. (*Id.* at p. 564.) The police searched these containers and found contraband. (*Id.* at p. 565.) Both parties *agreed* that the driver, Dasilva, had a reasonable expectation of privacy in the trunk of the vehicle, which Dasilva claimed had been loaned to him by a friend to drive to San Diego. (*Id* at 564, 566.) This was true even though no registration papers were found in the vehicle and a Department of Motor Vehicles check had returned registration to a business, not Dasilva or his friend, and had come up empty on the false name provided by Dasilva. (*Id.* at p. 564.)

The *Dasilva* court upheld the search of the trunk because the driver had voluntarily consented to it. (*Id.* at pp. 566-567.) On the other hand, because the driver had disclaimed ownership or possession of the items inside the trunk before they had been searched, the court concluded that he did not have a reasonable expectation of privacy as to those items, concluding: "We will not extend California law to permit a defendant who disclaims possession of an object to take a contrary position in an effort to attain standing to seek to exclude that object from evidence." (*Id.* at p. 566.)

Nothing in *Dasilva* militates against a finding of an invasion of Fourth Amendment privacy interests in this case. To the contrary, in *Dasilva*, the court noted that both the defense and prosecution *agreed* that the defendant had a possessory interest in the loaned vehicle, despite the fact that he, like appellant, admitted he was not the registered owner. (*Id* at 564, 566.)

The meaning of *Dasilva* and the cases upon which it relied was clarified in *People v. Dees, supra*, 221 Cal.App.3d 588. In *Dees*, the defendant originally claimed ownership of a car, which was searched without his consent. The defendant later sought to dissociate himself from the car and, on appeal, the People argued the defendant's lack of expectation of privacy was shown by his position disavowing ownership of the vehicle. (*Id.* at pp. 590–593.) Reviewing *Dasilva* and cases cited by the *Dasilva* court, the *Dees* court concluded

> These cases stand for the proposition that a *total disclaimer of any interest* in the area or item searched at the time of the search [Citations], or the absence of *any* evidence of ownership, possession or control of such area or item [Citation], will preclude a successful challenge to the legality of that search. In the former situation, the defendant has in effect given the authorities the green light to proceed insofar as his or her own Fourth Amendment rights are concerned. In the latter, there is a total failure of proof.

(*Id.* at pp. 594-595, first italics added.)

There was no "total disclaimer of any interest" in the vehicle by appellant in this case. After the keys were removed from appellant's person, he was asked through an interpreter whether he *owned* any vehicles. Appellant said no. (1RT:60.) When asked specifically about the Monte Carlo, appellant answered that the vehicle was not his (1RT:60-61), apparently truthfully. (See 4CT:899.) Appellant was under no obligation to

provide further, incriminating information to police in order to establish a reasonable expectation of privacy. Had appellant specifically disclaimed *any* interest in the car whatsoever, a difficult feat in light of the fact that the keys had just been found in his pocket, perhaps a total disclaimer could have been found. However, particularly in light of the fact that the question was asked through a translator who never testified at the hearing, appellant's statement that the Monte Carlo was not his did not deprive him of a legitimate expectation of privacy in the vehicle.

Likewise, there was not an "absence of *any* evidence" of possession of the vehicle. (*People v. Dees*, *supra*, 221 Cal.App.3d 588 at p. 594, italics in original.) Appellant had the keys to the car in his pocket. (1RT:59.) He had also been seen repeatedly in the vehicle by police. (1RT:59; cf. *People v. Allen* (1993) 17 Cal.App.4th 1214, 1222-1223 ["the trial court erred in determining defendant's lack of standing based exclusively on his one statement giving his address as 4782 East Orleans without considering the other relevant evidence . . . Unlike cases where a defendant makes vigorous oral disclaimers of ownership [Citation], defendant here did not disclaim all interest in the area searched, the Lyell Avenue address; he merely gave a different location as his address"].)

Indeed, police sightings of appellant in the car and appellant's possession of the keys were the very facts used by the prosecution to establish knowing constructive possession. The *Dees* court rightly criticized this form of contradictory logic: relying on evidence of possessory interest to prove guilt, but disclaiming the importance of such evidence in attempting to circumvent a defendant's Fourth Amendment rights. (*People v. Dees*, *supra*, 221 Cal.App.3d 588 at pp. 595-598 [discussing "prosecutorial self-contradiction"].) The *Dees* court indicated that in such

cases "the People in effect concede[] appellant's connection to the car and his expectation of privacy therein. [Citation.] Moreover, the lower court, by holding appellant to answer on the basis of the People's evidence, thereby rejecting appellant's attempt to disassociate himself from the Cadillac, cannot then turn the tables to deny his assertion of privacy based on the exact same showing." (*Id.* at p.598; see 1RT:147-148 [prosecution argument supporting constructive possession]; 4CT:946 [trial court's denial of *Phillips* motions].)

In the same way, the prosecution's use of the evidence that appellant was in possession of the keys to the car and was seen repeatedly by police in the car to prove knowing constructive possession of the vehicle's contents (1RT:137-139, 4CT:899) strongly undermines its argument that appellant had no possessory interest sufficient to raise a Fourth Amendment objection. The trial court's initial inclination about these conflicting positions, "I am not sure whether that will fly" (1RT:89), was correct.

2. Remand to the Trial Court Is the Appropriate Remedy

A ruling on whether the warrant was exceeded appears to be what the trial court originally intended. (1RT:94-95 ["I think we're going to have to go on the search warrant that will either stand or fall on whether the warrant, the way it is worded could encompass searching the car, having in mind where it was located"].) However, the trial court chose not to rule on the merits of appellant's suppression motion. Because the trial court erred in rejecting appellant's motion by incorrectly holding he had no legitimate expectation of privacy, the proper remedy is to remand for the trial court to determine the suppression issue in the first instance. (*People v. Dachino* (2003) 111 Cal.App.4th 1429, 1433 [remanding where "[b]ecause the court

ruled solely on the issue of standing, we do not speculate whether it implicitly rejected [the defendant's] contentions on the merits. [The defendant] had the right to a ruling on all the suppression issues."]; *People v. Cella* (1981) 114 Cal.App.3d 905, 914 ["whether the court intentionally or inadvertently failed to rule on the remaining merits of the section 1538.5 motion, [the defendant] must receive a full and complete hearing. [The defendant] is thus entitled upon remand to further proceedings to resolve expressly and completely his suppression contentions"].)

Assuming remand is not always required when a trial court fails to rule on the merits of a suppression motion because it finds no expectation of privacy, it is at the very least required when there is a "reasonable probability" that the trial court would have granted the underlying motion. (*People v. Dees*, *supra*, 221 Cal.App.3d 588, at p. 598 [remanding where it was "reasonably probable that the lower court [would] grant appellant's motion the second time around"].) Because this case presents a textbook example of officers exceeding the scope of the warrant, there is such a reasonable possibility and a remand is warranted.

A warrant "supporting the search of a motor vehicle must, at the very least, include some explicit description of a particular vehicle or of a place where a vehicle is later found." (*People v. Dumas* (1973) 9 Cal.3d 871, 875) Here, there was no description whatsoever of the vehicle searched, nor the place it was found. The vehicle was not discovered "on the property" or even in the parking space dedicated to the apartment. (1RT:62.) The testifying officer even conceded as much. (1RT:64.)

Issuance of a warrant to search a property and the vehicles located therein is not an open license to rummage through every visitor's car parked nearby. (See La Fave, 2 Search & Seizure § 4.10 (4th ed.)) [if the vehicle

"is not described in the warrant it must be found within rather than near the described premises before it can be searched pursuant to the warrant. Ordinarily, a description in a warrant of a dwelling at a certain place is taken to include the area within the curtilage of that dwelling, so that it would cover a vehicle parked in the driveway rather than the garage. But such a warrant would not cover a car parked nearby on a public street, even if it were clear beyond question that the vehicle belonged to the occupant of the described premises."]; *People v. Dumas*, *supra*, 9 Cal.3d 871, 875 [search of automobile for which defendant possessed registration did not fall under scope of warrant when it was parked on a public street near defendant's apartment].)

Indeed, the warrant in this case, which provided no description of appellant or his vehicle, arguably would not even apply if appellant's vehicle *were* found on the property and the police were aware the car did not belong to the occupants of the residence. (See La Fave, *supra,* at § 4.10 ["a warrant for a certain house does not cover the automobile of a visitor there who has parked his car in the driveway"]; *Dunn v. State* (Fla. App. 1974) 292 So.2d 435 [vehicle on the premises may be searched only when shown to be under the control of persons named in the warrant].)

The prosecution's attempt to justify the search of the vehicle as an "appurtenance" of the residence (see 1RT:85-86) likewise fails. The case cited by the prosecution for support, *People v. Elliott* (1978) 77 Cal.App.3d 673, actually supports appellant's position. (See *id.* at p. 689 [following *People v. Dumas*, *supra*, 9 Cal.3d 871, but holding that warrant authorized search of the cars which "were later found *in the garage attached to Elliott's house*" because the warrant met "minimum standards of definiteness required for the search of an automobile"], italics added.)

While appurtenances, structures, and outbuildings of a property may be searched pursuant to a warrant for a specific premises, such a search is limited to locations on the property itself and "nothing more." (*People v. Smith* (1994) 21 Cal.App.4th 942, 950 [warrant for 40-acre property was limited to property specified, which included barn located thereon]; La Fave, *supra*, at § 4.10 ["if the warrant also directs a search of a vehicle on the described premises, it is sufficient that the car is situated close enough to the house to be *within the curtilage*"], italics added.)

Nor can the search of appellant's person, which itself appears to have been illegal (see *Ybarra v. Illinois* (1979) 444 U.S. 85, 91 [warrant for premises does not provide authority to search all occupants of premises]), serve to validate the search of his vehicle. It would be a remarkable feat of logic to conclude that appellant, who was at least on the premises for which the warrant was issued, was not the proper subject of a search while his car, which was neither described in the warrant nor on the premises, became a legitimate target of the warrant after an illegal search.

3. This Court Cannot Avoid Remand by Holding the Error Harmless

Violation of appellant's Fourth Amendment rights is a federal error subject to prejudice analysis under the standard of harmlessness beyond a reasonable doubt. (*People v. Scott* (1978) 21 Cal.3d 284, 295.) For the reasons discussed in Argument VII.B.5 and Argument VII.C.5.b, each one of the weapons possession charges was important to the prosecution's presentation that appellant was a violent man due to his repeated, unlawful possession of weapons. Even the exclusion of a single incident of unlawful possession would have diminished the force of this presentation, which was based on only a handful of incidents. In light of the closeness of the case, it

cannot be said that the exclusion of any of the incidents would not have caused a juror to determine that appellant deserved to live. Therefore, the error warrants reversal of the sentence.

B. The Trial Court's Erroneous Admission of the Evidence Illegally Seized During The Circle K Incident Warrants Reversal

As noted above, appellant filed a motion seeking to suppress the evidence recovered from his vehicle during the Circle K incident, arguing that there was insufficient cause to detain and search appellant and his vehicle parked in the Circle K lot. (See 3CT:779-782.) On September 9, 1991, a hearing on the motion was held, the relevant facts of which are recounted above. (See Argument VII.C.2, *ante*; 1RT:3-55.)

The trial court ruled that: 1) appellant was detained within the meaning of *Terry v. Ohio* (1968) 392 U.S. 1 "until after Officer Stow had concluded his identification procedure with the defendant"; 2) there existed reasonable suspicion to detain appellant because of the prior robberies of the convenience store and the fact that appellant was parked in a poorly lit portion of the parking lot facing an exit; 3) Officer Stowe violated appellant's Fourth Amendment rights by engaging in a search of appellant's person to retrieve cash from his pocket; and 4) the subsequent search of the vehicle and discovery of the weapon was lawful based an appellant's subsequent consent. (4RT:946-951.) The trial court's rulings that there was reasonable suspicion to detain and that appellant lawfully consented immediately after being searched illegally were incorrect.

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1. Parking In a Dim Portion of Parking Lot for a Convenience Store That Has Been Robbed Does Not Provide Reasonable Suspicion to Detain

According to the trial court, there was reasonable suspicion to detain appellant due to his act of parking on the north side of the Circle K parking lot facing an exit. The trial court's reasoning was both legally and factually incorrect.

a. The Trial Court Manufactured a "Modus Operandi" Not Present in the Evidence

The trial court's factual error was to misconstrue the evidence adduced at the hearing. The trial court concluded that the requisite showing of reasonable suspicion had been met because Officer Stowe testified that the Circle K market "was subject to numerous robberies, thefts or beer runs and that part of the modus operandi was to park on the north side of the market, in the dark, with the car facing Dinuba Boulevard for a fast getaway." (4CT:948.)

While such a showing may have assisted in supporting a showing of reasonable suspicion, Stowe never related that there was a "modus operandi" for prior robberies identical to the situation he confronted when he detained appellant. Stowe testified very briefly that he 1) had on a couple of other occasions stopped to *investigate* vehicles which had parked on the north side of the Circle K (1RT:8), and 2) his reason for detaining appellant when he saw him was that "I have responded to and been made aware of thefts from this store where subjects will exit to the north and sometimes leave in vehicles." (1RT:9.) He also affirmed the trial court's leading question that he had "some suspicion that perhaps this car was parked around there to effect a getaway as has happened on other occasions." (1RT:9.)

Stowe's testimony did not establish that the "numerous thefts" of the Circle K were connected by a "modus operandi" which involved vehicles parking in a dimly lit section on the north side of the Circle K facing Danuba to effectuate a "fast getaway" as concluded by the trial court. (4CT:948.)

First of all, there was very little information supporting the trial court's conclusion that there were "numerous thefts." There was no testimony regarding the precise number of thefts from this Circle K, or whether it was any higher than the number of thefts at any other convenience store in the area. (See Clifton, Convenience Store Robberies In Gainesville, Florida: An Intervention Strategy By The Gainesville Police Department at p.3 available at http://www.ncssc.org/Pg/Doc/AN%20INTERVENTION%20STRATEGY%20BY%20THE%20GAINESVILLE%20POLICE%20DEPARTMENT.pdf [seminal study noting that during one five-year period in Gainesville in the 1980s, 96% of all convenience stores had been robbed, with the number of occurrences ranging from one to fourteen times].)

Second, there is little indication that appellant was stationed as a "getaway driver" to ensure quick egress from the lot. If the purpose of the car's position was to allow the fastest possible flight from a robbery, appellant would have left his engine on. (Cf. *People v. Perrusquia* (2007) 150 Cal.App.4th 228, 231 [no reasonable suspicion even where defendant was found in parking lot of convenience store subject to recent, repeated thefts, though defendant parked facing exit and with engine idling].)

Third, Stowe stated that he was aware of other thefts where vehicles *exited* to the north. Anyone robbing the Circle K could *exit* to the north regardless of where they parked in the lot. Such testimony says nothing

about whether anyone parked on north side of the Circle K lot was engaged in inherently suspicious activity. In fact, common sense suggests that someone hoping for a "fast getaway" from a robbery of a convenience store would park as close to the entrance of the store as possible, not around the corner, as had appellant

The only testimony provided by Stowe concerning vehicles that had *parked* to the north of the Circle K was that he had, on a "couple of other occasions" stopped to "investigate why the vehicles are there" (1RT:8), and his affirmance of the trial court's suggestion that he suspected that appellant had "parked around there to effect a getaway as has happened on other occasions." (1RT:9.) Stowe's comment about his "couple" of prior investigations contained no suggestion that *any* criminal conduct had been uncovered, much less thefts exhibiting the "modus operandi' manufactured by the trial court.

With regard to Stowe's answer to the trial court's leading question, its meaning was unclear due to the form of the question itself. The trial court responded to Stowe's statement that "I have responded to and been made aware of thefts from this store where subjects will exit to the north and sometimes leave in vehicles" by confirming that "this" had "happened before" at the Circle K. (1RT:9.) Then, the court suggested that Stowe was suspicious that appellant "parked around there to effect a getaway as has happened on other occasions" which Stowe confirmed. (*Ibid.*) Exactly what had "happened on other occasions" and what exactly the trial court meant by "around there" was not entirely clear.

The details of the other occasions which Stowe *had* explained did not provide the basis for the conclusion that the trial court ultimately reached - that those other occasions exhibited some form of defined "modus

operandi." If Stowe believed that the trial court *was* referring back to his prior testimony, and not assuming facts not in evidence, it could be that Stowe was affirming simply that he was suspicious that appellant was parked "around there" because in past robberies or thefts vehicles had 1) waited anywhere in the Circle K parking lot to effectuate a getaway, 2) had waited somewhere dimly lit in the Circle K parking lot to effectuate a getaway 3) had waited anywhere to the north section of the Circle K parking lot regardless of lighting to effectuate a getaway, 4) had parked farther from the store than was necessary to effectuate a getaway, or 5) had parked facing an exit to effectuate a getaway.

Even assuming that Stowe referred to other occasions in which criminal actors parked on the north portion of the lot in a location and orientation *identical* to appellant's vehicle, at most his testimony indicated that some criminal actors had parked there in the past, not that all or even most of the prior robberies occurred in that specific fashion. In fact, Stowe's testimony proves that not all of the robberies even followed the same pattern. Stowe testified that "sometimes" the suspects of prior thefts left in a vehicle. This indicates, at the very least, that "sometimes" thieves exited by other means, such as on foot, seemingly captured by the trial court's reference to illegal "beer runs." (4CT:948.) Further, nothing in the testimony forecloses the possibility that some, or even most of the prior robberies were accomplished by parking on the west side of the Circle K near the entrance or facing in towards a different exit or even towards the store. Nor did Stowe suggest that the prior robberies occurred at night or that they occurred in circumstances in which parking closer to the front of the store was available, which Stowe conceded would render the location of appellant's vehicle unsuspicious. (1RT:10, 19)

In short, Stowe's testimony failed to establish a "modus operandi" of any kind. There was no indication anywhere in the testimony that all of the prior thefts were accomplished in the same manner or even by the same or related individuals. At most, it showed that an unknown number of prior thefts had occurred at an unknown time of day after individuals parked somewhere "around" the north wall of the store. But this would be no more relevant to reasonable suspicion than if, as is likely, an unknown number of the robberies had occurred after vehicles had parked directly in front of the store or elsewhere on the lot.

b. The Trial Court's Determination That There Existed Reasonable Suspicion Was Erroneous

An officer may, consistent with the Fourth Amendment, "conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." (*Illinois v. Wardlow* (2000) 528 U.S. 119, 123.) While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, "the Fourth Amendment requires at least a minimal level of objective justification for making the stop. [Citation.] The officer must be able to articulate more than an 'inchoate and unparticularized suspicion or "hunch" of criminal activity.'" (*Id.* at pp. 123-124.) The trial court's determination of reasonable suspicion is reviewed de novo. (*Ornelas v. United States* (1996) 517 U.S. 690, 697.)

The trial court concluded that prior robberies of a convenience store combined with the fact that appellant had parked on the less well-lit north side of the Circle K lot facing an exit constituted reasonable suspicion to detain. This ruling was erroneous. Indeed, such a finding would mean that *everyone* who parked on the north side of this particular Circle K parking

lot at night, and less well-lit sections of parking lots of other stores across this state that had been robbed, could be detained, ordered out of their vehicle, and frisked, even without engaging in suspicious activity of any kind.

A very similar factual scenario was discussed in *People v. Perrusquia* (2007) 150 Cal.App.4th 228, in which reasonable suspicion was found to be absent. In *Perrusquia*, the investigating officer had been briefed in the morning by detectives about a series of six armed robberies at 7-Eleven stores in Anaheim, had been provided with a description of a possible suspects, and told to perform patrol checks and keep his eyes on 7-Eleven stores because they had been victimized so frequently. (*Id.* at pp. 230-231.) Based on his prior experience, the officer knew that the area around the particular 7–Eleven in which the detention occurred was a high-crime area. (*Id.* at p. 231.) In particular, the officer himself had had contacts in the area relating to assault with a deadly weapon and drug complaints, knew that numerous gangs were tied to the area, and he had frequently worked with gang detectives in the area during his patrol hours. (*Ibid.*)

The investigating officer noticed the defendant's car as he entered the lot, where it was parked, like appellant's vehicle, facing an exit. (*Ibid.*) Like appellant's vehicle, the car "caught [the officer's] attention because there were other spots available closer to the store's entrance" and in addition "someone was inside with the engine idling." (*Ibid*; 1RT:10 [location of appellant's car only suspicious because it was not parked in available spots closer to store].) After observing the suspect for a brief period, the officer, joined by another officer, approached the car and observed the suspect "fumbling" and then heard a "thud" in the vehicle.

(*People v. Perrusquia*, *supra*, 150 Cal.App.4th 228 at p. 231.) When the defendant observed the officer, he turned off the vehicle's engine, exited, and "aggressively, quickly" tried to pass the officer. (*Ibid.*) When the officer asked the suspect what was going on, the suspect replied to the effect that he was going to the store and the officer told him to "hang on a second." (*Ibid.*) A subsequent frisk revealed a weapon. (*Ibid.*)

Based on these skeletal facts, the court concluded that "the district attorney does not cite any case where the facts are quite as thin and nonspecific as they are here" and concluded there was no showing of reasonable suspicion. (*Id.* at p. 234.)

In the case at hand, appellant was parked at a convenience store, which—like countless other convenience stores— had been victimized by theft. (See Cox, *supra*, at p. 3.) Unlike in *Perrusquia*, there was no testimony that the area was a high crime area or that Stowe had been instructed to carefully scrutinize the particular convenience store in question for signs of criminal activity. (Cf. *Perrusquia*, 150 Cal.App.4th 228, at p.231.) Nor was there evidence that there was a string of robberies perpetrated by a single individual increasing the likelihood of a repeat offense following a particular pattern. (Cf. *Id.*) Although appellant had, like the suspect in *Perrusquia*, chosen to park facing an exit (presumably for convenience), and was not parked in the space closest to the entrance, this does not establish reasonable suspicion to detain. (*Id.* at p. 234.)

There was no evidence that would suggest that appellant was engaged in any form of criminal activity: he was simply sitting in his car, with no activity suggesting that he was prepared for a "getaway." (Cf. *Id.* at p. 231 [suspect waiting in car had engine idling].) Unlike the suspect in *Perrusquia*, appellant made no furtive movements in the vehicle nor did he

make any attempt to avoid police when they approached him. (Cf. *Id.* at p. 490 [noting that defendant "tried to avoid contact with the officers" and prior to search the officer had "heard what he described as 'kind of like a fumbling' and a 'thud'" from the vehicle]; *People v. Wilkins* (1986) 186 Cal.App.3d 804, 807 [no reasonable suspicion where police saw passengers parked in convenience store at night in high crime area who seemed to "lower themselves to conceal themselves in a crouched down position" as he drove past].)

Although appellant chose to park in a portion of the lot in which criminal actors had also parked, this form of guilt by geographic association does not constitute reasonable suspicion. Not only would this logic mean that everyone who parked at night where appellant parked could be the subject of detention, but also the unavoidable results of this reasoning could not be contained. By extension, it would mean that everyone who sat in a car directly outside a bank which had been robbed, or who took a stroll down an alleyway frequently traveled by drug dealers would likewise be subject to intrusive police investigation. Such logic would run afoul of the well-established rule that, even in a specifically identified "high crime area," police must articulate specific grounds for suspicion prior to detention. (See *In re Tony C.* (1978) 21 Cal.3d 888, 897 [a recent burglary report "does not transform a residential neighborhood into a no man's land in which any passerby is fair game for a roving police interrogation"].) In sum, there was no reasonable suspicion to detain appellant. As a result, the subsequent search was unlawful and the evidence should have been excluded.

2. Consent Provided Immediately Following Illegal Police Conduct Does Not Cure a Fourth Amendment Violation

The trial court ruled that the warrantless search of appellant's person was "improper and the seizure of the [cash discovered] must be suppressed." (4CT:949-950.) Nonetheless, it held that the search of appellant's vehicle immediately thereafter pursuant to appellant's "consent" was "voluntary" and therefore the subsequent search was valid. (4CT:949:51.) This ruling was plainly erroneous.

When the prosecution seeks to justify a search on the ground that consent was given, "they have the burden of proving . . . that the consent was lawful, was not a mere submission to authority, *and was not inextricably bound up with unlawful conduct.* [Citation]" (*People v. Lawler* (1973) 9 Cal.3d 156, 163 [illegal pat-down search tainted subsequent consent to search sleeping bag]; *People v. Superior Court (Stevens)* (1974) 12 Cal.3d 858, 861 [consensual search of coat invalidated by prior illegal entry and search of the apartment]; *Florida v. Royer* (1983) 460 U.S. 491, 501 [consent given after unlawful *Terry* stop invalid because it was "tainted by the illegality" of the detention]; *People v. Gallant* (1990) 225 Cal.App.3d 200, 211 [consent coming within three minutes of an illegal detention could not "be segregated from the illegal assertion of authority"].)

As explained above, the initial detention of appellant was unlawful, thus invalidating any subsequent consent to search. (*Florida v. Royer, supra*, 460 U.S. 491, at p. 501.) Even assuming the investigating officer had reasonable suspicion to detain, the trial court itself found that Officer Stowe had engaged in an unlawful search of appellant's person immediately prior to obtaining his consent to search the vehicle. Where "neither any time nor event intervened" between one unlawful search and another, the

consent and the illegal acts are "inextricably bound" and suppression is required. (*People v. Lawler*, *supra,* 9 Cal.3d 156, at p. 164.)

3. The Failure to Suppress the Evidence From the Circle K Incident Warrants Reversal of the Sentence

Violation of appellant's Fourth Amendment rights is a federal error subject to prejudice analysis under the standard of harmlessness beyond a reasonable doubt. (*People v. Scott* (1978) 21 Cal.3d 284, 295.) For the reasons discussed in Arguments VII.B.5 and VII.C.5.b, each one of the weapons possession charges was important to the prosecution's presentation that appellant was a violent man due to his repeated, unlawful possession of weapons. Even the exclusion of a single incident of unlawful possession would have diminished the force of this presentation, which was based on a handful of incidents. In light of the closeness of the case discussed above, it cannot be said that the exclusion of any of the incidents would not have caused a juror to conclude that appellant should be sentenced to death.

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IX.

THE TRIAL COURT COMMITTED *SKIPPER* ERROR IN EXCLUDING EVIDENCE THAT APPELLANT'S FATHER KIDNAPED AND RAPED APPELLANT'S MOTHER IN THE SAME MANNER THAT HE KIDNAPED AND RAPED ROSA BACA

In general, sentencing hearings in capital cases have a "relatively unrestricted scope of mitigating evidence the defendant is permitted to offer." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1234-1235.) This is because "[t]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Skipper v. North Carolina* (1986) 476 U.S. 1, 4-9; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 394-399; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

When "any barrier, whether statutory, instructional, evidentiary, or otherwise [Citation] precludes a jury or any of its members [Citation] from considering relevant mitigating evidence, there occurs federal constitutional error. . . ." (*People v. Mickey* (1991) 54 Cal.3d 612, 693.) In addition, when a defendant is denied the opportunity explain aggravating evidence, due process is violated. (*Gardner v. Florida*, 430 U.S. 349, 362; *Skipper v. North Carolina, supra*, 476 U.S. 1, at p. 9 (conc. opn. of Powell, J. [due process violated when exclusion of evidence prevented defendant from "rebut[ting] evidence and argument used against him"].)

Mitigating evidence must, of course, be relevant to the defense case at penalty. However, the threshold for constitutional relevance at a penalty

hearing is low. "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. [Citation]." (*Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

In this case, the trial court excluded evidence that the origin of appellant's mother's "marital" relationship with his father was the result of the father kidnaping the mother at a very young age in precisely the manner that he later kidnaped Rosa Baca for his son. The trial court also excluded testimony that the "continual" beatings of the mother by the father "continued from [the kidnapping of appellant's mother] on." (See 9RT:2150-2151.) The ruling of the trial court, that this mitigating life-history should be excluded simply because the jury knew of other physical abuse and because appellant was not present for the kidnapping of his mother and violence prior to his birth, is flawed in several respects.

First, the evidence unquestionably was such that a jury might "reasonably deem [it] to have mitigating value." (*Tennard, supra*, 542 U.S. at p. 285.) The evidence demonstrated that appellant was the product of rape and sexual slavery, which undoubtedly would interfere with his mother's ability to offer him the love and emotional support critical to normal childhood development. It also would have provided the jury context for the *duration* of the unspeakable violence which appellant's mother and other family members endured, which was not otherwise delineated in the defense case. Evidence of the duration of familial abuse was important because it showed that appellant was not only a victim and witness to traumatizing and severe violence against himself and his family members, but also that he never knew anything remotely resembling a normal and nurturing family environment.

Second, the evidence was relevant to rebut the prosecution theory that appellant was a "ready participant" in the kidnaping and rape of Rosa Baca. (9RT:1902 [prosecution opening argument].) The evidence that appellant's father had engaged in the precise criminal conduct at issue in the Baca incident before appellant's birth would have strongly supported the defense theory that appellant's sadistic father was the violent force behind the repeat performance of his prior misconduct. Because the prosecution's own witness entirely corroborated the defense theory that appellant's involvement in her kidnaping and rape was involuntary (see Argument VII.A, *ante*), additional evidence undermining the prosecution's wholly speculative theory could easily have led any juror who harbored doubts to conclude that appellant was a victim, not the co-perpetrator, of the sexual abuse directed against Baca.

Finally, assuming there was sufficient evidence to support the prosecution theory of the Baca incident, (cf. Argument VII.A, *ante*), evidence of appellant's mother's kidnaping was relevant to mitigate appellant's involvement. If appellant *voluntarily* participated in the sexual exploitation of Baca, perhaps the only thing that could have helped explain appellant's actions was that he had learned this form of criminal, sexual misconduct from his father. Depriving the jury of an explanation for appellant's crimes interfered with its ability to provide appellant the individualized consideration of his character mandated by the Eighth Amendment. For all of these reasons, the exclusion of this highly relevant evidence was erroneous and mandates reversal of his sentence.

A. Relevant Procedural History

During the penalty phase, appellant called Maria de Jesus Casares de Reyna, appellant's maternal aunt. (9RT:2148-2151.) Trial counsel sought

to elicit from de Reyna that appellant's mother had been kidnaped and forced into a "marital" relationship in the same way that appellant's father had attempted to sexually enslave Rosa Baca. (See 9RT:2149-2150.) The prosecution objected under Evidence Code section 352. The objection—premised upon the argument that this evidence went beyond direct trauma witnessed by the defendant and his resultant emotional disorders—was sustained. (9RT:2149.) Trial counsel attempted to overcome the ruling by providing the following proffer of the substance of de Reyna's testimony:

> She would testify that the father kidnaped Jose's mother the same way that Rosa was kidnaped, about the same age, and continually, the beatings of the mother by the father continued from that point on. I think it's kind of foundational just to kind of set the stage for the type of man he was and the abuse he continued to pour on the mother.

(9RT:2150-2151.)

The prosecution renewed its objection, stating "I think Counsel has not only set the stage, but he has populated it thoroughly with witnesses who all know how bad the man was." (9RT:2150.) The trial court again sustained the objection, explaining his ruling as follows:

> Well, yeah. I think the jury pretty well knows that [appellant's father] was a cruel and sadistic man, you know, with his family and with the defendant as far as mistreating him. And besides, this defendant would not have been percipient to the way he treated the mother, at least until he was born and old enough to perceive it himself.

(9RT:2150.)

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B. Evidence That Appellant's Mother Was Kidnaped and Forced Into a Form of Sexual Slavery to Appellant's Father Was Neither Irrelevant Nor Cumulative Evidence

Evidence Code section 352 allows exclusion of evidence if its probative value is substantially outweighed by the probability that admission will unduly consume time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. (Evid. Code, § 352.) Cumulative evidence may be excluded on this basis. (*People v. Burgener* (1986) 41 Cal.3d 505, 525 disapproved on other grounds by *People v. Reyes* (1998) 19 Cal.4th 743.)

The trial court's explanation of its ruling suggested two things: 1) that the evidence sought to be elicited by appellant was irrelevant because it referenced abuse which appellant did not witness (see 9RT:2150 ["this defendant would not have been percipient to the way he treated the mother, at least until he was born and old enough to perceive it himself"]), and 2) that the evidence was cumulative of other evidence of abuse. (*Ibid.* ["I think the jury pretty well knows that [appellant's father] was a cruel and sadistic man, you know, with his family and with the defendant as far as mistreating him"].) Because the proffered evidence was neither cumulative nor irrelevant, much less was the risk of its admission "substantially outweighed" by the risk of undue consumption of time or other prejudice, the trial court's ruling was error.

1. The Evidence of the Kidnaping of Appellant's Mother as a Young Teenager Was Unquestionably Relevant

The evidence that appellant's mother was kidnaped as a young teenager by appellant's father and forced into a form of sexual slavery was highly relevant mitigation. Notably, to be admissible it needed only to tend

"logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. [Citation]." (*Tennard v. Dretke*, *supra*, 542 U.S. 277 at p. 285.) Thus, so long as proffered evidence "has *some tendency* to show defendant was not as morally culpable" or "*some tendency* in reason to counter the prosecution's argument that defendant's prior [conduct] demonstrated a pattern of violence on his part" the evidence was admissible mitigation and "fundamental notions of due process are implicated" by its exclusion. (*People v. Frye* (1998) 18 Cal.4th 894, 1016-1017, italics added, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390.)

First, the evidence was relevant as mitigation in its own right. The evidence vividly and succinctly illustrated the torturous environment into which appellant was introduced as an innocent infant. Although it referenced events occurring before appellant's birth, it would have illuminated to the jury that every instance of sexual interaction between appellant's parents constituted rape and that appellant himself was a product of sexual slavery. It is hardly difficult to conceive how this almost unimaginable form of abuse would have impacted appellant's mother's ability to love and nurture appellant in a healthy manner. (See, e.g, MacFarland et al. *Intimate partner sexual assault against women: Frequency, health consequences, and treatment outcomes*. 105 Obstetrics & Gynecology 99-108 [noting numerous negative outcomes associated with intimate partner sexual assault, including that such sexual assault, separate from physical assault, is associated with a higher prevalence of posttraumatic stress].)

Although appellant did present evidence of severe abuse by his father, there was no evidence about the nature of maternal attention he

received. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 116 [error to exclude evidence that defendant had "been deprived of the care, concern, and paternal attention that children deserve"].) That appellant himself was the product of the horrific violence suffered by his mother, a fact which would understandably interfere with his mother's ability to provide normal maternal care, was undeniably relevant for the jury's consideration of appellant's ultimate moral culpability.

The evidence was also critical in establishing the duration of abuse to which appellant *was* a witness and victim. Although other testimony revealed incidents of repeated abuse, it was generally unspecific as to time. (See, e.g., 9RT:2031, 2116-2117, 2138-2139, 2145, 2152.) While such testimony established that the abuse of appellant's mother was frequent (see, e.g., 9RT:2138), there was no evidence that it began prior to appellant's birth, when she was about the formative age of Rosa Baca, and was "continual" from that point onward. (9RT:2150-2151.)

The continuous duration of the abuse was relevant mitigation for at least two reasons. First, it would show that appellant suffered the consequences of severe domestic violence in the critical period of his infancy, a time span for which there was no evidence presented at trial. (See *James v. Ryan* (9th Cir. Feb. 29, 2012) -- F.3d --, 2012 WL 639292 at *3 ["It is well established that early childhood trauma, even if it is not consciously remembered, may have catastrophic and permanent effects on those who . . . survive it. . . .[Citation.]".) Second, the evidence would strongly suggest that appellant's mother was subject to abuse during appellant's in utero development. (See *People v. Panah* (2005) 35 Cal.4th 395, 417 [25 Cal.Rptr.3d 672, 691 [mitigation included testimony from defendant's mother that "[w]hile she was pregnant with defendant, her

husband physically abused her, more than once pushing her and causing her to fall to the floor. The abuse continued after defendant was born"].)

Second, and perhaps equally importantly, the evidence was relevant to rebut the prosecution case. As an initial matter, the prosecution took advantage of the excluded evidence to falsely assert that the defense had actually *exaggerated* the vileness of appellant's father. In closing argument the prosecution repeatedly insinuated that the character of appellant's father, though "evil," may have been "painted a little blacker than it was." (10:RT:2210; 10RT:2196-2197 [although father's evil nature was "unrefuted" suggesting that "[w]hether or not they painted a somewhat blacker picture of his character than he really had, we don't know"].) In reality, the prosecution knew that it had specifically excluded testimony that would have shown that the character of appellant's father was even more savage than the jury knew.

More specifically, the fact that appellant's father kidnaped appellant's mother to enslave her as a wife was highly probative evidence to support the defense theory regarding the Baca kidnaping—namely that appellant did not voluntarily participate in that crime. The prosecution elicited from Baca that appellant had once asked her to be his girlfriend, (9RT:1954-1955) and used this evidence in closing argument to suggest that appellant was not coerced but was instead "acting in concert with the father." (10RT:2212.) But the fact that appellant's father had already engaged in this precise pattern of behavior himself prior to appellant's birth strengthened the defense theory that appellant's father was the sole force behind the kidnaping and rape of Baca.

The evidence was also relevant to the defense theory of duress. That appellant's mother's *entire relationship* with his father was based on duress

explained—in remarkably concise terms—the utter dominance he exerted over his family through threatening and violent conduct. Providing a catalogue of every act of violent intimidation or each incident of physical abuse attributable to appellant's vicious father may indeed have constituted an "undue consumption of time." (Evid. Code § 352.) However, it was surely not a waste of the jury's time to provide it with information about appellant's father that could be summed up in a short statement from a witness and yet would strongly corroborate the defense theory of duress in a way that no single incident of abuse would.

Third and finally, the evidence was relevant to lessen the impact of the aggravating evidence itself. If somehow, despite all evidence to the contrary, the jury believed that appellant voluntarily participated in the Baca rape, it was crucial for the defense to provide a context for the abuse of Baca which would limit its inflammatory impact. One of the only ways to lessen the aggravating nature of the prosecution theory of the Baca incident would be to show that appellant was taught that involuntary sexual relationships were normal. (See, e.g., *Foust v. Houk* (6th Cir. 2011) 655 F.3d 524, 543 [although appellant not himself sexually abused, evidence regarding acclimation to sexual abuse of women in the home "particularly relevant" where rape was one of the aggravating circumstances that supported the death penalty]; *Karis v. Calderon* (9th Cir. 2002) 283 F.3d 1117, 1139 [evidence that defendant "grew up 'seeing his mother regularly and violently abused by men' . . . is particularly compelling mitigating evidence in a rape case"].)

Even short of accepting the defense of duress, a jury might believe that a juvenile such as appellant, particular one under the constant threat of violent retribution from his father, might have participated in the kidnaping

of Baca because such behavior was modeled by his father. Although evidence had been introduced to support the inference that severe domestic violence was modeled by his father, there was no similar evidence that the sort of sexual abuse appellant allegedly perpetrated against Baca was of the type to which appellant had been exposed. This evidence more than any other would have mitigated appellant's participation in the Baca rapes.

2. The Kidnaping of Appellant's Mother Was Not Cumulative

This Court has held that evidence Code section 352 permits the court to exclude mitigating evidence offered by the defendant if it is merely cumulative. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1273 [trial court properly limited number of baby photographs of defendant from nine to five on grounds that remaining photos were cumulative].) However, section 352 does not give the trial court power to exclude any mitigating evidence merely because it touches on a similar subject. "Identical or virtually identical evidence may not be cumulative if there is significance to the evidentiary weight to be given." (*Monroy v. City of Los Angeles* (2008) 164 Cal.App.4th 248, 267 [trial court improperly prevented plaintiffs experts from rendering opinions already elicited from defense experts]; see also *People v. Carter* (1957) 48 Cal.2d 737, 748 [concerns regarding cumulative evidence inapplicable when evidence identical in subject matter was not cumulative in respect to its evidentiary weight].) Furthermore, mitigation evidence that serves not only to portray a more sympathetic picture of the defendant but also rebuts the prosecution's aggravation case cannot be excluded as cumulative under due process. (See *Skipper v. North Carolina, supra*, 476 U.S. 1 at 8 & fn. 1; see also *id.* at pp 10-11 (conc. opn. of Powell, J.).)

The general rule is that "*if a party is not prejudiced thereby* the court in its discretion may limit the number of witnesses or the number of documents to prove a particular link in a chain of evidence." (*People v. Peak* (1944) 66 Cal.App.2d 894, 907 disapproved on other grounds by *People v. Carmen* (1951) 36 Cal.2d 768, italics added.) In other words, if otherwise admissible and non-prejudicial, "cumulative" evidence is that evidence whose exclusion would have no discernable impact on the case. (*See State v. Schindele* (N.D.1995) 540 N.W.2d 139, 142 ["Cumulative testimony is by definition testimony that would not make a significant contribution to proof of a fact."]; *Stinehart v. State* (Wyo. 1986) 727 P.2d 1010, 1017 ["By definition, evidence, to be cumulative, should be essentially neutral in effect, otherwise it would be persuasive and not cumulative."].)

Thus, even when repeating extremely similar facts, evidence is not cumulative where it is the most effective manner to convey relevant information to a penalty phase jury. (See *People v. Hawthorne* (2009) 46 Cal.4th 67, 103 disapproved on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610 [although victim had previously testified about details of crime and their long term impact, 911 tape not cumulative where "only the tape conveyed the more immediate impact of the crimes" on victim]; *Skipper v. North Carolina*, *supra*, 476 U.S. 1, at p. 8 [rejecting state's argument that defendant's positive adjustment in confinement was cumulative evidence when the testimony would "quite naturally be given much greater weight by the jury" when coming from disinterested witnesses and not defendant].) And, even if cumulative, evidence can only be excluded as repetitive if its value is "substantially outweighed" by the harm of "undue consumption of time." (Evid. Code § 352.)

In this case, the evidence was not "cumulative" at all. Although there was testimony regarding appellant's father's *physical* abuse of appellant's mother and other family members, there was no evidence regarding appellant's mother being subject to the combination of profound physical, psychological and sexual abuse represented by the father's act of kidnaping her as a child to take as a "wife." "Sexual abuse is different than physical abuse" and evidence of these different forms of mistreatment is not cumulative. (*Foust v. Houk*, *supra*, 655 F.3d 524 at p. 543 fn. 9.)[51] This is particularly true where, as here, a defendant's alleged sexual misconduct is utilized by the prosecution in its effort to obtain a death sentence. (See *id.* [importance of evidence concerning of sexual abuse in the home was "all the more pronounced" where rape, and not physical abuse, "was an aggravating factor in this case"].) Far from cumulative, testimony of familial sexual abuse is "particularly compelling mitigating evidence" in a case involving rape. (*Karis v. Calderon*, *supra*, 283 F.3d 1117 at p. 1139-1140.)

Even were the kidnaping evidence, under the general penumbra of "abuse," similar or even cumulative to prior testimony, this would not render the testimony excludable under section 352. The harm of the admission of such evidence must have been "substantially outweighed" by "undue consumption of time[,] . . . substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.) As

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[51] Notably, the Court in *Foust* held that mitigation evidence concerning sexual abuse suffered by the defendant's sisters was not "cumulative" in the context of a claim for ineffective assistance of counsel. Obviously, the burden of establishing that evidence was sufficiently non-cumulative to make out a claim for ineffective assistance is far higher than the standard for admission under Evidence Code § 352.

this Court has explained, section 352 "requires that the danger of these evils substantially outweigh the probative value of the evidence. This balance is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744 [no error in exclusion of evidence where "the probative value was slight and the chance of prejudice and confusion substantial"].)

The proffered testimony was described in a single paragraph, hardly indicative of a risk of "undue consumption of time" in its admission, much less that its evidentiary weight was overwhelmed by the threat of potential delay. (Cf. *People v. Coffman* (2004) 34 Cal.4th 1, 75 [even if letters to co-defendant "occasionally illustrated with swastikas, lightning bolts and drawings of a sexual nature" were cumulative of other expert testimony, such repetition "does not mean their introduction into evidence necessarily would take up too much time or confuse the issues"].)

Furthermore, even if the trial court correctly identified the evidence as "cumulative" under section 352, simply characterizing relevant rebuttal evidence as "cumulative" under state evidentiary rules does not satisfy due process. (*Skipper v. North Carolina*, *supra*, 476 U.S. 1, at p. 8 & fn. 1; see also *id.* at pp. 10-11 (conc. opn. of Powell, J.).) Therefore, the trial court's ruling, to the extent that it was premised on an assumption that the evidence was cumulative and its introduction constituted an unnecessary expenditure of time, was error.

C. The Exclusion of Evidence That Appellant's Mother Was Sexually Enslaved Was Prejudicial

Skipper error is subject to review under the test of *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. McLain* (1988) 46 Cal.3d 97, 109 [*Skipper* error harmless where the evidence in aggravation was

"overwhelming and the evidence in mitigation was minimal"].) The kidnaping evidence excluded does not pass this test.

The exclusion of the extraordinarily important and highly mitigating evidence that appellant's mother was kidnaped by his father deprived the jury of an accurate depiction of appellant's tragic and violent life circumstances, vital to its solemn task of deciding whether appellant should live or die. The relevance of this evidence cannot be understated: it not only offered the jury a glimpse at the vicious intergenerational cycle of physical and sexual abuse in which appellant was trapped since birth, but also strongly rebutted the prosecution's argument that appellant was a "ready participant" in the kidnaping and rape of Baca and helped explain appellant's involvement as a product of duress. Furthermore, to the extent that the jury may have rejected the defense argument that appellant's participation was involuntary, it helped illustrate how appellant learned to engage in such conduct and that his primary model for behavior was the deviant behavior of his father.

Considering only the evidence as mitigation in its own right, courts have repeatedly found that failure to present the jury with evidence of sexual abuse within a defendant's household is prejudicial, particularly in cases in which rape is an aggravating circumstance, where such evidence is "particularly compelling." (See, e.g., *Karis v. Calderon*, *supra*, 283 F.3d 1117, at p. 1139-1140; *Foust v. Houk*, *supra*, 655 F.3d 524, at p. 543 fn. 9.)

However, the evidence was not only relevant as mitigation in its own right, but also relevant to negate the prosecution's aggravation case: supporting the defense theory that appellant's father was the sole force behind the kidnaping and rape of Baca and that appellant's participation was made under duress. Particularly because the prosecution case regarding

the Baca incident was weak to the point of insufficiency, (see Argument VII.A, *ante*), any relevant evidence which would have supported the defense theory was likely to persuade a juror who harbored any doubts about appellant's involvement. This, in turn, would have transformed a highly inflammatory incident in aggravation into a strongly mitigating instance of appellant's sexual victimization.

Even in the event that jurors could still have harbored suspicion that appellant voluntarily participated in the Baca kidnaping, the evidence would have served to blunt the aggravating nature of appellant's involvement by helping to explain that appellant's primary model was one whose behavior was deviant.

Any of these three theories of relevance would themselves be sufficient to demonstrate the prejudice created by the exclusion of appellant's mother's kidnaping. Viewed together, the strong mitigating weight of the excluded evidence is clear. Because the jury evidently struggled in its deliberations of this close case with strong mitigation evidence (see Argument VII.A.8), it cannot be said beyond a reasonable doubt that this error did not contribute to the verdict of death. Therefore, the sentence must be reversed.

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X.

APPELLANT'S ALLEGED JUVENILE MISCONDUCT WAS IMPROPERLY INTRODUCED AS EVIDENCE IN AGGRAVATION

As previously discussed, the Baca incident occurred when appellant was still a minor. (9RT:1964; 1CT:47.) Evidence of such juvenile misconduct is insufficiently relevant or reliable to be considered by a penalty phase jury, because such misconduct cannot serve as a sufficient basis for concluding that the death penalty would be appropriate to serve society's legitimate interest in retribution. Further, because California law does not allow use of adjudicated juvenile offenses in capital sentencing, see *People v. Lewis* (2008) 43 Cal.4th 415, 530, the use of *unadjucated* misconduct during a capital proceeding violated equal protection under the Fourteenth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) It also violated due process because the law is applied in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Because the admission of *adjuciated* juvenile convictions at sentencing would violate Appellant's Sixth Amendment right to a finding of all elements increasing his sentence by a unanimous jury under the standard of proof beyond a reasonable doubt, (see, *infra*, Argument XII.C.1.), admission of *unadjudicated* acts a fortiori violates these rights as well as the right to equal protection and due process.

The "social purposes" served by the imposition of capital punishment are "'retribution and deterrence of capital crimes by prospective offenders . . . .'" (*Atkins v. Virginia* (2002) 536 U.S. 304, 319, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 183.) Unless the imposition of the death penalty serves one or both of those purposes it constitutes cruel and unusual punishment. (*Coker v. Georgia* (1977) 433 U.S. 584, 592.)

Because minors lack maturity and self-control, it violates the Eighth Amendment to allow the jury to use evidence of the defendant's juvenile misconduct as a basis for imposing the death penalty.

In *Roper v. Simmons* (2005) 543 U.S. 551, 574-574, the United States Supreme Court held that because of the great differences in maturity and judgment between adults and minors the death penalty is a disproportionate penalty for offenders under the age of 18. Even prior to *Simmons*, the high court had recognized that "youth is more than a chronological fact. It is a time and condition of life when a person may be susceptible to influence and to psychological damage." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 115.) In *Johnson v. Texas* (1993) 509 U.S. 350, the high court observed that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." (*Id.* at p. 367 [recognizing that a sentencer in a capital case must be allowed to consider the *mitigating* qualities of youth in the course of its deliberations over the appropriate penalty]; see *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834-835 [because juveniles are "more vulnerable, more impulsive, and less self-disciplined than adults . . . less culpability should attach to a crime committed by a juvenile than to a similar crime committed by an adult"].) In light of those well-understood differences between minors and adults, it is inappropriate to use evidence of juvenile misconduct as aggravating evidence in the penalty phase of a capital trial.

Moreover, evidence of juvenile misconduct is insufficiently reliable to be considered in the penalty phase of a capital trial, because jurors cannot readily differentiate which acts of juvenile criminality actually demonstrate

the degree of heightened culpability required to support the imposition of a death sentence. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 573.) "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (*Ibid.*)

The consideration as aggravation in the penalty phase of this capital trial of appellant's misconduct as a minor, acts that occurred when he was particularly "susceptible to influence and psychological damage" such as the violent threats of his sadistic father (*Johnson v. Texas*, *supra*, 509 U.S. at p. 367), was in direct conflict with federal constitutional guarantees of due process and the constitutionally-based heightened need for reliability of capital trials and sentencing procedures. (U.S. Const., Amends. 5, 6, 8 & 14.)

Appellant recognizes that this Court has declared that "nothing in the 1977 or 1978 [death penalty statutes] indicates an intent to exclude violent criminal misconduct while a juvenile as an aggravating factor." (*People v. Lucky* (1988) 45 Cal.3d 259, 295.) Appellant respectfully submits that the *Lucky* analysis is flawed, and should be reconsidered in light of *Roper v. Simmons*, *supra*. Appellant is also aware that this Court has specifically rejected the application of *Roper* to factor (b) evidence of juvenile misconduct. (*People v. Bramit* (2009) 46 Cal .4th 1221, 1239 [admission at penalty phase of defendant's unadjudicated juvenile conduct did not violate *Roper v. Simmons, supra*, 543 U.S. 551]; *People v. Taylor* (2010) 48 Cal.4th 574, 652 [juvenile sexual assault by defendant was properly admitted despite *Roper*.].) Nonetheless, appellant submits that these decisions were similarly incorrect and should be reconsidered.

XI.

APPELLANT'S DEATH SENTENCE IS BASED SOLELY ON A LYING-IN-WAIT SPECIAL CIRCUMSTANCE THAT IS DISPROPORTIONATE AND ARBITRARILY APPLIED

In order to avoid the United States Constitution's Eighth Amendment proscription against cruel and unusual punishment, "a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' [Citation]." (*People v. Sims* (1993) 5 Cal.4th 405, 434.) This Court has repeatedly rejected arguments that there is no significant distinction between the theory of first degree murder by "lying-in-wait" or by premeditation and the special circumstance of "lying-in-wait", rendering the special circumstance "overbroad" or invalid for failure to meaningfully narrow death eligibility. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1095; *People v. Carasi* (2008) 44 Cal.4th 1263, 1310, 82; *People v. Cruz* (2008) 44 Cal.4th 636, 678; *People v. Lewis* (2008) 43 Cal.4th 415, 515–516; *People v. Bonilla* (2007) 41 Cal.4th 313, 333; *People v. Geier* (2007) 41 Cal.4th 555, 617-18 [61 Cal.Rptr.3d 580, 630, 161 P.3d 104, 147]; *People v. Jurado* (2006) 38 Cal.4th 72, 127; *People v. Moon* (2005) 37 Cal.4th 1, 44; *People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Nakahara* (2003) 30 Cal.4th 705, 721; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148; *People v. Crittenden* (1994) 9 Cal.4th 83, 155; *People v. Sims*, *supra*, 5 Cal.4th at p. 434; *People v. Roberts* (1992) 2 Cal.4th 271, 322-323; *People v. Wader* (1993) 5 Cal.4th 610, 669; *People v. Edwards* (1991) 54 Cal.3d 787, 824; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023; *People v. Morales* (1989) 48 Cal.3d 527, 557–558.)

In doing so, this Court has explained that the "lying-in-wait" special circumstance *does* in fact narrow the class of death eligible defendants and therefore is not unconstitutionally overbroad because "[i]t is limited to intentional murders that involve a concealment of purpose and a meaningful period of watching and waiting for an opportune time to attack, followed by a surprise lethal attack on an unsuspecting victim from a position of advantage." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1310; see also *People v. Cruz* (2008) 44 Cal.4th 636, 678 ["The distinguishing factors identified in *Morales* [] and *Sims* [] that characterize the lying-in-wait special circumstance constitute 'clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is "lying-in-wait", so as to justify the classification of that type of case as one warranting imposition of the death penalty.' [Citation.]"].) Stated more completely, as this Court reasoned in *People v. Stevens, supra*, 41 Cal.4th 182:

> [i]n distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citation.] Thus, any overlap between the premeditation element of first degree murder and the durational element of the lying in wait special circumstance does not undermine the narrowing function of the special circumstance. Moreover, . . . concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. A similar narrowing distinction is discernible between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not. [Citation.] Thus, any overlap between the elements of "lying-in-wait" in both contexts does not undermine the narrowing function of the special circumstance.

(*Id.* at pp. 203-204.)

Although no numerical analysis has been performed by this Court in rejecting the numerous narrowing challenges, the logic of the decisions suggests that the special circumstance is constitutionally sufficient because there is at least *some* degree of narrowing that "lying-in-wait" accomplishes. (See *Morales v. Woodford* (9th Cir.2004) 388 F.3d 1159, 1175 ["Even under the California Supreme Court's liberal interpretations of "lying-in-wait", [certain] hypothetical first-degree murders would not merit the special circumstance"]; *People v. Lewis*, *supra*, 43 Cal.4th at 515 [relying in part on the Ninth Circuit's decision in *Morales* to reject attack on "lying-in-wait"]; *People v. Jurado* (2006) 38 Cal.4th 72, *supra*, at p. 146 (conc. opn. of Kennard, J.) [rejecting constitutional challenge to "lying-in-wait" because it does "not apply to every defendant convicted of a murder. . . [Citation.]]".) And, at least in cases in which other special circumstances applied, this Court has twice reversed a "lying-in-wait" special circumstance finding for sufficiency of the evidence, refuting the contention that "lying-in-wait" applies to *all* premeditated murders. (See *People v. Lewis* (2008) 43 Cal.4th 415; *People v. Carter* (2005) 36 Cal.4th 1215, 1262; see also *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000 [granting writ of prohibition due to lack of sufficient evidence of "lying-in-wait"].) Appellant assumes *arguendo* that based on this reasoning the "lying-in-wait" special circumstance in fact provides a "meaningful basis" for distinguishing between capital and non-capital murder and therefore satisfies the narrowing requirement articulated in Justice White's concurring opinion in *Furman* and adopted by this Court and the United States Supreme Court. (See *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.); *People v. Sims*, *supra*, 5 Cal.4th 405 at p. 434.)

Nonetheless, the "lying-in-wait" special circumstance, both in its current application across California and as applied to this case, has another defect: it has become an arbitrary and disproportionate manner of selecting those eligible for death.

The constitutional dilemma is evident in the comparing the thousands of cases of murder for which the defendant is potentially death-eligible under a very broadly defined "lying-in-wait" special circumstance with the two death penalty cases decided by this Court over the last thirty-five years in which "lying-in-wait" has been the sole special circumstance. (See *People v. Edwards*, *supra*, 54 Cal.3d 787 and *People v. Jurado, supra,* 38 Cal.4th 72, 127.) This concern was most recently articulated by Justice Kennard in her concurrence in *People v. Combs* (2004) 34 Cal.4th 821: "[i]n over 150 death penalty cases decided by this court since [*People v. Ceja*, *supra*, 4 Cal.4th 1134], we have seen none in which "lying-in-wait" was the only special circumstance found true by the jury. This may well reflect a view that "lying-in-wait" should not be the sole basis for imposing the death penalty." (*People v. Combs, supra,* 34 Cal.4th 821 at p. 869 (conc. opn. of Kennard, J.); see also *Enmund v. Florida* (1982) 458 U.S. 782, 796 [finding death penalty disproportionate for felony murder simpliciter where "only three persons in [defendant's] category are presently sentenced to die"].)

Because of the extraordinarily broad definition of "lying-in-wait" adopted by this Court, a large percentage of all murders are death eligible under this special circumstance alone. As a result, there exists a stark statistical disparity between the huge number of defendants eligible for death under the "lying-in-wait" special circumstance and the vanishingly small number of defendants actually sentenced to die solely because of their

act of "lying-in-wait". Because of this disparity, and in the absence of a compelling argument or evidence suggesting that "lying-in-wait" is considered among the most reprehensible forms of murder, the imposition of the death penalty based solely upon a finding of "lying-in-wait" has become an arbitrary and disproportionate punishment. Appellant's case is in fact a prime example of the capriciousness of the "lying-in-wait" special circumstance. Therefore, appellant's sentence must be reversed.

A. Failure to *Substantially* Narrow the Subclass of Murderers Eligible For the Death Penalty Increases the Risks of Arbitrary Punishment

Furman established that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this penalty to be arbitrarily, capriciously and inconsistently imposed. (See *Furman v. Georgia, supra*, 408 U.S. 238, at p. 310 (conc. opn. of Stewart, J.) Thus,"[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460.) This requirement extends beyond the mere description of the categories of death eligible crimes and to the application of the statute itself: *Furman* established that "if a State wishes to authorize capital punishment it has a constitutional responsibility to . . . apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The eligibility criteria undergirding post-*Furman* capital punishment systems require that a state must not only "genuinely narrow the class of [death eligible] defendants" but must also satisfy the twin concern that this narrowing is done in a way that "reasonably justifies the imposition of a

more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.)

The principle common to constitutional restrictions on death penalty selection and eligible criteria is to limit arbitrariness in the imposition of death sentences: "The State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." (*Tuilaepa v. California* (1994) 512 U.S. 967, 973.) In order to guard against such arbitrariness, the Eighth Amendment requires that a special circumstance "must apply only to a subclass of defendants convicted of murder." (*Id.* at p. 972.)

This "narrowing" process does not *eliminate* the risk of arbitrariness in the imposition of the death penalty, but reduces the ultimate threat which narrowing seeks to avoid: "the risk of cruel and unusual punishment—either because [the sentence] is disproportionate to the severity of the offense or because its imposition may be influenced by unacceptable factors." (*Id.* at p. 982 (conc. opn. of Stevens, J.); *McCleskey v. Kemp* (1987) 481 U.S. 279, 313 [despite "imperfections, our consistent rule has been that constitutional guarantees are met when 'the mode [for determining guilt or punishment] itself has been surrounded with safeguards to make it as fair as possible.'[Citation]."].)

The Eighth Amendment safeguards afforded by the so-called "narrowing" function is necessarily most effective when "only a *narrow subclass* of murderers can be subjected to the death penalty." (*Tuilaepa v. California*, *supra*, 512 U.S. 967 at p. 982 (conc. opn. of Stevens, J.).)

"Narrow," of course, is a relative term and the safeguards afforded by a "narrow" eligibility factor depend on the scope of the narrowing which actually occurs. On the one hand, there is the narrowing that this Court has

established as the constitutional floor, the requirement that eligibility criteria "not apply to every defendant convicted of a murder[, but only] to a subclass of defendants convicted of murder." (*People v. Arias* (1996) 13 Cal.4th 92, 187; *People v. Jurado* (2006) 38 Cal.4th 72, *supra*, at p. 146 (conc. opn. of Kennard, J.) [applying principle to "lying-in-wait"].) On the other hand, "[t]here exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty . . . If [a state] were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 367 (dis. opn. of Stevens, J.).)

Obviously, the more narrowly defined and heinous an individual eligibility criterion, the lower the risk of arbitrary imposition of the death penalty. (See *id.* at p. 313 fn. 36 (maj. opn. of Powell, J.) [Georgia system "sorts out cases where the sentence of death is highly likely and highly unlikely, leaving a midrange of cases where the imposition of the death penalty in any particular case is less predictable"]; see also *id.* at 367 (dis. opn. of Stevens, J.).) Conversely, the broader and less culpable the conduct encompassed by the eligibility factor, the greater the risks of arbitrary infliction of a death sentence. (Cf. *ibid.*; see also *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1445 ["When juries are presented with a broad class, composed of persons of many different levels of culpability, and are allowed to decide who among them deserves death, the possibility of aberrational decisions . . . is too great"]; Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes* (2011) 46 Harv. C.R.-C.L. L. Rev.

223, 224 ["When only a handful of offenders are sentenced to death despite expansive statutes that render most murderers eligible for the death penalty, it becomes more likely that those selected for death are being chosen arbitrarily"].)

The "lying-in-wait" special circumstance lies, at best, at the constitutional floor of narrowing. (See *People v. Lewis* (2008) 43 Cal.4th 415, 515 [explaining that further broadening of the "lying-in-wait" special circumstance would destroy the remaining temporal distinction between the theory of "lying-in-wait" murder and the special circumstance of "lying-in-wait"]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 580 [noting that after the passage of Proposition 18, the only remaining distinction between "lying-in-wait" as a theory of murder and the special circumstance is that special circumstance requires an intent to kill the victim while the first degree murder under a lying-in-wait theory merely requires "wanton and reckless intent to inflict injury likely to cause death"].)

"lying-in-wait" has been interpreted so broadly that it has come under consistent attack by members of this Court and commentators alike for failing to sufficiently narrow. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 515 (dis. opn. of Moreno, J.) [complaining that Court's construction of the "lying-in-wait" murder special circumstances renders "most premeditated murders" eligible under the "lying-in-wait" special circumstance]; *People v. Morales*, *supra*, 48 Cal.3d 527 at p. 575 (dis. opn. of Mosk, J.) ["lying-in-wait" special circumstance "so broad in scope as to embrace virtually all intentional killings"]; see also Heidenreich, *"lying-in-wait": A General Circumstance*, 30 U.S.F. L. Rev. 1249, 1275 (1996) [arguing that virtually all first-degree murders satisfy California's "lying-in-wait" aggravator]); Caldwell, *The Prostitution of "lying-in-wait"* (2003) 57

U. Miami L. Rev. 311, 371 ["it is relatively clear that murder by "lying-in-wait" as applied by the California Supreme Court has been stretched to the breaking point"].)

Criticism aside, assuming that a "large" percentage, (cf. *People v. Jurado*, *supra*, 38 Cal.4th 72, at p. 146 (conc. opn. of Kennard, J.), "most" (*People v. Hillhouse*, *supra*, 27 Cal.4th 469 at p. 515 (dis. opn. of Moreno, J.)), or even "virtually all" (*People v. Morales*, *supra*, 48 Cal.3d 527, 575 (dis. opn. of Mosk, J.) intentional murderers are death eligible under the "lying-in-wait" special circumstance does not alone render it unconstitutional for failure to narrow under this Court's current precedents. Any of these formulations is quite evidently not "all," which this Court appears to have supplied as the test for narrowing. (*People v. Arias*, *supra*, 13 Cal.4th at p. 187.) Nonetheless, because of the undeniable breadth of the special circumstance, the risks of arbitrary punishment imposed through a sole "lying-in-wait" special circumstance are greatly increased. In conjunction with other constitutional concerns associated with the "lying-in-wait" special circumstance, both generally and as applied to this case, the dangers of arbitrariness render appellant's the death sentence invalid.

B. Death Is A Disproportionate Punishment for Concealment of Purpose "Lying-in-Wait" and the Disproportionate Nature of the Punishment Increases the Risk of Arbitrariness

In several cases, the United States Supreme Court has considered whether certain statutory schemes threatened disproportionate infliction of society's most severe punishments. (See, e.g., *Enmund v. Florida* (1982) 458 U.S. 782; *Roper v. Simmons,* 543 U.S. 551, *Atkins v. Virginia,* 536 U.S. 304, *Kennedy v. Louisiana* (2008) 554 U.S. 407; *Graham v. Florida* (2010) 130 S.Ct. 2011; *Coker v. Georgia* (1977) 433 U.S. 584; *Ford v. Wainwright*

(1986) 477 U.S. 399.) These cases, though addressing somewhat distinct concerns from those associated with the "lying-in-wait" special circumstance, are relevant in two ways.

First, as suggested by several Justices of this Court, there is no evidence that there exists a state, national, or moral consensus that a killing while "lying-in-wait" as defined by this Court is the type of crime for which society's ultimate punishment is fitting. (See *People v. Combs*, *supra*, 34 Cal.4th 821 at p. 869 (conc. opn. of Kennard, J.) [paucity of death sentences based only upon "lying-in-wait" "may well reflect a view that "lying-in-wait" should not be the sole basis for imposing the death penalty"]; *People v. Webster* (1991) 54 Cal.3d 411, 467-468 (conc. & dis. opn. of Broussard, J., ["Neither is there any societal consensus that a murder while "lying-in-wait" is more heinous than an ordinary murder, and thus more deserving of death. Of the 35 other states imposing the death penalty, only 3 treat "lying-in-wait" as either a special circumstance or an aggravating factor. [Citations] . . . at most two other states which would permit imposition of the death penalty for murders falling under the *Morales* criteria; at least forty-seven states would not"]); *People v. Morales*, *supra*, 48 Cal.3d 527 at p. 575 (dis. opn. of Mosk, J.) ["the killer who waits, watches, and conceals is no more worthy of blame or sensitive to deterrence than the killer who attacks immediately and openly"]; *People v. Stevens*, *supra*, 41 Cal.4th 182 at p. 223 (dis. opn. of Moreno, J.) ["Whether we still share with the medieval Normans that special repugnance for lying-in-wait murder as originally conceived 'an ambush assassination that involves physical concealment and a substantial period of watching and waiting' there is nothing to indicate that ordinary murder by surprise, the lying-in-wait

special circumstance as construed by this court, has been historically, or is regarded currently, as an especially heinous form of murder"].)

Second, even assuming that a death sentence premised upon a sole finding of "lying-in-wait" is not constitutionally disproportionate, the fact that the special circumstance meets several of the criteria normally employed in this determination supports the conclusion that the moral culpability of defendants who lie in wait is relatively low. As noted above, the lower the heinousness of the special circumstance, the greater the risk of arbitrariness in the imposition of the death sentence in a given case, particularly when the applicability of the circumstance is extremely broad. In combination, the relatively disproportionate nature of the punishment and the extremely broad applicability of the special circumstance render the imposition of death based solely upon a "lying-in-wait" special circumstance arbitrary.

1. Death Is a Disproportionate Penalty for Murder Committed While "Lying-in-Wait"

Under the Eighth Amendment, capital punishment "must 'be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them 'the most deserving of execution.'[Citations.]." (*Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 420.) The "lying-in-wait" special circumstance, as broadly construed by this Court, fails to limit capital punishment to the most heinous crimes for which death is appropriate and therefore allows for a disproportionate penalty. (Cf. *People v. Velasquez* (1980) 26 Cal.3d 425, 439 disapproved on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610 [1977 death penalty statute "does not permit consideration of a death sentence in an ordinary homicide, but only when the killing is accompanied by some other

circumstance which renders it particularly flagrant or atrocious"].) Because execution is a disproportionate punishment for conduct falling within the broad definition of "lying-in-wait", appellant's sentence must be reversed.

a. There Is No National Consensus That "Lying-in-Wait" By Concealment of Purpose Is Any More Heinous Than Ordinary Murder

In assessing whether a penalty is categorically disproportionate, the Court must consider "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." [Citation.]) (*Graham v. Florida*, *supra*, 130 S.Ct. 2011, 2022.) The "lying-in-wait" special circumstance, as construed by this Court, finds no support in national consensus.

As noted over twenty years ago by Justice Broussard, there is no legislative consensus "that a murder while "lying-in-wait" is more heinous than an ordinary murder, and thus more deserving of death. Of the [then] 35 other states imposing the death penalty, only 3 treat "lying-in-wait" as either a special circumstance or an aggravating factor. [Citations] . . . [A]t most two other states would permit imposition of the death penalty for murders falling under the *Morales* criteria; at least forty-seven states would not." (*People v. Webster*, *supra*, 54 Cal.3d 411 at pp. 467-468 (conc. & dis. opn. of Broussard, J.).) Only three other jurisdictions have retained "lying-in-wait" as a death eligibility criterion: Colorado, Indiana, and Montana. (See Colo. Rev. Stat. § 16-11-103(6)(f); Ind. Code Ann. § 35-50-2-9; Mont. Code Ann. § 45-5-102.)

As explained in Justice Broussard's dissent in *Webster*, "Indiana requires that the defendant be physically concealed from the victim."

(*People v. Webster*, *supra*, 54 Cal.3d 411, 467 citing *Davis v. State* (Ind. 1985) 477 N.E.2d 889, 895-896.) Although Montana has not provided a detailed construction of its "lying-in-wait" aggravator, the only cases in which it has been applied suggest that the defendant had concealed his person. (See *State v. Dawson* (1988) 233 Mont. 345, 358 [evidence of "lying-in-wait" sufficient where when defendant approached victim in the parking lot "he had already laid out tape and gags on a bed in his room. He approached her carrying a duffel bag from which the muzzle of a gun protruded."]; *Fitzpatrick v. State* (1981) 194 Mont. 310, 332 [crime contemplated "well in advance of the events which led to the killing of [victim], and [] immediately before the robbery petitioner sat in his car watching the Safeway Store and then the drive-in bank, waiting for the victim."].) Since Justice Broussard's dissenting opinion in *Webster* surveyed the field, the Colorado courts have explained that "lying-in-wait" is "widely understood" to mean that the "the killer conceals *himself* and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751, italics added.) Thus, California may be alone in the nation in allowing concealment of purpose "lying-in-wait", the theory relied upon in appellant's trial, to render a defendant eligible for death.

The Supreme Court has repeatedly found that the no national consensus exists where only a handful of states cling to particular capital punishment practice. (See *Kennedy v. Louisiana*, *supra*, 554 U.S. 407, 426 [significant that 45 jurisdictions did not allow capital punishment for child rape]; *Enmund v. Florida*, *supra*, 458 U.S. 782 at p.789 [Florida "one of only 8 jurisdictions that authorized the death penalty" solely for felony murder simpliciter]; *Atkins v. Virginia*, *supra*, 536 U.S. 304 at p. 313-315

[that 30 states opposed executing mentally retarded a sign of consensus against the practice when combined with unilateral direction of change]; *Tison v. Arizona* (1987) 481 U.S.137, 147, 153 [contrasting with *Enmund* the 21 states which "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur"].)

Legislative enactments are not the sole source for determining consensus. "Actual sentencing practices are an important part of the Court's inquiry into consensus." (*Graham v. Florida, supra,* 130 S.Ct. 2011, at p. 2023 [noting that juvenile LWOP sentences for non-murderers are "most infrequent. According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses."]; *Enmund v. Florida, supra,* 458 U.S. at p. 796 [death penalty disproportionate where "only three persons in [defendant's category are presently sentenced to die"].) Of the hundreds of death judgments decided by this Court since the reenactment of the death penalty, only two have been based solely upon "lying-in-wait". (See *People v. Edwards, supra,* 54 Cal.3d 787 and *People v. Jurado, supra,* 38 Cal.4th 72.)

While there have been twenty-seven other reported decisions treating convictions in which the "lying-in-wait" special circumstance was found true,[52] these defendants are not similarly situated to defendant because there

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[52] The following cases involved a lying a wait special circumstance finding, in addition to the special circumstance findings noted that were not otherwise set aside on appeal: *People v. Bacon* (2010) 50 Cal.4th 1082 [prior murder]; *People v. Bivert* (2011) 52 Cal.4th 96 [prior murder]; *People v. Bonilla* (2007) 41 Cal.4th 313 [financial gain]; *People v. Carasi,* (continued...)

existed in these cases other eligibility factors which supported the death sentence. As the proportionality analysis in *Graham v. Florida, supra*, 130 S.Ct. 2011, illustrates, cases in which a defendant is convicted of an aggravating circumstance that would itself support the challenged punishment are not relevant to analysis of whether there is consensus that the punishment is a disproportionate penalty for the offense alone. (*See id.* at p. 2023 [finding "unpersuasive" comparison of juvenile *non*-murderers sentenced to LWOP with juvenile murderers sentenced to LWOP for a non-

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[52](...continued)
supra, 44 Cal.4th 1263 [multiple murder, financial gain]; *People v. Carpenter* (1997) 15 Cal.4th 312, 344 [multiple murder, rape murder]; *People v. Combs, supra*, 34 Cal.4th 821 [robbery murder]; *People v. Cruz* , *supra*, 44 Cal.4th 636 [murder of peace officer; murder for purpose of escape]; *People v. Edelbacher, supra*, 47 Cal.3d 983 [financial gain]; *People v. Ervine*\ (2007) 47 Cal.4th 745 [murder of peace officer, murder to avoid arrest]; *People v. Geier*, *supra*, 41 Cal.4th 555 [financial gain, multiple murder, rape murder]; *People v. Gutierrez*, *supra,* 28 Cal.4th 1083 [multiple murder]; *People v. Hardy & People v. Reilly* (1992) 2 Cal.4th 86 [financial gain, multiple murder]; *People v. Hillhouse*, *supra*, 27 Cal.4th 469 [robbery murder]; *People v. McDermott* (2002) 28 Cal.4th 946 [financial gain]; *People v. Mendoza, supra,* 52 Cal.4th 1056 [murder to avoid arrest; murder of peace officer]; *People v. Michaels* (2002) 28 Cal.4th 486 [financial gain; robbery murder; burglary murder]; *People v. Moon*, *supra*, 37 Cal.4th 1 [multiple murder]; *People v. Morales*, *supra*, 48 Cal.3d 527 [torture murder]; *People v. Nakahara, supra*, 30 Cal.4th 705 [robbery murder, burglary murder]; *People v. Roberts*, *supra*, 2 Cal.4th 271 [prior murder]; *People v. Sims*, *supra*, 5 Cal.4th 405 [robbery murder]; *People v. Stanley* (1995) 10 Cal.4th 764 [prior murder, witness murder]; *People v. Thomas* (2011) 52 Cal.4th 336 [multiple murder, drive-by murder]; *People v. Webster, supra*, 54 Cal.3d 411 [robbery]. A "lying-in-wait" special circumstance was found at trial, but set aside on appeal in the following cases: *People v. Lewis, supra,* 43 Cal.4th 415 [multiple murder, robbery, kidnaping]; *People v. Carter*, *supra*, 36 Cal.4th 1215 [prior murder, robbery, burglary].)

murder offense where LWOP sentence would be attributable in part to commission of murder].)

Statistics about the number of executions actually completed may also inform the consideration of whether capital punishment for a particular aggravated crime "is regarded as unacceptable in our society." (*Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 433; see also *id.* at p. 425 ["Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002, [citation] and only three States had executed a juvenile offender between 1995 and 2005, [citation.]"]; *Enmund v. Florida*, *supra*, 458 U.S. 782, 818 [explaining that only six persons executed over 30 years were non-triggermen].)

In California, there have been thirteen executions since the reinstatement of the death penalty in 1978.[53] None of the cases of those executed involved true findings of the special circumstance of "lying-in-wait". Likewise, in the three other states in which "lying-in-wait" serves as an eligibility factor, no defendant has been executed based solely upon a finding that he had murdered while "lying-in-wait".[54]

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[53] (See *People v. Harris* (1981) 28 Cal.3d 935; *People v. Mason* (1991) 52 Cal.3d 909; *People v. Bonin* (1989) 47 Cal.3d 808; *People v. Williams* (1988) 44 Cal.3d 883; *People v. Thompson* (1988) 45 Cal.3d 86; *People v. Malone* (1988) 47 Cal.3d 1; *People v. Siripongs* (1988) 45 Cal.3d 548; *People v. Babbitt* (1988) 45 Cal.3d 660; *People v. Rich* (1988) 45 Cal.3d 1036; *People v. Massie* (1995) 19 Cal.4th 550; *People v. Anderson* (1990) 52 Cal.3d 453; *People v. Beardlee* (1991) 53 Cal.3d 68; *People v. Williams* (1988) 44 Cal.3d 1127; *People v. Allen* (1986) 42 Cal.3d 1222.)

[54] In the three pertinent jurisdictions, only four cases in which

(continued...)

Finally, consistency in the direction of change regarding a form of punishment may support an finding of national consensus either for or against a particular punishment practice. (*Atkins v. Virginia*, *supra*, 536 U.S. 304 at p. 315; *Roper v. Simmons*, *supra*, 543 U.S. 551 at p. 565, *Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 431.) Of the three other jurisdictions utilizing "lying-in-wait" as an aggravating circumstance, Indiana has rejected California's broad construction of "concealment of purpose." (See *People v. Webster*, *supra*, 54 Cal.3d 411 at p. 467-468

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[54](...continued)
"lying-in-wait" had been found have resulted in executions. (See *Vandiver v. State* (Ind. 1985) 480 N.E.2d 910, 915; *Fleenor v. State* (Ind. 1987) 514 N.E.2d 80, 88; *Matheney v. State* (Ind. 1992) 583 N.E.2d 1202, 1208); *State v. Dawson* (Mont. 1988) 761 P.2d 352, 360.) However, in these cases, "lying-in-wait" was not the sole aggravator, as the murders involved a torture (*id.* at p. 358), a contract killing of an elderly retiree. (*Vandiver v. State*, *supra*, 480 N.E.2d 910, 915), multiple murder, *Fleenor v. State, supra*, 514 N.E.2d 80, 88, and burglary. (*Matheney v. State, supra*, 583 N.E.2d 1202, 1208.) The remaining executions from these jurisdictions did not result from cases involving murder while "lying-in-wait". [Don't you need a cite for the proposition that the following defendants are the only ones executed in those states?] (*Davis v. People* (Colo. 1994) 871 P.2d 769, 770; *State v. McKenzie* (Mont. 1980) 608 P.2d 428; *State v. Langford* (Mont. 1991) 813 P.2d 936; *Judy v. State* (Ind. 1981) 416 N.E.2d 95, 103; *Resnover v. State* (Ind. 1984) 460 N.E.2d 922; *Smith v. State* (Ind. 1984) 465 N.E.2d 1105, 1110; *Burris v. State* (Ind. 1984) 465 N.E.2d 171; *Smith v. State* (Ind. 1997) 686 N.E.2d 1264; *Bivins v. State* (Ind. 1994) 642 N.E.2d 928; *Lowery v. State* (Ind. 1985) 478 N.E.2d 1214; *Hough v. State* (Ind. 1990) 560 N.E.2d 511, 522; *Trueblood v. State* (Ind. 1992) 587 N.E.2d 105; *Wallace v. State* (Ind. 1994) 640 N.E.2d 374 *Benefiel v. State* (Ind. 1991) 578 N.E.2d 338, 347; *Johnson v. State* (Ind. 1992) 584 N.E.2d 1092;*Conner v. State* (Ind. 1991) 580 N.E.2d 214, 221; *Bieghler v. State* (Ind. 1985) 481 N.E.2d 78; *Woods v. State* (Ind. 1989) 547 N.E.2d 772; *Lambert v. State* (Ind. 1994) 643 N.E.2d 349; *Wrinkles v. State* (Ind. 1997) 690 N.E.2d 1156.)

(conc. & dis. opn. of Broussard, J.).) Colorado has strongly suggested that it, too, rejects application of concealment of purpose "lying-in-wait" as an eligibility factor. (See *People v. Dunlap* , *supra*, 975 P.2d 723 at p. 751; see also *Enmund v. Florida*, *supra*, 458 U.S. 782 at p. 793 fn. 15 ["Colorado law may well have barred imposition of the death penalty in this case"].) Thus, indications of the direction of change support the conclusion that concealment of purpose "lying-in-wait" is no more morally culpable than other intentional murders. (See *Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 432 ["In *Roper*, we emphasized that, though the pace of abolition was not as great as in Atkins, it was counterbalanced by the total number of States that had recognized the impropriety" of the punishment].)

The fact that no states have explicitly *joined* California in adopting "lying-in-wait" by concealment of purpose as an eligibility factor is also relevant, (cf. *Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 431), particularly given the myriad of opportunities to do so that would result from any trial court adopting this Court's extremely broad construction. (*Ford v. Wainwright*, *supra*, 477 U.S. 399 at p. 409 fn. 2 [noting in its survey of national consensus against executing the insane those jurisdictions which had no specific law forbidding the practice but also had "not repudiated the common-law rule"].)

In sum, the national consensus supports the conclusion that death is a disproportionate penalty for the "lying-in-wait" special circumstance.

b. There No Moral Justification That "Lying-in-Wait" As Broadly Defined by This Court Warrants Death

Analysis of categorically disproportionate offenses involves not only surveying the indicia of national consensus but also "consideration of the culpability of the offenders at issue in light of their crimes and

characteristics, along with the severity of the punishment in question." (*Graham v. Florida*, *supra*, 130 S.Ct. 2011 at p. 2026.) Appellant was convicted of the special circumstance of "lying-in-wait", which necessitates a finding of intentional murder. (*People v. Sims*, *supra*, 5 Cal.4th at p. 432.) Thus, defendant was found to have a more culpable mental state than that analyzed in *Enmund,* in which felony murder simpliciter was found disproportionate. (*Enmund v. Florida*, *supra*, 458 U.S. 782.) Similarly relevant, the defendants in *Tison*, in which the penalty was found not to be disproportionate, lacked the intent to kill present in this case. (*Tison v. Arizona*, *supra*, 481 U.S. 137 at p. 157-158 [reckless disregard for human life "a highly culpable mental state that may be taken into account in making a capital sentencing judgment"].)

However, that "lying-in-wait" murder requires intent to kill does not render death a *per se* constitutionally proportionate punishment. Unlike the felony murder aggravating factor under which the defendants in *Tison* were rendered death eligible, there is no societal consensus that "lying-in-wait" murder qualifies as among the narrow class of most heinous murders warranting the death penalty. (See, *ante*, Argument XI.B.1.a; cf. *Tison v. Arizona*, *supra*, 481 U.S. at p. 138 ["A survey of state felony murder laws and judicial decisions after *Enmund* indicates a societal consensus that that combination of factors may justify the death penalty even without a specific "intent to kill"].) More importantly, as the *Tison* court itself explained, "[a] narrow focus on the question of whether or not a given defendant 'intended to kill,'[] is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers." (*Tison v. Arizona*, *supra*, 481 U.S. 137 at p. 157 [noting that some intentional homicides, "though criminal, are often felt undeserving of the death penalty"].)

Reinforcing the principle that intent to kill alone does not render the death penalty a proportional punishment for every murder, the Supreme Court has indicated that a statute which encompasses all intentional murder is unconstitutional. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 ["especially heinous, atrocious, or cruel" eligibility factor invalid where "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous'"]; cf. *Arave v. Creech* (1993) 507 U.S. 463, 475 [when grafted onto "utter disregard for human life" aggravator, "pitiless" alone might be invalid eligibility factor where sentencing judge "might conclude that every first-degree murderer is 'pitiless'"].)

The appropriate question, therefore, is not simply whether appellant intentionally killed, but whether the "lying-in-wait" special circumstance, as construed by this Court, provides a meaningful distinction in terms of culpability between ordinary murder and capital murder sufficient to overcome California's outlier status in terms of national consensus. In other words, the federal and state constitutions require that murder by "lying-in-wait" be sufficiently distinct that "there is a qualitative moral difference between such murders and those which do not involve "lying-in-wait"--one of such significance that a person who kills by "lying-in-wait" should be executed . . ." (*People v. Webster*, *supra*, 54 Cal.3d 411 at p. 467-468 (conc. & dis. opn. of Broussard, J.).) Although this Court has found sufficient distinction between the intentional murder and "lying-in-wait" murder to satisfy the "subclass" requirement of narrowing (see, e.g., *People v. Stevens, supra*, 41 Cal.4th 182 at p. 203-204), it has not expressly considered whether the "lying-in-wait" special circumstance imposes a

constitutionally disproportionate punishment based on the lack of national consensus and other indicia of evolving standards of decency.

In terms of moral culpability, capital punishment is excessive when it "does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." (*Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 441.) Unless the death penalty "when applied to those in [appellant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' [Citation] and hence an unconstitutional punishment." (*Enmund v. Florida*, *supra*, 458 U.S. 782 at p. 798.)

With regard to deterrence, the Supreme Court has stated that it can "assume safely that there are murderers . . . for whom . . . the death penalty undoubtedly is a significant deterrent." (*Kennedy v. Louisiana* , *supra*, 554 U.S. 407 at p. 441.) However, even assuming that the death penalty deters some murders, it is extraordinarily difficult to conceive that the existence of the "lying-in-wait" special circumstance contributes in any meaningful way to this deterrence. (See *People v. Morales*, *supra*, 48 Cal.3d 527 at p. 575 (dis. opn. of Mosk, J.); *People v. Webster*, *supra*, 54 Cal.3d 411 at p. 467-468 (conc. & dis. opn. of Broussard, J.).) Presuming the unlikely possibility that any potential murderers are even aware that a "lying-in-wait" special circumstance exists, it is highly improbable that they are also aware of the technical boundaries delineated by this Court which would render their conduct subject to the death penalty. Regardless, the assumed deterrent value of capital punishment is not alone sufficient to render the punishment proportionate. (*Kennedy v. Louisiana* , *supra*, 554 U.S. 407 at p. 441.)

As for retribution and blameworthiness, as indicated by several Justice of this Court, there is little moral distinction between special circumstance "lying-in-wait" and other first degree murders. (*See People v. Webster*, *supra*, 54 Cal.3d 411 at p. 467-468 (conc. & dis. opn. of Broussard, J.); *People v. Morales*, *supra*, 48 Cal.3d 527 at p. 575 (dis. opn. of Mosk, J.); *People v. Stevens*, *supra*, 41 Cal.4th at p. 223 (dis. opn. of Moreno, J.).) After all, the only difference between a capital "lying-in-wait" murder and non-capital murder may be the fact that, after an brief and indeterminate period of "watchful waiting," the victim was taken by surprise, and thus attacked from a position of advantage. (See *People v. Mendoza*, *supra*, 52 Cal.4th 1056, 1073 [rejecting defendant's sufficiency claim that "substantial" waiting period was "only a matter of seconds"]; see also generally, *People v. Stevens, supra*, 41 Cal.4th 182 at p. 216-226 (dis. opn. of Moreno, J.) [criticizing this Court's "lying-in-wait" jurisprudence as "murder by surprise"].)

The most thorough attempt to explicate the difference in moral culpability between "lying-in-wait" murder and ordinary murder was provided by this Court in *Stevens*, wherein it declared that "lying-in-wait" by concealment of purpose "inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise." (*People v. Stevens, supra*, 41 Cal.4th 182.) However, aside from murder by duel, it is extraordinarily rare that a murderer does not attempt to avoid detection or defeat self-defense by the victim, if the opportunity presents itself. And while concealment of purpose may "betray at least some level of trust" (*ibid.*), the breadth of this Court's holdings does not raise the level of trust which need be compromised to any significant degree. (See *id.* at p. 187

["lying-in-wait" properly found where defendant pulled alongside victim, prompting victim to slow down and lower his window, motioned as though trying to get victim's attention, and smiled at him, prior to shooting].) Appellant's case, in which the "trust" betrayed was that an attempted drug deal would not result in a lethal attack, is a case in point.

Supreme Court case law actually suggests that the high court does not find "lying-in-wait" to be among the most culpable of factors associated with intentional murder. In *Maynard v. Cartwright*, *supra*, 486 U.S. 356, the Court indicated that a state court's finding that the defendant "lay in wait" did *not* render an intentional murder constitutionally valid despite the overbreadth of the underlying eligibility factor. (*Id.* at p. 364.)

In *Maynard*, the Court found that Oklahoma's"heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally overbroad and that the statutory gloss of "especially heinous" did not "limit the overbreadth of the aggravating factor." (*Id.* at p. 364.) The Court then proceeded to address the argument that the sentence was constitutional because the Oklahoma courts had relied on particular facts adduced at the trial to support the aggravating circumstance, including that the defendant "lay in wait" for the victim:

> the conclusion of the Oklahoma court that the events recited by it 'adequately supported the jury's finding' was indistinguishable from the action of the Georgia court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. [Citations] Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or

cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

(*Id.* at p. 364.)

Although the decision in *Maynard* related to the narrowing requirements of the Eighth Amendment, the decision's reasoning strongly suggests that "lying-in-wait" does not alone render a defendant sufficiently culpable to satisfy the requirement of proportionality, at least where the eligibility factor is itself extremely broad.

2. The Breadth of the "Lying-in-Wait" Special Circumstance Increases Both the Disproportionality of the Punishment and the Risk of Arbitrariness

The United States Supreme Court has recently explained that the *breadth* of an eligibility factor, in terms of the number of defendants to which the factor potentially applies, informs the analysis of proportionality. As stated in the Court's recent decision in *Kennedy v. Louisiana*, "we find significant the number of executions that would be allowed under respondent's approach." (*Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 438.) In *Kennedy*, the Court voiced its concern that "there are hundreds, or more, of [aggravated child rape] convictions just in jurisdictions that permit capital punishment." (*Id.* at p. 439.) Juxtaposing this number with the approximately "2.2% of convicted first-degree murderers [which] are sentenced to death," the Court found that an eligibility factor which would permit states to sentence to death this great a number of offenders could "not be reconciled with our evolving standards of decency and the necessity to constrain the use of the death penalty." (*Ibid.*)

In assessing the number of defendants to which the "lying-in-wait" special circumstance applies, in one jurisdiction alone, the statistics are

equally stark. In California, there have been approximately 100,000 murders since the reinstatement of the death penalty in 1978, with yearly murder rates ranging from a high of 4,096 in 1993 to the currently reported low of 1,809 in 2010. (See California Criminal Justice Statistics Center, Crime In California 2010, at p.5 available at http://ag.ca.gov/cjsc/pubs.php#crime.) Although it is somewhat difficult to assess exactly what percentage of homicides qualify under the broadly defined special circumstance of "lying-in-wait", it is safe to say that "lying-in-wait" applies to a significant percentage of all homicides in the state of California. Defendants who were death-eligible under the lying-in-wait special circumstance alone and whose death sentence was affirmed on appeal, however, represent less than 1% of all death sentences affirmed. (Compare California Dept. of Corrections and Rehabilitation, Condemned Inmate List available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf with *People v. Edwards*, *supra*, 54 Cal.3d 787 and *People v. Jurado, supra,* 38 Cal.4th 72.)

Strict numerical analysis aside, simply assuming that "lying-in-wait" does not restrict death eligibility to a "small percentage" of murders (see *People v. Jurado*, *supra*, 38 Cal.4th 72 at p. 146 (conc. opn. of Kennard, J.) means that death eligibility under the "lying-in-wait" special circumstance falls in "hundreds" per year and the thousands or even tens of thousands since the reinstatement of the death penalty—in one jurisdiction alone. (Cf. *Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 438 [hundreds of eligible capital rapes per year in all death penalty jurisdictions problematic].) In comparison, only two prior cases affirmed by this Court have had only "lying-in-wait" as a special circumstance. The minuscule number of death penalty cases resting solely on the "lying-in-wait" special circumstance in

comparison with the large number of death eligible offenses attests to the absence of a moral distinction between murder and capital murder based on "lying-in-wait". (See *People v. Combs*, *supra*, 34 Cal.4th 821 at p. 869 (conc. opn. of Kennard, J.).)

Not only does the broad applicability of the "lying-in-wait" special circumstance strengthen the claim that the punishment is disproportionate (*Kennedy v. Louisiana*, *supra*, 554 U.S. 407 at p. 438), it also increases the risk of arbitrary infliction of the death penalty. As noted by the Court in *Kennedy*, when there is a broad applicability of an eligibility factor, there is a significant risk that the imposition of the death penalty may become "so arbitrary as to be 'freakis[h].' (*Id.* at p. 439.)

As the Baldus study at issue in *McCleskey* illustrated, the threat of arbitrariness increases when the heinousness of the aggravating circumstances themselves are relatively weak. (*McCleskey v. Kemp*, *supra*, 481 U.S. 279, 313 fn. 36; see also *id.* at p. 367 (dis. opn. of Stevens, J.).) The relationship between proportionality and arbitrariness is actually explicitly affirmed by the *McCleskey* majority, in which the court explained that "where the statutory procedures adequately channel the sentencer's discretion, [intercase] proportionality review is not constitutionally required." (*McCleskey v. Kemp*, *supra*, 481 U.S. 279 at p. 306.) The *McCleskey* court cited as authority for this proposition *Pulley v. Harris* (1984) 465 U.S. 37, in which it upheld California's 1977 death penalty scheme where it found the statutes "limit[ed] the death sentence to a *small sub-class* of capital-eligible cases." (*Id.* at pp. 50-51, 53, italics added.) Admittedly, this Court has repeatedly reaffirmed that intercase proportionality review is not required even under the much broadened 1978 Briggs Initiative and subsequent expansions. (See, e.g., *People v.*

Crittenden, supra, 9 Cal.4th 83 at p. 157 ["unless a defendant demonstrates that the state's capital punishment law operates in an arbitrary and capricious manner, the circumstance that he or she has been sentenced to death, while others who may be similarly situated have received a lesser sentence, does not establish disproportionality violative of the Eighth Amendment."].) However, the lack of intercase proportionality review is but one of many factors which increases the risk of arbitrary imposition of the death penalty based upon the murder while "lying-in-wait" special circumstance.

All of the factors together—including the breadth of the circumstance itself and the correspondingly large number of potentially eligible murders, the lack of national consensus or moral force to the argument that the crime as construed is a sufficiently heinous circumstance to warrant death, and the vanishingly small number of defendant's actually sentenced to death based on "lying-in-wait" alone—render the special circumstance unconstitutional.

3. Even If Constitutional as Construed by This Court, The "Lying-in-Wait" Special Circumstance Is Disproportionate and Arbitrary as Applied to Appellant

Despite this Court's repeated refusal to conduct intercase proportionality review, it has nonetheless "examined the individual circumstances of the offense and the offender in reviewing capital sentences" to determine whether the penalty is constitutionally applied. (*People v. Morris* (1991) 53 Cal.3d 152, 234, disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824; Cal. Constitution (art. I, § 17).) In addition, even given evidence that there exists a threat that the "lying-in-wait" special circumstance may be arbitrarily applied under the

Eighth Amendment and Due Process, this Court may require some evidence suggesting that it *was* arbitrarily applied in this case. (Cf. *McCleskey v. Kemp, supra*, 481 U.S. 279 at p. 312.)

Appellant was convicted of murder and attempted murder while "lying-in-wait" and concedes, as he must, that these fact reflects a high degree of moral culpability. However, appellant's case is different from many cases in which death sentences have been upheld in a few important respects, which must be considered in their totality.

First, the evidence underlying the "lying-in-wait" special circumstance which allegedly separates appellant from other murderers in terms of culpability is itself relatively weak. (See Argument A.8, *ante*.) Second, "lying-in-wait" was the sole special circumstance under which appellate stands convicted. Third, there was presented powerful mitigating evidence including the fact that appellant is borderline mentally retarded and that he and his family suffered horrific physical and sexual abuse at the hands of his father. (See Argument A.8, *ante*.) Fourth, though the circumstances of the offense involved an intentional murder and attempted murder, the victims were engaged in an inherently dangerous and illegal conduct. (*United States v. Caro* (4th Cir. 2010) 597 F.3d 608, 645 (diss. opn. of Gregory, J.) [noting that death sentences in Virginia were declining because prosecutors were "not seeking death for drug-related murders-apparently because they do not view these offenders as the worst of the worst"].) Finally, the co-defendant in the case, against whom the evidence of "lying-in-wait" was arguably stronger since it included inculpatory admissions, was acquitted of "lying-in-wait". (See 4CT:910-918 [motion to dismiss special circumstances based on nonmutual collateral estoppel based on acquittal of Contreras]; see also 4CT:937 [prosecution

response, concluding that jury considering evidence at Contreras trial, including admissions by Contreras, could "have easily found Contreras was "lying-in-wait""].)

These facts support the conclusion that the death penalty was arbitrarily and disproportionately applied in this case. As such, appellant's sentence should be reversed.

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XII.

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers

eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3, Factor (a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 5CT:1168-1170; 10RT:2264-2266.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of

the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

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C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. In fact, the prosecutor stressed in his penalty phase closing argument "I can't emphasize that enough . . . it's not a standard beyond a reasonable doubt." (11RT:2959.)

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 5CT:1187-1188; 10RT:2275-2277.) Because these additional

findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36

Cal.4th at p. 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (5CT:1168-1170, 1187-1188; 10RT:2264-2266, 2275-2277), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with

the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full

deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87 (1989 Rev.); 5CT:1172; 10RT:2267.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented evidence of unadjudicated criminal activity allegedly committed by appellant – including the six instances listed in the notice of aggravation (see 1CT123-124) – and argued that such activity supported a sentence of death. (See, e.g., 9RT:1901-1909, 10RT:2303-2313.)

The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC 8.88; 5CT:1187-1188; 10RT:2275-2277.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the

aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal

Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the

consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case.

(See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

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D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 5CT:1168-1170; 10RT:2264-2266) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85 (g) [duress or domination], (I) [age of defendant], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions (5CT:1168-1170; 10RT:2264-2266), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (5CT:1168-1170; 10RT:2264-2266.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based

on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider them.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* , *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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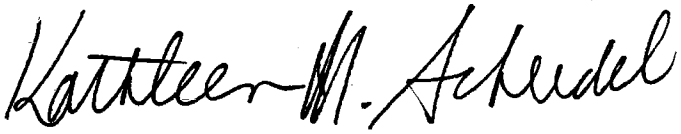
CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and his judgment of death vacated.

DATED: May 22, 2012

MICHAEL J. HERSEK
State Public Defender



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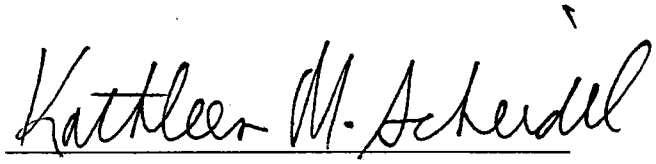
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Kathleen M. Scheidel, am the Assistant State Public Defender assigned to represent appellant Jose Lupercio Casares, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 74,490 words in length excluding the tables and this certificate.

DATED: May 22, 2012



Kathleen M. Scheidel
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Jose L. Casares No. S025748

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

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Each said envelope was then, on May 22, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on May 22, 2012, at San Francisco, California.

DECLARANT