SUPREME COURT COPY

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IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT WALTER SCULLY, Defendant and Appellant.

S062259

No. ~~S029301~~
(Sonoma County Sup. Ct.
No. SCR-2269)

SUPREME COURT
FILED

AUG 30 2012

Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S029301
v.	)	(Sonoma County Sup. Ct. No.
ROBERT WALTER SCULLY,	)	SCR-22969)
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

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

STATEMENT OF THE CASE

On July 11, 1995, the Sonoma County District Attorney filed an Information charging appellant with 15 counts and alleging numerous special allegations and eight prior convictions. (10CT:1719-1737.) On July 18, 1995, appellant entered a plea of not guilty to all counts and denied the special allegations. (1RT:11.) On November 15, 1996, after jury selection had begun, the prosecutor filed a First Amended Information, charging 14 counts, numerous special allegations and eight prior convictions.

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

(21CT:4247-4267.) On November 18, 1996, appellant entered a plea of not guilty to all counts and denied the special allegations. (48RT:7350-7356.)

The First Amended Information charged appellant and his codefendant, Brenda Kay Moore, in Count 1,[2] with the first degree murder of Frank Vasquez Trejo on March 29, 1995, in violation of section 187, subdivision (a). It further alleged that Count 1 was a serious felony within the meaning of section 1192.7, subdivision (c)(1), that the codefendants aided and abetted the crime for the purpose of avoiding and preventing a lawful arrest (§ 190.2, subd. (a)), that Frank Trejo was a peace officer intentionally killed while engaged in the performance of his duties (§ 190.2, subd. (a)(7)), that the defendants were engaged in the commission of a robbery (§ 190.2, subd. (a)(17)), that defendant (Scully) personally used a short-barreled shotgun (§ 12022.5), causing it to be a serious felony (§ 1192.7, subd. (c)(8)), and that a principal was armed with a short-barreled shotgun (§ 12022, subd. (a)(1)). (21CT:4247-4248.)

In Count 2,[3] appellant was charged with robbery (§ 211). It alleged that appellant took personal property from Frank Trejo; that appellant personally used a short-barreled shotgun (§ 12022.5), causing this count to be a serious felony (§ 1192.7, subd. (c)(8)); and that a principal was armed with a short-barreled shotgun (§ 12022, subd. (a)(1)). (21CT:4248-4249.)

Count 3 alleged that appellant, his codefendant and another person and persons whose identity were unknown conspired together to commit robbery, in violation of section 182, subdivision (a)(1). It alleged four overt

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[2] Unless otherwise noted, both appellant and his codefendant were charged with all of the counts in the Information.

[3] Counts 1 through 6 were all alleged to have occurred on March 29, 1995.

acts: that defendants (1) armed themselves with a loaded short-barreled shotgun; (2) obtained a street map of Santa Rosa, California, marking potential locations of robbery victims; (3) obtained a mask and gloves to avoid identification as perpetrators of robberies; (4) drove to the location of 6930 Burnett Street, Sebastopol, and surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves. (21CT:4249-4250.)

Count 4 charged attempted robbery (§ 664/211), alleging an attempt to take personal property from Marian Wilson. It was further alleged as to this count that it was a serious felony (§ 1192.7, subd. (c)(19)) and that a principal was armed with a short-barreled shotgun (§ 12022, subd. (a)(1)). (21CT:4251.)

Count 5 charged appellant with possession of a short-barreled shotgun (§12020, subd. (a)), making him probation ineligible except in unusual cases (§ 1203, subd. (e)(11)). (21CT:4252.)

Count 6 charged appellant with possession of a short-barreled shotgun and a .357 magnum revolver, having been convicted previously of felonies. (§12021, subd. (a)(1).) (21CT:4252-4253.)

Count 7 charged that on March 30, 1995, appellant entered an inhabited dwelling occupied by Frank Cooper, with the intent to commit a felony (§ 459).[4] Count 7 further alleged that in violation of section 462, subdivision (a), appellant personally used a short-barreled shotgun and .357 magnum revolver (§ 12022.5), causing the offense to become a serious felony (§ 1192.7, subd. (c)(8)), and that a principal was armed with a short-

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[4] Counts 7 through 14 were all alleged to have occurred on March 30, 1995.

barreled shotgun and .357 magnum revolver (§ 12022, subd. (a)(1)). (21CT:4253-4254.)

Count 8 charged that, in violation of section 245, subdivision (a)(2), appellant committed an assault with a firearm on Frank Cooper and that appellant personally used a short-barreled shotgun (§ 12022.5), causing the offense to become a serious felony (§ 1192.7, subd. (c)(8)). (21CT:4254-4255.)

Counts 9 through 14 alleged false imprisonment for purposes of protection from arrest (§§ 210.5, 236), that appellant personally used a short-barreled shotgun and .357 magnum revolver (§ 12022.5), causing the offenses to become serious felonies (§ 1192.7, subd. (c)(8)), and that a principal was armed as to Counts 9 through 14 with a short-barreled shotgun and .357 magnum revolver (§ 12022, subd. (a)(1)). The victims in these Counts are: Frank Cooper (Count 9), Yolanda King (Count 10), Karen King (Count 11), Jeremy King (Count 12), Tyrika Hill (Count 13) and Atatiana King (Count 14). (21CT:4255-4262.)

The First Amended Information also alleged that appellant suffered three prior strike convictions (§ 1170.12), six prior serious felony convictions (§§ 667, subd. (a) and 1192.7, subd. (c), one prior prison conviction pursuant to section 667.5, subdivision (a) and two prior prison convictions pursuant to section 667.5, subdivision (b). (21CT:4262-4267.)

It took a significant amount of time to find a judge in Sonoma County to hear the case. On November 13, 1995, appellant's case was initially assigned for all purposes to the Honorable Raymond Giordano. (10CT:1863.) On January 24, 1996, Judge Giordano recused himself based on his relationship with some of the anticipated witnesses. Sonoma County

Superior Court Presiding Judge Elaine Watters (now Elaine Rushing),[5] assigned the case to the Honorable R. Bryan Jamar. (3RT:252.) Judge Jamar was disqualified because he had attended Deputy Trejo's memorial service and had contributed to a scholarship fund on behalf of Deputy Trejo. Judge Watters assigned the case for trial before the Honorable Rex Sater. (3RT:276-277.) Judge Sater had also attended Deputy Trejo's memorial service (3RT:280-281), and subsequently consented to disqualification (11CT:2987-2094, 2096; 3RT:283). Presiding Judge Watters ultimately assigned the case to her own courtroom, stating that she did not attend Deputy Trejo's funeral. (3RT:305.) The matter remained in Judge Watters's courtroom throughout the remaining proceedings.

There were numerous pretrial hearings. The court denied appellant's motion to change venue after a seven-day hearing. (18RT:2734; 18CT:3611-3628.) After numerous hearings concerning the extensive restraints and shackles imposed on appellant, including a stun-belt which was found to have accidentally activated during proceedings, the court ordered that a security chair, with its attendant shackles, be the method used to secure appellant. (See 23RT:3094.) The court also took evidence regarding the prosecution's request that appellant be housed during trial at San Quentin State Prison, rather than the local county jail. Appellant remained housed at the Sonoma County jail. There was a lengthy hearing regarding the prosecution's request under Evidence Code section 1101, subdivision (b), to present evidence of appellant's prior misconduct to support counts 3 and 4 – the alleged attempted robbery and the alleged

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[5] At the time of appellant's trial, Judge Rushing's last name was Watters, which is the name appellant uses throughout this appeal.

conspiracy to commit robberies. (15RT:2005-2090, 2128-2198; 16RT:2206-2325.) The trial court granted the prosecutor's motion in part, allowing the prosecutor to present evidence of four prior robberies.

Appellant moved to be cocounsel when Elliot Daum, one of his appointed counsel, requested a continuance due to an illness that would incapacitate him for a few weeks. When the court denied appellant's motion to be cocounsel, appellant moved to proceed in pro per. On September 16, 1996, the court granted appellant's motion for self-representation. (28RT:3810-3813.) On October 1, 1996, the court granted appellant's motion for reconsideration of cocounsel status and appellant proceeded as cocounsel along with his previously appointed counsel, Daum, and Richard Ingram. The court clarified that Daum would be lead counsel in charge of the case, would make all strategy decisions regarding all aspects of the trial and would be in charge of selecting appellant's jury. (30RT:3941-3942.)

Appellant and his codefendant, Moore, proceeded to trial together, but before separate juries. (9RT:1110-1111.) On July 11, 1995, the prosecution decided not to seek death for Moore and to seek instead a sentence of life without the possibility of parole. (1RT:33.) The trial court ruled that jury selection in appellant's case should take place first and commence on September 16, 1996. (20RT:2892-2894; 21RT:2915.) However, due to Daum's illness, the court decided to proceed first with the selection of Moore's jury. (27RT:3636.) Appellant's jury selection proceedings began on October 7, 1996 (31RT:3986), and concluded on November 21, 1996. (51RT:7903-7906.)

The state began its guilt phase case on December 3, 1996. (55RT:8365.) At the close of the prosecution's case-in-chief, appellant

moved for an acquittal on several counts, including Count 4, the alleged attempted robbery of Marian Wilson. (22CT:4567- 4572.) The court granted appellant's motion (94RT:14940, 14964-14965) and entered a judgment of acquittal. (22CT:4609.) The state rested on March 5, 1997. (94RT:14876; 95RT:15027.) The defense began its case on that same day (95RT:15027) and rested on March 18, 1997 (102RT:16108). The case went to the jury on April 3, 1997. (111RT:17657.)

On April 14, 1997, the jury reached its verdicts on all remaining counts but Count 3, and informed the court it could not reach a verdict as to that count. The court declared a mistrial as to Count 3, the conspiracy charge. (114RT:18224.) The court sealed the verdicts and intended to wait until Moore's jury had reached its verdicts before reading them. (114RT:18224-18227.) The court later became concerned that the wait could result in the unavailability of one of appellant's jurors, requiring a substitution and deliberations to begin anew. (114RT:18230-18237, 18259-18266, 18269-18280.) Thus, on April 16, 1997, the court unsealed and read the verdicts. The jury found appellant guilty of first degree murder, found true the special circumstance allegations and other allegations, and but for Count 3, found appellant guilty of the remaining charges. (114RT:18292-18300.)[6]

A bifurcated proceeding regarding the alleged prior prison convictions and prior serious felony convictions began and ended on April 23, 1997. (117RT:18744-18760.) On April 28, 1997, the jury found true

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[6] Moore was found guilty of counts 2, 5 and 7 through 14. Moore's jury was unable to reach verdicts as to count 1, the murder charge, voting eleven to one in favor of acquittal. It also did not reach a verdict as to the charge of count 3, the conspiracy. (116RT:18589-18595.)

all the prior conviction allegations. (118RT:18791-18794.) The state began its penalty case the same day, April 28, 1997 (118RT:18810), and rested on May 1, 1997 (121RT:19202). The defense began its penalty case on May 7 (123RT:19264), and rested on May 13, 1997 (126RT:19692). On May 27, the jury returned its verdict, sentencing appellant to death. (128RT:20031-20032.)

On June 12, 1997, the court denied appellant's motion for a new trial (129RT:20068) and motion to modify the judgment to life without the possibility of parole (129RT:20115). On June 13, 1997, the court sentenced appellant to death on Count 1, and to 274 years to life on the non-capital counts. (129RT:20134-20140.)

Appeal is automatic under section 1239.

STATEMENT OF FACTS

INTRODUCTION

Appellant was released from Pelican Bay State Prison on March 24, 1995, after having been confined for well over a decade in the most restrictive and repressive prisons in the state. Pelican Bay State Prison (PBSP) is located at the northern border of California. Appellant was given $200 and three days to make his way the length of the state, to San Diego, where he was to report to his parole officer. Appellant's friend, Brenda Moore, picked him up at the prison and offered to take him most, or at least part of the way to his San Diego destination. Moore lived in Crescent City, the same town where PBSP was located.

Moore's old pickup truck was in need of repair before it could make the trip south. A friend worked on the truck and late on March 26, appellant and Moore left Crescent City. Not long after they left, the truck caught fire and they were forced to stop in Santa Rosa. Moore took her

truck to a mechanic the next day, March 27. After it was repaired, but before they headed south toward San Diego, Moore decided she wanted to go back home. She told appellant she was going to leave him in Santa Rosa. It was late at night, about 11:00 p.m., on March 29. Appellant was already late in reporting to his parole officer as three days had passed since they left Crescent City.

Appellant became upset and they argued. Moore pulled to the side of the road and then into an empty parking lot of a saddlery store. Within minutes, Deputy Frank Trejo drove his patrol car behind Moore's truck and shone the spotlight from the car on the truck. Minutes later, Deputy Trejo was dead. What happened in those few minutes was where the prosecution and the defense versions diverged.

The prosecution contended that appellant murdered Deputy Trejo in the first degree, either with premeditation and deliberation or during the course of a robbery – the robbery being the taking of the deputy's gun and gun belt.

Appellant's defense was that Deputy Trejo's death was the result of a horrible accident and that appellant's culpability was, at most, a second degree murder. Appellant admitted that he was in a panicked state that night. He admitted that he had a shotgun. He had found it hidden on Moore's property. He knew that as a felon it was against the law for him to possess a gun, but took the gun nonetheless because he was afraid that outside the prison walls, his life was in jeopardy.

Appellant presented evidence that inmates released from the kinds of prisons where appellant had been housed are fearful about running into someone from prison. This is because they have had minimal human interaction for years on end, and the guards tell inmates that they have

enemies – enemies who could be an inmate housed next to them, or someone they may have never even laid eyes on. The evidence showed that after over a decade in such housing conditions, called Security Housing Units, in which appellant had no semblance of normal social interaction, to be released and on his own, without any transition or preparation for that release, was a frightening and disabling experience. As the defense evidence demonstrated, this was how appellant felt upon his release – on edge, not prepared for life in the outside world, and filled with fear and anxiety.

Appellant testified on his own behalf. Deputy Trejo approached appellant, who was sitting in the passenger side of the truck. Appellant got out of the truck with the shotgun in his hands; his mind was racing and he wanted time to slow down, to think. Appellant disarmed the deputy. He took the key from the deputy's car and threw it into a field next to the parking lot. Appellant ordered the deputy to lay down on the ground. Appellant testified that he kept his eye on the deputy and walked backwards. He tripped, fell and the gun hit his leg and unintentionally discharged. Appellant saw that the shot hit the deputy. He panicked, ran to Moore's truck and ordered her to drive.

Within hours, appellant was arrested for murder. Immediately after appellant's surrender and arrest, the Sonoma County community responded. Beginning with appellant's arrest and lasting throughout the trial the community's primary newspaper was saturated with stories about Deputy Trejo's death, appellant and the case. The community built a permanent memorial in Deputy Trejo's honor. Approximately 2000 people attended his memorial service, which was televised. The community established memorial funds for Deputy Trejo's children and grandchildren. Sonoma

County, understandably, felt and responded to the community's loss of Deputy Trejo.

Appellant admitted shooting Deputy Trejo. He took full responsibility for the deputy's death and told the jury that he was to blame for the whole terrible tragedy. Appellant told the jury that at no point did he intend to shoot Deputy Trejo. He disarmed Deputy Trejo, but he did not intend to steal the deputy's gun or gun belt.

The decision the jury was to make turned in large part on whether they believed appellant's testimony, which comported with the physical evidence. But from the moment the trial began, appellant was at a grave disadvantage from which he could not recover and thus not be fairly tried. The extensive publicity in the community in which the crime occurred and in which appellant was tried resulted in a jury pool in which its members had formed opinions adverse to appellant. The publicity, which included details about the crime, the impact on the community from the loss of Deputy Trejo, and hostility toward appellant, had become deeply embedded in the community's public consciousness.

THE GUILT-INNOCENCE PHASE EVIDENCE

A. The Death of Deputy Frank Trejo

On March 24, 1995, five days before Deputy Trejo's death, appellant was released from PBSP, in Crescent City, California. (95RT:15052-15054.) He was given $200 and told to report to his parole officer in San Diego by March 27, 1995. (95RT:15054, 15088.) His co-defendant, Brenda Moore, an acquaintance who lived in Crescent City, picked him up at the gates of the prison. (95RT:15055.) Moore told appellant she would take him at least as far as San Francisco, and possibly all the way to San Diego. (95RT:15089; 96RT:15284.)

Appellant stayed at Moore's home for two days. On March 26, 1995, they left Crescent City, arriving in Santa Rosa late that night. (95RT:15077.) Moore's pickup truck had mechanical difficulties requiring repair in Santa Rosa. Three days had passed since they left Crescent City. Moore was tired and wanted to go back home. She did not want to take appellant, already late in reporting to his parole officer, any further toward his San Diego destination. (95RT:15113-15114; 96RT:15292.) Late at night on March 29, Moore pulled to the side of the road and into the Santa Rosa Saddlery parking lot. (95RT:15128.) Moments later, Deputy Trejo pulled in behind them, shining the spotlight on top of his patrol car on to Moore's truck. (95RT:15130.)

1. Patrons at the R&S Bar

The Santa Rosa Saddlery was next door to the R&S Bar. A large number of bar patrons were outside, in the bar's parking lot when Deputy Trejo parked behind Moore's truck. The parking lot was dark. The view from the bar's parking lot to the police vehicle and the truck was obstructed by cars and a chain link fence. Five persons in the bar's parking lot testified for the prosecution about their observations of the events leading up to the shooting.[7] All five of the witnesses had been in various stages of intoxication that night.

The prosecution's eyewitness accounts of what they had observed in the Saddlery parking lot varied dramatically. In some instances, a single witness's testimony contradicted other statements and testimony that the

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[7] A sixth witness, 16-year-old Raul Espinoza, also testified for the prosecution. Although he was in the parking lot of the R&S Bar, he did not witness any of the events preceding or at the time of the shooting. (74RT:RT:11335-11338, 11355.)

witness had provided, and the testimony of some of these witnesses conflicted with the indisputable physical evidence. Indeed, the trial court commented outside the jury's presence that there had been major discrepancies between prior statements and trial testimony among numerous prosecution witnesses. (71RT:10731.) The trial court also commented upon the importance of their testimony, stating that the "kernel of this case is how the jury is to evaluate the testimony of the eyewitnesses who testified versus Mr. Scully's testimony . . . . [T]his is about the most important thing I can think of, practically, that the jury in the Scully case is going to be asked to determine." (108RT:16952.)

a. Jesus Alejandro Ramirez Gutierrez

The first witness to testify about his observations that night was Jesus Alejandro Ramirez Gutierrez (Ramirez).[8] On March 29, 1995, about 5:30 to 6:30 p.m., he went to the R&S Bar with friends. (58RT:9000-9001.) Sometime between 7:00 and 8:00 p.m., Ramirez's friend, "Memo" (hereafter Guerrero),[9] who he had been expecting, arrived at the bar. Guerrero needed to use the pay phone in the bar's parking lot and Ramirez went outside with him. (58RT:9005-9006.) Guerrero then used the pay phone to respond to a page he had received on his beeper. (58RT:9005, 9008; 59RT:9098-9099.) While Guerrero was on the phone outside, Ramirez saw Miguel Aguilar,[10] another friend. (58RT:9008-9009;

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[8] Ramirez provided most of his testimony through the assistance of a Spanish-speaking court interpreter. (58RT:8998-8999.)

[9] "Memo," whose full name was Onecimo Guerrero Tavares, also testified for the prosecution. (61RT:9455 et seq.)

[10] "Miguel," whose full name was Oscar Gustavo Aguilar Lopez (continued...)

59RT:9122.) Aguilar commented that a deputy had stopped someone in the parking lot next to the bar. (59RT:9124.) Looking where Aguilar pointed, Ramirez saw a patrol car and a pickup truck in the parking lot next to the bar. Ramirez also saw a deputy and a man, later identified as appellant (58RT:9048), standing in back of the truck. (58RT:9010-9011, 9014.) It appeared that the two men were talking to each other (58RT:9016) and that it looked like a traffic stop, as Aguilar had indicated. (59RT:9124.)

Ramirez testified that he saw appellant and the deputy in the parking lot sometime between 7:00 and 8:00 p.m. He described the time as when the sun sets and the moon starts to rise (59RT:9096), but also recalled that there was no light from the sky when he made his observations. (59RT:9097.) The only light illuminating the area was a spotlight on top of the police car, which was pointed toward the pickup truck. (58RT:9021; 59RT:9097.) When Ramirez observed the deputy and appellant, Ramirez was looking between cars parked in the bar's parking lot. (59RT:9119.) Horse trailers may also have been parked between where Ramirez was standing and where the deputy and appellant were. (60RT:9292.)

Ramirez saw that the deputy had a flashlight and directed the beam at the truck's licence plate for about a minute or more. (58RT:9014-9015.) The deputy and appellant were about three or four feet from each other. (58RT:9014.) Ramirez also saw a woman sitting in the pickup truck. (58RT:9016.) At some point, appellant walked away from the deputy and to the passenger's side of the truck. When appellant walked back toward

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[10] (...continued)
was also known as Miguel Aguilar (59RT:9122). Miguel Aguilar testified for the prosecution. (61RT:9455, et seq.)

the deputy, he was carrying a weapon. (58RT:9018.) He aimed it at the deputy, who dropped his flashlight and reached toward his hip for something. (58RT:9019-9020, 9024-9025.) The woman got out of the driver's side of the truck, walked to the deputy and removed something from him, which Ramirez believed to be the deputy's gun belt and radio. (58RT:9025.) The woman then went inside the deputy's car but he could not see what she did there. She was inside the car only for a few moments and then she returned to the truck and got in on the driver's side. (58RT:9027, 9030.) The deputy's hands were up; appellant told him to get on the ground, face down. (58RT:9028, 9032.) The deputy was prone, flat on the ground. (59RT:9132-9133, 9161.)

At that time, Ramirez was still by the pay phone. He tried to get the person off the phone so that he could call the police. (58RT:9030.) The man on the phone, however, was too drunk to understand him. (58RT:9044.) Ramirez believed that Aguilar then went inside the bar to call the police. (58RT:9044.) Once the deputy was face-down on the ground, Ramirez could no longer see him. (58RT:9032.)

Ramirez heard a shot fired, saw a flash and saw the deputy's body jump. (58RT:9033.) It was difficult to see because it was dark and the light that illuminated the body was mainly the light from the shot itself, the muzzle flash of the gun. (59RT:9192, 9197.) When the shot was fired, appellant was behind the deputy, facing toward the bar and shot the deputy from behind. (58RT:9034; 59RT:9163.) The end of the gun was about a foot from the back of the deputy's head. (59RT:9160.) Ramirez was sure that the deputy was not on his knees at the time of the shooting. (59RT:9133-9134.) After Ramirez heard the shot, appellant went to the truck, got in the driver's seat and he and the woman drove off.

(58RT:9033, 9035.) At the preliminary hearing, Ramirez had testified that he saw the woman, not appellant, start the truck. (60RT:9331-9332.)

Ramirez walked to the fence to get a better look and saw the deputy dead on the ground. (58RT:9036-9037.) Ramirez then left with Guerrero, in Guerrero's car, along with two girls who were already in the car. He had never met either girl before. (58RT:9044-9045; 59RT:9100.)[11] When he, Guerrero and the girls left, they drove around the area, took the girls home and drove back by the R&S Bar, where they saw that many police cars now surrounded the bar's parking lot. (58RT:9046; 59RT:9172.) He did not stop to speak with law enforcement about what he had observed. He did not do so at all until a few weeks after the shooting. (59RT:9173.) Before he met with law enforcement, he had talked with Guerrero about what they had witnessed. (60RT:9243.)

Ramirez testified that he had consumed only two beers that evening before he saw the shooting.[12] (59RT:9094.)

Ramirez was impeached repeatedly at trial. At some points Ramirez testified that discrepancies between his statements to police and testimony at the preliminary hearing and at trial could have been problems with the interpreter and that the "confusion" in his testimony was due to misunderstandings that can occur with translations from English to Spanish and vice versa. (59RT:9086-9090, 9153; 60RT:9313-9314, 9320-9321.)

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[11] The two girls in Guerrero's car were Kellie Jones and Rhonda Robbins. (See *post*, 65RT:10116 et seq. [Robbins' testimony] and 70RT:10539 et seq. [Jones' testimony].)

[12] When Ramirez left the bar after the shooting, one of the women he left with, Kellie Jones, testified that Ramirez smelled strongly of alcohol, was tipsy and was slurring his words. (70RT:10594, 10622; 71RT:10745-10746.)

During cross-examination, it appeared that Ramirez was able to understand and speak English sufficiently to testify in English. Appellant pointed out that while testifying, Ramirez often lapsed into speaking English, and did so without an accent. (60RT:9212-9214.) Appellant also contended that Ramirez was evasive in his testimony, claimed confusion, and appeared to "hide behind the language barrier." (60RT:9213.) Appellant moved under Evidence Code section 752 that the court determine whether Ramirez needed an interpreter. After inquiry, the court decided to have Ramirez testify in English, without an interpreter. (60RT:9214-9217.) Ramirez was questioned and testified in English throughout the remainder of his cross-examination by appellant's attorney.[13]

At another point during his testimony, Ramirez attempted to explain the differences as due to the confusing manner in which questions were posed to him. (60RT:9439.) At times, Ramirez blamed the discrepancies on his currently improved memory. Ramirez testified that his memories about what he observed that night were better at trial then when he had talked to the police and when he had testified at the preliminary hearing, 18 months prior. (59RT:9070.) He testified that his memory had improved because at the time of the preliminary hearing he was in a state of fear from the shooting, even though it was four months after what he had observed.

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[13] During cross-examination by the codefendant's attorney, Ramirez expressed difficulty and confusion about some of the questions. The court decided to have the questions posed to Ramirez in English, but he was to testify in Spanish, which the interpreter would translate to English. (60RT:9274-9277.) During the remainder of his testimony, he occasionally answered in English and questions posed to him were occasionally translated in Spanish. Toward the end of his testimony all questions and answers were through the translator. (60RT:9358 et seq.)

(59RT:9070-9071.) He contended the fear that affected his memory lasted for about a year. (59RT:9071-9074, 9083.)

Among the discrepancies in Ramirez's testimony were his observations about appellant's appearance. (58RT:9060-9165; 60RT:9391, 9394.) When Ramirez identified appellant at trial, he testified that he based it on appellant's height and body type. (58RT:9057.) When it was pointed out to Ramirez that appellant had been seated during all of Ramirez's testimony, he claimed that he was basing it on his observations at the shooting and having seen appellant stand at the preliminary hearing. (58RT:9057; 59RT:9084-9085.) Ramirez ultimately admitted that he had not seen appellant stand at the preliminary hearing. (59RT:9081.) His certainty that appellant was behind Deputy Trejo at the time of the shooting was in direct conflict with even the prosecution's expert forensic testimony. (See §§ 3.d. & e., *post* [testimony of Erwin Jindrich and Richard Waller].)

Ramirez was impeached with his criminal history. In April, 1995, a few days after the shooting and before he spoke to law enforcement, Ramirez was arrested for assaulting his pregnant girlfriend and was served with a restraining order. (59RT:9177-9179.) Ramirez learned from Guerrero that the police wanted to talk to him about the shooting. (59RT:9180-9181.) Three days before his scheduled appearance for the restraining order, Ramirez met with the police. (59RT:9184.) He testified that he had not previously spoken to the police because of the "trauma" from what he had observed at the R&S Bar. (60RT:9364.) Ramirez admitted that he also had been arrested for spousal battery in 1992 and served time for that crime. (59RT:9182.)

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b. Oscar Gustavo Aguilar Lopez

The second of the witnesses to testify about his observations on the night of March 29, 1995, was 20-year-old Oscar Gustavo Aguilar Lopez (Aguilar).[14] (61RT:9455.) Aguilar testified that he also is known by the name "Miguel." (61RT:9456.) Aguilar testified about the events leading up to the shooting, and saw appellant leave after it occurred, but did not actually see the shooting.

Aguilar arrived at the R&S Bar that night around 9:30 p.m, with his brother and two other friends. His brother parked in the bar's parking lot and over the course of the next hour or so, Aguilar walked to the bar, drove in a friend's car to an acquaintance's trailer next to the bar, drove to a nearby gas station, walked to the pay phone on more than one occasion, each time returning to sit in his brother's car. (61RT:9457-9458, 9464-9465, 9516, 9523.)

When he got back from the gas station, Aguilar noticed a patrol car and a green pickup truck in the parking lot next to the bar. The deputy was already out of the patrol car. (61RT:9466-9467, 9523-9524.) Aguilar was sitting in his brother's car, looking through the front window and through the wire mesh of the fence that was in between the R&S Bar and Saddlery parking lots. (61RT:9486; 62RT:9546.) When he was walking in the bar's parking lot, it was difficult to see what was occurring in the Saddlery's parking lot because cars and horse trailers obstructed his view. (61RT:9533; 62RT:9558.) From the front door of the bar, or from the pay phone, he could not see the patrol car very well. (62RT:9560.) The lighting

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[14] Aguilar testified through a Spanish-speaking court interpreter. (61RT:9462.)

in the Saddlery parking lot was from the patrol car spotlight, which was shining on the patrol car and the pickup truck. (61RT:9526, 9529.)

Aguilar saw a woman standing next to the driver's side door of the pickup truck. It appeared that she was looking for something in the truck. She did this for about 10 minutes. Her back was to Aguilar, so he could not see well what she was doing. (61RT:9474, 9477, 9526-9527.) During that 10 minutes, the deputy stayed in the same position in which Aguilar initially saw him; he was standing near the driver's side of his patrol car, in between his car and the pickup truck. (61RT:9525, 9527.) At some point, while the woman was still looking for something, the deputy walked to the passenger side of the truck. He had a flashlight in one hand and with his other hand, was adjusting something near his belt. (61RT:9475.)

When the deputy reached the passenger side of the truck, Aguilar assumed that the deputy opened the truck's door. (61RT:9477.) The deputy shone the flashlight inside the truck's cabin. (61RT:9477, 9531; 62RT:9573-9574.) The next thing Aguilar saw was the deputy walk backwards toward the back of the pickup truck; the deputy's hands were up. The man in the truck got out. Aguilar identified appellant as the man in the truck. (61RT:9500.) Aguilar first testified that as appellant and the deputy went toward the back of the pickup truck, appellant pushed the deputy with his left hand. (61RT:9503.) Aguilar agreed that he had testified at the preliminary hearing that it looked like the deputy and appellant may have been fighting when appellant first got out of the truck. (62RT:9662.) He subsequently testified that what he saw was a "touching," and not pushing. Ultimately he testified that he never saw the man touch the deputy, but if he had, it would have been with the man's left hand. (61RT:9483, 9502-9504; 62RT:9563-9564.) He saw that appellant had a gun. Appellant told the

deputy to "hurry up." (61RT:9481; 62RT:9565.) The two men were then between the pickup and the patrol car. From his first observations of the deputy and appellant, until the time they ended up behind the pickup truck, about 12 or 13 minutes had passed. (61RT:9492.)

Aguilar got out of his car and walked toward the bar, intending to use the pay phone. He saw the deputy kneel, at which point he could only see the deputy from the chest up. (61RT:9505.) At another point in his testimony he stated that he saw the deputy kneel while still in his brother's car, at which point he got out and walked toward the bar's pay phone. (62RT:9554.) As he walked toward the phone, he saw two of his acquaintances, Alex and Memo,[15] who were using the telephone. (61RT:9493-9496; 62RT:9577.) Aguilar told them that the deputy was having a problem. (61RT:9496; 62RT:9554.) The person who Aguilar knew as Memo then looked in the direction of the Saddlery parking lot. (62RT:9584.)

When Aguilar got to the pay phone he looked back toward the patrol car and truck, heard a shot and shortly thereafter saw the truck take off.

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[15] Aguilar testified that he knew Alex only by that name (Alex) and not as Alejandro. (61RT:9494.) He also testified that Alex had once told him that his name was also "Memo." (61RT:9495.) Aguilar was shown a photograph of Alejandro Ramirez (Peo. Exh. No. 156), who Aguilar identified as Memo. (61RT:9510-9511.) Aguilar also identified People's No. 158, a photograph, as depicting the person who he knew as Memo, but whom the attorneys had been calling Alex. (62RT:9645.) It was stipulated that No. 158 was also a photograph of Alejandro Ramirez. (62RT:9645.)

Onecimo Guerrero testified that his nickname is "Memo," and identified Exhibit No. 158 as a photograph of Alejandro Ramirez. He had not called Alejandro "Memo," had only known him by the name Alejandro and had never heard anyone call Alejandro "Memo." (63RT:9751, 9818.)

(61RT:9496-9497.) When he heard the shot, he was standing next to the man he knew as Memo, and Memo's friend. (62RT:9602-9603.) The woman was driving the truck. (61RT:9499.) Aguilar then walked inside the bar to get his brother, after which he walked to the fence separating the two parking lots to get a better look at the deputy. (61RT:9506-9507.)

Aguilar's preliminary hearing testimony and statements to police were consistent in that he stated, and then testified, that he was not looking at the Saddlery parking lot when the shooting occurred. He had looked in that direction only after the shot was fired. On repeated occasions he admitted that at the preliminary hearing he had testified that he was not looking toward the Saddlery parking lot when the shot was fired, but did so after he heard it. (62RT:9561, 9585-9586.) He had testified that just prior to the shooting, he was walking toward the bar, was near the pay phone and was facing a taco truck at the moment the shot was fired. (62RT:9663-9666.) He could not see the deputy at that point because the deputy was laying down and cars blocked his view. (61RT:9506; 62RT:9604.) Aguilar agreed that at the preliminary hearing he also testified that when he heard the gunshot, he was facing the taco truck, not the Saddlery parking lot. (62RT:9639-9640.) At trial, he nonetheless contended for the first time that he looked and then he heard the shot. (61RT:9497.) Aguilar also testified at the preliminary hearing that it was hard to hear the shot because of the loud sounds from the R&S Bar, where a band was playing. At trial he admitted that he had so testified, but nonetheless claimed that there was not much sound coming from the bar. (62RT:9585-9587, 9652.)

Aguilar spoke with the police that night, in the parking lot of the R&S Bar (61RT:9508) and then returned to the bar to play cards. (62RT:9579.) Within a few days of the shooting, Aguilar spoke to the

police again about what he had seen. After he spoke with the police, Aguilar ran into "Memo" at the R&S Bar and they talked about what had happened that night. (62RT:9591.) As noted above, the person who Aguilar referred to as Memo, appears to have been Alejandro Ramirez. (See 61RT:9495, 9510-9511.) At least one other time before appellant's preliminary hearing, Aguilar spoke with "Memo," in detail, about their recollections of what they had observed that night. (61RT:9515.) "Memo" told Aguilar that he saw the woman in the pickup take the deputy's gun and radio. (62RT:9653.)

c. Onecimo Guerrero Tavares

Onecimo Guerrero Tavares (Guerrero)[16] testified that on March 29, 1995, a little before 11:00 p.m., he went to the R&S Bar with two friends, Kellie Jones and Rhonda Robbins. He testified that he is also known as "Memo." (63RT:9751.) He and his friends went to the R&S Bar to buy tacos from the taco truck that was parked in the bar's parking lot. (63RT:9749.) He did not go there to use a phone in response to a page he received on a beeper. (63RT:9812.) Like Aguilar, he did not see the actual shooting.

When Guerrero arrived in the parking lot, he walked to the taco truck, ordered tacos and then walked to the phone. The girls stayed in his car. (63RT:9752.) Guerrero saw his friend, Alejandro Ramirez, walk toward the phone. (63RT:9754-9755.) Guerrero then noticed a patrol car

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[16] Onecimo Guerrero, who was 20 years old at the time of appellant's trial (63:9791), testified through a Spanish-speaking court interpreter for most of his testimony. (63RT:9746.) At times he testified in English and at other times answered the question before the interpreter translated it from English to Spanish. (See, e.g., 63:RT9806; 65RT:9983-9985, 9990, 10053.)

and a truck in the next door parking lot. (63RT:9756.) He saw a woman in the passenger side of the truck, and in front of the patrol car he saw a man, later identified as appellant, and a uniformed deputy. (63RT:9757-9758, 9762.) The lights on the patrol car were on, as was a spotlight on top of the patrol car. (63RT:9763.) The deputy's hands were up and on the back of his head, and appellant was pointing a shotgun at the deputy. (63RT:9765.) The two men were talking to each other. Guerrero could not hear what they were saying, but he heard appellant tell the deputy to "lay down on the ground." (63RT:9790-9791.)

After that, Guerrero could no longer see well what was happening because he was between the phone and the taco truck, waiting for his tacos. (63RT:9791.) Guerrero never saw the deputy on his knees. (65RT:10056.) The view from the phone to the Saddlery parking lot was not good. (63RT:9813.) Just as Guerrero was walking to the truck to get his tacos, he heard a gunshot. (63RT:9771; 65RT:10057.) After he heard the shot, he looked toward the patrol car and the truck. He could not see the deputy. (63RT:9775, 9777.) Guerrero saw appellant walk to the pickup truck and believed that he got in on the passenger side. (63RT:9771.) A large cloud of dust, or smoke, or both rose from the ground at the time of the gunshot making it difficult for Guerrero to see well. (63RT:9772, 9819.) He heard the pickup truck motor start and saw the truck leave, fast. (63RT:9778.) He walked close to the fence to get a better look and saw the deputy on the ground, face down, in front of his patrol car. (63RT:9779, 9781.)

Before the shooting, Guerrero saw the woman go inside the patrol car, at which point the headlights on the car went off and the spotlight on top of the car moved so that it pointed skyward. (63RT:9770; 65RT:10035.) The woman also had something in her hands when she left

the patrol car, but Guerrero could not see what it was. (63RT:9771.) While the woman was inside and around the patrol car, appellant and the deputy remained in front of the patrol car. (63RT:9771.) The woman then got back in the truck on the passenger's side. (63RT:9771.) Guerrero estimated that about 10 to 15 minutes had passed from the time he saw the patrol car, until he heard the shot. (65RT:10018-10019.)

Within minutes of the shooting, Guerrero left the scene with Robbins, Jones and Ramirez. (63RT:9782.) He drove the girls home and Ramirez home, and then drove himself home. (63RT:9784-9786.)

Guerrero testified that before the shooting occurred, he would have called 9-1-1 but someone was on the phone. (63RT:9766.) He did not get to use the phone at all when he was at the R&S Bar that night because someone remained on it the entire time he had tried to use it. (65RT:10011.)

Guerrero was repeatedly impeached. Like his friend Ramirez, Guerrero's testimony at trial differed from that at the preliminary hearing and from what he had told the police about his observations that night. When the police first questioned him, Guerrero told them that he did not see the woman leave the truck. (65RT:10036.) He said he did not tell them about her leaving the truck because he did not want to talk too much about what he had seen (65RT:10037); it might also have been because he did not remember during the interview that he had seen her get out of the truck and go inside the police car (65RT:10037).

Guerrero also testified that the discrepancies between his statement to the police, his preliminary hearing testimony and his trial testimony might have been because he was nervous and confused. (65RT:10045.) Guerrero testified that when he spoke to the police shortly after the crime,

he was "confused" and had told the officers that he was nervous because he had too much coffee. (65RT:9987, 9991, 10036-10037.) He had had one cup of coffee. (65RT:10096.) When he testified at the preliminary hearing in this case, he was again nervous due to the amount of coffee he had consumed and because he had not before testified in a court. (65RT:9989-9990.) At trial, he claimed that the coffee did not make him nervous, but when he became confused, the coffee interfered with his ability to concentrate. (65RT:10096.)

Guerrero also admitted that, contrary to his trial testimony, when he was interviewed by police he told them that he did not know who had gone into the car and that it may have been the deputy or appellant. (65RT:10042.)[17] He agreed that at the preliminary hearing he also did not say that the woman had gone into the police car, which he testified was because he was confused and nervous when he testified at that hearing. (65RT:10039-10040.) He also admitted that he had told the police that the man with the gun had blonde hair, "white" like the hair of the woman in the truck, but at trial acknowledged that appellant's hair was dark. (65RT:10067.)

Guerrero was awaiting sentencing for drug convictions at the time of his trial testimony. In October of 1996 he was convicted of felony transportation, possession and sale of a controlled substance, as well as felony evading a police officer. He testified that he was under the influence

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[17] One of the lead detectives on the case testified that he reviewed a transcript of Guerrero's taped statement, made when he spoke to the police, and that when asked about the woman in the truck Guerrero stated that he only saw her seated in the truck and that he did not know who went in to the police car, whether it was the deputy himself, the man with the gun, or some other person. (102RT:16173, 16177-16178.)

at the time of the crimes for which he was convicted. (63RT:9792-9793.) He told the jury that he had not been sentenced and that it was his understanding that his sentencing was postponed until after his testimony in appellant's case. (65RT:9992.) He claimed that no promises had been made to him regarding his upcoming sentencing. (63RT:9793-9794; 65RT:9994-9995.)

Monte Hansen, Guerrero's attorney, testified that his client faced up to 12 years in prison. Hansen said that although a sentence of probation would be highly unlikely, his client would be eligible for probation if the sentencing judge found unusual circumstances. Hansen intended to argue that his client should be granted probation because his testimony in appellant's case was such a circumstance. (98RT:15703-15711.)

Guerrero also testified about his drug use.[18] He told the jury that he regularly used methamphetamine (meth), at least once a day, but did not start using meth until the month after the shooting at the Saddlery parking lot. He claimed to have begun using meth in June of 1995, and that he sold it to support his drug habit. He used between one and two grams a week. (65RT:9997-10004, 10090.) He testified that he had not used meth the day or night of the shooting, had not used it when he was interviewed by the

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[18] Outside the juries' presence, Guerrero testified that he was familiar with methamphetamine (meth), has been arrested for selling it, but was not using it on March 29, 1995. He admitted that he told the officers that he was nervous the night of the shooting, but his nervousness was because of what he had seen. He testified that he used meth a few times each week until June of 1996. He denied that he was using meth on the night of the shooting and denied using it from the time of the shooting until he testified at appellant's preliminary hearing. He claimed he began using it, for the first time, about three of four months after the preliminary hearing. (63RT:9830-9846.)

police about the shooting and had not used it when he testified at the preliminary hearing. Using meth did not make him nervous. It allowed him to do his work better and more quickly. (65RT:10082-10083.) It did not cause his speech to be faster because he used meth regularly and while it made him feel energetic, it also relaxed him. (65RT:10083.)

Rhonda Robbins, one of the women whom Guerrero went to the R&S Bar with on the night of March 29, 1995, testified about Guerrero's drug use. In March of 1995, Guerrero was dealing meth and had been for about a year. (69RT:10367.) As far as Guerrero's drug dealing past, he first sold cocaine and then later sold meth. (69RT:10407.) Robbins used meth and got it from Guerrero, but never had to buy it from him because he would give her some at the same time that he used it himself, including before March of 1995. (69RT:10368, 10407-10408.) He also gave meth to her friend, Kellie Jones, and the three of them had used it together. (69RT:10368, 10413.) Robbins had seen Guerrero use as much as a half gram of meth in one sitting. (69RT:10409.) When he took meth, he was nervous and sometimes paranoid. (69RT:10409-10410.) On the night of the shooting, Robbins believed Guerrero was under the influence of meth. (69RT:10410.) He was acting nervous and a little paranoid. (69RT:10411.) She added that it was unusual for Guerrero not to be under the influence of meth.[19] (69RT:10411.)

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[19] H. Westley Clark, M.D., Chief of the Associated Substance Abuse Programs at the San Francisco Veteran's Administration Medical Center, provided expert testimony regarding the effect on memory from meth use and addiction. (103RT:16248-16253.) Clark testified about the effects on the central nervous system and the brain from meth use, including its deleterious effects on perception and memory. If one is under the influence

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Kellie Jones, who was also with Guerrero at the R&S Bar parking lot, described him as acting kind of "uppity" and weird before they stopped at the bar that night and testified that she had told an investigating officer that she thought that Guerrero was high on "crank" that night. She identified crank as being speed or meth. (70RT:10604, 10607.)

d. Rhonda Robbins

On the night of Deputy Trejo's death, Robbins and Kellie Jones, both of whom were 18 years old, arrived at the bar with Guerrero, some time after 11:00 p.m. (65RT:10117-1011; 79RT:10541.) Robbins went to high school with Guerrero and had known him for about two years. (65RT:10119.) On March 29, 1995, Guerrero had picked up Robbins and Jones at Robbins' house a little before 11:00 p.m. (65RT:10119-10120.) They stopped at the R&S Bar when Guerrero received a page and wanted to use the pay phone at the bar to respond to the page. (65RT:10122; 69RT:10419.)

Initially, both Robins and Jones remained in the car, but they later got out to get the car key from Guerrero so that they could listen to the radio. (65RT:10125, 10141.) In the parking lot next to the bar, Robbins saw a patrol car with its headlights and spotlight on parked behind a truck.

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[19] (...continued)
of the drug at the time he observes an incident, but not under its influence when retrieving the memory, he is not going to retrieve the same sort of information as one who was retrieving a memory who had not been under the influence at the time of making the observation. Observing an event while under the influence of meth affects one's ability to perceive, recollect and recall the memory. (103RT:16258-16260.) Dr. Clark had also observed from clinical practice that one who has problems with meth tends to have problems with memory. (103RT:16265.)

(65RT:10125, 10127.) She also saw a deputy, a woman, and a man, whom she identified as appellant. (65RT:10128-10129.)

Robbins heard two people arguing; the woman remained in the truck, on the driver's side. (65RT:10130-10131.) Appellant walked toward the patrol car and there met the deputy; they were both between the patrol car and the truck. (65RT:10131.) She next saw the deputy and appellant get into a scuffle, as if they were wrestling. (65RT:10133.) Robbins described it as similar to a pushing and shoving match. She believed it lasted about a minute, during which both the deputy and appellant were yelling and at the end of which, both men fell. (65RT:10132-10133; 69RT:10449.) Once they fell, she could no longer see them. (69RT:10451.) Before they fell, she did not see a weapon in the hands of either the deputy or appellant. (65RT:10133.) Once the deputy and appellant were on the ground, Robbins did not see the deputy again until after she left the bar's parking lot in Guerrero's car, at which time she saw him laying on the ground. (69RT:10400.) She also saw appellant get up from the ground. (69RT:10400.)

When the deputy and appellant were wrestling, the woman went inside the patrol car, after which the direction of the spotlight changed from pointing toward the truck to pointing toward the bar. The patrol car's headlights went off.[20] (65RT:10133-10134; 69RT:10436.) The woman also took a box out of the patrol car. (65RT:10134-10135.) The woman then returned to the truck and got in on the driver's side. (65RT:10136,

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[20] Robbins later testified that the patrol car's headlights went off after the deputy and appellant had wrestled (69RT:10394) and then changed her testimony again, stating that the lights went off when the two men were still on the ground. (69RT:10400.)

10138.) Robbins did not see appellant go into or remove anything from the patrol car. (69RT:10310.) She never saw appellant take anything from the deputy.[21] (69RT:10464.)

When the shot was fired, Robbins and Jones were not in Guerrero's car. As soon as the shooting occurred, they ran back and got in the car. (65RT:10141; 69:RT10363-10364.) About a minute later, Guerrero returned and they left. (65RT:10142-10143.) Guerrero took her and Jones home. (65RT:10143.)

Prior to trial, Robbins had told the police that she did not see the shot fired, but only heard it. She also did not tell the police that when the deputy was shot he was on his knees and that appellant fired the gun at his face. At trial, however, she testified that she saw the shot when it was fired, that appellant was standing in front of the deputy, within two feet of him and that the gun was so long that the end of it was possibly a few inches from

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[21] After Robbins' first day of testimony, the prosecutor notified the defense that he spoke with Robbins and she told him that she might have seen appellant remove something from the deputy. Outside the jury's presence, Robbins testified that she did not see appellant take anything from the deputy, but on the night of the shooting, after they left the scene, Guerrero told her that the man took something from the deputy after the deputy had been shot. (69RT:10288.) She further testified at the hearing that she could not recall whether she had seen appellant take anything from the deputy. Although she recalled speaking with the prosecutor after her first day of testimony, she could not recall whether she told the prosecutor that she might have seen appellant remove something from the deputy and stated that the issue was not part of the conversation she had that day with the prosecutor. (69RT:10288-10289.) The court found the issue of Robbins' recollection that appellant may have taken something from the deputy relevant and – specifically as to the codefendant – exculpatory, and directed the prosecution to prepare a stipulation about his conversation with Robbins. (69RT:10294-10295.) That stipulation was read to the codefendant's jury (71RT:10689), but not to appellant's jury (70RT:10649).

the deputy's face, and that when the deputy was shot he was kneeling. (65RT:10136-10137, 10139; 69RT:10462; 70RT:10519-10520.)

On cross-examination, Robbins was asked a series of questions regarding her interview with the police about her observations of the shooting.[22] Robbins testified that she could not recall whether she had told the police that the man who shot the deputy was over six feet tall,[23] had a beard a couple of inches long, that she did not see the weapon in appellant's hands and that she was unable to see the deputy and appellant when they were wrestling because her view was obstructed by cars, windshields and rear windows. (69RT:10332-10334, 10354.) When asked about having told the police that she heard, but did not see a shot fired, she stated she did not believe she said that to the police and claimed that she had told the police when interviewed that she saw the man shoot the deputy in the face. (69RT:10333-10334.)

Robbins then reviewed her statement to the police and agreed that she had not told the police that she saw appellant shoot the deputy in the face. She acknowledged that she had told them that all she saw was the deputy and appellant wrestle to the ground; then she heard a shot, but did not see the shot fired.[24] She had also told the police that she was glad that

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[22] Robbins' statement to the police had been tape-recorded. (69RT:10312.) Robbins was given a copy of the transcript of her statement before the preliminary hearing and before the trial. (69RT:10314.) When she reviewed it she saw no discrepancies between what she had said in her statement and her memory of what she had witnessed. (69RT:10315, 10403; 70RT:10527.)

[23] At trial, Robbins described appellant as "little." (69RT:10332.)

[24] Santa Rosa Police Detective Thomas Schwedhelm, who was one (continued...)

she had not seen the actual shooting. (69RT:10358.) She told the police that she saw appellant getting up from the ground, after the shot was fired. (69RT:10467.) She agreed that she had told the police that the person who shot the deputy was "very tall," and that the transcript of her statement says she said "at least over six" feet. (69RT:10350, 10387, 10397.) Further, when describing her visibility of the confrontation she agreed that she had told the police that her view was obstructed by cars and trucks, and that after the patrol car's headlights were turned off and the spotlight position changed, the area was no longer illuminated. (69RT:10351, 10354-10357, 10372, 10387.)

About two hours after she and Jones got home, Guerrero returned and she, Guerrero and Jones drove to a home on the coast. (69RT:10299-10301.) They stayed until about 6:00 a.m. About 7:30 a.m., Guerrero took her and Jones back home. (69RT:10302-10303.)

Robbins testified that about an hour before Guerrero picked her up and they went to the R&S Bar, she had smoked marijuana and felt affected by it. (69RT:10310-10311, 10405-10406.) Kellie Jones had also smoked marijuana and she too seemed under the influence of the drug. (69RT:10406.) Robbins also testified that until about one week before the shooting, she was taking Trazodone for depression. (69RT:10349.)

Kellie Jones had been Robbins' best friend for seven years. They spent a lot of time together and they talked about what they had observed on

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[24] (...continued)
of the officers who interviewed Robbins, confirmed that Robbins told him that she did not see the shooting and was glad that she had not. (102RT:16187-16188.)

March 29, 1995, at the Saddlery parking lot and about the death of the deputy. (69RT:10412, 10415.)

e. Kellie Jones

Jones arrived at the R&S Bar parking lot with Robbins and Guerrero. Like Robbins, Jones also had known Guerrero for about two years. (70RT:10541.) She described the events before arriving at the R&S Bar similarly to Robbins, but believed that Guerrero picked them up at Robbins' house around 9:00 p.m., rather than 11:00, on March 29, 1995. (70RT:10543.) She testified that they went to the R&S Bar because Guerrero needed to use the phone after he received a page on his beeper. (70RT:10546.)

Once at the bar, Jones saw a green truck parked next to the R&S bar parking lot. (70RT:10552.) She saw a patrol car drive slowly by the truck, for about a minute (71RT:10703, 10705), but she could not recall if it then drove into the Saddlery parking lot. (71RT:10704.) She did not notice the patrol car parked behind the truck in the Saddlery parking lot until about ten minutes after she and her friends had arrived at the bar. (70RT:10554-10555.)

Jones made all of her observations while sitting in Guerrero's car and looking through the rear windshield, as well as through the other cars parked in the area. She got out of Guerrero's car only briefly, stayed at the door of the car and then got back in. At that same time, Robbins got out of the car and she too stayed by the car; she yelled to Guerrero to throw her the car keys, but he did not. Other than that, neither she, nor Robbins left the car. (70RT:10559-10560; 71RT:10706, 10709.) Jones agreed that at the preliminary hearing she had testified that Robbins never got out of the car.

(71RT:10711.) At the time the shot was fired, she and Robbins were both in Guerrero's car. (71RT:10707, 10712.)

Jones saw the deputy from the patrol car talking to a man, later identified as appellant. (70RT:10556, 10569.) She could not hear what they were saying. (70RT:10557.) She also saw a woman sitting in the truck, on the passenger's side. (70RT:10557.) The deputy walked to the passenger side of the truck to talk to the woman, who was then outside the truck. (70RT:10562.) He was there about a minute. (70RT:10563.) The deputy then went back to where appellant was standing, which was between the patrol car and the truck. (70RT:10563.) Jones did not continue to watch them, but when she turned back to look, she saw appellant wrestling the deputy to the ground.[25] (70RT:10564.) They wrestled for a couple of minutes. (71RT:10721.) She could not see the deputy's or appellant's arms, but saw that appellant had a gun, holding it in both of his hands. (70RT:10564-10565.) Jones testified that she next saw the deputy on his knees and appellant standing about seven feet from him. (70RT:10566; 71RT:10725.) She subsequently testified that appellant may have been so close to the deputy at that time that appellant could have reached out and touched him. (71RT:10727.) Appellant then shot the deputy. (70RT:10569.)

Jones admitted that when she spoke with the police she told them only that she had heard the shot, and not that she had seen the shot being fired.[26] (71RT:10757-10758.) She testified that she had gotten confused

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[25] She later testified that both appellant and the deputy were standing for the entire wrestling match. (71RT:10722.)

[26] Jones testified that she reviewed the statement that she gave to the (continued...)

about what she had seen, and what Guerrero had told her he had seen. When the police directed her to tell them only what she herself had heard and seen, she told them that she had heard the gun shot, at which time she then looked out the back window of Guerrero's car toward the Saddlery parking lot. (71RT:10758-10760.) She testified at trial that in fact she could not remember whether she saw the deputy when the actual shooting occurred. (71RT:10725.)

After the deputy was shot, the woman from the truck went inside the patrol car, took something out and moved the spotlight toward the bar. (70RT:10567-10568.) The item the woman appeared to take from the patrol car looked like a CB radio. (70RT:10596.) Jones did not see appellant go into the patrol car. (70RT:10595.) It appeared that after the deputy was shot that appellant took something off of the deputy, possibly the deputy's gun belt. (70RT:10753; 71RT:10738.) The woman said "there's people watching,"[27] and then she and appellant left in the truck. (70RT:10571, 10573.)

Shortly after the deputy was shot, Guerrero and a friend, whom she did not know, returned to the car and they all left the scene.[28]

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[26] (...continued)
police, had been told to notify the prosecution if she saw changes or additions to be made, and that she saw nothing that needed to be changed, corrected or added. (70RT:10715-10716, 10630.)

[27] Jones subsequently testified that at the preliminary hearing she had stated that the woman's comment that people were watching occurred before the deputy was shot. (71RT:10734.)

[28] Jones identified the person depicted in People's Exhibit No. 158 as the person who was with Guerrero when they left the bar that night.
(continued...)

(70RT:10576-10577.) Jones could tell that the man with Guerrero had been drinking. His breath had a strong odor of alcohol, he slurred his words and he was tipsy. (71RT:10745-10746.) Guerrero's friend spoke in English. (71RT:10745.) Guerrero took her and Robbins to Robbins' house. (70RT:10581.) She did not recall whether she saw Guerrero again later that night (70RT:10584); she made no mention of going to the coast with Robbins and Guerrero that night. She subsequently gave a statement to the police about her observations. (70RT:10588.) During the interview she and one of the officers prepared a diagram regarding the locations of various individuals, cars and structures at the R&S parking lot.[29] (70RT:10612.)

Jones admitted that she had smoked marijuana before going out with Robbins and Guerrero that night. She said that Robbins had also smoked

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[28] (...continued)
(70RT:10592-10593.) It had been stipulated that the person depicted in Exhibit No. 158 was Alejandro Ramirez. (62RT:9645; 71RT:10745.)

[29] When Jones met with police to give her statement, she was interviewed by Santa Rosa police officer Eric Goldschlag. (79RT:10612-10613.) During the interview, Jones and Goldschlag prepared a diagram that clarified the location of various things that Jones observed that night. (70RT:10660-10661; 71RT:10780-10882.) Subsequent to the interview and before a copy of the diagram was provided to the defense, Goldschlag shredded the diagram. (70RT:10662-10663, 10669.) The prosecution proffered, and presented testimony that it was the police department's policy to destroy notes of interviews after reports are prepared incorporating the notes. (70RT:10643-10644.) Goldschlag testified that the diagram gave sense to the information Jones provided to him during the interview. (70RT:10671.) The court concluded that relevant and material evidence (72RT:10986) was intentionally destroyed, rendering part of Jones' statement and testimony meaningless (111RT:16890) and that at a minimum the destroyed evidence may have impeached Jones' testimony such that the jury may have disbelieved her (72RT:10987).

marijuana, and had smoked more than she had. (70RT:10543, 10602; 71RT:10698-10699.) She denied having used meth around the time of March, 1995, testified that Robbins also did not use it and that she did not know whether Guerrero used meth during that time period. (70RT:10604.) On the night of the shooting, Guerrero was acting "weird" and "uppity," but she did not know if he had used meth that night. (70RT:10604.) She agreed, however, after reviewing the statement that she gave to police that she had said that Guerrero was "wired on crank" that night. (70RT:10608.)

2. Appellant's Testimony

Appellant told the jury that he was responsible for the death of Deputy Frank Trejo. (95RT:15028.) He testified that the events which ended in Deputy Trejo's death were unplanned and the result of a terrible accident.

On March 24, 1995, appellant was released from Pelican Bay State Prison. His friend, Brenda Moore, picked him up from the prison and offered to drive him to San Diego, or at least part-way there, in time for him to report to his San Diego parole officer on March 27, 1995. (95RT:15052-15054.) Three days after appellant's release from prison, he and Moore left Crescent City to drive appellant south. (95RT:15074; 96RT:15284.) During the few days that appellant was at Moore's house, he found a rusty, inoperable shotgun in an old van by Moore's house. (95RT: 15036, 15064.) Believing the shotgun would offer him protection, he took it, although he knew that as a felon it was a crime for him to be in possession of a gun. (95RT:15035, 15063.) Appellant cleaned the gun, after which the pump action of the gun worked, which led appellant to conclude that the gun was now operable. He had not, however, test-fired it at any time. (95RT:15036-15037, 15057.)

Appellant believed that he needed a gun for protection. He explained that for the prior 11 years he had been housed in the Security Housing Unit (SHU) of a maximum security prison. The conditions and circumstances in the SHU result in an inmate both getting enemies and believing that those enemies will attack when given the opportunity. (95RT:15035.) Upon his release, appellant was afraid that these enemies, many of whom had been previously released from prison, might attack him. When he found the gun he took it for protection. He kept the gun near him, in the front passenger side of the truck. (95RT:15076-15077.)

Appellant and Moore arrived in Santa Rosa on the same day that they left Crescent City. It was already late, so they stayed in Santa Rosa that night. (95RT:15077-15078, 15089; 96RT:15284.) Moore's truck had continued to have mechanical problems, including smoke coming from the rear wheel. In the morning, which was the day appellant was to report to his parole officer, appellant attempted to repair Moore's pickup truck but was unsuccessful. (95RT:15083; 96RT:15285). In fact, it caught on fire. (96RT:15286.) He and Moore took the truck to Meineke Muffler Shop in Santa Rosa for repair. (95RT:15081, 15084, 15090.) Moore paid for the repairs on her truck from money a friend had wired to her. (95RT:15118.)

Appellant was aware he was late in reporting for parole and admitted that he did not call the San Diego parole office or look for a local parole office to explain the problems he was having in getting to San Diego and reporting on time. (95RT:15088.)

The next day, March 29, Moore decided to drive appellant only as far as San Francisco. Before they left, appellant and Moore went to a local park in Santa Rosa. (95RT:15091.) They asked people at the park for the most direct route to San Francisco without having to use the highway. The

mechanic had told Moore not to drive her truck on the highway because of its mechanical problems. (95RT:15092, 15096; 96RT:15287.) While at the park, appellant and Moore joined a group who invited them to their barbeque. (95RT:15092.)

When they left the park, Moore headed toward San Francisco on back country roads and got lost. She turned around to head back to Santa Rosa, intending to take the highway to San Francisco instead of small roads.[30] Moore thought her truck seemed to be running alright so she decided to risk driving it on the highway. (95RT:15094, 15096; 96RT:15290-15291.) Moore stopped in Sebastopol to use a restroom. (95RT:15094, 15097.)

When Moore returned to the truck, she told appellant that all of the problems they had encountered with the truck the last few days were too much for her and she wanted to go home. She would drive him back to Santa Rosa, but she was not going to take him as far as San Francisco. (95RT:15113, 15114; 96RT:15292.) Appellant got upset and yelled at Moore. (95RT:15116, 15120.) Appellant was insisting that she take him to San Francisco and felt that Moore was being deceitful and was abandoning him. (96RT:15294.) She was crying and he described himself as confused, frightened and feeling irrational. He was feeling the effects from the alcohol he had earlier consumed at the barbeque they had joined. He had been drinking over the course of about six hours, from the time they were in

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[30] Santa Rosa Police Sergeant Thomas Schwedhelm testified that the map, which had been found among appellant's items during the investigation of the case, had numerous marked locations on it, including a route that would be a means to drive to San Francisco, from Santa Rosa, on roads other than a freeway. (93RT:14799-14801.)

the park until they headed back to the Santa Rosa area. (95RT:15123-15127; 96RT:15294.)

As Moore headed toward Santa Rosa, they continued to argue and Moore kept crying. (95RT:15122.) She pulled her truck to the side of the road and then into the Saddlery parking lot. (95RT:15128.) A patrol car pulled in behind them and shone the spotlight on top of the patrol car on to Moore's truck. (95RT:15130-15131.) Appellant panicked. (96RT:15297.) He told Moore to drive, but as she started to leave, the emergency lights on the patrol car came on. Appellant told Moore to leave anyway because he knew he was not to be in possession of a gun and wanted to think of how to get rid of it, but Moore stopped the truck and the patrol car's emergency lights went off. (95:RT15131-15133.)

Appellant's panic continued and his state of mind was frantic. (96RT:15297.) Moore told appellant not to worry and that she would explain that they had been arguing, but that things were alright now. (95RT:15135-15136.) Moore got out of the truck, walked to the patrol car and shortly thereafter returned to get her driver's license.

At the same time, the deputy came to the passenger side where appellant was sitting, opened his door and ordered him out. (95RT:15136.) Appellant got out and brandished the shotgun at the deputy. (95RT:19530, 15036, 15139.) He told the deputy to put his hands up, which he did. When the deputy began to walk backwards, appellant told him to freeze and chambered a round in the shotgun. (95RT:15030-15031, 15143, 15145.) Appellant directed the deputy to kneel and once he had done so, appellant disarmed him by ordering him to unbuckle his gun belt and remove it. (95RT:15032, 15147-15148.) Appellant tossed the gun belt aside and heard it land in the back of Moore's pickup truck. (95RT:15032, 15174.)

After appellant had disarmed the deputy, appellant told him to lie down. The deputy put his arms in front of him and laid down. (95RT:15043. 15167.) Appellant went to the patrol car, removed the key and threw it. (95RT:15032, 15167-15168.) After he threw the key, appellant walked backward, looking toward the deputy. (95RT:15032, 15173, 15176.) Appellant tripped and as he fell the gun slammed against his leg, discharged, fell forward out of his hand and landed about a foot or two in front of him. (95RT:15033, 15177-15180.) Appellant thought the gunshot might have hit the deputy. (95RT:15180-15181.) He walked closer and saw from the blood that the deputy had been hit in the head and that he was dead. (95RT:15033, 15183-15185.) Appellant felt his world cave in. He ran to the truck, got in and told Moore, who was crying hysterically, to drive. (95RT:15185-15186; 96RT:15299.)

Throughout the encounter appellant was scared and his mind was racing. He could not make sense of anything that was going on around him. (95RT:15139, 15161-15162.) Appellant had no intention of killing Deputy Trejo. (95RT:15034.) He had no intention of taking anything from him. (95RT:15034.) He did not take Deputy Trejo's wallet, go through his pockets looking for items of value, or take any money from Deputy Trejo. He did not take the deputy's shotgun or any other weapons from the patrol car or look through the car for any items of value. (95RT:15028.) The purpose of removing the gun and gunbelt was to disarm Deputy Trejo, not to steal his gun. (95RT:15028, 15030, 15171.) Appellant's thoughts and mind were so scattered and racing during the encounter that when he disarmed Deputy Trejo and threw the gunbelt, he did not even know whether he would be leaving in Moore's truck. (95RT:15175.)

3. The Prosecution's Physical and Forensic Evidence

The prosecution called numerous law enforcement officers, evidence technicians and forensic experts. Testimony from these witnesses included descriptions of the crime scene and of various items that had been gathered during the investigation of the case. A critical issue in dispute about which two of the prosecution witnesses testified was the position of Deputy Trejo's body at the time of the shooting. The prosecution contended that Deputy Trejo was not in a prone position at the time of the shooting. As stated below, the defense presented evidence, including expert testimony, that Deputy Trejo had been prone.

a. Deputy Sheriff Joseph Quinn

The first deputy sheriff to arrive at the scene after the shooting was Sonoma County Deputy Sheriff Joseph Quinn, a colleague of Deputy Trejo. (71RT:10822.) He arrived within minutes of the shooting. (72RT:10905.) He found Deputy Trejo in the parking lot of the Santa Rosa Saddlery shop, which is located at the intersection of Highway 12 and Llano Road, in Sonoma County, between Sebastopol and Santa Rosa. (71RT:10809-10810, 10821-10822.) He saw Deputy Trejo lying on his stomach, his hands and arms forward, his legs straight out. There was major trauma to the right side of Deputy Trejo's face. (71RT:10836-10837.) He notified the sheriff's department that Deputy Trejo was deceased. (71RT:10826-10827.) The spotlight on top of Deputy Trejo's patrol vehicle was on and pointing forward, toward the highway, not toward the R&S Bar. He explained that the position of such a spotlight is changed from inside the car. (72RT:10881, 10911-10911.)

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b. Evidence Technician Diana Long

Diana Long, a field support technician with the Santa Rosa Police Department, assisted with the investigation of the case. She prepared a sketch of the R&S Bar parking lot, noting the location of the cars in the lot that night (74RT:11358, 11361-11362), and drew a scaled diagram of the area, including distances from the bar to the fences, the phone and a taco truck that was in the bar's parking lot. (74RT:11365-11367, 11370-11372.) She took a number of photographs of the R&S Bar and Saddlery parking lots. (76RT:11502-11511.) She photographed and took fingerprints from 46 of the R&S Bar patrons. (77RT:11632-11633.) She collected various items from the scene and later from the coroner's office, including the deputy's uniform, boots, wrist watch, belt keeper and various items from Deputy Trejo's pockets, including over $82 in cash. (74RT:11372-11373; 75RT:11401-11408; 76RT:11568, 11616-11618.) She booked into evidence a number of items found in Deputy Trejo's car, including two speed loaders, which contained six bullets each, handcuffs, a Swiss army knife, black leather gloves and a baton. (76RT:11620-11623.) Also booked into evidence was a shotgun removed from Deputy Trejo's patrol car. (76RT:11496.)

Long and other law enforcement officers also later seized items from Moore's truck, including an oily, plaid shirt with what appeared to be burn marks, a brown watch cap, a 200 milliliter empty bottle of 100 proof peppermint schnapps and a box of 10, one-size-fits-all latex gloves.[31]

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[31] Holly Bostrom, an acquaintance of Moore, testified for the defense about the use of latex gloves for pet grooming. Bostrom had worked as a professional dog groomer for 20 years. Bostrom used latex

(continued...)

(76RT:11463, 11466-11469, 11476-11480, 11592-11593, 11597-11598.) A latent fingerprint obtained from the liquor bottle matched appellant's fingerprint. (78RT:11842; 80RT:12133.) The box of latex gloves stated on it that one of its uses was for pet care. (76RT:11603.)

c. Evidence Specialist John Rainwater

John Rainwater, an evidence specialist with the Santa Rosa Police Department, testified about the tasks that he performed in the investigation of this case, including examining fingerprints and photographing evidence and areas of the crime scene. (77RT:11772, 11780-11787.)

When Rainwater left the scene, he went to a nearby church parking lot where Moore's truck had been located. (85RT:13112-13113.) He gathered a number of items, later booked into evidence, that were found between the church parking lot and the residence where appellant was later arrested. The area from the church to that residence was marshy and muddy. (86RT:13272-13273.)

Among the items Rainwater collected was Deputy Trejo's police radio. (85RT:13127-13129.) He collected several plastic bags from the muddy field that was between where the truck was located and the residence where appellant was later arrested. One bag contained a gunbelt, which had on it a set of keys, a folding knife, handcuffs and a handcuff key, a gun's speed loader, and pepper spray. Some of the items displayed Deputy Trejo's name. (85RT:13141-13147.) Other bags contained a shirt,

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[31] (...continued)
gloves in her dog grooming profession. On numerous occasions Bostrom saw a box of latex gloves on the front seat of Moore's truck. She knew that Moore had an Afghan hound that needed constant grooming, which involved various chemical products, and using latex gloves was needed for that process. (102RT:16121, 16130-16131.)

a blue knit cap with the top cut out of it, latex gloves, a map of Napa and Sonoma counties, which had writing and markings on it, and a flashlight. (85RT:13165-13177.)

d. Forensic Pathologist Erwin Jindrich

Erwin Jindrich, a forensic pathologist, assisted with the investigation at the scene, and performed an autopsy on Deputy Trejo. (81RT:12445-12447.) When Jindrich arrived at the scene, Deputy Trejo was face down on the pavement. Jindrich observed fragments of glass, blood and brain tissue on the deputy and a pool of blood next to his head. (81RT:12449-12452, 12476.) At the morgue, Deputy Trejo's head and body were X-rayed, and Jindrich conducted the autopsy.

The X-rays showed metallic shot to the skull, right of the midline, and a shot in the area of the deltoid muscle in the decedent's right shoulder. (81RT:12454-12457.) The direction of the shot suggested a left to right trajectory, and also suggested a slightly tangential impact. (82RT:12562.) The shot in the shoulder descended down through the soft tissue of the shoulder. (81RT:12485.) Jindrich could not say with certainty whether the wound on Deputy Trejo's shoulder occurred because the shoulder was close to the head, or that a shot struck an intermediate target, such as the deputy's glasses, that was deflected and struck the shoulder. (81RT:12467.) During the autopsy Jindrich removed a portion of the shotgun shell from the deputy's skull, which suggested that the shot occurred from a relatively close distance, but it was not a contact wound. (81RT:12457; 82RT:12564.) Jindrich opined that the gunshot wound to Deputy Trejo's head was the cause of death, and that death was virtually instantaneous. (81RT:12466, 12468; 82RT:12571.)

Jindrich testified that he was unable to determine the position of the shooter or of the deputy given the mobility of the target. The only thing he could say was that, given the gunshot wound to Deputy Trejo's face, the deputy had to have been in a position in which his head was oriented facing or toward the gun. (82:12576, 12578.) He testified that Deputy Trejo was found on his abdomen, face down, but his nose was not fractured or broken. Other than the wounds from the gunshot, the deputy had no abrasions or contusions on his nose or his face. In other words, Deputy Trejo had none of the kinds of wounds one would expect if his face had struck the asphalt. (82RT:12568-12569,12578.) There were also no abrasions on either of the deputy's knees. (82RT:12569-12570.) Jindrich testified that had Deputy Trejo's hands already been on the ground with his head up and facing forward, the brain matter that was on his hands may well have landed there from being expelled from the gunshot wound. (82:12580-12581.)

e. Criminalist Richard Waller

Richard Waller, a California Department of Justice criminalist, performed tests and analyses on the physical evidence. (88RT:13692-13694.) Based on tests he conducted, Waller concluded that the shot shell, which was recovered from Deputy Trejo during the autopsy, was fired from the shotgun that was People's Exhibit No. 28. (89RT:13869-13876.) Waller examined the gun and described it as a 12-gauge sawed-off shotgun, testifying that its barrel had been cut. (88RT:13700, 13703, 13705.) He determined it was operable, that there was rust on the weapon and that there was no blood on it. (88RT:13697, 13706.)

Waller conducted test firings to determine the distance from the gun to where the shot hit, explaining that such a determination is made by the

pattern produced from the pellets where the shot hits, after firing the gun at a target from various distances. (89RT:13886-13896.) He determined that the distance from the gun to Deputy Trejo was approximately nine to ten feet, which would mean that the shooter would be further away, approximately another two feet, because the distance is measured from the end of the gun, that is, the muzzle, and not from the shooter. (89RT:13897, 13903, 13957.)

The shot appeared to have initially struck Deputy Trejo's eyeglasses, but Waller conducted no tests to determine whether that had occurred. (89RT:13899, 90RT:14044-14046.) Waller did not alter his own position when conducting the test firings, conducting all of them from a standing position. (89RT:13931.) The target at which he was aiming was fixed, mounted on a target holder at an indoor target range and each time he fired he aimed for the center of the target. (89RT:13932, 13935; 90RT:14065.) The area was well-lit, there were no shadows or obstructions within his line of sight and he was standing on a smooth, flat and level surface. (89RT:13936-13937; 90RT:14065.) The surface of the parking lot where the shooting occurred had cracks and other "problems" with the pavement. (90RT:14127.)

Based on his experience with shotguns, he would expect, at night, to see a flash when the gun is fired, but did not recall whether there was a flash of any kind when he repeatedly fired People's Exhibit No. 28 during the tests he conducted. (89RT:13890-13891.) He recalled its sound when fired, which was loud. (89RT:13891.)

Waller testified extensively about blood spatter and blood spatter pattern interpretation. (88RT:13737-13739.) The prosecution presented this evidence in part regarding the disputed issue of Deputy Trejo's position

at the time of the shooting. Waller explained that impact from a firearm is high velocity. A bullet comes at a very high velocity, strikes the blood and creates small particles, even down to the size of a mist. (88RT:13740.) He observed a large amount of blood on Deputy Trejo's jacket. (89RT:13829.) He did not see what he would characterize as high-velocity blood spatter, or spattering at all on the jacket. (89RT:13971.) Waller made no conclusion one way or the other about whether the large amount of blood on the deputy's jacket indicated blood spatter.

Waller testified about the blood and tissue that he observed on Deputy Trejo's pants, describing its locations. (88RT:13731-13736, 13740-13749.) Some of the blood spatter that he observed on the pants was consistent with high velocity impact, such as that from a gunshot, as opposed to drops of blood, but the majority was from smears and transfer and did not have a pattern. (89RT:13835-13837.)

Waller testified that he could not conclusively state from the blood evidence that Deputy Trejo was on his knees at the time of the shooting. (90RT:14042.) He did not believe, however, that the evidence was consistent with the deputy being in a prone position, or prone and propped up on his elbows. (89RT:13908-13910.) He based his conclusion on the distance from the shooter to the deputy, the blood and tissue on Deputy Trejo's shirt and jacket, the blood, tissue, lead, bone and glass fragments found on and around the deputy's hands and body, and the blood spatter patterns. (89RT:13908-13910; 90RT:14072.) He testified, however, that the tissue and other material he observed on Deputy Trejo's hands were consistent with his hands being in front of his face at the time of the shooting (90RT:14115), and agreed that if the deputy's head was raised, his hands would be in front of him and thus in front of the wound

(90RT:13996). He also testified that the kind of forward spatter that he observed on Deputy Trejo's leg would be consistent with him being in a prone position. (90RT:14133-14134.)

Regarding the theory that Deputy Trejo was on his knees at the time of the shooting, Waller testified that given the wound to the front of the deputy's head, it would be very unlikely, if not impossible, to have the two isolated areas of spatter that Waller found on the left front cuff and on the back of the pants' leg, if the deputy had been on his knees and in an erect position. (90RT:14021-14023.) He contended, however, that the blood spatter he observed on the pants could have, hypothetically, been deposited there if the deputy was on his knees, sitting back toward his heels, depending on how the pants were "folded or flopped." (90RT:14113-14114.) He nonetheless agreed that he did not see the kind of spatter he would expect to see under those circumstances. (90RT:14131-14132.)

4. Defense Forensic Evidence

Peter Barnett, a criminalist, testified on behalf of the defense. He was qualified as an expert in the areas of crime scene reconstruction based on the scientific examination of the physical evidence and of high velocity blood spatter patterns from gunshot wounds. (99RT:15797, 15802.) For this case, Barnett reviewed diagrams and photographs of the crime scene, police reports, the autopsy evidence, the physical evidence collected during the investigation and portions of the trial transcript, including the testimony of the state's criminalist, Richard Waller. (99RT:15802.)

Barnett testified that the gunshot hit Deputy Trejo's head and that pellets from the shot hit his shoulder at an angle, more or less parallel to the spinal column. (99RT:15810.) He testified that the shot may have been

directly ahead of the deputy, but because the head is mobile and can swivel, it is difficult to position the origin of the shot. (99RT:15808.) Regarding the pellet wound on Deputy Trejo's shoulder, Barnett testified that it appeared to be from a trajectory that went downward and toward the back, in a manner more or less parallel to the spinal column. (99RT:15809; 101RT:15998-15999.)

Based on his review of the evidence, Barnett concluded that at the time of the shooting Deputy Trejo was in a prone position on his stomach, with the upper part of his torso raised off the ground.[32] (99RT:15819.) Among the factors that led to this conclusion were the glass fragments on the deputy's sleeve, which indicated that his arm moved minimally, if at all, after the glass fragment had landed there. (99RT:15805, 15821.) Another factor was the trajectory of the shotgun blast and pellets. Based on the blood spatter, in conjunction with the autopsy evidence, the trajectory of the shotgun charge in relation to the deputy's head wound was on a horizontal plane, with the trajectory going from left to right. (99RT:15806.) There was also the wound to Deputy Trejo's shoulder, with both the head and the shoulder wounds caused by a single shot, from two trajectories. (99RT:15821.) The wound to the head was horizontal and the one to the shoulder was more vertical and downward. Given that one shot caused both wounds, in addition to the skims that touched on the deputy's jacket, his head had to have been lined up with the trajectory through the shoulder.

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[32] Barnett testified that he did not consider Waller's testimony when he formed his conclusion regarding the deputy's position at the time of the shooting. He did not read it until after he had formed his conclusion. (101RT:15981-15982.) Also after forming his conclusion, he read appellant's opening statement. (101RT:15981.)

(99RT:15821.) The position that explains this alignment is one where Deputy Trejo was prone, with his torso propped up. (99RT:15821-15822.) The evidence also suggested that the deputy's hands would have been in front of, or forward of the wound to his head, and because of the prone position, it resulted in the glass fragments, blood and tissue landing on his hands. (99RT:15823-15824.) Waller reached the same conclusion about the position of the deputy's hands: that they were likely in front of the wound. (90RT:13996, 14115.)

Barnett testified that another factor he considered in reaching his conclusion that Deputy Trejo was in a prone position was that there was no evidence of "falling blood" on the deputy's jacket or around the area of his belt. (99RT:15811, 15818, 15820; 101RT:16054; 102RT:16081, 16093.) Falling blood is blood that falls downward as a result of gravity, rather than projected downward by a force. (99RT:15811.) The absence of any falling blood on the deputy's clothing demonstrated that at no time after being shot was Deputy Trejo in a vertical position. (99RT:15818.) The absence of blood droplets, or falling blood, anywhere in the area of the deputy's body, on the asphalt, on the car or on any other surface, further supported Barnett's conclusion. (99RT:15819.)

Barnett agreed with Waller on a number of points. They both determined the distance from the muzzle of the gun to Deputy Trejo at about ten feet and that the shot created a pellet pattern spread of approximately four to four-and-a-half inches. (99RT:15810; 101RT:15978.) He also agreed with Waller that the small defects on the back of Deputy Trejo's jacket, which were next to the through-and-through hole on the jacket that corresponded to the wound on the shoulder, were

from "skims," likely caused by pellet strikes of a tangential nature.[33] (99RT:15814.) The pellets did not hit at a perpendicular angle and in fact did not penetrate, but instead struck the surface and skipped off that surface. (99RT:15812-15814.)

There were also areas about which he and Waller disagreed. Waller observed blood spatter on the bottom of Deputy Trejo's pants' cuff and described it as high velocity blood spatter. (99RT:15828.) Barnett disagreed. Barnett explained to the jury that blood spatter patterns are used to determine the event that caused blood to spatter and is described in terms of energy, that is, what amount of energy was involved to produce the spatter. (99RT:15840-15841.) Gunshot wounds are high energy events but the size of the blood spot is not what determines the nature of the event. It is the overall pattern from which that determination is made. An isolated blood spot does not provide sufficient information from which conclusions can be drawn about the nature of the event. (99RT:15842-15843.) The blood on the deputy's pants, a few isolated blood spots, did not constitute a pattern, thus precluding a conclusion about the nature of the event that caused the bloodstains. (99RT:15843; 102RT:16095.) Barnett described the blood stains as thick and thin stains that did not comport with what one sees with high velocity blood spatter. (99RT:15829.) Contrary to Waller's

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[33] Barnett concluded that the shot to Deputy Trejo's shoulder was not from a ricochet. The only object from which it could have ricocheted was the deputy's glasses, and there were no marks on the glasses indicating the frames had been struck by a pellet. The graze marks on his face also could not account for the shoulder injury because the shoulder wound shows a trajectory hitting at a near 90 degree angle. A pellet may deflect and thereby slightly change direction, but a ricochet will not change direction by 90 degrees. (99RT:15825, 15827.)

testimony regarding the direction of the blood, based on Waller's contention that the blood was evidence of spatter, it would have flowed upward from the cuff, and not downward, as Waller testified. (99RT:15830-15831.) Additionally, if Deputy Trejo had been on his knees, with his legs behind him, it would not be logical to conclude that the blood found on the front cuff landed there as a direct result of the head wound. (99RT:15831.) Barnett testified that the blood on the pants' cuff likely occurred when Deputy Trejo was later moved. (99RT:15832.)

Also contrary to Waller's testimony, Barnett testified that it would be very unlikely that high velocity blood spatter, which Waller said he observed on the back of the deputy's knee, would be deposited there from the impact of the gunshot if Deputy Trejo had been in a kneeling position and given its location behind the wound. (99RT:15833-15834.) Barnett testified that it did not appear to be spatter at all, and given that the blood was only one drop, it was inappropriate to conclude it was spatter in the first place. Barnett concluded that the blood on the back of Deputy Trejo's knee likely occurred when his body was moved and his clothing was handled after the shooting. (99RT:15835.) Barnett referred to the amount of blood at the scene, on the deputy's clothing, in the body bag in which Deputy Trejo was placed, and on the gloved-hands of the persons who moved the deputy to conclude that the one or two small spots of blood on the back of the deputy's knee were produced by personnel moving his body and clothing at the crime scene or thereafter. This was particularly so because the blood did not comprise a pattern.[34] (99RT:15847-15848.)

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[34] Barnett also disagreed with Waller as to the partial blood spots that were observed using a stereomicroscope. They did not appear as

(continued...)

Barnett also testified about the likely position of the shooter. Based on the physical evidence it appeared that at the time of the shooting the shooter was not in an erect position. This conclusion was formed with the understanding that the deputy was prone, which the physical evidence supported. (101RT:16000.)

5. Appellant's State of Mind

a. Life in a Security Housing Unit at a Maximum Security Prison

Appellant presented five witnesses with whom he had served time.[35] He presented these witnesses to provide a first-hand description of the conditions and circumstances under which he was housed.

Dale Bretches, who was incarcerated at Pelican Bay State Prison (PBSB) and housed in the Security Housing Unit (SHU), testified that the SHU was like a prison within a prison. He was kept isolated for 23 hours a day, and let outside for little more than an hour a day. He was fed in his cell. (96RT:15324.) No programs were allowed in the SHU. There were

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[34] (...continued)
falling blood, or as high velocity blood spatter for two reasons: (1) their shape; and (2) they did not comprise a pattern. (99RT:15836.) Barnett provided the jury with an understanding of the minute size of the blood at which they were looking and about which he and Waller observed using the stereomicroscope. He explained that the individual drop on the deputy's pants was about half as wide as an individual thread in the weave of the garment. (99RT:15837.) He explained that given its microscopic size, it is very difficult to interpret the direction of this small or partial drop of blood. (99RT:15837.)

[35] All of the inmate witnesses were serving prison sentences at the time of their testimony and testified that they had been convicted of felonies, most of which were crimes of violence.

no school or work programs for SHU inmates. (96RT:15328-15329, 15332.)

Jose Padilla described the circumstances in the SHU, where he was housed at PBSP. SHU inmates rarely come in contact with another person, unless the inmate happens to have a cell mate. (98RT:15625.) Guards sometimes told an inmate that the inmate housed next to him was his enemy. This created paranoia. (98RT:15626.) Although there was a prison "rule" about opening cell doors so that only one inmate was let out of his cell at any one time, the guards frequently violated that rule. (98RT:15625.) Given the rumors the guards spread about enemies, and the paranoia it created, when more than one cell door was opened, it often resulted in fights. (98RT:15625.) A few years ago Padilla was released from his cell to go to the yard, but the guards had also released another inmate. A fight ensued, the guards yelled at them to get down, which they did, but a guard nonetheless shot Padilla in the head. (98RT:15626.) Now, whenever his cell door is opened or when he is moved for any reason, it is in the back of his mind what bad thing might happen. (98RT:15627.)

Inmate witness Daniel Grajeda testified about his confinement in the PBSP SHU. Grajeda was kept in his cell over 23 hours a day and let out once a day to go to the "yard," which was an outdoor space about the size of the courtroom's jury box. (96RT:15345-15346.) The yard was all concrete. It had neither grass nor trees. The walls surrounding the yard were about 20 feet tall. (96RT:15355, 15357.) When on the yard, inmates were usually there alone, unless the SHU inmate happened to have a cellmate and then the cellmate might go to the yard at the same time. (96RT:15357.) Although PBSP is in a national forest, not one tree was visible from the SHU. (96RT:15356.)

Among the various facilities in which Grajeda had been housed the prior 17 years, all his confinements had been in the SHU or "high security." In other words, Grajeda had been in "the hole" for all those years. (96RT:15346.) Although he had been discipline-free for a few years, and his only write-up was for talking once in the law library, he would not be considered for housing elsewhere than in the SHU. (96RT:15347.) The only way an inmate with an indeterminate SHU assignment can get out of the SHU is if he is released on parole, dies, or "debriefs." (96RT:15347, 15365-15366.) Debriefing requires an inmate to turn in another inmate, or make up a story implicating the inmate in a crime or a prison violation. (96RT:15347-15349.) Grajeda said he would never debrief. (96RT:15365.) If the prison official interrogating the "debriefing" inmate does not believe him, it is an unsuccessful debriefing and the inmate remains in the SHU until he dies or is released on parole. (96RT:15347.) Debriefing is risky because the inmate who debriefs will become the mortal enemy of the person about whom he debriefed. Grajeda described prison life, and life after prison, as one filled with paranoia, and where former inmates often react foolishly and without thinking. (96RT:15349-15350.)

James Pendleton, another PBSP SHU inmate, testified that it was not uncommon for inmates to have enemies in prison. Correctional officers told him that he had enemies. (96RT:15370-15371, 15377.) Pendleton stated that there are people whom he had never even laid eyes on who considered him an enemy and that if he were released from prison, he would be very concerned if he ran into one of them. (96RT:15371-15372, 15376.) There were fears about being released and running into someone from prison. If a former inmate runs into someone who was an "enemy," there would be a reaction, one without planning and without thinking.

(96RT:15377.) Prison authorities add names to an inmate's file if the authorities believe that the person may be the inmate's enemy. The inmate never learns the names of those people. (96RT:15376-15378.)

At the time that Pendelton testified, his cellmate was soon to be released on parole. (96RT:15376.) There were no prison programs or anything else to prepare his cellmate for his release from the SHU and prison.

Eliot Grizzle testified about his experience of being transported from Pelican Bay State Prison, where he was housed in the SHU, to a local prison closer to the courthouse, so that he could testify at appellant's trial. (98RT:15636-15637.) Unlike PBSP, he and the other inmates at the local prison were not restrained and shackled when they were let out of their cells. He had not been around anyone other than his cellmate in a number of years and he did not know how to act. (98RT:15640.) He felt "jumpy" not being shackled and chained when he was around others. (98RT:15640.) He was unable to assess voice inflections and this, as well as having eye contact with others, made him feel on edge. (98RT:15641.) He wondered if those around him were potential enemies, as he had felt at PBSP. Grizzle was particularly concerned about being among potential enemies because he had a release date set for approximately five years from the date he was testifying.

Housed in the SHU, he had not been able to participate in any programs or correspondence courses. Because he was assigned to the SHU he was prevented from learning a trade, which could be of use if ever released from prison. There was not even any social contact with others. (98RT:15642-15643.) Phone calls were only permitted in emergencies; he

was able to use the phone one time, when his grandfather died. (98RT:15654.)

The apprehension Grizzle had felt about being released in a few years was increased "ten-fold" after the experience of being transported to the local prison. He did not know how to handle the situation. He felt that some of the inmates at the local prison might be potential enemies. He felt fear, the same kind of fear he felt at PBSP. Once released, he has no idea how he would make it from the prison to his home given the circumstances under which he has lived in PBSP's SHU. (98RT:15643-15644.)

The defense followed these witnesses with a videotape and photographs of PBSP's SHU, with testimony by Chris Reynolds, the defense investigator, who had toured parts of PBSP, in particular the SHU, and documented his observations with photographs and a videotape. (99RT:15756 et seq.)

b. The Deleterious Psychological Effects of Security Housing Units

Stuart Grassian, M.D., testified for the defense regarding the effects of being housed in solitary confinement in prison and from being housed for years in a Security Housing Unit (SHU). He testified about the impact of such living conditions on appellant's state of mind at the time of his release from Pelican Bay State Prison (PBSP) and at the time of the crime. (97RT:15456-15457, 15488.)

Grassian had conducted extensive research on the psychiatric effects of solitary confinement. He found that inmates had become ill when housed in such extraordinary living conditions, which included sensory isolation and sensory deprivation. (97RT:15457.) Not only were they ill, but they were ill in similar ways. (97RT:15457-15458.) He also found that inmates

were frightened about their condition, of how ill they had become, and tried to hide it. (97RT:15457-15458.) After repeatedly observing this phenomenon, he classified the clinically recognizable grouping of symptoms as a syndrome. (97RT:15458.)

Grassian testified that the symptoms acquired after years in a SHU lie along the spectrum of delirium disorders, which are acute organic brain syndromes. Delirium is a syndrome, a diagnosis. (97RT:15520-15521.) The symptoms he observed among inmates housed in such conditions included perceptual distortion, hypersensitivity to external stimuli, simple as well as complex hallucinations, increased paranoia, obsessive thoughts, deliriums, panic attacks, free-floating anxiety and difficulties with thinking, concentration and memory. (97RT:15470-15471.)

Paranoia was a very common symptom among the inmates. (97RT:15471.) The perceptual distortions and the paranoia can combine to cause the person suffering from them to believe that he is in imminent danger. (97RT:15471.) The other major disturbances he observed among the inmates was difficulty with thinking, concentration and memory. (97RT:15471-15472.) Generally this manifested in two ways. Some inmates became unable to focus their attention at all. (97RT:15472.) Others became obsessional in their thinking. (97RT:15472.)

Another symptom can be loss of impulse control, which can result in violence. (97RT:15473.) When this occurs, however, the conduct is not preplanned or intentional, but instead occurs in situations where control is lost and the person suffering from the syndrome is in a disassociative or confused state. (97RT:15551.)

Grassian studied the effects of PBSP's SHU on the inmates housed there. (97RT:15464.) His research included interviewing inmates housed

for years in the SHU. (97RT:15465.) He toured the cells and the tiers at the prison. (97RT:15465.) He described the SHU as a restricted stimulation environment, one deprived of perceptually-informative stimuli. (97RT:15475.) There was no variation to the inmate's perceptual life. The uniformity was so extreme that when something was not uniform it was noxious and disorienting to the inmate. (97RT:15475.) This was so in part because when a variation occurred, it was generally something negative, or harmful, further disorienting the inmates. (97RT:15475.)

There were no activities for the inmates. (97RT:15476-15478.) Given the lack of activity, stimuli and extreme uniformity, the brain becomes adversely affected. (97RT:15476-15478.) Grassian explained that for the brain to function normally, there has to be a certain level of internal stimulation in the reticular activating system and there has to be some external stimulation. Without such stimulation, there is brain dysfunction and the symptoms Grassian earlier described develop. (97RT:15478-15479.)

In addition, this assault on the brain takes place in an atmosphere of stress and fear. The inmate lives with constant fear that something might happen, and if it does, it will be bad and potentially life-threatening. (97RT:15479, 15487.) The SHU inmates live in a constant state of tension, waiting for something to happen. Thus, although a SHU inmate would essentially be doing absolutely nothing and be exposed to virtually no stimulation whatsoever, the inmate nonetheless would become exhausted. (97RT:15479.) This development impairs the ability to focus, causing some inmates to become obsessively preoccupied with something, while others disintegrate and become disoriented, confused, agitated, and at times develop full-blown psychoses. (97RT:15480, 15487.)

PBSP's inmates scheduled to be released from the prison received no assistance to transition to the outside world, other than a videotape which the inmate watched alone. (97RT:15493.) The released inmate cannot even interact with people because the inmate has not done so for years. (97RT:15494, 15576.) Without the information and tools needed to function outside prison, an inmate released from these restrictive environments, such as a SHU, will be in a disorganized, impulsive and chaotic state. (97RT:15493.) The inmate can suffer from anxiety and experience racing thoughts. Grassian explained that someone released from the SHU who has racing thoughts is like a freight train out of control. The individual cannot keep track of things because everything is moving too fast and he cannot slow his mind down. (97RT:15508.) If the person is then also in a moment of panic and fear, the inability to slow down is even greater. (97RT:15509.)

This was the situation in which appellant found himself when he was released from PBSP. Grassian interviewed appellant, who had been housed in the SHU, or in solitary confinement for most of his previous 13 years of incarceration, before his release from PBSP in March of 1995. (97RT:15488.) Appellant was adversely affected by the conditions in the SHU. Appellant was aware of what kinds of things happened there, including other inmates getting beaten and stabbed. (97RT:15487.) His coping mechanism for dealing with the SHU's harsh conditions was to be rigid and obsessional in his daily routine and in the way that he organized his thoughts. By the time of his release, appellant's thinking was narrow, rigid and obsessional. (97RT:15491-15492.)

There was virtually no transition program for appellant before his release from PBSP's SHU. He had not been provided any vocational

training or opportunity for education; there had been no rehabilitation opportunities at the prison. (97RT:15494.) The utter lack of programs and resources to teach appellant how to function in the outside world almost ensured his helplessness. (97RT:15494.) Inmates who for years were housed in the SHU, or solitary confinement, as was appellant, had not interacted with other people in a natural way for years, which caused them to be further vulnerable. (97RT:15494-15495.) The vulnerability and helplessness were in addition to the adverse effects on the brain that occur from living under such harsh conditions.

When appellant was released from PBSP, and no longer had his strict routine or the regimen of prison, he also no longer had the focus such a regimen gave him. Essentially he was lost as to how to act, react and organize his thoughts and actions. (97RT:15491-15493.) He could not plan or look into the future. He lacked the ability to plan from one day to the next. (97RT:15491-15493.) He was unable to juggle the numerous situations and changes that occur over the course of a day, or even an hour. (97RT:15495-15496.) Appellant's conduct was panicked and impulsive, not planned or indicative of planning. (97RT:15568.)

Grassian concluded that appellant was suffering from deliriums from the effects of his many years of confinement in the SHU and other solitary confinement housing. (97RT:15504, 15552.) On March 29, 1995, he was suffering from this mental impairment caused by his SHU confinement, which was exacerbated by the acute panic that he experienced when his friend, who had promised to help him to arrive timely where he had to report for parole, told him that she was going to leave him instead in Santa Rosa. The alcohol appellant had consumed that day and evening further impaired his thoughts and actions. (97RT:15504, 15561.) Grassian added

that during the interview appellant was distressed when he talked about the shooting. Grassian concluded that it was an awful memory for appellant to have to relate to him. (97RT:15506.)

B. Alleged Conspiracy to Commit Robbery and Alleged Attempted Robbery of Wilson

As to both of these counts, the prosecution presented evidence pursuant to Evidence Code section 1101, subdivision (b), of four robberies of bars and restaurants that occurred within a three-week period in 1981: the Bull Pen Bar (63RT:9728-9743); the Boll Weevil restaurant (57RT: 8878-8898); a Pizza Hut on December 23, 1981 (55RT:8512-8529; 57RT:8873-8877); and a Pizza Hut on December 29, 1981 (55RT:8531-8546).[36] Regarding the alleged attempted robbery in Count 4, the prosecution also presented testimony from, among other witnesses, Marian Wilson, the alleged victim. (56RT:8597-8726.) As stated above, this count was dismissed for lack of evidence at the close of the prosecution's case. (94RT:14940, 14964-14965; 22CT:4609.)

As to the conspiracy to commit robbery alleged in Count 3, the evidence in furtherance of the conspiracy included appellant's and Moore's possession of the following items: (1) latex gloves (Peo. Exh. No. 514); (2) a navy-blue watch cap with the top cut off (Peo. Exh. No. 513); (3) a map of Sonoma County, which included a street map of Santa Rosa and which had hand-drawn markings on it (Peo. Exh. No. 516); and (4) a shotgun (Peo. Exh. No. 28).

A prosecution witness testified that there had been no attempted break-ins at any of the businesses near the R&S Bar. (93RT:14796-14797.)

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[36] See also Argument 2, *post*, in which the record evidence regarding these incidents is provided in detail.

Indeed, the prosecutor spent considerable time describing the areas close to the R&S Bar and the restaurant owned by Wilson, in which no crime or attempted crime occurred. The prosecution called 29 witnesses who worked at or owned stores, restaurants or business establishments in the general vicinity of the Santa Rosa and Sebastopol area, all of whom testified that on the night of March 29 and the morning of March 30, 1995, nothing unusual occurred at their establishments. (See 73RT:11004-11055, 11058-11092, 11131-11202; 74RT:11254-11289; 84RT:12888-12901, 12987-13004.) Nothing was missing or amiss, all was in order and nothing had been disturbed. Witnesses who had been at work at the restaurants or businesses that were open late on March 29, 1995, testified that it was a quiet night and that nothing unusual happened. (See, e.g., 73RT:11004, 11013, 11016, 11158-11166, 11183-11192; 74RT:11260-11264, 11271-11272; 84RT:12988-12992, 12999-13000.) Regarding the map with hand-drawn marks on it, none of the areas marked were the subject of a purported attempted robbery. (93RT:14777-14793, 14796-14797.)

The jury was unable to reach a verdict as to the conspiracy charge. (114RT:18224.)

C. The Crimes at the Cooper and King Residence and Appellant's Surrender

After leaving the Saddlery parking lot, appellant directed Moore to drive; when they came to a parking lot, he told her to park. Appellant knew that the police would be looking for the truck so he and Moore got out and left the truck in the parking lot. (95RT:15187-15188.) Appellant took a number of items that had been in Moore's truck, including the shotgun, a

map of the area,[37] the police radio, the flashlight and the gun belt. (95RT:15189-15191.) Appellant heard sirens and helicopters and saw the helicopter's spotlights. (95RT:15196-15197.) He was scared, confused and had no idea what to do. (95RT:15195, 15198; 96RT:15230.) He did not want to leave Moore with her truck, or later leave her side when they hid in some trees, because he felt at that point that she was his only reality, the only person he had left in his life and possibly the only hope he had in not being killed by law enforcement. (95RT:15192; 96RT:15231.) Appellant saw a line of trees. They both walked to that area and remained there for about two hours. (95RT:15192, 15198.) The helicopters appeared to be closing in on them. They walked to a nearby house, which turned out to be the residence of Frank Cooper and Yolanda King. (95:RT:15198-15200.)

When they got to the house, appellant was anxious, upset and scared. (96RT:15226.) The first person he saw in the house was Frank Cooper. Appellant told Cooper to get on his knees or he would blow his head off. (96RT:15223.) When appellant realized there were a number of people living in the house, he moved them all into one room, which was Karen King's bedroom. (95RT:15200.) The people in Karen's room were Cooper; Yolanda King; Yolanda's adult children, Karen and Jeremy; and Karen's children, three-year-old Tyrika and her infant daughter. (96RT:15237-15238, 15244-15245.) In the morning, appellant let Cooper

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[37] Appellant testified that Moore had purchased the map at a gas station because they did not know the area. (96RT:15266.) Appellant wrote street names on the map and circled areas where they were driving as he helped navigate while Moore drove. He marked most of the main roads on which they were driving. (96RT:15266, 15269.) He agreed that he also marked areas on the map that were wineries and vineyards, but they did not end up going to any of them. (96RT:15275-15276.)

and Jeremy leave for Jeremy's purported medical appointment. (96RT:15239.) Appellant told Cooper and Jeremy when they left not to call the police because appellant thought the police might surround the house and start shooting. (96RT:15240-15242.) He later permitted Yolanda King to leave. (96RT:15244.)

All five of the adult occupants of the Cooper/King residence testified. Frank Cooper owned the home that appellant and his codefendant entered that night. Cooper, who had been awakened by the sound of police cars and helicopters around 1:30 a.m., heard someone kicking in his back door. (82RT:12614-12615.) When Cooper went to investigate, he was confronted by a man with a gun, later identified as appellant. (82RT:12615, 12624-12625.) Appellant directed Cooper to gather everyone in the house and to go to one room. (82RT:12626-12627.)

They all gathered in Karen King's room. Appellant unloaded the weapons he had, a shotgun and a pistol. He placed the bullets in a sock and put them on his waistband. (82RT:12642, 12644-12645.) After the initial shouting, which occurred when appellant had first arrived, appellant treated Cooper and his family politely and with respect. (83RT:12807.)

For the most part, they all remained in the one bedroom for about five hours, until about 6:30 a.m., when Cooper and appellant went downstairs to make coffee. (82RT:12649-12651; 83RT:12788-12789.) During the time that they were all in Karen King's room, appellant repeatedly told them to stay away from the windows and that he did not want to hurt anyone. (82RT:12666.) Cooper talked to appellant, telling him to find peace of mind, in an effort to keep appellant calm. (83RT:12776-12777, 12803.) Cooper testified that peace was kept

throughout the night, once everyone had gathered into Karen's room. (83RT:12803.)

In the morning, Cooper told appellant that he had to take Jeremy to the doctor for a 7:30 a.m. appointment and warned appellant that if he and Jeremy did not go that it might cause suspicion and lead to someone coming to the house. Appellant did not ask whom the appointment was with or what it was for, and never suggested that someone call and postpone it. Appellant let Jeremy and Cooper leave. (82RT:12653-12655; 83RT:12695, 12860-12861; 91RT:14348-14350.) Cooper was stopped by law enforcement roadblocks. After talking to police and advising them of the situation, he was told to call his home, tell Yolanda King that he had run out of gas and that she needed to bring him some gas. (82RT:12658, 12661-12663.) Cooper did so and appellant let Yolanda King leave. (91RT:14350-14351.) Cooper described appellant's behavior as changing over the hours at the Cooper house. When appellant first arrived, he seemed paranoid. By the time Cooper left, appellant seemed less paranoid and more calm. (83RT:12783-12784.)

Jeremy King testified that after he went into his sister Karen's room, he fell asleep and did not wake up until daylight. In the morning, he took a shower and left with Cooper to go to his medical appointment. (83RT:12856, 12861, 12863-12864.) Jeremy, who was in custody at the time of his testimony, was recalcitrant when examined by the defense, insisting that he could not remember much of what had occurred that morning and that he had no desire to remember it. (84RT:12934.)

Yolanda King testified about her recollections of March 30, 1995. Appellant appeared nervous. Appellant did not yell at them, but at times spoke loudly to Cooper. (90RT:14176.) Around noon, they watched the

news on the television in the bedroom and saw the broadcast about a deputy sheriff being killed. (91RT:14199-14201.) When Yolanda King left the house to take gas to Cooper, she asked Moore if she could take the children. Moore told her that she could not and took the baby from the arms of her mother, Karen King. (91RT:14225-14226.) Yolanda King drove about 100 feet before she was surrounded by police with drawn guns. (91RT:14228.) She was treated like a suspect. (91RT:14352.) It was stipulated that on the occasions when she spoke to the police and later testified at the preliminary hearing in this case, Yolanda King never stated that appellant pointed a gun toward any of the children. (91RT:14370-14371.)

Karen King, Yolanda King's daughter, also testified about the night and early morning hours of March 30, 1995. Her testimony essentially corroborated that of her mother, her brother Jeremy, and Cooper. Karen testified that over the course of the night and morning, appellant came to trust her and her family members. At times, the atmosphere in the room was more relaxed and less tense. On the occasions when Karen was upset or crying, appellant assured her that he would not hurt her or her children. (92RT:14568, 14570.) Not long after Karen's mother left, the police called and negotiations for appellant's surrender began. (92RT:14457-14460, 14464-14465, 14555-14558.)

Sergeant Clarence Faria from the Sonoma County Sheriff's Department assisted in negotiating appellant's surrender. (88RT:13628, 13630.) Faria testified that he told appellant that no one would shoot him if he followed Faria's directions. Within minutes, appellant walked out of the house as directed. (88RT:13642-13643, 13646.) When appellant spoke with Faria, he sounded resigned. (88RT:13648.) Faria described appellant during their phone conversation as honest and straightforward.

(88RT:13687.) Appellant made no demands of Faria, no threats and no request for assistance in an escape. Appellant's only request was to be able to surrender with dignity and not to be shot. (88RT:13643, 13652.)

D. The Charged Prior Convictions

On April 23, 1997, at a bifurcated proceeding, the prosecutor presented documents regarding eight prior convictions that the state had alleged appellant had previously suffered. (117RT:18745-18751.) On April 28, the jury returned its verdicts finding the alleged prior convictions true. (118RT:18791-18794; 25CT:5080-5083.) Immediately thereafter, the penalty phase began.

THE PENALTY PHASE EVIDENCE

A. Aggravating Evidence

In its case in aggravation, the prosecution presented evidence of appellant's prior convictions and misconduct involving the use or attempted use of force or violence.

1. December 1981 Prior Acts

The prosecution presented evidence of four acts involving the use or attempted use of force or violence that occurred within an approximate three-week period in December 1981, in San Diego. These alleged acts occurred within the same weeks as the four robberies from 1981 presented at the guilt-innocence phase of appellant's trial, pursuant to Evidence Code section 1101.

On December 14, 1981, around 10:00 a.m., at a bar called Victor's Too, two males entered and took money from the bar's workers and took the establishment's receipts. (118RT:18834-1884.) One of the men took a worker's wedding ring and wristwatch. (118RT:18840.) One had a pistol and the other, identified as appellant, had a shotgun. (118RT:188337,

18839; 119RT:18980.) One of the men, not identified as appellant, kicked one of the workers. (119RT:18982-18983, 18986.)

On December 18, 1981, two men entered the Blue Haven Bar. The only people in the bar were the workers and a few remaining customers. (120RT:19047-19049.) The customers left, except for the two men who came late to the bar. One of the men had a knife. The other man, identified by stipulation as appellant, had a gun. (120RT:19050-19052, 19057.) The man with the knife took about $70 from the cash register and demanded to know where the rest of the bar's money was kept. (120RT:19052.) The other man ordered one of the workers to get on the floor, swore at her and pulled her hair. (120RT:19055.) One of the men kicked another worker in the face. (120RT:19056.)

On December 24, 1981, Debbie Joe's Bar had closed for the night. Two people were at the bar, cleaning and closing up. A woman, followed by two men, entered the bar. The woman was acting strangely, taking things off the wall at the bar. The worker then saw that both men had guns. Appellant was identified as the man holding a shotgun. (118RT:18845-18851.) The other man had a handgun, held it on one of the workers and took his money. (118RT:18850.)

On December 26, 1981, two men confronted the workers at the International House of Pancakes and demanded money. Both men had been customers at the restaurant. One of the men had a shotgun. The other, identified as appellant, had a revolver. One of the employees gave the men the restaurant's receipts. The men then left. (118RT:18872-18881.)

2. Diane Keogh

Diane Keogh testified about a sexual assault that occurred in her apartment on October 4, 1978. (119RT:18900-18937.) The assailant, later

identified as appellant, hit Keogh in the face (119RT:18914-18917) and forced her to have intercourse (119RT:18919). After the assault, appellant accompanied Keogh to seek medical treatment for her bleeding lip; Keogh's intention was to call the police, which she did at the medical facility. (119RT:18922-18924, 18927-18928.)[38] Appellant pled guilty to this offense.

3. Alleged Acts of Misconduct in Custody

The prosecution presented incidents alleged to have occurred at San Quentin and at Corcoran State Prisons. Retired California Department of Corrections Officer Wayne Hafner testified that on February 7, 1984, while assigned to the gun rail at San Quentin State Prison, he observed an altercation between two inmates in the dining hall. Hafner fired a warning shot, but the altercation continued. Hafner then fired a round of gunshot at the lower extremities of the inmates, and they dropped to the floor. He identified appellant as one of the inmates involved in the altercation. (118RT:18855-18861.) Both inmates were covered in blood. A knife-type instrument was lying on the ground between the two inmates. The second inmate, Chapman, appeared to have open wounds. Appellant did not appear to have bleeding injuries at that time. (120RT:19097-19100.)

Sean Crady, a San Quentin Correctional Officer, testified that on April 27, 1984, while conducting an inmate-count from outside the cells, he observed an inmate, who was inside his cell, run toward him with a hand-

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[38] Appellant had written an apology to Keogh not long after the crime committed against her, before he had pled guilty to the offense and before the preliminary hearing. Keogh had kept the letter for many years, informing the prosecution that she had gotten rid of it only a year before the prosecution contacted her to testify at appellant's capital trial. (119RT:18934-18935.) This information was not presented to the jury.

made, four-foot long stabbing instrument. (119RT:18965-18969.) Crady jumped aside and was not touched. A search of the inmate's cell revealed no weapons. (119RT:18969-18971.) Crady testified that the prosecutor had recently shown him a photograph to refresh his memory as to the identity of the perpetrator. The person in the photograph looked to be the defendant in the courtroom. (119RT:18974.)

James Hall, a San Quentin Correctional Officer, testified that on May 1, 1984, his duties included pouring coffee for inmates as they held out their cups through the prison cell bars. (119RT:18894-18895.) The area where he worked was always on lockdown, that is, inmates were locked in their cells 24 hours a day. On this date, when in front of appellant's cell, Hall felt a small poke, or prick on his left side. He then saw something withdrawn into appellant's cell. Hall sought treatment and was given a tetanus shot. (119RT:18895-18898.) A subsequent search of appellant's cell revealed a metal stabbing weapon. Hall regularly found inmate-manufactured weapons and contraband weapons during inmates' cell searches. (120RT:19077-19081.)

Former Correctional Officer Franklin Despain testified about an incident at San Quentin Prison, on May 1, 1984, in which appellant had three hacksaw blades, wrapped in plastic, hidden in his rectum. (119RT:19006-19007.)

Three witnesses testified for the prosecution that on May 19, 1985, at San Quentin State Prison, appellant assaulted another inmate, Louis Moody. (120RT:19108, 19111-19126.) Appellant was later convicted of assault for this incident.

On August 29, 1990, Paul Lytton was working as a correctional officer in the security housing unit at Corcoran State Prison. On that date,

his assignments included watching the inmates in the prisoner's "yard" and he observed an inmate hit another inmate. He then observed a third inmate join the scuffle. Lytton yelled a warning and the inmates went to the ground, as commanded. Because of the frequency of violence in prison, Lytton was armed with both a 37 millimeter gun that shoots five wooden blocks in each round and a lethal semiautomatic rifle. Lytton testified that the third inmate was "inmate Scully," but was unable to identify him in court. (120RT:19058-19067.)

The prosecution also presented evidence of two incidents alleged to have occurred at the Sonoma County jail, during the pendency of this case. On July 8, 1996, a correctional officer searched appellant's cell, which was in the "special housing unit," and found a piece of metal in the binding of a book. (119RT:18987-18991.) The officer said that any time an inmate from the "special housing unit" was taken from his cell, he was shackled. (119RT:18998, 18991-18993.) On October 13, 1996, during a routine cell search of the inmates on the tier where appellant was housed, appellant threw urine at several correctional officers. (119RT:19010-19013.)

4. Victim Impact Evidence

The court permitted extensive impact evidence, including testimony from victims of the crimes that occurred after the homicide and were charged in the present proceeding. Five members of Deputy Frank Trejo's family testified about the impact on them from the loss of their father, and as to Deputy Trejo's widow, the loss of her husband. Two victims from the crimes that occurred after the homicide testified about the impact on them from the crimes committed against them. The testimony of the victim impact witnesses is set out in detail in Arguments 16 and 17.

B. The Defense Case in Mitigation

Appellant presented additional evidence about the impact and consequences of confining a person, year after year, in the preternatural environment of the security housing unit (SHU), and then releasing that person, without a transition preparing him for life outside the highly restrictive environment behind the SHU prison walls. He also presented brief testimony from his family and from a former probation officer.

1. Inmate Testimony

Appellant presented testimony from two Pelican Bay State Prison SHU inmates regarding life in a SHU. John Stinson described his life in Pelican Bay's SHU as an arrested development. From the time of his initial arrest and incarceration, as a young man, he felt as if he had stopped maturing, and that everything that was important to him, such as his family, was put on hold. When he was released, he tried to adapt and obtain gainful employment, but stated the obvious to the jury – that he was not successful. (124RT:19401-19405.) The only physical contact he had with a human being was when the guards passed him his food through a slot in the door, when he was handcuffed and searched or, on the occasions when he was housed with a cellmate. (124RT:19408.)

Edward Burnett, a 47-year-old inmate, also testified about living in a SHU. He had been there for the previous 11 years and assumed he would live there for the rest of his life, despite his good behavior in custody. (124RT:19424-19425m 19428-19429, 19434.) Years passed without him seeing anyone other than a guard or his cellmate, except in passing. He remarked that a SHU inmate can go years living within 100 feet of another inmate and never have the opportunity to exchange a word with that person. (124RT:19443-19444.) Burnett stated that the only way he would ever be

considered for prison housing other than a SHU was if he became an informer for the Department of Corrections. (124RT:19423-19444.)

2. Appellant's Institutionalization

Appellant presented testimony from Dr. Craig Haney, an expert in prison conditions and environments, the effects of incarceration, the causes of violence in maximum security prisons in California, and the behavior observed among inmates who have been incarcerated on a long-term basis in solitary confinement or SHUs in maximum security prisons. (125RT:19511-19516.) Haney has studied and written extensively about the psychological effects and consequences of living in maximum security prisons and SHUs, and the manner in which inmates adjust to the institutional setting of such confinements. (125RT:19517-19518.) Such adjustment and transformation can result in an inmate becoming "institutionalized." Included in Haney's area of study and expertise is the way in which certain conditions in institutions affect the functioning of the institution itself. (125RT:19517.)

In 1982, appellant was incarcerated at San Quentin. (125RT:19536.) At age 23, appellant's first incarceration in an adult prison occurred at the very time that overcrowding and violence were escalating at San Quentin. (125RT:19537.) Within approximately six weeks of appellant's arrival a notorious riot occurred in the eating hall, involving approximately 1000 inmates. The riot did not break up until the guards fired on them, injuring numerous inmates. (125RT:19537.) Appellant told Haney that the experience terrified him and that he has never seen anything like it in his years of confinement. As a result of the experience, appellant began to focus only on day-to-day survival. He could not permit himself to think about or consider a future. (125RT:19604-19605.)

In the mid-1980s, Dr. Haney interviewed several hundred inmates housed in California's prisons regarding prison conditions. The interviews covered such topics as overcrowding, the escalation of violence, double-celling, lock-downs, and racial tensions. (125RT:19548.) He found that a main concern among the inmates was the escalation in violence. (125RT:19548-19549.) The increased violence caused inmates to become extraordinarily fearful. (125RT:19597.) To deal with their fear, inmates often armed themselves. (125RT:19597.) Most inmates found they could not count on prison staff for protection. (125RT:19597.) If an inmate sought help from prison staff, other inmates viewed the inmate as vulnerable, and thus a target, or a snitch, which placed the inmate in further danger. (125RT:19598.) The result was that most inmates believed that they had to take care of their own problems, including settling conflicts. Unlike in the outside world, they could not go to the police or a court for help with a conflict. (125RT:19600.)

In the late 1980s, a new kind of prison was created. They were referred to as "Super Max" or SHU prisons. In these institutions the whole prison was to be run as a lock-down unit. (125RT:19558-19559.) The plan was to impose a severe regimen of day-to-day life on the inmates housed there, which was exactly how they were then built and run. (125RT:19559, 19564.) Inmates in these prisons are fed in their cells, all visits are non-contact, the outside "yards" to which inmates are allowed to occasionally go are small and made entirely of concrete. Any time an inmate leaves his cell, he is shackled and remains so until he arrives at the destination to which he is being transported, at which point the shackles are removed through a slot in a security cage, the same manner in which he was shackled before leaving his cell. (125RT:19559-19562.)

Corcoran State Prison and PBSP are Super Max SHU prisons. (125RT:19583.) Appellant was incarcerated at PBSP. He was also incarcerated at Corcoran. (125RT:19616.) Corcoran was unique because inmates who had previously been racially segregated were integrated on the yards. Inmates who had not been in the presence of other inmates, and also inmates who were "mortal enemies" of each other, were grouped together on the yards. This "mixing" of inmates resulted in extraordinary violence at Corcoran State Prison. (125RT:19564-19565.)

PBSP opened after Corcoran and took the next step in control and confinement by further reducing an inmate's interaction with others. At PBSP there was complete segregation of inmates, and the only interaction an inmate would have with another human being was if the inmate had a cellmate. (125RT:19583.) At PBSP, basically no semblance of normal social interaction existed for inmates. (125RT:19583.)

Haney explained that the manner in which PBSP was constructed and operated exacerbated the harmful effects that can occur when one is confined in an institution for years on end. The inmate becomes totally and completely dependent on the guards to provide him with the basic necessities of life. (125RT:19589.) Individuals living under these harsh and unnatural conditions are changed by the experience in that they become "institutionalized." Institutionalization is a term used to describe what occurs to people confined in institutions when the person takes on the ways of the institution. (125RT:19590.) An inmate in these prisons can become dependent on the institution in ways that are not conscious; the inmate accepts the routines, practices and logic of the institution as if it was his own. It guides what the inmates does, how he feels, how he reacts to stimuli and to an extent, how he thinks. (125RT:19590.)

The harm from becoming "institutionalized" at a place like PBSP is particularly acute when an inmate is released from that environment, without any transition or preparation for the outside world. This is so because the conditions at PBSP are far different from the normal social existence. (125RT:19591.) Before the advent of SHU prisons, inmates generally ate with their fellow inmates, interacted with them at work or in vocational training or in education classes and in some group circumstances. (125RT:19591.) At a SHU prison, the existence is fundamentally different from normal social interaction, but in order to survive, the inmate must adapt to it. But adapting is extremely difficult because the conditions are outside the normal human experience. (125RT:19592.) There is total dependency; even small decisions are highly dependent upon the institution itself. (125RT:19592.)

When an inmate who has become institutionalized at a place like PBSP is released from custody, it can be a frightening experience for which the inmate is unprepared. In fact, it can be disabling. (125RT:19593.) PBSP does not prepare inmates for release. The only "preparation" provided is a videotape about some aspects of life outside prison. (125RT:19594.) The disabling effect on the inmate upon release is often physical, including anxiety and panic attacks. (125RT:19594-19595.)

Haney testified that in his opinion appellant had become institutionalized as a result of his prison experiences. (125RT:19605, 19607.) In addition to interviewing appellant, Haney reviewed appellant's custody records, including reports prepared by psychologists in the criminal justice system. (125RT:19606-19607.) Custody records from when appellant was only thirteen years old indicated that the myriad of problems from which he suffered suggested that long-term psychotherapy was

essential. No records showed, however, that appellant received any assistance, let alone long-term psychotherapy. (125RT:19608.) His custody records reflected that he suffered from the ravages of alcohol and substance abuse, possible depression and also a lack of skills to cope with stressful situations. (125RT:19612-19614.)

3. Appellant's Juvenile Probation Officer

Appellant's former juvenile probation officer, Marcile Jones, testified regarding appellant's fractured childhood, early substance abuse and addiction, and lack of family or community support. (123RT:19271-19274, 19276-19284, 19291-19294.) Appellant was considered an at-risk youth due to his emotionally impoverished home life, the absence of support or a helping hand from a responsible adult, his poor school performance and the overwhelming problems of his family situation, all of which made it nearly impossible to provide appellant with realistic assistance. (123RT:19280-19284.) Jones testified about appellant's early exposure to and use of marijuana and other addictive substances. Appellant used these drugs and sniffed glue beginning in elementary school. (123RT:19276-19278.)

4. Appellant's Family Members

Appellant presented brief testimony from five members of his family. Appellant's father, Robert Scully, Sr., who was recovering from a heart attack at the time of trial, testified via a pre-recorded videotape. He told the jury that appellant was about two or three years old when he and his wife, appellant's mother, separated and divorced. (122RT:19229, 19232.) After their separation, other than photos through the mail, Mr. Scully did not see his son again until the 1980s, when appellant was incarcerated at San Quentin State Prison. (122RT:19233-19234.) From 1989 until shortly

before he testified, when he was contacted by the defense, Mr. Scully had lost contact with appellant. (122RT:19235.) Mr. Scully described himself as a binge drinker, and did not give up alcohol until about three or four years prior to his testimony. (122RT:19233-19234.) Appellant's grandfather was also an alcoholic. (122RT:19234.) Mr. Scully loves his son and was glad that he was back in his life. (122RT:19236.)

Appellant's sister, Marilyn Beall, testified via telephonic conditional examination. She suffered from a debilitating illness that interfered with her ability to speak and compromised her mobility. She was assisted in her testimony by her former husband, Ron Young. (124RT:19459, 19464.) When Marilyn was 15 and her brother was 13, they ran away together, from North Carolina to Florida, and were gone for about 6 months. (124RT:19464-19465.) Marilyn loved her brother and would have liked to be at his trial, but her health precluded her attendance. (124RT:19464-19466.)

Appellant's sister, Lola Bobby, testified that their home life growing up was difficult. As her brother before her, she too left home early because of the many problems there, but she eventually went back. (124RT:19450-19451.) Their mother suffered from depression and anxiety and at times abused alcohol. Their mother and step-father were violent. (124RT:19452-19454.) There was alcohol use and abuse in the family, and her brother, not immune to it, began drinking when he was 11 or 12 years old. (123RT:19300-19306; 124RT:19453-19454.)

Appellant presented very brief testimony from his mother and his sister Patricia, both of whom testified that they were at the trial to show their support and express their love for appellant. (124RT:19448-19450.)

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ARGUMENT

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THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S INITIAL AND RENEWED MOTIONS FOR A CHANGE OF VENUE REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

The loss of Deputy Trejo not only affected the deputy's family, his colleagues and friends, but the county in which his death occurred. Yet it was that county in which appellant was tried. A media blitz publicizing the case, emphasizing the profoundly sad loss of Deputy Trejo and excoriating appellant, resulted in a community so hurt by the loss and enraged about the circumstances that led to Deputy Trejo's death, that the crime and the hostility toward appellant it engendered became embedded in the Sonoma County community's public consciousness. Indeed, the press reported that for some, their community has become "a paradise lost." It was therefore not surprising, indeed it was inevitable, that appellant could not be fairly tried in Sonoma County.

Appellant filed a pretrial motion to change venue. Venue surveys conducted by both parties showed an astronomically high recognition rate of the case and appellant, as well as a high rate of prejudgment as to appellant's guilt and the sentence the respondents believed he deserved. The defense survey showed that approximately 83 percent of the respondents recognized appellant's case (12RT:1482; 51RT:7888-7889), and approximately 78 percent of those who recognized the case believed that appellant was either probably or definitely guilty (12RT:1492-1494). The prosecution expert's survey found an approximate 73 percent of Sonoma County respondents recognizing appellant's case (13RT:1716-

1717), and 70 percent of the county's respondents believing that appellant was probably or definitely guilty (13RT:1731). Nevertheless, despite the rampant and negative publicity about appellant, the trial court denied appellant's motion.

Appellant's chances of a fair trial in Sonoma County were then further reduced when his jury selection was forced to trail that of his co-defendant. The trial court had ordered a joint trial with separate juries for appellant and his co-defendant with appellant's jury to be selected first. However, appellant's lead counsel became ill and could not proceed on time, so the court instead ordered that the co-defendant's jury be selected first. This left appellant in a particularly vulnerable position in terms of attempting to obtain a jury that had not been prejudicially effected by the extensive pretrial publicity and inflammatory rhetoric in the community. It also raised defense concerns that if appellant renewed his venue motion after voir dire, the court would be even less inclined to grant appellant's motion given that the co-defendant's jury would have been selected and waiting for weeks to begin the trial and that the county had undertaken a significant expense in modifying the courtroom to accommodate two separate juries.

Not surprisingly, during the selection of appellant's jury, voir dire established that approximately 85 percent of the jury panel had at least some knowledge of the case. (21CT: 4273, 4278-4287.) Of the jurors who became appellant's jury and decided his fate, 75 percent knew of the case before they arrived for jury duty. (51RT:7890.) At the completion of voir dire, appellant renewed his motion to change venue, and the court again denied it.

At the time of the initial venue motion, as well as during and after jury selection and the renewed motion to change venue, the evidence demonstrated that appellant could not receive a fair trial in Sonoma County due to the massive publicity adverse to appellant. The record relating to appellant's venue motions plainly establishes that, as a result of the massive publicity, the prejudice to appellant not only should be *presumed* as a matter of law, but was *actual* as a matter of fact. At the time of appellant's motions, it was reasonably likely that a fair trial could not be had in the county, and it was reasonably likely that a fair trial was not had, requiring reversal of the entire judgment.

B. Factual and Procedural Background

1. The Venue Hearing

Appellant filed his initial motion for a change of venue on May 3, 1996 (14CT:2626-2663), a little over one year after the charged crimes occurred. Four expert witnesses testified at the hearing a few weeks later, at which the defense called Drs. Edward Bronson and Robert Ross. The prosecution called Dr. Ebbe Ebbesen and in rebuttal, the defense called Dr. Ronald Dillehay. The experts testified at length and they all essentially agreed that the potential jury pool had been exposed to extensive publicity adverse to appellant.

a. Dr. Edward Bronson

The court qualified Dr. Bronson as an expert in the area of change of venue.[39] (11RT:1382-1383, 1401.) Bronson initially conducted an analysis

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[39] Bronson had been qualified as an expert in court well over 100 times. (11RT:1375, 1377-1378.) He had been retained by the defense in two other cases in 1996 in which the victim was a law enforcement officer. (continued...)

of the pretrial publicity in appellant's case to make a recommendation as to whether a venue change should be considered. (11RT:1403, 1411-1412; 12RT:1421.) He reviewed newspaper articles and electronic coverage regarding appellant's case and, upon seeing the quantity and quality of the pretrial publicity, became concerned whether appellant could get a fair trial in Sonoma County. (11RT:1410-1412; 12RT:1471-1472.)

To address these concerns and provide additional information to defense counsel and ultimately to the court, Bronson recommended that a survey be conducted. (11RT:1405, 1411-1412.) The survey was intended to measure the recognition rate of appellant's case in the community, to test for prejudgment, including penalty prejudgment, whether appellant could begin a trial in Sonoma County with his presumption of innocence intact, and to determine specific knowledge that respondents might have about the case, as well as their feelings about the case and appellant. (11RT:1295, 1301; 12RT:1481-1482.) The survey was designed and written by Bronson and administered by his colleague, Dr. Robert Ross.[40] (11RT:1284, 1372, 1410; 12RT:1479.)

Bronson's survey preparation included a detailed content analysis of the media coverage by systematically reviewing the publicity that attended

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[39] (...continued)
In one of those cases, after conducting a survey, Bronson recommended that a change of venue was unnecessary. (12RT:1472.) In the other, Bronson recommended against a venue change without even conducting a survey. (12RT:1446-1447.) Bronson has concluded that a venue change was unnecessary about 75 times in the cases in which he has been retained. (12RT:1472-1473.)

[40] The court found Ross qualified as an expert in survey design and implementation. (11RT:1285). Ross, a political science professor, had taught methodology for 28 years. (11RT:1279.)

the case. (11RT:1403.) In reviewing the nature and extent of the publicity in this case, Bronson kept in mind what the courts have addressed in terms of the kinds of media coverage most likely to damage a defendant's fair trial rights, such as inflammatory language, material that creates a strong presumption of guilt, inaccurate characterizations and inadmissible material. (11RT:1405, 1412-1413, 12RT:1436-1437.) According to Bronson, inadmissible material learned from the media is particularly problematic because a court's ruling that such material cannot be admitted during the guilt or the penalty phase is of little value if jurors have read about it previously. It is difficult during voir dire to learn the actual knowledge prospective jurors have regarding inadmissible evidence because counsel must frame the question so that the question itself does not reveal the inadmissible evidence. (12RT:1442.)

Bronson reviewed close to 140 newspaper articles about appellant's case. (12RT:1424.) Approximately 110 of the articles he reviewed appeared in one newspaper, the Santa Rosa Press Democrat (Press Democrat), which is the local paper with the largest circulation in Sonoma County. (12RT:1424-1425.) According to Bronson, when the articles are concentrated in one newspaper and it is the main newspaper for a community, the potential harmful impact on the jury pool is exacerbated. (12RT:1424.)

In addition to the sheer number of articles, Bronson looked at where they appeared in the newspaper; for example, whether it was on the front page and with accompanying photographs, or in the back pages of the newspaper. (11RT:1413-1414; 12RT:1422-1423.) The placement is significant because a front-page article is more likely to be read and it represents an editorial judgment that it is important. (12RT:1425.) Sixty-

nine of the one hundred forty articles were on the front page, all but two of which were so long that they were continued beyond the front page. Bronson noted that front page articles had continued since his initial review and that one article was a detailed account of appellant's prior criminal record. (12RT:1425-1426.) The articles he reviewed included photographs, graphics and graphic cartoons. (12RT:1426.) Bronson commented that there were a number of letters to the editor, and that the Press Democrat's editorial board included seven editorials in the newspaper about appellant and his case, all of which illustrated that the case was of special concern to the community. (11RT:1413-1414; 12RT:1422-1423; 1426.)

Bronson considered the extent of the publicity, including whether the publicity was concentrated in the first week or two after the crime or whether it continued to be covered by the news long after the crime. (11RT:1413-1414; 12RT:1422-1423.) In appellant's case, the publicity continued after the first few weeks of the crime, and had continued for over a year after the crime. (12RT:1423-1424.)

Bronson considered the nature of the publicity, commenting that both the courts and social science research have addressed the prejudicial impact from inflammatory language, such as describing a killing as "execution-style." (11RT:1405; 12RT:1436-1438.) In appellant's case, there were 21 media references to "execution style slaying," as well as several other similarly inflammatory descriptions of the perpetrator of the homicide as a "cold-blooded killer." (12RT:1435-1436, 1438, 1468.) This is the kind of publicity, as opposed to fact renditions, that creates an emotional reaction to a case in the community, either in favor of the victim, or hostility toward the defendant, or both. (12RT:1440.) Moreover, emotionally-laden publicity, as compared simply to a factual rendition of

what someone may know about a case, is difficult to address and cure during voir dire. It is also difficult to know how such inflammatory language may ultimately influence and affect the judgment in a case. (12RT:1440-1441.)

In assessing the impact of the publicity, Bronson considered the salience of the crime to the community. (12RT:1444-1445.) He explained this term in the context of a homicide where the victim was a law enforcement officer. Acknowledging that such crimes are generally not well-received, there is nonetheless a difference when the victim was a protector for that community – the community where the flags were flown at half staff and where there was an outpouring of emotional support for and recognition of the victim and his contributions to the community – as occurred in this case. (12RT:1444-1445, 1462.)

Material that may later be ruled inadmissible was another area Bronson addressed. In appellant's case, the media saturated the community with inflammatory material that was subsequently ruled inadmissible. For example, appellant's alleged membership in the Aryan Brotherhood became a major theme of numerous newspaper articles. There were 38 references to the Aryan Brotherhood Prison Gang, Aryan Nation, white pride, prison gangs, and white supremacists. (12RT:1463-1464.)

The media also was replete with articles about appellant's prior convictions and alleged prior misconduct, including acts for which he was not convicted. The media coverage of this information was before the court had ruled, one way or the other, about its admissibility at appellant's trial.

The media also published numerous articles about appellant's restraints. As a result, appellant went to trial in a community that had been informed, out of court, of the great lengths the county went to in acting on

its belief that appellant required restraints beyond the norm. Additionally, newspaper articles included 124 references to Pelican Bay State Prison and appellant, and described the prison as one for "hardened criminals," "violent felons," "animals," inmates who display "disruptive or assaultive behavior on other prisoners," and "hard core criminals." (12RT:1443-1444.)

Ultimately, a significant amount of this evidence was found to be inadmissible. The trial court granted appellant's motion that the prosecution be prohibited from making any references to the Aryan Brotherhood. (53RT:8028.) The court also precluded the prosecution from introducing a number of appellant's prior convictions as impeachment when appellant testified on his own behalf (23RT:3180-3182, 3185-3186), and limited the number of allegedly similar robberies introduced under Evidence Code section 1101. (17RT:2531-2532, 2568.) The trial court also granted appellant's motion to limit the jury's observations of appellant's restraints in the courtroom. (53RT:8112-8113.)

Bronson testified that one extraordinary aspect of appellant's case and the extensive media was the vilification of appellant, unaccompanied by any mitigating or humanizing references to or about appellant. He could not recall ever before having worked on a case in which the media failed to report something about the accused that demonstrated his humanity. In this case, he found no reference in the media to a witness saying appellant was their friend, no comment by one of appellant's parents or even a reference to appellant's childhood. (12RT:1464-1465.) When a jury is inundated with publicity of negative characteristics, coupled with an utter lack of positive references, it affects both phases of a capital trial, and in particular the penalty phase, where the jury looks at the accused as an individual

before deciding his fate. The publicity in this case dehumanized appellant. (12RT:1465.)

The survey was conducted from January 18 to January 28, 1996. (11RT:1311.) Demographic questions were asked to ensure a reasonably close approximation of the general population, specifically of the adult, jury-eligible population in Sonoma County. (11RT:1298.) The data collected was based on 402 respondents and there was a solid response rate of 70 percent. (11RT:1294, 1314.) Ross found that the sample in the survey was an unbiased representation of the pool of prospective jurors in Sonoma County. (11RT:1326.)

Bronson found that of the 402 qualified respondents, 335 (83.3 percent) recognized appellant's case. Of the respondents who recognized the case, 78 percent thought appellant was either definitely or probably guilty. This, Bronson testified, was extraordinarily high. Appellant's case was one of the highest cases of prejudgment on which he had ever worked. (12RT:1493-1494.)

Bronson opined that the publicity was so prejudicial in this case that, not only was there a reasonable likelihood that appellant would not get a fair trial in Sonoma County, but a certainty that he could not. He based his opinion on the nature, extent and analysis of the publicity; both the qualitative and quantitative nature of the media coverage;[41] his research on appellant's case; and the survey results. (11RT:1410; 12RT:1468-1469, 1517-1518, 1529.) The survey results confirmed that prejudice flowed from

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[41] As Bronson pointed out, media penetration is also found among people who may not regularly listen to or read the news. They are exposed to the information in the media via other sources, such as informal conversations with friends, family members and coworkers. (12RT:1513.)

the publicity. (12RT:1517.) In his opinion the remedy was a change of venue.

In recommending a change of venue Bronson also took into account that the prosecution was seeking the death penalty for appellant. He did this for two reasons. First, the prosecutor's decision to seek death affects both the nature and gravity of the crime. (12RT:1448.) There were 111 references to appellant's case being a death case, eight of them headlines. (12RT:1449.) Second, the impact of such pretrial publicity and its effect on the emotional status of the people sitting in judgment of the accused is particularly insidious because of the normative decision-making that occurs during sentencing in a capital case. (12RT:1450.) As Bronson aptly queried, how does one cure the fact that the pretrial publicity created a sense in the community that Deputy Trejo's death needed to be avenged? (12RT:1450.)

Based on the publicity analysis and the survey, Bronson did not believe voir dire would provide an avenue to cure the problem. (11RT:1410; 12RT:1477, 1518.) He explained that "acquiescence bias" – the tendency of a person to give an answer to a question that may be more socially desirable than fully truthful – plays a part in voir dire, unlike in an anonymous survey, where there is no judgment as to one's biases. (12RT:1477-1478, 1502, 1519.) Bronson noted as an example that there were many respondents in the survey who readily gave their belief about what should happen to appellant, including respondents stating, "hang him," "string him up," "fry him," execute him swiftly, and comments from some respondents who, while they did not believe in the death penalty, believed from what they had read and learned about the case, that appellant should be executed. (12RT:1503.)

According to Bronson, voir dire often can not cure this bias because research has shown that most people do not recognize their own biases and prejudices and that they generally sincerely believe that they can decide issues fairly and impartially. Moreover, in a case with extensive pretrial publicity, such as appellant's, most jurors cannot do the "mental gymnastics" necessary to change opinions or conclusions from those which have been overwhelmingly disseminated in the media. (12RT:1519.) Also, on a survey one can ask the kinds of questions that cannot be asked on voir dire because it touches upon information that might be inadmissible at trial. For example, in appellant's case, such a question might be whether the respondent had heard or read about whether appellant was a member of the Aryan Brotherhood, or was an escape risk. While such information was pervasive in the media, it was inadmissible at appellant's trial. Had such questions been asked during voir dire, it would have further subjected appellant to bias and prejudice. (12RT:1478.) Another reason that voir dire cannot cure the harm from extensive pretrial publicity is due to the manner in which memory works in recalling information. Something can be said at trial that triggers a recollection of prior knowledge of the case, that the juror had not previously remembered. (12RT:1548-1549.)

Bronson opined that the size of the Sonoma County community also supported a change of venue. In January, 1996, its population was only 421,500. (18RT:2650; 18CT:3616.) The death of the deputy resulted in an emotional community outpouring in Sonoma County, including a community fund to defray expenses for the family and a scholarship fund in Deputy Trejo's name. These are the kinds of county-wide responses that occur in small communities, that is, the "personalization" of things that can happen in one's own community and which therefore support a change of

venue. (12RT:1460-1461). Bronson said that the impact of Deputy Trejo's death on the community was well-illustrated by the Sonoma County prosecutor himself, who was quoted in a television report as saying that the county was seeking death for appellant because the killing of Deputy Trejo "strikes . . . at the community." (12RT:1460.)

As demonstrated below, Bronson's concerns, and conclusions, were borne out during voir dire.

b. Dr. Ebbe Ebbesen

The prosecution offered Dr. Ebbe Ebbesen as an expert in the area of change of venue surveys. Ebbesen specialized in experimental and social psychology, and also taught methodology. (13RT:1662-1664.) He had designed venue surveys for purposes of presenting them in court on four occasions. (13RT:1668.) He had consulted on issues of venue, and testified as an expert, 30 times. (13RT:1668-1669.) He had never recommended a change of venue (14RT:1915-1916), and had testified only on behalf of the prosecution (14RT:1917). Ebbesen was extremely skeptical about the need for ever changing venue, even in highly-publicized cases. As an example of a case in which he would consider a change of venue appropriate, Ebbesen said that if the public were on the courthouse steps asking for the accused's execution and the jury had to make its way through that mob, he might then be worried and consider whether a change of venue would be appropriate.[42] (14RT:1822-1823.)

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[42] Ebbesen had also testified for the prosecution in the trial of Richard Allen Davis (*People v. Davis* (2009) 46 Cal.4th 539), and found that a change of venue from Sonoma County in that case was not called for because, in comparing the answers from respondents in Sonoma to those in San Diego, he had concluded that the defendant could be fairly tried in

(continued...)

The prosecution retained Ebbesen to review the defense venue survey. (13RT:1670.) The prosecution did not retain him to determine whether a venue change in appellant's case was necessary to ensure that appellant receive a fair trial. (13RT:1661.) Given that his only task was to evaluate Bronson's survey and results, Ebbesen believed that he had no need to know the nature and extent of the publicity in appellant's case. He stated that he could determine the adequacy of the survey without such knowledge. (14RT:1879-1880.)[43]

Ebbesen believed that there were flaws in the defense survey. (13RT:1670.) He decided that to render an opinion about Bronson's survey and results, he needed to design and administer his own survey to determine whether such flaws existed, and if so, whether they created a problem with the results. (13RT:1670.) He conducted his own survey in two counties, Sonoma County and San Diego, the county in which he worked. He thought that by conducting his own survey, using his own methods, in two

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[42] (...continued)
Sonoma. (14RT:1823-1824.) Ebbesen agreed that his conclusion in his summary report in the *Davis* case had the exact same wording as that for appellant's case, but for the change in the defendants' names. (14RT:1832.) Ebbesen also stated that, in *Davis*, although he maintained that the defendant in that case could have been fairly tried in Sonoma County, for appearances sake it may have been prudent to have moved the venue because when "a juror comes in and starts crying" during voir dire, even though jurors in other jurisdictions may have also cried during voir dire, "it doesn't look fair" when it occurs in the venue in which the crime occurred. (14RT:1878.)

[43] When Ebbesen later decided to conduct his own survey, he maintained that knowing the nature and extent of the publicity was unimportant. He nonetheless read a portion of the print media, but did not view any of the television or radio publicity. (14RT:1879-1882.)

counties, it would give him a baseline against which to compare the Sonoma County results and to test whether the conclusions from the defense survey were appropriate. (13RT:1688-1689.)

On numerous occasions during his testimony, Ebbesen had to apologize to the court about the errors in his survey summaries, reports and appendices, or otherwise point out errors in his survey and reports as he discovered them during his testimony. (See, e.g., 13RT:1686-1687 [grammatical and typographical errors, misspellings, due to time constraints]; 13RT:1691 [appendix tables unnumbered due to being pressed for time]; 13RT:1698 [discovery before survey completion that about 50 of the interviews were incorrect, all of which had to be redone]; 13RT:1723 [mistake in parenthetical accompanying one of the survey questions]; 14RT:1764 [survey question failed to show the skip pattern]; 14RT:1859-1860 [failure to obtain or review the incomplete surveys or the data about them].)[44]

Ebbesen found that his survey produced results similar to those produced by Bronson's survey. Indeed, Ebbesen had to agree that Bronson's high recognition rate was accurate given that he too found a high rate of recognition in Sonoma County (between 68 and 73 percent) and concluded that the difference between the recognition rates by Sonoma and San Diego Counties' residents was "highly significant." (13RT:1705.)

Most of the remainder of Ebbesen's testimony was his attempts to minimize the significance of the high recognition and prejudgment rate in Sonoma County. Ebbesen testified that while Bronson's survey and results

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[44] Dr. Dillehay testified about the errors and problems with Ebbesen's research, methodology, survey and survey results. (See *post*, § c.)

may have accurately determined the high number of people in Sonoma County who were familiar with appellant's case, it did not determine how much the respondents actually knew about appellant and the case. (13RT:1703-1704, 1708.) To account for this, Ebbesen's survey told respondents some of the facts and asked them to self-assess whether what they knew about this case was "a lot, some, very few or none of the facts." (13RT:1704.) Even using this method, however, Ebbesen's survey demonstrated that 68 percent of Sonoma County respondents were familiar with appellant's case, as compared to about 12 percent in San Diego. (13RT:1706.) Among the information given to respondents in Ebbesen's survey was Deputy Trejo's and appellant's name, which resulted in 73 percent of Sonoma respondents indicating familiarity with the case, which Ebbesen admitted was "very highly significantly different" than San Diego respondents. (13RT:1716-1717.) Ebbesen also found that when respondents were asked to state the charges against appellant, Sonoma County residents provided the information at a "much higher rate" than respondents in San Diego. (13RT:1721.) Ebbesen agreed that the depth of the knowledge that respondents had about appellant's case showed that there was a "very large significant difference between Sonoma and San Diego." (13RT:1713.)

Ebbesen expressed fault with Bronson's survey for failing to account for how guilt-prone people are. (13RT:1679, 1691.) He testified that the high rate of prejudgment found among Sonoma County residents may be due to how guilt-prone people are, and not from the extensive publicity about appellant and the case. (14RT:1744, 1746, 1751-1752.) Ebbesen

believed that most people believe in a presumption of guilt, not innocence,[45] and are guilt- and conviction-prone. He said that these are facts that should be taken into account when trying to determine whether a person's knowledge about the case is what led them to be guilt-prone, or whether they were guilt-prone because that is the underlying nature and belief of most people.[46] (13RT:1690.) Ebbesen asked all respondents whether they believed appellant was definitely or probably guilty. Bronson had asked this question only of respondents who were familiar with the case. (13RT:1728-1729.) For respondents who said they were unfamiliar with the case, Ebbesen fed them information about the case. In addition to telling them the charges, he told respondents the victim's and appellant's name (13RT:1716), and the media's account of appellant's actions against Deputy Trejo. Stories included details about the encounter between appellant and the deputy, and appellant's surrender the following day. (13RT:1722.) Based on the media's rendition of the homicide provided to the respondents, 40 percent of San Diego respondents indicated the perpetrator was probably guilty. (13RT:1729.)

Ebbesen contended that this rate might suggest that Bronson's high guilt rate in Sonoma county was because some of the respondents started

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[45] Indeed, Ebbesen stated that "nobody begins presuming anybody is innocent." (14RT:1781.)

[46] Defense expert Dillehay testified in rebuttal regarding Ebbesen's questions to respondents about their guilt- or conviction-proneness, noting that Ebbesen's questions personalized the questions, which can skew the results. Dillehay testified that Ebbesen's results differed substantially from numerous other tested surveys in which guilt-proneness questions were not personalized. The results in other tested surveys were that far fewer respondents were guilt- and conviction-prone. (16RT:2329-2334; 18RT:2620-2622.)

with the preconceived notion that anyone charged with a crime was guilty, and not because the community was saturated with publicity. (13RT:1730.) Ebbesen nonetheless admitted that the guilt rate among respondents in Sonoma county, which he found to be 70 percent, was "statistically significantly higher" than the guilt rate that his survey found for San Diego respondents. He stated this likely reflected an effect from the publicity. (13RT:1731.) Indeed, Ebbesen's survey results regarding Sonoma county respondents' belief in appellant's guilt were even higher than that found by Bronson, and Ebbesen himself noted the closeness in both of their percentages. (13RT:1731.) The percentage that Ebbesen found in Sonoma County was 70 percent (13RT:1731), and Ebbesen noted that Bronson had found 65 percent (14RT:1799). Based on one of Ebbesen's questions about whether Sonoma County respondents believed appellant was guilty, Ebbesen's result was 72 percent, which he noted was a "large difference" when compared to San Diego respondents and a result he believed was due to publicity. (14RT:1799.)

Next, Ebbesen contended that the high rate of prejudgment among Sonoma respondents may not be fixed, which he contended Bronson failed to take into account. Ebbesen included "set-aside" questions in his survey. These ask respondents whether they could set aside what they had read, learned, seen or heard about a case and about the accused, set aside their prejudgment notions or opinions from that information and not be influenced by that information, and instead base their decision on what they may later hear in court. (13RT:1683; 14RT: 1750.) Ebbesen decided to include such questions in his survey, although he admitted that the validity and usefulness of such "set-aside" questions had been criticized and that he himself had criticized them. (14RT:1864-1865.) He also admitted that

other than his own surveys, there was no research of which he was aware that supported set-aside questions in terms of their efficacy and value. (14RT:1868.) Further, he agreed that Bronson's findings about the "fixedness" of a person's opinion were correct. (14RT:1783.) Nonetheless, he proceeded with such questions in his survey. He found that respondents in both counties told him that they could set aside their previously-held opinions about guilt, which suggested to Ebbesen that the widespread publicity in Sonoma County did not fix opinions in that county any more than opinions were fixed in San Diego County. (14RT:1750-1751, 1763, 1802.)

Ebbesen also commented that a high percentage of respondents in both counties claimed they could be fair and impartial (14RT:1802), although he admitted that when he tested this result by conducting a jury simulation, that a "statistically significant" higher percentage of respondents in Sonoma County maintained their opinion that appellant was guilty of first degree murder (14RT:1808). It is not clear why Ebbesen conducted the jury simulation given that for years he had criticized the use of mock jury questions in surveys. (14RT:1848.) When the results showed the statistically significant percentage of Sonoma County respondents who maintained their opinion that appellant was guilty of first degree murder, as opposed to the San Diego respondents (14RT:1808), Ebbesen could only offer speculation as to why the higher rate might not be the result of the extensive publicity in Sonoma County (14RT:1770-1775, 1808).

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Ebbesen admitted that for years he had criticized the use of mock jury questions in surveys.[47] (14RT:1848.) Nonetheless, Ebbesen instructed the respondents to act like jurors and provided them with simulated defense evidence. (14RT:1763-1764, 1777, 1808.) Ebbesen recognized that Sonoma respondents returned a statistically significant higher rate of guilt verdicts than San Diego respondents, but contended it was not necessarily due to pretrial publicity. He suggested it may have been due to the presumption of guilt with which most people start, or that respondents may have been less familiar with the case than they had claimed to be. (14RT:1770-1774.)

This, he then argued, may have caused the higher percentage of prejudgment of guilt in Sonoma County, rather than it having been due to the extensive pretrial publicity in the county. (14RT:1770-1775.) Therefore, Ebbesen claimed, Bronson's conclusion that the 64 percent who believed appellant guilty was due to publicity-induced prejudgments of guilt, was overestimated.

Ebbesen also contended that the significant statistical differences between respondents in the two counties may have been due to respondents' confusion about their actual familiarity with the case. (14RT:1808.) To address this possibility, Ebbesen gave respondents additional information about the case, and found that Sonoma County respondents could be

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[47] In rebuttal, Dillehay echoed the problems with simulations, and agreed with Ebbesen's criticisms. (16RT:2374.) During Dillehay's testimony, the court interjected that she agreed completely with him regarding simulations and that Ebbesen's questions did not simulate reality in the courtroom, provided no benefit in understanding what a juror may actually do and that she had no intention of considering the results from those questions. (16RT:2374.)

"pushed" in their beliefs to the same extent that San Diego respondents could be pushed. After pushing the respondents' beliefs, Ebbesen found he was able to at least decrease the rates of prejudgment between the counties. (14RT:1809-1813.)

Another feature that Ebbesen included in his survey, that Bronson had not, was false-positive questions. (14RT:1756-1757, 1791-1793.) His false-positive questions added a made-up fact to a media story, or modified a fact or information in a story that had been in the media. (14RT:1935, 1937-1939.) If a respondent indicated that he recalled the information in the question with modified or incorrect information added, Ebbesen counted it as a false-positive, despite the numerous media-reported "facts" that Ebbesen had also included in the question. (14RT:1937-1939; 16RT:2361-2367.) Ebbesen contended that respondents who indicated familiarity with appellant's case based on a false-positive question should not be included in the recognition rate in survey results. He suggested that, theoretically, some of the respondents in Bronson's survey may not have had the familiarity they claimed to have had and should not have been included in his survey results of the recognition rate. If respondents were included who Ebbesen would have discounted, based on their answers to a false-positive question, it might account for Bronson's high recognition rate.[48] (14RT:1747; 1793-1795.)

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[48] This is a curious supposition, however, given that Ebbesen's recognition rate was also high – between 68 and 73 percent. Moreover, Dillehay testified, *post*, about the flaws and problems with Ebbesen's false-positive questions, and explained that such questions lead to improper conclusions about a respondent's knowledge. (18RT:2604.) He said that prejudice does not arise simply from facts that people may know, but includes misinformation and falsities. (18RT:2606.)

Ebbesen conceded that the recognition rate of specific aspects of appellant's case was far greater in Sonoma than in San Diego. (14RT:1794-1795.) He contended that this may not have been due to prejudgment from the publicity, however, but instead due to the nature of the crime, that is, a murder, as well as that the victim was a police officer. To test this theory he asked respondents who had previously stated that they thought appellant was definitely guilty, whether appellant should be executed for his crime. In response to this question he found that there was not a significant difference between the number of respondents in San Diego and Sonoma, who had already decided that appellant was definitely guilty, who would execute appellant after their first degree murder verdict, which was based on what they knew about the crime from publicity. (14RT:1748.) Ebbesen contended that his result may indicate that the hostility expressed toward appellant from Sonoma respondents may not have been from the extensive publicity, but instead from the nature of the crime. (14RT:1748.)

In sum, Ebbesen's dubious analysis, theoretical musings and testimony about Bronson's findings offered little in support for maintaining the trial in Sonoma County. Ebbesen's results were remarkably close to Bronson's results. On those occasions when he contended that questions in his survey resulted in a lesser degree of difference between Sonoma respondents and that of his test county, he employed methods that he agreed had been criticized by experts in the field, including himself. Moreover, the high rate of recognition and prejudgment remained significantly statistically greater in Sonoma than in San Diego in Ebbesen's results, even using his dubious methodology.

c. Dr. Ronald Dillehay

Ronald Dillehay, Director of the Center of Justice Studies at the University of Nevada, testified for the defense in rebuttal. Dr. Dillehay was qualified as an expert in the area of venue and the law.[49] (15RT:1973.) The defense retained Dillehay to conduct a scientific evaluation of Bronson's, Ross's and Ebbesen's research. He looked at the studies from start to finish, from the formulation of the questions through the sampling of respondents, the procedures used in the administration of the interview, and the data analyses conducted, including the interpretations of the data in light of the current accepted methods. (15RT:1974.) Dillehay reviewed the publicity in appellant's case; read and studied the Ross reports and Ebbesen's report; read testimony from the venue hearing and was present during Ebbesen's testimony; reviewed Ebbesen's, Ross's and Bronson's data; and read reports, affidavits and testimony from Ebbesen's previous cases. (15RT:1974.)

Dillehay testified at length about the numerous problems with Ebbesen's survey, including interview procedures, data collection and standardization. (15RT:2104-2120, 2122-2127; 16RT:2345-2348, 2354-2357.) Dillehay also expressed concern with the computer system that Ebbesen used in compilation of the survey results, because it was a system

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[49] Dillehay had been retained for or involved in research on over 100 criminal court cases, had published over 100 articles in peer-reviewed journals (15RT:1963, 1966), had designed and administered numerous venue surveys and had critiqued and analyzed others' venue surveys. (15RT:1967-1968.) On the cases in which the defense has retained Dillehay, he has at times recommended a change of venue and at other times has not only recommended against moving for a venue change, but has advised that a survey was not needed for that determination. (15RT:1989-1990; 16RT:2422-2423.)

that failed to discover improperly entered data. (15RT:2104-2106.) According to Dillehay, another problem with the data was that Ebbesen had not collected data on the number of respondents who terminated the survey or how many calls it took to get the number of subjects used in the survey. (15RT:2001-2002.) In Dillehay's 30 years of work in the field he had never reviewed a study or seen a survey that did not report the response rate, which is data on both the number of calls made and the consequences from each call. Dillehay noted that Bronson had collected and documented the response rate in his report. (15RT:1981, 2110.) Dillehay added that without a response rate a serious evaluation of a survey cannot be done (15RT:1983), and was "astonished" that Ebbesen did not know his response rate and did not think it important (15RT:1982).

Dillehay observed other problems with Ebbesen's data. There were frequent discrepancies in the data analysis between the numbers in his report and in the sample size (15RT:2120; 18RT:2617-2619), and problems with how the responses were coded (16RT:2360). Ebbesen had initially provided the wrong "code book," which was needed to analyze Ebbesen's data file, and the wrong data file. (15RT:1976-1977; 16RT:2393-2394.) However, once Ebbesen sent Dillehay the corrected materials, Dillehay found that the new data variables, the raw data set and Ebbesen's data file still did not jibe. Dillehay had two independent statisticians conduct the analysis and they too were unable to make sense of Ebbesen's data. (15RT:1978.) Because Dillehay, as well as the other statisticians were unable to conduct an original analysis of Ebbesen's raw data, Dillehay instead worked from Ebbesen's own report. (15RT:1979; 16RT:2396.)

Dillehay found, as Ebbesen himself had testified, that Ebbesen's survey results demonstrated a statistically significant difference in

recognition rate between Sonoma and San Diego respondents. This was so despite the problems with Ebbesen's survey. (16RT:2340.) As stated above, Ebbesen's survey results demonstrated a 68 percent recognition rate in Sonoma County, as compared to a mere 12 percent in San Diego. (13RT:1706.) The likelihood of such a substantial difference arising by chance was 1 in 10,000. (16RT:2340.)

Dillehay addressed some of the ways in which Ebbesen's and Bronson's surveys, data and analysis differed. For example, Bronson did not include set-aside questions, and Ebbesen had included them in his survey. Dillehay testified that results from set-aside questions can be unreliable because respondents know the socially desirable response to give and the questions themselves imply the desired response, and research shows that preconceived attitudes about a subject intrude, even when respondents state that they can set aside those beliefs or attitudes. (15RT:1994-1997.) In any case, Dillehay found particularly telling that both Ebbesen's and Bronson's surveys demonstrated a profound prejudgment rate in Sonoma, despite respondents claiming that they could be fair and impartial and could set aside their prejudgment. Bronson's survey result as to prejudgment was 65 percent and Ebbesen's was 70 percent, results so close as to be within sampling error. (16RT:2352.)

During the hearing Dillehay commented upon an article about appellant's case in the Press Democrat that day, which was over a year after the crime. He stated that it was one that would likely lead to prejudgment. It described the crime, referred to appellant's criminal history, referred to the Aryan Brotherhood and appellant's alleged connection to that organization and referred to concealed weapons and the kinds of items

allegedly used in escape attempts. It was on the front page, continued to another page and included photographs. (18RT:2641.)

Dillehay testified about the harm that can come from massive publicity, as had occurred in this case, even if the publicized information is later admitted at trial. The damage from pretrial publicity remains because of the substantial difference between information acquired through the media or word of mouth and information acquired in the courtroom, presented under controlled and tested circumstances. (19RT:2647.) Moreover, even if some of the detail of the information was lost over time, its prejudicial effect generally was not. When new information is presented, it can restore the memory, including feelings that affect prejudice. (15RT:2420.)

When the prosecution seeks death, it exacerbates the problems that arise when a jury is selected from a venue that has demonstrated, by way of a survey, prejudgment against, and prejudice toward, the defendant. Research has demonstrated that when a highly-publicized capital trial takes place in the venue of the crime, jurors assume a role as the conscience of the community. (18RT:2644.)

Dillehay stated that in his experience appellant's case ranked among one of the highest in terms of case recognition and prejudgment of guilt. (15RT:1992.) He opined that the recognition and prejudgment rate were so high that there was a reasonable likelihood that appellant could not receive a fair trial in Sonoma County. (15RT:1999; 16RT:2380; 18RT:2643.)

d. The Trial Court's Ruling

The trial court denied appellant's motion without prejudice, subject to renewal after voir dire. (18RT:2649-2656, 2734; 18CT:3611-3628.) The court cited section 1033 and the five factors this Court has found relevant to

determine whether there is a reasonable likelihood that a fair and impartial trial cannot be had in a county. (18CT:3616.) These factors are the nature and extent of the news coverage; the size of the county; the nature and gravity of the offense; the respective standing in the community of the victim and of the defendant; and any political overtones present in the case. (*Maine v. Superior Court* (1968) 68 Cal.2d 375.)

The trial court stated that the extent and nature of the publicity was the factor it found that most supported a change of venue. (18RT:2649-2650, 2653.) The court also found that the gravity of the offense supported a change of venue but its nature did not, thus the gravity standing alone did not warrant a change of venue. (18CT:3619-3620.)

In assessing the publicity, the trial court reviewed the submitted exhibits. The court stated that the surveys, as well as the experts' testimony about them, were unhelpful and that they were too speculative to consider their results. (18CT:3624-3625; 18RT:2654-2656.) The court concluded that the extensive publicity was not inflammatory or sensational enough to warrant granting appellant's motion to change venue. The court substantially relied upon *Odle v. Superior Court* (1982) 32 Cal.3d 932, stating that if the publicity in that case did not warrant a change of venue, then the publicity in appellant's case also did not so warrant. (18RT:2653-2654; 18CT:3621-3624.)

As to the other factors, the court found that they did not support a change of venue. (18RT:2650.) The trial court stated that the victim was not prominent before his death and was not from a well-known or well-respected family. (18RT:2650-2651.) The trial court agreed that appellant was an "outsider" and was described in the media as a "career criminal," a "felon and recent parolee," among other unsavory descriptions. She stated

that none of the descriptions was necessarily inaccurate, and there was no evidence to indicate that the community was hostile to someone with these characteristics. (18RT:2650-2651.) In its subsequent written ruling denying appellant's initial motion, the court noted that appellant's unpopularity was "universal" and not confined to Sonoma County. (18CT:3619.)

The court concluded that the media stories about appellant's alleged membership in the Aryan Brotherhood was not a reason to change venue. It noted that there was once a case in which the defendant was portrayed in the media as being an Aryan Brotherhood member, venue was not changed and this Court upheld the trial court's ruling denying the motion. (18RT:2652.)

The trial court found that the gravity of the crime – a homicide of a police officer in which the state was seeking to have the defendant executed – indicated a change of venue was warranted, but the nature of the crime did not. Thus, analyzing the gravity with the nature, the court concluded this factor did not militate in favor of a change of venue. (18CT:3619-3620; 18RT:2652-2653.)

The court discounted the adverse impact from the political overtones in appellant's case, finding that legislation[50] introduced based on appellant's conduct was not the kind of situation supporting a venue change. In so concluding the court stated that the political overtones regarding appellant

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[50] Legislators from Northern California re-introduced legislation after appellant's arrest to require the Department of Corrections to physically transport inmates released from Pelican Bay State Prison, to their parole destination. The legislators specifically named appellant as the reason for the law's need. (See 14CT:2677, 2679; see also C. 3., *ante*.)

and his situation were unlike those that have supported a change of venue, such as "political finger-pointing," or a local defense attorney and prosecutor running for the same judgeship. (18RT:2655; 18CT:3626.)

The court adopted its tentative ruling and denied the motion without prejudice. (18RT:2734; 18CT:3611-3633.) Appellant petitioned for a writ of mandate to compel the trial court to grant a change of venue. (37SuppCT:9382, et seq.) The Court of Appeal denied the writ. (20CT:4046-4047.)

2. The Questionnaires and Voir Dire of Prospective Jurors, and Post-Jury-Selection Proceedings

Because this Court independently reviews the voir dire of the actual, available jury pool and the actual jury panel selected in evaluating appellant's claim that the trial court erroneously denied his post-jury-selection venue motion (*People v. Famalaro* (2011) 52 Cal.4th 1, 29-30), appellant provides below an overview of the selection process that occurred in appellant's case.

The court had summoned approximately 800 prospective jurors. (51RT:7896.) Over half were excused without preparing the multi-page questionnaire. One hundred and ninety-seven prospective jurors prepared questionnaires. (1SuppCT-22SuppCT.) After sequestered voir dire of prospective jurors about their knowledge of the case from pretrial publicity and asking them their views on the death penalty, only 88 jurors remained. (51RT:7888.)

Ultimately, the trial court swore 12 jurors and 6 alternate jurors to sit in judgment of appellant. Many of these jurors had beliefs adverse to appellant based on substantial knowledge about the case from publicity and other sources outside the courtroom. What they had read, heard and learned

was prosecution-oriented, hit close to home and thus felt personal to them given that the crime occurred in their community and to a deputy sheriff who protected them, and was prejudicial to appellant.

a. Appellant's Jurors

Juror 3360 had been unsuccessfully challenged for cause by the defense, based on that juror's prejudgment of the case from what the juror had learned from the publicity. (35RT:4839-4840; 36RT:4991.) This juror had read the Press Democrat and listened to local news about appellant and the case. He recalled the case in part because shortly after the crime occurred he was considering moving to Sonoma County. He read and heard that appellant had been released on parole from Pelican Bay State Prison, had been picked up by Brenda Moore, they were later confronted by Deputy Trejo, who was then shot and killed. (5SuppCT:1309; 45RT:4771.) He read newspaper accounts of appellant taking hostages. (5SuppCT:1309; 45RT:4771.) He was familiar with Pelican Bay State Prison, had heard that Pelican Bay was for the "problem prisoners" who "don't fit in with the general population," and wanted to know why appellant had ended up in that prison. (35RT:4790-4791.) The juror had talked about the case with friends and coworkers, and from the information he learned from the media, he favored the prosecution. (35RT:4771, 4784.) He found the media accounts prosecution-oriented and from what he had read and heard, he had formed the opinion that a "violent criminal committed another violent crime." (35RT:4771-4772.)

Juror 3726 had watched Deputy Trejo's memorial service on television, had talked about the case with her coworkers and had talked with her brother about Deputy Trejo's death, as he had once wanted to be a police officer. The news about appellant and Deputy Trejo's death

permeated the county to such a degree that this juror was familiar with the case even though she stated that she was not reading, watching or hearing much about current events at the relevant time period because she worked unusual hours and was also tending to her dying brother who was hospitalized in San Francisco. (43RT:6460; 10SuppCT2641-2643.) Nonetheless, she recalled the publicity. Moreover, her work involved being at a location close to the scene of the crime, resulting in a number of people at her work talking about the case. (10SuppCT:2642-2644; 43RT:6448-6452.)

Four of the other jurors in appellant's case, despite having indicated that they knew little about the case, had a degree of knowledge that demonstrated bias against appellant. They had read, heard and learned about appellant and the case, and had formed opinions based on the extensive publicity in Sonoma County. Little, if any of the publicity-induced information would have been known in a venue other than Sonoma County. When juror 4084 first arrived for jury duty, his recollection of the case was initially vague. During voir dire, he recalled more, including having read a number of reported alleged facts about the case, noting that the newspaper had "all the details." (43RT:6296-6297, 6302.) This juror recalled news stories and photos about the slain deputy's funeral, but had not noted it in his questionnaire because "it ha[d] nothing to do with the defendant that happened on that day." (43RT:6297, 6302; 16Supp CT:4471.) He had failed to recognize that the news coverage of Deputy Trejo's funeral was a story that touched the case and did not understand the import and significance of such information. During voir dire this juror recalled the photographs in the newspaper of the many police officers who attended the funeral, stating that what struck him most was the pictures of

the family, "that's the part that . . . brings the emotion out . . . the deceased is gone and the family is there grieving." (43RT:6309; 6302.)

Juror 3971, who was a juror at the guilt phase of appellant's trial, also initially indicated that she recalled little about the case. However, once her memory was triggered, she recalled having read in the Press Democrat the reporter's version of how the shooting occurred, and recalled personal information about Deputy Trejo, including that he had helped youth in the community with soccer. She also had talked about the case with others. (15SuppCT:4037; 45RT:6716, 6721.)[51]

Juror 4350, who listened to radio and read the local paper, also recalled reports as to how the crime occurred. The hostage-taking was near his home, he talked about the crime with his wife and was shocked that a killing and a hostage-taking could happen so close to his home. He was very familiar with the areas where the crimes occurred as he lived near them. (19SuppCT:5307-5308, 5310; 40RT:5671.)

Juror 3923 read an article in the Press Democrat that appeared shortly before jury selection, that repeated the story about what was alleged to have occurred. His coworkers knew he had been called for jury duty and, likely due to the local interest in the case, asked him whether he would be a juror for appellant's case. (13SuppCT:3665.) This juror also knew one of the deputies providing security in the courtroom. The deputy had been 3923's neighbor in 1996. The deputy and the juror were friendly and had helped each other out a few times. The court noted that while the deputy

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[51] Juror 3971 served at the guilt phase, but was excused by stipulation due to hardship prior to appellant's bifurcated trial on alleged prior convictions. (117RT:18653-18658.)

would not be a witness, he might well be one of the guards in the courtroom during the trial.[52] (51RT:7763-7765.)

Juror 4393 read the Press Democrat a few times a week and assumed from what she had read that appellant was guilty. On questioning, she modified this to say that he was at least the best suspect. (41A-RT:5814, 5820.) She recalled that the Press Democrat had reported that the two people in custody were most likely guilty. (20SuppCT:5495.) She had also heard people at work discuss the case. (41A-RT:5812; 20SuppCT:5494.) Her claimed willingness to judge appellant impartially was highly questionable. She stated that she thought, "if she had to," she could keep an open mind. (41A-RT:5818.)

Juror 4064 read a story about the case in the Press Democrat. He said his memory was vague about the case, but as soon as the judge described it, he recalled the news story he had read about the officer who was shot near Highway 12. He offered that when he first read the story he felt shock that an officer was killed when there was no altercation and that the officer had just peacefully walked up to the suspect's car. This juror had recalled these publicized "facts," from reading the newspaper, and had learned about the case from outside sources. (43RT:6363; 6371-6372; 16SuppCT:4316.)

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[52] Appellant had moved, on more than one occasion, to recuse the Sonoma County Sheriff's Department from acting as the courtroom's bailiffs at appellant's trial, including from being the bailiffs in whose charge the jury would be placed. (13CT:2615-2625; 19RT:2815; 104RT:16279-16281.) The court took judicial notice early in the proceedings that the entire Sonoma County Sheriff's Department had suffered and felt grief from the loss of one of their own (5RT:585), but denied appellant's motions. (19RT:2815; 104RT:16279-16281.)

Further demonstrating the breadth of the publicity in Sonoma County, and the effect on the pool and ultimately the actual jurors in appellant's case was a comment by juror 3166, initially an alternate, but who served as a juror at the penalty phase. She stated that she felt "really stupid" not knowing much about the case because "so many people" did. (36RT:5080.) She heard about the crime on the radio, although she generally did not listen to the news on either the radio or the television, and had not read a newspaper in four years. Nonetheless, she recalled that a deputy had been killed and she had talked about the case with others. (3SuppCT:656, 658-659; 36RT:5074.) This juror also regularly saw a friend who had served as a deputy sheriff on the same force as Deputy Trejo. That deputy had retired due to injuries from repeated scuffles in the jail when he was assigned to work there. (51RT:7799, 7802.)

b. The Juror Pool in Sonoma County

In order to accurately capture the atmosphere in Sonoma County, as well as to demonstrate the depth and breadth of the publicity which irremediably poisoned the well even before appellant's trial for his life began, appellant provides herein a summary of the voir dire of those prospective jurors who had knowledge of the case from pre-trial publicity and other sources outside the courtroom.

i. The Publicity Questions in the Juror Questionnaire

The jury questionnaire included generic questions regarding the news media, asking prospective jurors where they got their news and whether they followed crime stories. (See, e.g., 1SuppCT:5-6.) The questionnaire provided a short, two-sentence statement regarding the case, stating the date the shooting occurred; the name of the homicide victim and

of the defendants; and that the defendants were charged with, among other crimes, murder and a subsequent hostage-taking. Then followed a short series of questions about what prospective jurors had heard and learned about this case before appearing for jury duty, and whether what they had heard caused them to form an opinion about the case. (See, e.g., 1SuppCT:6-9.)

The information the prospective jurors had learned about appellant's case from publicity and from having listened and talked with others in the community showed a recognition rate which validated Bronson's pretrial survey. Specifically, 163 of the 197 prospective jurors who prepared a questionnaire recognized the case from pretrial publicity – a recognition rate of approximately 85 percent. (21CT:4278-4287.)

Many prospective jurors had recalled specific pejorative language from the news stories they had read and seen. Many recalled details of the crimes as reported in the news, often referring to specific terms the media frequently used, such as an "execution style" murder or a "cold-blooded" slaying, and the belief that appellant was guilty of a first degree murder. Some prospective jurors referred to the articles about appellant's alleged affiliation with the Aryan Brotherhood or a white supremacist prison gang, while others referred to appellant in various other pejorative terms, calling for his execution. For example, prospective juror 3093[53] said appellant murdered Deputy Trejo "execution style" (2SuppCT:379); 3178 said this was an "open and shut" case of guilt (3SuppCT:721); 3182 said "hang him," "he is very dangerous," "he will do it again if let out"

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[53] Hereafter only the prospective juror's number will usually be noted.

(3SuppCT:782); and 3844 said appellant is "scum," guilty and should get the death penalty (12SuppCT:3194-3224).

Prospective juror 3554 wrote that appellant should not have been released from prison, was guilty of killing a peace officer and should be executed (8SuppCT:1991-1993); 3995 contended there was a link between the way the victim was "executed" and appellant's association with white supremacist prison gangs (15SuppCT:4100); 4058 stated that appellant was "truly guilty" and should be put to death (16SuppCT:4286); 4150 stated that appellant was a member of the Aryan Brotherhood and was guilty (17SuppCT:4781-4782); and 4225 believed appellant was guilty and agreed with other prospective jurors who had called appellant a "scumbag" and a "slez ball" [sic] (18SuppCT:5060-5061).

Prospective juror 4295 stated that the media left little doubt that appellant was guilty. (19SuppCT:5185.) From what 4522 had read and heard, appellant was guilty. (21SuppCT:5774.) Prospective juror 3943 had not only heard broadcasts about the crime, but his father, who had worked for the Sonoma County Sheriff's Department for 20 years, knew Deputy Trejo. This prospective juror had talked with his friends about the crime, who had said that appellant would be lucky to get into custody alive. (14SuppCT:3851-3852.) Another prospective juror, 4072, had read news reports which swayed him to conclude that the charges against appellant, "a dangerous person," were true. (16SuppCT:4378-4379.)

Numerous other prospective jurors who were excused based on their questionnaire had watched Deputy Trejo's funeral service on television, or attended the service, knew people who attended the service, contributed to his memorial fund and knew Deputy Trejo and his positive contributions to the Sonoma community. Prospective juror 4126 watched Deputy Trejo's

memorial service on television (17SuppCT:4658), as did 3125 (2SuppCT:473). Prospective juror 3125 had additional connections to the case as her husband worked with Deputy Trejo and thus knew many anticipated prosecution witnesses; she had also contributed to his memorial fund. (2SuppCT:473.) Many others who were excused based solely on their questionnaires had also either attended Deputy Trejo's memorial service or watched it on television, knew friends or acquaintances who had watched or attended the service, had contributed to his memorial fund, knew many of the anticipated witnesses or were otherwise well-aware of the community's response to the loss of Deputy Trejo. These jurors included: 3093 (2SuppCT:379-380); 3346 (5SuppRT:1216-1217); 3602 (8SuppCT:2177-2178); 3182 (3SuppCT:782-783); 3231 (4SuppCT:875-876); 3554 (8SuppCT:1991); 4058 (16SuppCT:4285-4286); 4225 (18SuppCT:5060-5061); 4295 (19SuppCT:5184-5186); 4518 (21SuppCT:5742-5744); 4588 (22SuppCT:6052-6053); 3136 (2SuppCT:503-504); and 3512 (7SuppCT:1806).

Many other prospective jurors who did not undergo voir dire had made clear in their questionnaires that the publicity had convinced them that appellant was guilty. Prospective juror 3196 indicated that from reading the Press Democrat, she could not set aside her belief that appellant was a "man with a past history of violence [who] has shown no remorse for his behavior." She recalled stories about appellant's past crimes, including rapes and assaults and offenses while in prison, including having blades and bullets on his person. She had also talked about the case with others in the community. (3SuppCT:813-814.)

Prospective juror 4511 also had read about appellant's case in the Press Democrat. She recalled details about the crime and the case from the

publicity and commented that "they were described in the paper and you are familiar with the reports, no doubt." (21SuppCT:5711.) She stated it might affect her ability to be fair. (21SuppCT:5713.) Her questionnaire also indicated she had talked with others about the "unconscionable" acts committed and from what she knew, believed appellant was probably guilty. (21SuppCT:5711-5712.) She was generally against the death penalty, but felt it should be "meted out in this case." (21SuppCT:5711-5712.)

Prospective juror 3255 recalled details from stories in the Press Democrat and from what he read believed that appellant was probably guilty. (4SuppCT:968-969.) Based on what he had read in the Press Democrat it sounded to 3450 like appellant was caught at the scene with hostages, there were witnesses to the shooting and because of the information she had read, believed that the charges were probably true. (6SuppCT:1557-1558.) Prospective juror 3728 believed from what he had heard and read that the charges were true. He discussed with others how terrible it was for the deputy and his family. (10SuppCT:2704-2705.) Prospective juror 4388 recalled reading about the case in the Press Democrat and spoke with others about the crime. From what he read and heard, 4388 believed that the defense had to provide a good explanation to overcome the prosecution's case. (20SuppCT:5463-5464.)

It was clear from the questionnaires alone that the impact of the crime permeated throughout Sonoma County as demonstrated by the number of prospective jurors who had discussed appellant's case with relatives in Sonoma County, neighbors, coworkers and others in the community, and by the many who were in some way connected to Deputy Trejo. Juror 4544's grandson and Deputy Trejo's niece were friends. She had read about the case commenting that "obviously I have read about the

case in the Press Democrat." (21SuppCT:5866.) Her son and grandchildren lived near the area of the hostage taking and her grandchildren's school was closed during the hostage situation. (21SuppCT:5866.) Her discussion about the case with others included topics such as the tragedy of losing Deputy Trejo and why appellant had been "allowed such freedom." (21SuppCT:5866.) She believed appellant was guilty. Regarding the death penalty she thought she had probably read too much about the case to be able to set aside her personal beliefs about the penalty. (21SuppCT:5882.)

Another prospective juror reacted similarly to all the publicity, and concluded that appellant was guilty. Prospective juror 3462 read about the crime in the newspaper and discussed with family members "how the murder was committed;" one of her family members was a deputy sheriff. (6SuppCT:1619.)

Based on what 3642 had learned about the case, he leaned toward believing appellant guilty. (9SuppCT:2302.) He knew people who attended Deputy Trejo's memorial service. His aunt (whose son was an officer killed in the line of duty) was in close contact with Deputy Trejo's widow, providing her with support, including accompanying her to court. (9SuppCT:2302.) His wife's coworkers lived by the hostage victims' home and through discussion with them also learned about both the hostage-taking and Deputy Trejo's death. (9SuppCT:2301.)

Prospective juror 3051 had read articles about the case and talked about it with her husband, most likely because the case was local. From what she had read, it seemed that appellant was "caught pretty much in the act of committing the crime," so she favored the prosecution. (1SuppCT:224-225.) Prospective juror 3121 read about the case in the

Press Democrat, heard about it on television and from these sources recalled details about the case and appellant. She talked about the case with her husband, including that the crime was scary, that their community was not as safe as it used to be and their sorrow for Deputy Trejo. Based on the publicity, she favored the prosecution because appellant shot Deputy Trejo "point blank." (2CT:410-411.)

Prospective juror 3915 read about the case in the Press Democrat, talked about the case with others and overheard people in the community discuss the case, including potential jurors when she reported for jury duty. (13SuppCT:3541.) These discussions covered such topics as sadness for Deputy Trejo's family because of the loss of a father and husband, "how awful for a person to just be released from prison to commit murder," and the increased prevalence of violent crime. (13SuppCT:3541.) From what she had learned, she believed that appellant was guilty and the only issue was the sentence. (13SuppCT:3542.) Similar sentiments were echoed by 3949, who had read and heard about the case from the local media and from discussions with coworkers. (14SuppCT:3944.) He had learned details from the publicity, including the victims' family background, favored the prosecution and felt the state's case was "solid." (14SuppCT:3945.) He had decided that appellant was guilty and should be "put away or fried." (14SuppCT:3945.)

Echoing sentiments similar to the legion of potential jurors who had been influenced adversely toward appellant from the publicity was 4529. This juror read about the case in the local paper, believed appellant was guilty, would find it difficult to believe otherwise and had overheard others talking about their belief in appellant's guilt. (21SuppCT:5804-5805.) Number 3767 was familiar with the case, despite having moved to Sonoma

County after the crime, from reading about it in the Press Democrat and talking about it with community members at the church where his wife worked. (11SuppCT:2921.) He drove by the memorial service while it was occurring and drives twice daily by the memorial erected in honor of Deputy Trejo. (11SuppCT:2921-2922.) Prospective juror 3837 overheard others in the community, including potential jurors, talk about the case and say that "Scully was a cop killer." (12SuppCT:3138.) Given what she had learned, she favored the prosecution "because once a killer always a killer." (12SuppCT:3139.) Based on what 4057 had heard and seen about appellant's case, he too believed that appellant was guilty. (16SuppCT:4254-4255.) Similarly, from what 4190 had read in the Press Democrat, she believed that appellant was guilty and had already admitted his guilt. (18SuppCT:4998-4999.) Prospective juror 3202 had read a series of articles in the Press Democrat, saw TV broadcasts about the case and appellant and talked with others in the community about the case. (4SuppCT:844.)

ii. The Voir Dire of Prospective Jurors

Hovey voir dire began on October 16, and jury selection ended on November 21, 1996, covering 20 court days. During voir dire, where prospective jurors had the opportunity to clarify and expand upon their questionnaire responses, the jurors' biases against appellant from what they had learned from publicity was increasingly evident. The record demonstrates the magnitude of the hostility toward appellant and belief in his guilt, fostered by the main news source in Sonoma County and which permeated throughout the community. Moreover, numerous prospective jurors were connected to and potentially biased against appellant due to reasons unique to Sonoma, including their connection to Deputy Trejo, their

attendance at his memorial service or acquaintance with attendees, their contributions to memorial and scholarship funds in his honor, and the effect upon these prospective jurors of the county's response to its loss from Deputy Trejo's death, which included a memorial constructed in his memory.

(1) Excused Jurors

The first prospective juror questioned, 3167, believed from the radio broadcasts he heard that appellant was guilty and this belief would always be in the back of his mind. (32RT:4224, 4227.) The broadcasts he heard provided information about appellant's background and concluded that appellant had "murdered" the officer. (32RT:4224, 4228.) Television broadcasts about the case informed him that Pelican Bay State Prison was for "the worst of the worst." (32RT:4229.) From what he had heard, appellant was "a cop killer" (3SuppCT:690-691), and "[I] don't like cop killers." (3SuppCT:691.) He knew people who had attended Deputy Trejo's memorial service and he believed appellant deserved the death penalty. (32RT:4236-4237; 3SuppCT:690.)

When juror 3727 heard about the crime she was shocked that a murder happened in Sebastopol. She drove by the crime scene to see the flowers and temporary altar placed there in honor of Deputy Trejo. (42RT:6261-6263; 10SuppCT:2673.)

The court itself commented on 3522's prejudicial opinions toward appellant, opinions that had been formed in part from the publicity. This prospective juror was scared when she read about the crime because it was so close to home and she had overheard others talking about the case and appellant. (38RT:5277, 5287-5289; 7SuppCT:1898.)

Prospective juror 3045 had read about the case in the newspaper and heard about it on television. Based on what 3045 had read and heard, she stated that "there is no doubt in my mind that Scully is guilty of murder, is a cold-blooded professional criminal who does not deserve mercy and should be executed. . . . His presence in the courtroom gives me a chill." (1SuppCT:217.)

Juror 3325 believed that appellant was guilty after having learned information from the Press Democrat and television, including that appellant killed Deputy Trejo "execution style." (5CT:1154-1155.) She had also spoken with others in the community about the crime, and commented that some said "just hang" him, a sentiment she shared. (5CT"1154; 38RT:5352.) She watched Deputy Trejo's memorial service on television and daily passes the memorial that was erected for him. There was so much information in the Press Democrat she did not think she could set aside her beliefs about the case, especially given the seriousness of the crime. (38RT:5352-5355; 5SuppCT:1154-1155.)

A number of the jurors commented that it would be difficult to sit fairly in judgment of appellant in light of the breadth of the publicity disseminated about appellant's case. One such juror was 3878, who agreed that he would have a "different state of mind" on a case where he had not heard so much information about the case he was being asked to judge and believed it would be difficult to give appellant the presumption of innocence based on all he had read and heard about the case. (46RT:6982, 6988.) This juror had read and heard about the crime from print and broadcast media (12SuppCT:3354), recalled many details about the case and appellant, including a story about appellant being in a prison gang, the Aryan Brotherhood, and that appellant may have met the woman involved

in the crime through a mutual friend who was also an Aryan Brotherhood gang member. (46RT:6987.) He commented that the reported "events were rather spectacularly reported" (12SuppCT:3356), that it was a "shocking case" (46RT:6982), and he believed appellant to be a dangerous felon (46RT:6980). He recalled the media's emphasis on Deputy Trejo and his family and noted a "community outcry" for Deputy Trejo's family. (46RT:6985; 12SuppCT:3355.) He recalled local controversy about appellant being released from Pelican Bay State Prison on his own and not escorted back to his home county. (46RT:6985; 12SuppCT:3355-3356.)

Other prospective jurors admitted that the publicity had influenced them and that they had prejudged the case in a manner adverse to appellant. Juror 3751 believed appellant was guilty based on the stories he read in the Press Democrat about appellant and Pelican Bay State Prison. (32RT:4298-4299, 4307-4308, 4316.) He had also discussed the case with his wife and his coworkers, and commented on the local interest of the case. (32RT:4297; 11SuppCT:2828-2829.) Juror 3089 recalled information about the charges that had been reported in the local newspaper, believed appellant was probably guilty of murder and would be concerned if he were the accused with a juror holding his beliefs. (33RT:4498-4499, 4507; 2SuppCT:348-349.) Juror 3431 had a similar sentiment, commenting that she would not want to be a defendant with a juror with her state of mind. She favored the prosecution, having learned information about appellant's case from the newspaper, television and from talking with neighbors, noting that they lived in the area of the crime. (39RT:5474-5476, 5484-5489; 6SuppCT:1495, 1497.) Juror 4152 was another prospective juror who commented that she would not want someone with her frame of mind about appellant and the case to be on her jury. She had learned about the case

from the local news and based on that publicity believed that appellant had committed the crime. (34RT:4621-4622, 4622, 4625-4627.)

Juror 3926 read about the case and appellant in the Press Democrat and saw news coverage on television. Based on what she had learned from these sources, she favored the prosecution, believed that appellant was guilty and described appellant as a "scary person." (14SuppCT:3697.) She could not recall reading or hearing one positive item about appellant. (44RT:6547.) She would not want someone with her frame of mind sitting as a juror if she were the accused, and commented that had she not been exposed to the publicity she read about appellant and the case she would have felt differently about the presumption of innocence to which appellant should be entitled. (44RT:6545, 6547; 14SuppCT:3696-3697.)

Numerous other jurors had been exposed to the media's conclusions about the case, which were adverse to appellant. These jurors had concluded that appellant was guilty. Prospective juror 4298 read about the case in the Press Democrat and from what she read believed that appellant was guilty. (41A-RT:5870-5873-5874; 19SuppCT:5215-5216.) Juror 4364 had read about the case and appellant in the newspaper and heard information about it on the radio, and from those sources believed that appellant was guilty. He stated it would be hard to set those feelings aside and commented that the case had been well-publicized. (35RT:4898-4900, 4902-4904, 4908.) Prospective juror 3237 was convinced of appellant's guilt before arriving for jury duty based on what she had learned about the case. Although new to Sonoma County, she was nonetheless familiar with the case and had conversed with a friend about it. From what she had learned, she believed appellant was guilty and that the death penalty was the appropriate punishment. (34RT:4714-4715; 4SuppCT:906-907.)

Juror 3795 had read about appellant in the newspaper, recalled from the publicity that before appellant had killed an officer that he had robbed a store, and had read news stories within a few months before reporting for jury duty that appellant was "extremely dangerous," a white supremacist, a "career criminal" and that he had to wear a stun belt in court. (11SuppCT:2952.) He had talked about the case with his family, friends and with coworkers. (11SuppCT:2952.) From what he read about the case he believed that appellant was guilty and that it was an "open-and-shut case." (41B-RT:5952, 5961-5963.) Juror 3757 believed appellant was guilty from what he had read in the Press Democrat and saw on television, and recalled learning that Deputy Trejo was a "highly-respected" deputy (41B-RT:5890-5895; 11SuppCT:2859-2860); juror 4103, who had watched Deputy Trejo's memorial service on television, had also read about the case and saw reports of it on television and based on what he heard and read believed the charges against appellant were likely true (17SuppCT:4595-4596); juror 4184 commented that he had heard about appellant and his case on the news and that it was a fairly big thing around town (35RT:4878, 4886; 18SuppCT:4905); juror 4169, who worked as a press person for the Press Democrat, recalled having read that the victim officer was killed by a "point-blank-range shooting," and favored the prosecution because when a police officer is shot he tends to lean "toward the good side instead of the evil side" (47RT:7107-7109, 7112-7115; 18SuppCT:4875); juror 4231 had read quite a lot about appellant's case in the press and discussed it with coworkers (46RT:6931-6934; 19SuppCT:5091); juror 4030 heard about the case on TV and from people in the town (45RT:6906-6907, 6916-6918; 15SuppCT:4192).

Juror 3456 had watched Deputy Trejo's memorial service on television, heard about the case on the radio (6SuppCT:1588-1589), and discussed it with her husband, who had read about it shortly before jury selection and commented to her that he hoped she was not being called for appellant's case (33RT:4440). This juror also stated that this crime affected her deeply because 30 years prior, her father had been an officer for the same sheriff's department as Deputy Trejo. (33RT:4440-4442, 4452.) Juror 3917, who had recalled details about the case from what she had read in the Press Democrat, also had personal connections to the case. She had discussed what she had read in the press with her best friend, a commander in the Santa Rosa Police Department, who told her that he was very upset about the deputy's death and should not discuss it with her. (36RT:5053-5054.) She also knew people who attended Deputy Trejo's memorial service. (13SuppCT:3573.)

Some prospective jurors commented on the pejorative terms the press had used to describe appellant, and basically conceded that they had accepted those descriptions. Juror 3517 read about the case in the Press Democrat, discussed it with her husband and coworkers, commented that she was against the death penalty and that based on what she read and heard believed appellant guilty. (7SuppCT:1867-1868.) All she had read and heard about appellant were negative things, including that he had been referred to as "scum." (35RT4902-4904, 4908.)

The trial court itself commented about the amount of detail that some of the prospective jurors could recall based on what they had learned from the publicity. (See, e.g., 36RT:4940, 4991; 44RT:6571.) Prospective juror 3336 believed appellant guilty from what she had learned from the publicity, stating that when Deputy Trejo was called to investigate a

robbery, appellant overpowered him, forced him to kneel on the ground and shot him "execution style." (5SuppCT:1185-1186.) This prospective juror was also compromised because her husband, who was in law enforcement, and his colleagues had contributed to Deputy Trejo's memorial fund, and her husband bought a shirt in the slain officer's memory, the proceeds of which also went toward a fund for him. (5SuppCT:1186.) Additionally, juror 3336's sister-in-law worked for the Sonoma County Sheriff's Department. (5SuppCT:1187.)

Prospective juror 3359 also recalled a significant amount of detail from the press's rendition of the case. This juror read about the case in the paper, heard about it on the radio and talked about it with family members and coworkers. (5SuppCT:1278.) He recalled details from what he read and heard, including that there were robberies of various businesses and that when the deputy went to investigate, he was killed. (5SppCT:1278.) This juror also knew someone who had attended Deputy Trejo's memorial service. (5SuppCT:1279.) Juror 3659 was also very familiar with the case, recalled details from the Press Democrat, local radio and television stations and from his own personal police scanner. (9SuppCT:2363; 39RT:5405.) He thought he might have heard Deputy Trejo's voice on the scanner on prior occasions. (9SuppCT:2363.) He talked with his wife about the case and from the publicity believed that appellant was guilty. (39RT:5416; 9SuppCT:2363.)

Another juror persuaded by the media that appellant was guilty was 3665, who also recalled many details about the case, all learned from the Press Democrat, including that it had been reported that appellant had robbed a Sebastopol restaurant before the murder, that Deputy Trejo was "murdered" at "point blank range," and that his codefendant claimed to be

an "innocent pawn." (9SuppCT:2425.) He recalled seeing many police cars at the time of Deputy Trejo's funeral. (39RT:5515-5516.) He believed he had "read enough of the evidence in the media" to prove that appellant was guilty as charged and that given all the publicity it would be difficult to presume appellant was innocent. (39RT:5516-5517; 9SuppCT:2426.) Numerous jurors expressed similar sentiments and conclusions. Prospective juror 4128 read about the case in the Press Democrat and based on what she read believed that appellant was guilty. (43RT:6411, 6422.) Because the crime was so close to home, she was particularly affected by it (43RT:6421-6322), and once summoned for jury duty, had talked with friends about possibly being on appellant's jury. (17SuppCT:4688-4689.) Juror 4153 read articles about the crime and appellant in the Press Democrat and based on what he read concluded that appellant was guilty. He commented that it was reported that appellant was "caught shooting the guy." (43RT:6468-6469, 6476)

Juror 3896 stated that she had read numerous articles about the case in the Press Democrat. She recalled details from what she had read, noting that there had been many articles about it and that the newspaper "went on to describe a lot about what took place," including that from a reconstruction of the crime it was learned that Deputy Trejo was forced to kneel down before appellant shot him. (44RT:6568-6569.) She was familiar with Pelican Bay State Prison, read that appellant had been incarcerated there, knew that it was for the most violent criminals and had read that appellant had committed other crimes and had a tendency to break the law. (44RT:6569, 6577; 13SuppCT:3449.) She knew John Rainwater, one of the main prosecution investigators on appellant's case, and a number of her friends were officers in the Santa Rosa Police Department

(44RT:6578-6579), which was the investigating agency for the case. She also had discussed the case with her friends and coworkers. (44RT:6575.) Nonetheless, she claimed that she could put aside what she had read and learned about the case if she were chosen to be a juror, despite acknowledging that what she had read affected her opinion and that it would be easier to be on a case where she had not read and learned so much before having to sit in judgment. (44RT:6571, 6578.) She also claimed that she would be comfortable with someone like her on a jury if she were the defendant (44RT:6583), despite all the information she had about the case before she arrived for jury duty. She thought that appellant must prove his innocence (44RT:6570), but eventually agreed with the presumption of innocence (44RT:6572).[54]

Like juror 3896, prospective juror 3159 also was familiar with the case before arriving for jury duty. He had learned about it from the local television news and from talking to friends, many of whom were in law enforcement. During voir dire he admitted that he had heard others say about appellant, just "hang him." (41A-RT:5762.) He described what he had heard as "local hearsay," and stated that some of his coworkers, many of whom were in law enforcement, believed appellant was guilty. (41A-RT:5759-5761; 3SuppCT:627.) This juror had worked closely with deputies from the Sonoma County Sheriff's department. (41A-RT:5761.) Juror 3514 was familiar with the case from publicity and from community

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[54] Despite this juror's substantial recall of details of the case that had been reported in the press, the court did not consider her as a juror who should be excused for cause based on her preexisting knowledge of the case. The juror was ultimately excused for cause, over the prosecution's objection, but the court's ruling was based on the juror's death penalty views. (46RT:6959, 6975.)

contacts. (41A-RT:5770-5771.) He had discussed the case with his probation department coworkers, recalled from the media information about appellant's background, including numerous prison disciplinary problems. (41A-RT:5776.) This juror belonged to the same employee association as Deputy Trejo. (7SuppCT:1838.) He was familiar with a number of anticipated state's witnesses and knew the prosecuting attorney. (7SuppCT:1853-1854, 1857-1858.) He said it would be hard for him to keep an open mind on this case, and admitted he favored the prosecution. (41A-RT:5773; 7SuppCT:1837.)

Juror 4279's statements during voir dire reflected the mood in Sonoma County from the loss of Deputy Trejo. He spoke of the sadness he felt each time he saw flowers at the deputy's memorial. (42RT:6101-6102.) He recalled hearing that the deputy who appellant had slain had been a "fine officer" who was about to retire. (19SuppCT:5153; 42RT:6105.) This juror watched some of Deputy Trejo's memorial service on television and was familiar with the memorial for the slain deputy that was at the site of the crime. He drove by it twice daily. (19SuppCT:5154-5155; 42RT:6090.) He read about appellant's case in the Press Democrat, saw news about it on television and spoke with others in the community about the crime, including its "brutality" and the "tragic loss" that a "fine sheriff's officer" was killed. (19SuppCT:5153.) He recalled from the publicity that appellant "murdered" a sheriff's deputy "execution style," that the deputy was without a weapon or that appellant had taken the deputy's weapon and shot him with it, that appellant may have been out on bail from a high security facility, when apprehended had weapons on him and was a repeat offender. From what he had read and heard in the media, he believed that appellant was guilty. (42RT:6092-6093.)

Another juror who expressed the community's response to and loss from Deputy Trejo's death was juror 3681, who commented that Deputy Trejo's memorial service was an expression of community grief. (41A-RT:5705.) This juror knew substantial information about the case from having read the local newspaper, listened to the radio and from a personal connection to a Sonoma County deputy sheriff who attended the victim's funeral and told her about the mourners who had attended. (9SuppCT:2488; 41A-RT:5687, 5704-5705.) Noting that the case was widely covered in the media, she recalled that the publicity included witness interview accounts. (9SuppCT:2487.) The juror had discussed the case with others before she came for jury duty. Her husband was a reserve deputy sheriff in Sonoma County, her cousin's husband was a deputy sheriff for the Sonoma County Sheriff's Department and had been called to assist the night Deputy Trejo was killed, her former son-in-law worked at the Sonoma County jail and this juror was acquainted with as many as eight Sonoma County deputy sheriffs. (9SuppCT:2488; 41A-RT:5704-5708.)

Juror 3970 also believed that appellant was guilty based on what he had read in the Press Democrat about the crime and appellant. (42RT:6148.) In addition to his detailed recollection of what was reported as having occurred at the Saddlery on Highway 12, he read that appellant had planned to rob the patrons at the bar next to the Saddlery and that appellant planned to rob business establishments on his way from Pelican Bay State Prison to San Diego. (42RT:6146; 15SuppCT:4006.) The publicity stated that appellant had assaulted correctional officers and was a high escape risk. (42RT:6149.) This juror talked with friends, coworkers and family about the case. (42RT:6147.) He would not want someone with

his frame of mind for this case sitting as a juror if he were the accused. (15SuppCT:4006; 42RT:6150-6151.)

The Press Democrat had convinced 4560 that appellant was guilty. (22SuppCT:5991; 45RT:6809, 6812.) The newspaper articles showed appellant as having a lack of regard for the life of others. (22SuppCT:5992.) This juror thought that having a trial for appellant was a waste of time. (45RT:6813.) She had also discussed the case with her spouse and her friends and had been to the site of the crime and the memorial as she frequented that area of town. (45RT:6809.) She described the memorial as a beautiful tribute and stated that it brought tears to her eyes. (22SuppCT:5992.) She did not attend or watch the memorial on television because she did not want to see what the Trejo family was going through. (22SuppCT:5991.) When asked whether she could base her decision on the evidence presented, and set aside whatever she had read about the case from the publicity, the best she could offer was, "I can try." (45RT:6812.)

Prospective juror 4204 was convinced appellant was guilty as charged. He based his opinion on both the publicity as well as his own connections to the community and prosecution as a firefighter. (43RT:6398.) He had read and heard about the crime and appellant and was "sure" all the charges were true. (18SuppCT:5030.) He had worked with Sonoma County law enforcement, including the sheriff's department, as a volunteer for the search and rescue unit. He knew people who attended Deputy Trejo's memorial service (18SuppCT:5030), and knew two officers in the Sheriff's department who were on the witness list, one of whom had taught him in the areas of crime scene preservation and investigation (18SuppCT:5047; 43RT:6388). If either of the two officers who he knew

testified and there was testimony contrary to their testimony by a defense witness, he would tend to believe the officers he knew over the defense witnesses. (43RT:6396-6397).

(2) Prospective Jurors Who Remained in the Jury Pool After Motions to Excuse for Cause

Many other prospective jurors remained in the pool, despite their familiarity with appellant's case from pretrial publicity, as well as their connection to the case by virtue of the venue, such as having attended or viewed the television broadcast of the memorial service, contributed to a fund for Deputy Trejo's family or, at minimum, knowing members of the Sonoma County community who had been a part of these events. Indeed, many of these prospective jurors believed that appellant was either probably guilty or, at minimum, leaned toward a belief in appellant's guilt. Juror 3601 read about the crime in the local newspaper, including a report that when appellant was apprehended for the killing he had the officer's radio with him, and recalled publicity about Deputy Trejo, including how long the officer had worked for the sheriff's department and reports about the funeral. (33RT:4362-4363.) She mourned that someone who was trying to keep them safe had been killed. (33RT:4371.) She encountered the roadblock on Highway 12 on the night of the incident. (8SuppCT:2146; 33RT:4371.) Based on what she had learned about the case before she was summoned for jury duty on appellant's case, she believed that appellant was possibly guilty. (33RT:4363.) Jurors 3803, 3738 and 3353 had read about the case in the Press Democrat and from what they had read, favored the prosecution. (46RT:6993-6994; 11SuppCT:2983-2984 [3803]; 10SuppCT:2735-2736 [3738]; 35RT:4821-4822; 5SuppCT:1247-1248

[3353].) Juror 3742 had recalled a number of details about appellant and the case from the various articles he had read in the Press Democrat. (10SuppCT:2766; 34RT:4585.) A friend had also read about the case and the two of them had discussed it. (10SuppCT:2766.) This juror recalled reading that the deputy was shot in the face after approaching appellant's vehicle, and that there was something about a rear tail light being out. (34RT:4585.) Appellant had been on parole. (34RT:4585.) He read about where the crime occurred. (10SuppCT:2766.)

Even jurors who may not have made up their mind about appellant's guilt from the pretrial publicity, were familiar with the case from the publicity and were surrounded by others (fellow prospective jurors at the courthouse who reported for jury duty, coworkers, family and community members) who, based on the publicity and local conversations about appellant's case, had already tried, convicted and sentenced appellant. For example, 3583 recalled that there had been many stories about appellant's case. (33RT:4385.) On the day she reported for jury duty, a fellow prospective juror told her she hoped that she wasn't being called for the Scully case because he was the man who killed the sheriff. (8SuppCT:2053.) It appeared to her that the juror who said that had already made up her mind. (33RT:4389.) She recalled a story about somebody being robbed. (33RT:4379.)

There were additional examples of the impact from the widespread publicity on appellant's prospective jurors. Juror 4017, who was called for jury duty along with some of her coworkers, stated that a number of other coworkers commented that they hoped she was not being called for appellant's case because he was guilty. (45RT:6743-6744.) Juror 4546 read about appellant's case in the press, saw reports of it on television news

broadcasts, talked with others as well as overheard others in the community talk about the case, some of whom believed appellant guilty. (48RT:7247.) She knew people who attended Deputy Trejo's memorial service and who contributed to his memorial fund. (21SuppCT:5898; 48RT:7248.) This juror's husband, a pastor, visited appellant's codefendant in jail. (48RT:7257-7259.) Juror 4347, a delivery person for the Press Democrat, read about appellant's case in that paper and learned from talking with others in the community that appellant had been recently released from Pelican Bay State Prison, that prison authorities had not transported him to Southern California for his parole and that a deputy was killed. (19SuppCT:5277; 41B-RT:5897-5899.) He recalled reading about court proceedings related to the case, possibly including one about venue. (41B-RT:5904.) Juror 3761 read several stories in the Press Democrat, saw television coverage about the case, recalled the huge procession of police cars and helicopters on the day of Deputy Trejo's funeral and talked with his friends about the funeral. (11SuppCT:2889-2890.)

Jurors who claimed that they could try to remain open about appellant's guilt nonetheless found the media's presentation of appellant and the case to be prosecution- and conviction-prone. Juror 4552, who read the Press Democrat and tended to believe what he read, had not read or heard anything positive about appellant or anything that would cause him to lean toward appellant. (22SuppCT:5960; 42RT:6162, 6175-6177.) Although 3263 stated that he had not yet formed an opinion, he commented that the Press Democrat certainly had. Among the stories he had recalled was one that said that the codefendant had kidnaped someone to secure appellant's release. In talking about the case with a family member, he recounted it was said "how cold-hearted the murderer must have been to

have killed a law officer." (4SuppCT:999-1000.) Juror 4543 claimed that she could be impartial, despite acknowledging that the newspaper wrote about appellant as if he were guilty (46RT:7051), and stated that if there was an eyewitness, as had been reported in the paper, she favored the prosecution. (46RT:7040-7041.)

Juror 4076 had read about Deputy Trejo and appellant in the Press Democrat, as well as learned information about the case from local television and radio news. Hearing and reading about the crime he felt "shock" that something of this magnitude could occur in his "own neighborhood." (33RT:4530.) When called for jury duty, given the community's knowledge about the case, his friends asked him if it was for the case about the deputy who was killed. (16SuppCT:4409.)

Juror 3058 recalled information from reading about the case in the Press Democrat and seeing broadcasts on television. She had talked about the case with others, including the sorrow they felt for Deputy Trejo's family. Having read that appellant was a parolee from Pelican Bay State Prison, she added that sometimes a criminal does not have a right to be paroled and if that criminal is convicted of murder with special circumstances the person should not be allowed to stay alive. (1SuppCT:255, 269.)

Juror 3814's prejudicial recollections of what he had read in the Press Democrat included that before Deputy Trejo was slain he was forced to get on his knees and beg for his life. (41A-RT:5850, 5858.)

Prospective juror 3545 was familiar with appellant's case from reading about it in the Press Democrat, despite only recently moving to Sonoma County and not living in the area at the time of the crime. She also stated that when she arrived for jury duty she overheard a man and a woman

talking about appellant. The man was a fellow prospective juror, and the nephew of the woman, identified as a good friend of Deputy Trejo's widow. The nephew (the prospective juror) made the comment, "I hope he fries." (39RT:5425-5428; 7SuppCT:1960.)

Another recent resident of the county, 3853, who moved to Sonoma several months after the crime, was familiar with the case from having read about it in the Press Democrat. (40RT:5606.) She commented that what she had read and thought about the case stayed with her because it was a bad crime and close to home. (40RT:5621-5622.) Although she acknowledged that the news can be incorrect, she thought the information she read about appellant's case sounded like it could be true, and commented that the news stories implied appellant was guilty. (12SuppCT:3263; 40RT:5608, 5623.)

Juror 3012 was yet another juror who remained after the cause challenges, despite his belief, based on what he had read and heard about in the media, that appellant should get the death penalty if he was found guilty. Among the details he recalled from the publicity was that Deputy Trejo was shot in the head and that he was the first deputy to die in the line of duty in Sonoma County in 14 years. (1SuppCT:38; 40RT:5583.) Before coming to court for jury duty, he had talked about the case with others.[55] (1SuppCT:38.) Juror 3849 heard about the crime and appellant on television, heard it talked about at a local sporting event, and believed that if the defendant committed the kind of murder that the prosecution was alleging, that the accused should get the death penalty. (43RT:6327, 6332.)

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[55] This juror was on the short list of prospective jurors next to be called to the jury box. (36SuppCT:9322-9326.)

Juror 3750 had read about the case in the newspaper, and from what she had read favored the prosecution, believed appellant was responsible for killing Deputy Trejo, and had a feeling that appellant was guilty. She had talked about the case with her family, friends and coworkers. (48RT:7219, 7229-7232; 10SuppCT:2797-2798.) Juror 3817 read news accounts of the case, discussed it with her coworker – who had been a friend of Deputy Trejo and had attended his memorial service – and knew an anticipated prosecution witness. (11SuppCT:3076-3077, 3093.)

Even jurors new to Sonoma County were familiar with the case because of its continued locally widespread publicity and talk of the crime among the county's residents. Some of these jurors are noted above. Another, 3678, who had moved to Sonoma County a couple of months after the crime, noted that she was aware of the case generally because "it has been in the news a lot." (34RT:4683-4684.) The dissemination of information in the community appeared to reach most residents. Juror 4255, who commented that she was not one to read the newspaper, listen to the radio or watch television, had nonetheless heard about the crime and appellant, from either her parents or others in the community. (41B-RT:6063-6064.)

In sum, a vast number of jurors expressed that because of what they had read and heard about appellant before they came to court for jury duty, it would be hard to believe or feel anything but that appellant was guilty. Many prospective jurors characterized what they had read and heard about the killing in a manner unduly prejudicial to appellant. The terms used included "execution-style," "cold-blooded," and murdered at "point-blank range." Numerous jurors commented on how they felt about appellant, based on what they had learned from publicity or from others in the

community, which included such terms as "scum," a "white supremacist," a "scumbag," a "sleaze-ball," "heartless," an "extremely dangerous career criminal," a man without remorse, a "violent criminal," "scary," a "cold-blooded professional criminal" and a "high escape risk." Jurors stated that the case seemed to be an "open-and-shut" case of guilt. Many jurors did not mince words when they stated what should happen to appellant: "hang him," "fry him." Juror 3241, who had read about appellant's case in the Press Democrat, astutely commented that "anyone in this community who read the newspaper would have the same feeling that I have," which was that based on the publicity, the charges appeared true. (36RT:5033-5036; 4SuppCT:937-938.) Indeed, throughout jury selection, juror after juror admitted that they were adversely effected by the one-sided media condemning appellant, even those who claimed they would try to keep an open mind.

c. Appellant's Renewed Motion for Change of Venue

Appellant filed his renewed motion to change venue three days before the completion of jury selection. (21CT:4272-4287.) The court decided to rule on the motion after the parties had passed and accepted both the 12 jurors and 6 alternates, to enable it to see exactly who the 18 would be. The court stated it would rule before the jury was sworn. (50RT:7699-7700, 7702.) When appellant subsequently accepted the 12 prospective jurors and the six alternates, counsel made clear that he was not only dissatisfied with the jury, but felt compelled to stop exercising peremptory challenges because of the potential jurors who were next to be called to the

jury box.[56] (51RT:7886-7887.) Counsel stated that not only were a large number of the remaining prospective jurors biased, based on their voir dire, but defense counsel had unsuccessfully challenged for cause a number of those who remained to be called to the jury box. (51RT:7886-7887.)

As trial counsel pointed out, of the approximately 800 prospective jurors called for jury duty, only 197 of those prospective jurors remained to prepare a questionnaire. Of those 197, only 88 survived after review of their questionnaires and *Hovey* voir dire. Of the remaining jurors who were part of the general voir dire, 85 percent had knowledge of the case before they arrived for jury duty. (51RT:7888, 7894; 21CT:4272-4287.) The recognition rate for the case was, therefore, almost precisely the percentage found by Bronson, who had found an 83 percent recognition rate. (51RT:7888-7889.) Trial counsel further pointed out that of the 18 jurors selected, over three-fourths of them, 77 percent, recognized the case and had knowledge of it before they arrived for jury duty.[57] (51RT:7890.)

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[56] Counsel knew which prospective jurors from the remaining pool of jurors would next be called to the jury box. The jury commissioner prepared a computer generated, randomized list of all the remaining jurors in a manner that permitted the court and the parties to know who would be called next to the jury box after a juror in the box was excused for cause or by peremptory challenge. (36SuppCT:9322-9326; 45RT:6922; 48RT:7324; 51RT:7886-7887.)

[57] Seventy-five percent of the twelve jurors (9 of 12) who were sworn and reached a verdict on the guilt phase were familiar with the case before arriving for jury duty. Prior to appellant's bifurcated trial on alleged prior convictions, juror 3971 was excused by stipulation due to hardship (117RT:18653-18658) and replaced with alternate juror 3166 (117RT:18704-18705). Juror 3971 was one of the nine jurors who had knowledge of the case before arriving for jury duty. Juror 3166, who had not read a newspaper in four years and did not listen to radio news or watch

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The trial court denied appellant's renewed motion for a change of venue. (51RT:7895-7899.) The court relied on section 1033 and the extent and nature of the publicity, a factor this Court has stated is one of five to consider in assessing whether a fair trial can be had in the challenged venue. The court limited the discussion to the extent and nature of the publicity, indicating that in its opinion it had heard no new information concerning the other four factors. (51RT:7895.) The court stated that if it found from voir dire that the dissemination of potentially prejudicial publicity was more widespread than it anticipated before voir dire began, and that the case had become deeply embedded in the community's consciousness jeopardizing appellant's right to be fairly tried in Sonoma County, it would be duty bound to grant appellant's motion. (51RT:7895-

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[57] (...continued)
television news, stated that she was not familiar with the case, although she had heard about the crime on the radio at the time it occurred. The radio broadcast stated that a deputy had been killed. She had talked about the case with others and regularly saw a friend who had served as a deputy sheriff on the same force as Deputy Trejo, but who had retired due to injuries suffered from incidents in the county jail when he was assigned to work there. (51RT:7799, 7802.) She told the court that her friend was "very aware of the situation, he knows I am on a case, but he just said - - and then he stopped. I mean, he knows not to discuss that kind of stuff." (51RT:7800.) This juror too had heard of the case before arriving for jury duty, and the percentage of jurors who were deciding appellant's sentence who had recognized appellant's case before the trial began remained at 75 percent. If juror 3166 is considered as one of the overall 13 jurors who had decision-making power, then the percentage is 77 percent. Even if this Court concluded that 3166's recognition of the case was limited and did not include her among the jurors who recognized the case, resulting in 8 of the 12 decision makers, the percentage nonetheless is 67% – two-thirds of the jurors.

7896.) It did not make such a finding, and denied the motion. (51RT:7898.)

In denying appellant's motion, the court stated that the venire summoned did not demonstrate that level of pretrial publicity necessary to disqualify them as a group of prospective jurors. (51RT:7898-7899.) The court further noted that as to the 12 jurors selected to sit on the jury, and the 6 alternates, both sides are "deemed" to have passed for cause,[58] given that neither side used all of their peremptory challenges. (51RT:7898). The court added however, that she did not give this fact "special weight or importance." (51RT:7898.)

C. Appellant Established a Reasonable Likelihood That a Fair Trial Could Not Be and Was Not Had In Sonoma County

1. Governing Legal Principles

A change of venue is designed to protect the fundamental right to an impartial jury, a right protected by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Skilling v. United States* (2010) __ U.S. __, __; 130 S.Ct. 2896, 2912-2913; *Irvin v. Dowd* (1961) 366 U.S. 717, 727-728; *Maine v. Superior Court*, *supra*, 68 Cal.2d 375, 383-384.) When extraordinary local prejudice will prevent a fair trial, due process compels the transfer of the trial to a different venue. (*Skilling v. United States*, *supra*, 130 S.Ct. at p. 2913.)

The California standard governing a change of venue is codified in section 1033. Section 1033, subdivision (a), was designed to provide the

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[58] Appellant had unsuccessfully challenged for cause juror 3360. (36RT:4991.)

protection that a change of venue affords. A motion for change of venue must be granted when "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county" in which the defendant is charged. (§ 1033, subd. (a); *People v. Famalaro*, *supra*, 52 Cal.4th at p. 21.) "The phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578; quoting *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 294.) When the issue is raised before trial, any doubt as to the necessity of a venue change should be resolved in favor of the defendant's request to change venue. (*People v. Williams* (1989) 48 Cal.3d 1112, 1125.) This is because the prejudicial effect of publicity before jury selection is speculative. (*Ibid.*) The rule that all doubts be resolved in favor of venue change takes on particular significance in a capital trial, and the risk of facing a biased jury can be readily avoided by the simple expedient of a change of venue. (*Martinez v. Superior Court, supra*, 29 Cal.3d at pp. 584-585.)

On appeal, this Court independently evaluates whether there was a reasonable likelihood that appellant could not be fairly tried in the county where he was charged. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 21; *People v. Hart* (1999) 20 Cal.4th 546, 598.) Whether the issue is raised by a pretrial writ or on appeal from a judgment of conviction, a reviewing court must make its own determination of whether a venue change should have been granted. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 21; *People v. Williams*, *supra*, 48 Cal.3d at p. 1125; see *Sheppard v. Maxwell, supra*, 384 U.S. at p. 362.) Actual prejudice to the defendant need not be shown. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1126; *Odle v. Superior Court*, *supra*, 32 Cal.3d at p. 937; *People v. Tidwell* (1970) 3 Cal.3d 62, 69.)

This Court's review of the denial of appellant's renewed motion to change venue is likewise an independent review as to whether there was a reasonable likelihood that a fair trial could not be had for appellant in Sonoma County. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 29.) In evaluating appellant's claim, this Court's review encompasses the voir dire of the entire jury pool, including the actual jury selected (*ibid.*), to determine de novo whether a fair trial was obtainable (*People v. Douglas* (1990) 50 Cal.3d 468, 495, citing *People v. Williams*, *supra*, 48 Cal.3d at p. 1125). "Resolution of the venue question requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do." (*Odle v. Superior Court*, *supra*, 32 Cal.3d at p. 944.) The standard of review is the same as that for appellant's pretrial motion. To succeed on appeal appellant need only show a reasonable likelihood that he did not receive a fair trial. "Whether ruling on a motion to change venue well before trial or during the voir dire, the standard remains the same – the reasonable likelihood of a fair trial." (*Ibid.*)

Since this court's decision in *Maine v. Superior Court, supra*, 68 Cal.2d 375, California courts have analyzed five principal factors in determining whether there is a reasonable likelihood that the defendant will not receive a fair trial in the venue in which it was brought. Those factors are the (1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the victim.[59] (*People v. Famalaro*, *supra*,

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[59] Although *Maine* established and applied the underpinnings of the analysis, this Court's decision in *Martinez v. Superior Court*, *supra*, 29 Cal.3d 574, expressly held that these five factors should be used as the

(continued...)

52 Cal.4th at p. 21.) Because no single factor is controlling, each case must be approached on an individual basis and "each factor is worthy of consideration even if 'isolated and alone' it would not compel a change of venue." (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 582, citing *Maine v. Superior Court, supra*, 68 Cal.2d at p. 388; *Williams v. Superior Court* (1983) 34 Cal.3d 584, 588.) Another factor that may be considered, when present, is whether there were any political ramifications from the case. (See *Maine v. Superior Court, supra*, 68 Cal.2d at p. 387 [district attorney and defense counsel competing for same judgeship]; *People v. Tidwell, supra*, 3 Cal.3d at p. 71 [publicity of the "political debate" concerning the trial's fiscal impact on the county]; *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, 794-795, 800-801 [recriminations between mayor, police chief, police commission and others].)

Upon application of these legal principles to the instant case, it is readily apparent that prior to jury-selection proceedings, appellant demonstrated a reasonable likelihood that he could not obtain a fair and impartial trial in Sonoma County. Each of the relevant factors supported appellant's request for a change of venue. The results of the surveys introduced by both counsel supported a change of venue. Once jury selection began, the effect from the massive pretrial publicity was no longer a matter of speculation, as the voir dire proceedings demonstrated that knowledge of the case had permeated the jury venire. Jury selection confirmed that the pretrial publicity and its resulting impact adverse to appellant had in fact so tainted both the jury pool and the selected jurors

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[59] (...continued)
criteria when ruling on change of venue motions.

that there was a reasonable likelihood that a fair trial was not had on the guilt, special-circumstance, and penalty determinations.

2. Under the "Five Factors" Considered by California Courts There Was a Reasonable Likelihood That a Fair Trial Could Not be Had in Sonoma County, Requiring a Change of Venue

a. The Nature and Gravity of the Offense

The "nature" of an offense refers to the "peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) There is little question that appellant established that this part of the factor weighed in favor of a change of venue. The crime and its aftermath – the killing of a local and popular deputy sheriff at the hands of a recently-released convict, followed by a hostage-taking and a televised surrender – unfolded before the community, resulting in fear from the crime, loss of the deputy and antipathy toward appellant becoming part of the community's consciousness and forcing many in Sonoma County to come to grips with its "paradise lost."

The "gravity" of an offense refers to "its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1159; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 582.) In a capital case, the gravity of the offense and the severity of the potential penalty weigh heavily in favor of granting a motion to change venue. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1395; *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 593.)

The seriousness of the offense could not be more clear. This case involved the killing of a local, popular deputy sheriff. Also clear was that the consequence to appellant could not be greater in that the prosecutor

sought to put appellant to death. "It is well-settled that a charge of murder with special circumstances is the gravest offense carrying the gravest penalty – a factor weighing heavily in favor of the defendant." (*Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 593; *Odle v. Superior Court*, *supra*, 32 Cal.3d at p. 941; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 583.)

In the present case, the trial court found that the gravity of the crime supported a change of venue, but believed that the nature of the offense did not and thus found that this factor did not weigh in favor of a change of venue. (18CT:3619-3620; 18RT:2652-2653.) The trial court erred in its conclusion. Both the nature and the gravity of the offense weighed heavily in favor of granting appellant's motion.

b. The Nature and Extent of News Coverage

Both the extent and the nature of the news coverage warranted a change of venue. Appellant submitted numerous exhibits containing hundreds of documents in support of his initial motion for change of venue which amply demonstrated extensive, inflammatory pretrial publicity that permeated Sonoma County and, as shown during voir dire, affected the pool of jurors in appellant's case. Both parties had also submitted surveys which provided information in assessing the reasonable likelihood of appellant being fairly tried in Sonoma County, which included evidence of the extent and nature of the news coverage.[60]

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[60] Courts have long approved the use of qualified public opinion surveys or opinion testimony (*Maine v. Superior Court*, *supra*, 68 Cal.2d at pp. 383-384; *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877, 882), and have recognized that appellate de novo consideration of oral testimony is not handicapped when, as here, it is accompanied by the exhibits in which the accuracy of their analysis can itself be reviewed.

(continued...)

i. The Extent of the Publicity

The "extent" of news coverage is quantitatively measured by, for example, the number of television and radio news stories and the number of print articles, their pattern, their prominence, and factors such as the number of photographs and whether there were editorials and letters to the editor.

The publicity in appellant's case was extensive, continuous and sensational. The number of articles alone demonstrated the importance of the case to the community and the likelihood that the stories would be read. Approximately 150 newspaper reports, almost of all of which were in the Press Democrat, were published from the time of appellant's arrest until he filed his pretrial motion to change venue. (14CT:2666-2763; 15CT:2890-2964; 12RT:1424-1425.) At times, there were even multiple articles about, and related to, appellant and his case on a single day. The Press Democrat was the county's main newspaper, with a six-day (Monday through Saturday) circulation of 98,401 and a Sunday circulation of 103,329 (see 14CT:2656), serving a county with a population of only 421,500 (18RT:2650; 18CT:3616). Moreover, publications serving small neighborhoods throughout Sonoma County also published articles about appellant, Deputy Trejo and the case. (See, e.g., 14CT:2693, 2707, 2712, 2734.)

Many of the newspaper reports were front page or lead articles, numerous stories were multi-page, and many included photographs. (See, e.g., 12RT:1425-1426.) These are facts that demonstrate the importance of a case to the community and the likelihood that the stories would be read.

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[60] (...continued)
(*Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 877.)

(See, e.g., *Williams v. Superior Court*, *supra*, 34 Cal.3d at pp. 589-590 [continual, repetitive and at times inflammatory news coverage, with many articles on the front page and some the subject of a main headline, shows readers and listeners were subjected to the news coverage]; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 578-579 [change of venue warranted where the publicity included front-page photos of the accused and covered the legal maneuvering of the codefendant's capital trial].) Moreover, local television and radio stations reported on the crime and about appellant. (See 13RT:1604.) As a result of the extensive publicity, the Sonoma County community was saturated with information about appellant and his case. The numerous, lengthy and inflammatory articles demonstrated the importance of the case to the community and the likelihood that the stories would be read.

Additionally, the publicity continued for well over a year after the crime, including up to the time of appellant's initial and renewed venue motions.[61] The extent of the publicity weighed heavily in favor of a venue change.

ii. The Nature of the Publicity

The "nature" of publicity is qualitatively measured. That is, the publicity is assessed in terms of its ability to foster hostility toward the accused and to engender support for the state's case, its inflammatory attributes and its sensationalized language. (See *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877.) A venue change is more likely to be

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[61] Indeed, the massive publicity attendant to appellant's case continued through trial and his sentencing. The trial court itself commented during voir dire that the publicity had not subsided and had continued beyond when the crime first occurred. (44RT:6571.)

granted where coverage has been inflammatory or productive of outright hostility. (See *ibid.*) But even where such circumstances are not present, if "a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (*Ibid.*; accord, *People v. Jennings* (1991) 53 Cal.3d 334, 362; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 580.) Coverage that has contained detailed descriptions of the crime using graphic language about the circumstances and the defendant weighs in favor of a change of venue. (See *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 582.) The same is true when there have been editorials about the crime and its ramifications. (See *Frazier v. Superior Court, supra*, 5 Cal.3d at p. 290; *People v. Hamilton, supra*, 48 Cal.3d at p. 1157.) Coverage that contains inaccurate reporting of facts, or reporting of facts that would be inadmissible at trial, weighs in favor of a change of venue. (See *Marshall v. United States* (1959) 360 U.S. 310, 312-313; *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 878.) Even publicity that is factual in nature and non-inflammatory can weigh in favor of a change of venue when it is extensive. (See *People v. Jennings, supra*, 53 Cal.3d at p. 362; *Martinez v. Superior Court, supra*, 29 Cal.3d at pp. 580-581.)

In appellant's case, the coverage was inflammatory and infected the community with hostility toward appellant. The trial court itself, when addressing a plea from the media to release transcripts from closed hearings, pretrial orders and sealed exhibits, stated that the media's publications were "highly inflammatory . . . against the defendant." (10RT:1205.)

The Sonoma County community was saturated with inflammatory publicity adverse to appellant, some of which referred to evidence that was held to be inadmissible at appellant's trial and almost all of which was reported in sensationalized terms. This publicity included appellant's alleged membership in and affiliation with the Aryan Brotherhood prison gang and other unnamed white supremacist gangs; statements from the codefendant inculpating appellant; reports about appellant's years in prison and recent release from a prison purported to be for the most violent of the state's incarcerated; alleged prison misconduct; accounts of his prior convictions; and the extreme security measures imposed on appellant in the courtroom and at the jail. (See14CT:2666-2763; 15CT:2890-2964.)

The nature of the publicity aroused animosity and antipathy toward appellant. The media vilified appellant in its reporting of the loss the Sonoma County community suffered by the death of Deputy Trejo. The media repeatedly used charged terms in reporting about the case and appellant. It routinely described the homicide using emotionally-ridden phrases, such as an "execution style" slaying and a "cold-blooded" murder, and used terms that have emotional impact, such as multiple references to appellant as a "cop killer." Indeed, the publicity was replete with such highly-charged language. By the time of appellant's initial venue motion, the newspaper reporting alone had twenty-one references to the killing as being "execution-style." (12RT:1435.) The articles stated that Deputy Trejo was "killed execution style" (14CT:2678); the murder was "execution style" (14CT:2678); reported that Moore, appellant's codefendant, described the killing as "execution-style" (14CT:2688); that appellant was charged with the "execution-style murder" of a popular Sonoma County deputy (14CT:2693; 15CT:2956); and that appellant was charged with the

"execution-style slaying" of Deputy Trejo (14CT:2697, 14CT:2706, 14CT:2733, 2735, 2742, 2746, 2763, 2708; 15CT:2925, 2944, 2946). Other articles reported the killing as "cold-blooded" (14CT:2675; 15CT:2942); one article declared that appellant shot Deputy Trejo "like an animal" (14CT:2733); another, which referred to the killing as "cold-blooded," imbued the story with the imprimatur of the prosecution, reporting that the prosecutor stated that the killing was deliberate, if not an outright "execution" (14CT:2726).

The widespread and inflammatory nature of the stories, much of which was presented as "established facts," tended to create a belief in appellant's guilt of a robbery and a first degree murder. (See *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 877 [when publicity describing facts, statements and circumstances is widespread, it can create a belief in the accused's guilt and thus a reasonable likelihood of unfairness, even when the coverage is not inflammatory or productive of overt hostility].)

The media presented some information as established facts, when these "facts" were contested issues at trial about the shooting and events surrounding it. For example, articles claimed that eyewitnesses had reported that appellant had forced Deputy Trejo to his knees and that the deputy was unable to defend himself because appellant shot the deputy in the head without hesitation. (14CT:2719, 2718.) The media reported that, according to the police, appellant "robbed" Deputy Trejo of his gun, gun belt and radio. (14CT:2670, 2676; 15CT:2905.) Other reporters wrote that according to the prosecutor, Deputy Trejo was killed after appellant's botched attempt to rob the manager of a downtown Sebastopol restaurant, and the articles included statements from the alleged victim of that

supposed attempt. (14CT:2707, 2708, 2714.) Yet another article claimed that appellant "abducted, attacked and shot" Deputy Trejo. (15CT:2954.)

Numerous articles included "facts" disputed at trial. It was reported that appellant was in the Santa Rosa area to commit robberies, with some reporting that appellant had killed Deputy Trejo because the deputy had interrupted appellant during the commission of these crimes. It was reported that the prosecutor claimed that appellant had planned robberies in the area. (14CT:2685.) Fueling the fear among Sonoma residents was a headline that read appellant "Scoped out SR for robberies" (14CT:2726) and claimed that appellant had cruised the area, looking for easy robbery targets for several days before killing Deputy Trejo (14CT:2726). The articles claiming that Deputy Trejo was killed because he interrupted appellant in his robbery attempts also reported that appellant was in the area preparing to rob the R&S Bar when the deputy arrived and appellant killed him (15CT:2905); another reported that appellant was in Santa Rosa on a "robbery spree" and had intended to rob the R&S Bar when Deputy Trejo approached him (14CT:2754); and yet another wrote that appellant may have been planning to rob the many patrons of the bar (14CT:2708).

The newspaper also published articles including details about a map found among appellant's items purported to have markings on it indicating businesses, and residences, that appellant intended to rob.[62] These articles

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[62] This map, showing the Vallejo, Napa and Sonoma County area was introduced at trial. (Peo. Exh. No. 516.) The map had various handwritten notes and marks on it, including marks showing the locations of businesses that had Western Union services, which Moore had needed because she had to pick up the money wired to her for the car repairs; a route that would be a means to drive to San Francisco, from Santa Rosa, on

(continued...)

reported that a police sergeant had said that the map was evidence against appellant because it showed targeted businesses that appellant had planned to rob. (14CT:2709; 15CT:2906.) Yet another article reported that a local map found among appellant's items indicated potential victims, marked by circles. It further reported that although the location of the R&S Bar was not circled on the map, appellant had been preparing to rob the bar when he was interrupted by Deputy Trejo. (14CT:2725.) Another reporter contended that the only reason that appellant had not robbed the R&S Bar and its patrons was because Deputy Trejo came upon him, and that a map found in appellant's property was marked with burglary sites, including targeted private homes. (15CT:2929.) These were among the articles that presented as established "facts," issues that were disputed at trial.

The publicity was not neutral. It used words, characterizations and themes that created anxiety for the Sonoma County community, delivered a high degree of sensationalism, and caused the prosecution's version of the "facts" and the community's fears to become embedded in the community. In *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 593, this Court stated that media characterizations of a murder as "execution-style" or "cold-blooded" create a high degree of sensationalism. Similarly, in *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 585, this Court recognized that inflammatory terms describing the accused as an "indiscriminate 'cop'

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[62] (...continued)
roads other than a freeway; and the main roads on which appellant and Moore were driving. Other marks on the map were located in the Pacific ocean, and at vineyards and wineries. (85RT:13169; 86RT:13286-13289; 93RT:14799-14806; 96RT:15266, 15269, 15275-15276.)

killer" are the kinds of characterizations that can easily become embedded in the public consciousness of the community.

The media also ignited fear in Sonoma County in its reporting of the hostage-taking, which it described as a manhunt throughout their community to locate a violent felon who only days earlier had been released from a maximum security prison and had targeted their community for robberies and other crimes. One headline read "Long day of jitters for area besieged" and reported that deputies went door-to-door warning Sonoma County residents that killers were on the loose. (15CT:2895.) It was reported that the school in the area of the hostage-taking was closed and that residents in the area felt trapped, one stating that it was "like being a hostage in your own neighborhood." (15CT:2895.) Other headlines read "Hostage family recounts ordeal" (14CT:2717), and "Family 'barricaded for 17 hours'" (14CT:2733). Another article stated that being held hostage by an armed intruder is a "family's worst nightmare." (15CT:2922.)

Among the factors considered in measuring the nature of the publicity is whether it engendered hostility toward the accused. (See *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877.) As demonstrated by the surveys, questionnaires and voir dire described above, it certainly did so here.

Appellant's alleged affiliation with the Aryan Brotherhood, or any references to it, or to any other white supremacist or prison gang was not admitted at trial. (See, e.g., 94RT:14979-14980; 104:RT16473-16475.) The publicity, however, included multiple references to appellant's alleged membership in and affiliation with the Aryan Brotherhood prison gang and alleged connections to unnamed white supremacist gangs. In one article, the reporter wrote that the Sonoma County Assistant Sheriff stated that

appellant was a "high ranking" member of the Aryan Brotherhood and, since his incarceration at the county jail, had garnered power over other inmates. (15CT:2944.) The Sheriff claimed that since appellant's arrival at the jail "strange things have happened" and that they had created a chronological history to keep track of appellant's behavior. (15CT:2944.) Other articles stated that appellant was a "high ranking" member of the Aryan Brotherhood, a "racially motivated" prison gang (14CT:2733, 2734), and that appellant was a member of a white supremacist organization known for its violence (15CT:2894, 2929). An article claimed that the sheriff's department feared that the Aryan Brotherhood prison gang might help appellant escape from the Sonoma County jail. (14CT:2715.) The news reported that when appellant was in prison, he was housed in isolation because prison officials feared his gang membership posed a danger to other prisoners. (14CT:2676.) Another article reported that appellant was a "robbery felon and reputed member of the Aryan Brotherhood." (14CT:2673.) It was reported that informants at Pelican Bay State Prison had tipped authorities that robberies and contract killings were being orchestrated by a gang of white supremacists that included appellant. (14CT:2688.) Indeed, the Press Democrat took every opportunity to demonize appellant and report that he was a member of a racist, violent prison gang. (See 14CT:2694, 2699, 2700, 2716, 2756, 15CT:2906; 15CT:2946.) The newspaper also reported that appellant's codefendant was linked to white supremacists (14CT:2687), and served as an outside contact for imprisoned Aryan Brotherhood members (14CT:2713).

The publicity included statements from the codefendant Moore equivalent to a confession from appellant. Publicizing a codefendant's statement implicating the defendant, especially when coupled with

pervasive reports linking the defendant to the crime as charged, "is at least as damaging – if not more so because less probative of remorse – as a report that defendant had confessed." (*People v. Tidwell*, *supra*, 3 Cal.3d at p. 70.) Moore's publicized statements were a confession minimizing her involvement, indeed absolving her, and implicating appellant. For example, one article reported that Moore gave a "lengthy" interview to law enforcement in which she stated she was a "victim" herself and had not wanted to participate in the deputy's murder. (14CT:2678.) In other articles it was reported that Moore stated that appellant shot the deputy and then turned the gun on her (14CT:2679), and that she told the police that she was appellant's victim, not his co-participant (15CT:2925). One article even claimed that Moore had described the killing as "execution-style." (14CT:2688.) Another reported that Moore claimed she was afraid of appellant and that it was only under duress that she went along with the Sonoma County "crime spree," and that she had not been fully aware of the extent of appellant's violent past. She wanted a trial separate from that of appellant's, so that she could tell her jury about appellant's violent past. (14CT:2763.)

There was also extensive publicity about appellant's prior convictions and allegations of acts of violence. The media's persistent references to appellant's prior criminal history, publicized in the community in which appellant was tried, tainted the jury pool and the jurors who tried the case. In *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 681, the court found "very significant" the persistent and repeated media references to defendant's prior criminal record. The court stated that even factual publicity can result in a reasonable likelihood of unfairness when the information is highly prejudicial. (*Ibid.*)

Articles reported appellant's prior convictions and conduct in a sensationalized fashion. For example, many of the articles included eye-catching headlines, some of which described appellant's prior acts of unlawful conduct using dramatic and emotional language. One headline read "Long record of violence by Trejo suspect," and followed with an article detailing incidents allegedly committed by appellant inside and outside of prison (15CT:2925); another headline read "Slaying suspect freed from prison last week" (14CT:2673); and another that "Since 1976, Scully's been a jail regular" (15CT:2904). One multi-page article reported that appellant was the "leader of three robbers" who robbed restaurant employees in San Diego, that he had "spent a third of his life behind bars and was in violation of his parole when" appellant killed Deputy Trejo, and that this was the "second time Scully violated his parole shortly after his release from prison." (14CT:2673.) Other articles referred to appellant as having a history of violence, both in and out of prison. (14CT:2754.) One article, after stating that appellant had a "long history of violence," reported that he was the leader of a gang that, with guns, robbed 10 restaurants, with some of the 19 victims suffering physical abuse at the hands of appellant. (15CT:2926.) Yet another reported that appellant was a parolee with 13 aliases and a record of robberies and assaults, who had killed Deputy Trejo only days after his release from prison. (14CT:2673, 2700.)

The Press Democrat published appellant's alleged prior convictions and acts of misconduct that were not admitted at the guilt phase,[63] and some of which were not admitted at all during appellant's trial. Among these

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[63] For example, appellant's alleged in-custody behavior was inadmissible at the guilt phase. (See, e.g., 104RT:16474.)

reported acts were allegations that when appellant was in prison he carried bullets and other concealed weapons. Publicity informed the Sonoma community that the court would be holding a hearing about appellant's eight prior robbery convictions. (14CT:2763.) As to the convictions that were later admitted at the guilt phase, they were admitted for a limited purpose only, a fact not part of any news report. These stories were another instance of information adverse to appellant that was not admitted at the guilt phase, but had been disseminated to the public who became appellant's jury pool.

Moreover, there was publicity that inaccurately reported appellant's prior convictions, including stating that he had been convicted twice of rape and that included inaccurate information concerning some of the crimes that were later admitted at trial. (See, e.g., 14CT:2673, 2676, 2677, 2687; 2700, 2739, 2756, 2758, 2686; 15CT:2894, 2903, 2926, 2946.) The publicity about appellant's prior crimes, inaccurate information, and information that was not admitted during trial all worked to appellant's detriment. The effect of this publicity resulted in further bias against appellant by the community, and ultimately appellant's venire and selected jurors.

Another area of publicity that generated fear among the county's residents and fostered hostility toward appellant were the articles regarding the extreme security measures imposed, both in the jail where appellant was housed, and in the courtroom. In reporting these stories, the media proclaimed appellant was "uniquely dangerous."

It was reported that the judge had closed to the public the hearings regarding the security to be imposed when appellant was in the courtroom. The article stated that the court was convinced that the dissemination of information of stories the court had heard about appellant's alleged prior

prison and jail behavior were "so inflammatory that they might deny him a fair trial if they reach the ears of potential jurors." (15CT:2914.) The court's conclusion about the harm from potential jurors hearing this inflammatory evidence was correct. Closing the courtroom, however, did not stem the flow of prejudicial information.

Indeed, numerous articles disseminated information about the extreme security measures. An article reported that when appellant was in the courtroom he had an electronic device strapped to his body, under his jail jumpsuit, ready to electrically shock him in case he created problems. (14CT:2699.) The sheriff's department required appellant to wear several sets of shackles, as well as a stun-belt. A reporter claimed that sheriffs providing courtroom security released the straps over their revolvers out of concern about appellant. (14CT:2714.) Despite the many shackles and electronic stun-belt that appellant was required to wear, this same article reported that when appellant was in the courtroom security was increased to nine deputies. (14CT:2714.) Two other articles publicized similar information. (See 14CT:2713, 2753.) Another article stated that the Sonoma County jail had x-rayed appellant to determine whether he had concealed weapons inside his body. (15CT:2906.)

This highly-charged and prejudicial publicity was detailed. One article reported that appellant, the "accused cop killer," required extraordinary restraints in the courtroom. He was shackled to a chair, and forced to wear belly chains and an electronic stun belt around his ribs. The article reported that the judge found that appellant's eight-page criminal record and his reputation for violence against inmates and guards, justified the "extreme restraint." (14CT:2715.) It was reported that the sheriff's department and the court had taken unusual security precautions to ensure

that appellant did not harm anyone in the courtroom. (14CT:2718.) When appellant was transported anywhere, whether to the courtroom from the jail, or to the showers inside the jail, the security included at least three officers accompanying him. (14CT:2718.) A headline read "Judge says Scully an 'extreme risk,'" and reported that the court had ordered that appellant must continue to wear a stun-belt in court. (14CT:2756.)

Other articles reported the Sheriff's Department's reaction to having appellant housed at the Sonoma County Jail. One article began with the headline "Sheriff says he's too dangerous for jail." (14CT:2733.) Another article reported that the Sonoma County Sheriff, for the first time in history, asked the court to order that appellant be moved from county jail to state prison while awaiting trial. (15CT:2946.) The article included that the Sheriff was upset with the judge for not granting his request given that the court agreed that appellant's behavior was "increasingly unmanageable." (15CT:2946.) Another article reported similar information, stating that Sonoma County jailers wanted appellant moved to state prison while awaiting trial due to his dangerousness, including his reputation for attacking guards, at times while shackled. (14CT:2697.) The Assistant Sheriff told the press that appellant was looking at the Sonoma County Jail to find out its weak spots. (15CT:2903.) That article also said that appellant had been moved to a new cell because he had attempted to loosen wall screws and scratch into the wall near a window in his cell. It went on to state that due to appellant's violent history, he was transported by four to seven officers when transported from his cell to the courtroom. (15CT:2903.) Two articles reported that appellant, the "accused cop killer," was a hazard to officers and other inmates at the Sonoma County jail. (14CT:2733, 2734.)

Another area of publicity inimical to appellant was the information about Pelican Bay State Prison (PBSP) and its status in the prison system as the one for the "worst of the worst." This publicity further embedded hostility toward appellant in the community's consciousness. Among the information disseminated in these articles was that appellant was housed at PBSP, which was for the "toughest felons" in California (14CT:2674); that PBSP housed "the most violent of the inmates in the state prison system" (14CT:2676); that PBSP housed the state's most violent criminals, including those who assault guards and other inmates (14CT:2677); and that PBSP was for the most dangerous and disruptive inmates (15CT:2914).

Similarly prejudicial were the articles that reported appellant's alleged misconduct when incarcerated. The reported information included stories about appellant having a history of assaulting police and corrections officers, which resulted in California's state prison system categorizing appellant as the highest threat to public safety. (15CT:2939.) The media publicized claims that while in prison appellant allegedly assaulted inmates and guards, and committed other crimes, including inciting a riot, which resulted in appellant being housed at prisons reserved for the state's most violent criminals. (14CT:2699; 2700.) It was reported that appellant was not only a "high security risk," but had "amassed such a lengthy record of assaults on fellow inmates and guards in state prison . . . as well as escape attempts that he had to spend the next 10 years in maximum security." (14CT:2758-2759).

Another area of publicity in appellant's case that further substantiated that the nature of the publicity weighed in favor of granting appellant's venue motion was the publicity about the loss to the community from Deputy Trejo's death. Because this publicity was replete with stories

that appellant was the person who shot and killed Deputy Trejo, the public antipathy toward appellant became further embedded in the consciousness of the community. The publicity spoke of Deputy Trejo's years of service protecting Sonoma County, his commitment to the community and his love for his family. One headline read "Deputy eulogized as a family man who loved his job," with the article reporting that Deputy Trejo "worked for you whether you knew him or not." (14CT:2693.) Another reporter wrote that Deputy Trejo, the "father of four and grandfather of three was doing the work he loved." (14CT:2675.) Other articles wrote about Deputy Trejo's love for his job and commitment to the Sonoma County community. One headline read "Slain Deputy Loved His Job" (14CT:2672); a reporter wrote that Deputy Trejo was a "15-year veteran called reliable, devoted to job" (14CT:2673); and another read that appellant was charged with the "execution-style murder" of a popular Sonoma County deputy (14CT:2693).

Many stories told of Deputy Trejo's years of service and his public commendations. One article stated that Deputy Trejo "earned more than a dozen law enforcement commendations and letters of appreciation" (15CT:2928); others reported that Deputy Trejo was one of the county's "top performers" (14CT:2675), and that Deputy Trejo was a "highly decorated" deputy (15CT:2928). Reporters let Sonoma County residents know that Deputy Trejo had been set to retire after the many years he had given to the community (14CT:2695), and was the first Sonoma County deputy slain in the line of duty since early 1970 (14CT:2670).

Particularly evocative were the stories and photographs about Deputy Trejo's funeral and memorial service. Headlined articles, many of which were in oversized type-face and all of which included photographs, read

"Fallen Hero" (15CT:2927), "2000 Turn Out For Slain Deputy" (14CT:2685), and "Trauma & Drama" (14CT:2743).

The publicity told the community how it could help and respond to the tragic loss that they shared. Articles informed Sonoma County residents about the memorial fund established for Deputy Trejo's family (see, e.g., 14CT:2673, 2682, 15CT:2921), as well as notified the community that the Latino Peace Officers Association was establishing a Deputy Trejo Scholarship fund for students planning a law enforcement career (14CT:2738). Others reported the local Internal Revenue Service's community-organized benefit to assist Deputy Trejo's family: "IRS benefit for slain deputy's family." (14CT:2696, 2701.) It was publicized that the Sonoma County Board of Supervisors tripled the amount of vacation pay and "comp time" that county employees could donate to Deputy Trejo's family. (15CT:2928.) The coverage was also replete with photographs of the memorial for Deputy Trejo at the site of his death.

The Press Democrat also published editorials about the loss to the Sonoma County community from Deputy Trejo's death. Publicity that includes editorials about the crime and its ramifications weighs in favor of a change of venue. (See *Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 290; *People v. Hamilton, supra*, 48 Cal.3d at p. 1157.) One editorial entitled "Community mourns Deputy Frank Trejo," stated that his death "is an attack on the community that these officers serve and an attack on all of us. The people of Sonoma County mourn Deputy Trejo's death and offer condolences to his family, friends and colleagues." (15CT: 2920.) The Press Democrat also published letters to the editor from community members expressing their gratitude to Deputy Trejo. (14CT:2690-2691.)

Another area of publicity in appellant's case that resulted in a predisposition against appellant was the extensive coverage about the county prosecutor's decision to seek death as appellant's punishment. Any juror called for jury duty would learn that the prosecutor was seeking death for the accused, but the extent of the publicity, repeatedly telling the community before anyone arrived for jury duty that death was sought for appellant, and that death was the just result, led to bias against him. Bronson had testified that the extent of the coverage about the death penalty can lead to the belief that death is appropriate. (12RT:1450-1451.) He explained that the publicity in this case had created a "sense that the community . . . needs to avenge Trejo's death." (12RT:1450.)

The news stories were replete with references to the penalty sought – indeed, 111 references to appellant's case being a death case, eight of them headlines (12RT:1449) – showing a public endorsement that this was a case where appellant deserved to die for his crime. (See also 14CT:2695, 2706, 2726, 2730, 2733, 2746, 2752, 2753, 2754, 2755, 2761, 2763; 15CT:2942, 2944, 2947.) Numerous articles told Sonoma County residents that death was being sought for the "cop-killer." Many of the articles announced this decision in its headlines, such as: "Scully faces the death penalty" (14CT:2707); "Death penalty sought for murder suspect" (14CT:2685); and "Suspects may face death penalty" (14CT:2693). The Press Democrat published that the prosecutor stated that extreme security measures were needed for appellant "given the fact that [appellant] has nothing to lose in this capital case." (14CT:2716.) That sentiment was later echoed by the Sonoma County Sheriff and reported in an article that stated he had asked the court to move appellant to San Quentin from the county jail for increased security, because "the man has nothing to lose." (14CT:2733; see

also 14CT:2759; 15CT:2944.) Other articles reported that the charges could put appellant in San Quentin's gas chamber (14CT:2727), and that the Sonoma County District Attorney was "confident of its death penalty case against" appellant (15CT:2911). The prosecutor was quoted in that same article as saying that appellant has an "extensive criminal record indicating lack of regard for human life." (15CT:2911.) Comments about a defendant's alleged lack of regard for life are charged terms that foster antipathy toward a defendant. They encourage the community – and in appellant's case, his future jurors – to conclude that a defendant deserves to die for his crime. (See *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877 [inflammatory language fosters hostility toward the accused].)

The publicity in Sonoma County brought the community together to mourn their loss, and correspondingly, their shared antipathy for appellant, the person who caused Deputy Trejo's death. Appellant detailed above the knowledge and effect of the publicity on the prospective jurors (see § B. 2., *ante* (the questionnaires and voir dire)), and will not repeat the extensive evidence here. However, it bears repeating that the recognition rate of appellant's case among the venire was approximately 85 percent, a rate that exceeded that found by both the defense and the prosecution experts among the respondents in their venue surveys. In *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1211, the Ninth Circuit concluded that a venue change should have been granted where the publicity had "saturated the county," and the media coverage resulted in an 87 percent recognition rate among the jury pool and that two-thirds of those empaneled remembered the case from the press accounts.

"'The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open

court, and not by any outside influence, whether of private talk or public print.'" (*Skilling v. United States*, *supra*, 130 S.Ct. at p. 2913, quoting *Patterson v. Colorado ex rel. Attorney General of Colo.* (1907) 205 U.S. 454, 462.) "Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources." (*Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 877; see also *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 384.) Indeed, information from outside sources may be particularly prejudicial because it is not tempered by protective procedures. (*Marshall v. United States*, *supra*, 360 U.S. at pp. 312-313.)

The nature and extent of the publicity permeated and infected Sonoma County as a whole, the courthouse and the courtroom in which appellant was tried.[64] This factor weighed heavily in favor of granting appellant's initial motion to change venue. Based on the knowledge of the case held by the vast majority of the jury pool before they arrived for jury duty, as demonstrated during voir dire, speculation was no longer necessary. The nature and extent of the publicity required that appellant be tried in a venue other than Sonoma County. Appellant established that he could not be fairly tried in Sonoma County.

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[64] The extensive media coverage of appellant's case continued throughout trial. Local television stations and the Press Democrat also repeatedly sought to photograph and film proceedings, including the venue hearing, trial testimony, closing arguments, taking of verdicts, sentencing, and filed repeated requests opposing closed proceedings and seeking disclosure of sealed exhibits. (See, e.g., 13CT:2456-2491; 10RT:1201-1205; 14CT:2860-2861; 15CT:2862-2868, 2886-2887; 24SuppCT:6447, 6730-6731, 6794-6795, 6806-6817; 26SuppCT:6831-6833, 6849-6859, 6863-6865.)

c. The Status of the Victim

The popularity and prominence of Deputy Trejo weighed in favor of a change of venue. A victim can become "popular" and "prominent" within the meaning of the relevant law in two ways: first, by prominence before death; second, by prominence *from* death, "a posthumous celebrity." (*Odle v. Superior Court, supra*, 32 Cal.3d at p. 940; accord, *Daniels v. Woodford, supra*, 428 F.3d at pp. 1210-1212 [officer victims were turned into "posthumous celebrities"].) Indeed, even the favorable reputation in the community of a victim's extended family, and their recognition as "upstanding citizens" can weigh in favor of granting a change of venue, particularly where the defendant is a stranger to, and friendless in, the community. (See *Williams v. Superior Court*, *supra*, 34 Cal.3d at p. 594.)

The trial court had erroneously concluded that this factor did not weigh in appellant's favor for changing venue because Deputy Trejo's prominence was only posthumous, noting that he was not prominent before his death and was not from a well-known or well-respected family. (18RT:2650-2651.) However, posthumous celebrity can result in this factor supporting a change of venue, and it did in this case.

A police officer killed in the line of duty is a particularly likely candidate for becoming a "posthumous celebrity." In *Odle v. Superior Court*, *supra*, 32 Cal.3d 932, news articles about the deceased officer and his family engendered significant interest in and sympathy for the officer's family. The press uniformly portrayed the victim as a "good cop" who had earned commendations, reported that his funeral was attended by about 1000 police officers, that the area of the county where the crime occurred held civic events on the slain officer's behalf and that funds were started for his family. This Court concluded that the slain officer became a

"posthumous celebrity" in the portion of the county where the crime occurred, by virtue of the events and media coverage after the crime. (*Id.* at pp. 940-941; see also, *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584 [even victims who are not a "public figure" or well-known county-wide can have significant prominence in the community which can engender community sympathy]; *In re Miller* (1973) 33 Cal.App.3d 1005, 1012 [description of articles about victim's funeral, including references to open casket, and plight of the survivors, as contributing to "reasonable likelihood" test being met].)

Deputy Trejo reached prominence after his death due to the barrage of media coverage demonstrating that prior to his death he was a beloved and well-known deputy sheriff who was an integral part of the community. Articles in local newspapers, and in particular the well-read Press Democrat, reported that Deputy Trejo was a long-time veteran of the Sonoma County Sheriff's Department who was doing the work he loved for his community. The media told the Sonoma County community that Deputy Trejo was a "fallen hero." Articles in the local press quoted Deputy Trejo's wife saying that no punishment would be enough for appellant. The memorial service was televised, and the Press Democrat reported that there were not seats enough for the 2,000 who attended (14CT:2685, 2743, 2744), a phenomenon impressive by any account, but certainly striking in a community the size of Sonoma County. Pretrial publicity lauded Deputy Trejo for his many accomplishments in law enforcement, including numerous commendations, and other contributions he had made to the community. (See, e.g., 15CT:2675, 2694, 2928.) The Press Democrat published information about the memorial fund created in Deputy Trejo's name, both by informing the community that it existed, how to contribute to

it, and that contributions were made by, among others, the county's judges. The media reported that Sonoma County was permitting its employees to triple the amount of their employee vacation hours and compensation time that they could donate to the slain deputy's family. (14CT:2695.)

Even before the prospective jurors reported for jury duty, the media reported that judges had either removed themselves from appellant's case or were recused at the parties' request because of their connection to Deputy Trejo, or their relationship and close association with potential prosecution witnesses. For example, there were reports that Judge Giordano knew Deputy Trejo casually; that he was well acquainted with other deputies, some of whom would be witnesses in the case; and that his bailiff had worked the same beat with Deputy Trejo. (14CT:2746, 2750, 2753.) Judge Jamar was removed from appellant's case after attending Deputy Trejo's memorial service and contributing to his memorial fund. (14CT:2747, 2749, 2750, 2753.) Judge Sater also was removed from appellant's case because he attended Deputy Trejo's memorial service. In fact, it was reported that only three Sonoma County judges did not attend Deputy Trejo's memorial service. (14CT:2751, 2752, 2753.)

A few months before jury selection began, the Press Democrat reported a "candlelight vigil" dedication ceremony and memorial service commemorating the one-year anniversary of Deputy Trejo's death, and reported on the impact his death had on the community. (14CT:2755.)

Numerous stories chronicled Deputy Trejo's life, with moving details about how he had wanted to be a law enforcement officer from the time of his youth. The media reported stories about his family, the jobs he had held, where he grew up and the 40th wedding anniversary he and his wife had been anticipating. (See 14CT:2670 et. seq.) News stories paid

homage to Deputy Trejo, who had served the Sonoma County community for many years and, before his untimely death, was on the verge of retirement. (14CT:2678.) The detailed accounts of Deputy Trejo's work, life, and the community's response to its loss from his death would likely not follow the case to another county, and certainly not to the extent the stories had been publicized in Sonoma County.

An impromptu memorial was erected immediately after Deputy Trejo's death, and remained for months at the site where his death occurred, a location frequently passed by the local community. (14CT:2707; 15CT:2928.) The memorial ultimately became permanent. An article informed the Sonoma County community about the permanent memorial, which included a flag pole with an American flag, a bench and a plaque with the Biblical passage "the wicked flee when no one pursues. But the righteous are as bold as a lion." (14CT:2755.)

In sum, there was pervasive publicity about Deputy Trejo, Sonoma County's dedicated public servant, community member and hero, which gave rise to profound civic pride and emotion in the Sonoma County community. Deputy Trejo's status in Sonoma County increased the risks of prejudice arising from a trial in the county. (See *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584; *Maine v. Superior Court*, *supra*, 68 Cal.2nd at pp. 385-386.) His prominence in the public eye undoubtedly engendered community sympathy. He was not only known to the community because he had been a dedicated deputy sheriff for years in Sonoma County, but he attained posthumous celebrity. This factor supported granting appellant's motion.

d. The Community Status of Appellant

Appellant was an outsider. He was not from Sonoma County and had never lived there. He had a criminal record that was well-publicized. Indeed, the Press Democrat went so far as to supplement one of its many articles with a time-line graph of appellant's prison history. (14CT:2700.) Numerous articles reported that appellant was a member of the Aryan Brotherhood, a white supremacist prison gang.

Appellant arrived in Sonoma County after being released from prison a few days earlier. He was on his way to San Diego to report to his parole officer. He had been in Sonoma County only three days before being arrested for the murder of Deputy Trejo and having his name and photograph appear all over the local media, in the most negative way possible. Thus, appellant's status in the community weighed in favor of changing venue in two separate ways. He was not only an outsider who had never lived in or been a member of the Sonoma County community, but was now known notoriously in Sonoma County as a "cop-killer," an "animal," "a violent criminal," a member the Aryan Brotherhood, a white racist prison gang, a "cold-blooded" murderer, an escape risk, and a hostage-taker. (See 14CT:2694, 2699, 2700, 2716-2717, 2733, 2756, 15CT:2906, 2895, 2922, 2946.)

The trial court found appellant's status in the community did not weigh in favor of a change of venue, stating that while the press portrayed him as a "career criminal," and a "felon and recent parolee," among other unsavory characteristics, the descriptions were not only likely true, but there was no evidence to indicate that the community was hostile to someone with these characteristics. (18RT:2650-2651.) In so finding, the court, citing to *Frazier v. Superior Court*, *supra*, 5 Cal.3d at pp. 293-294,

concluded such descriptions were not as objectionable as characterizing a defendant as a "hippie," when the community did not like hippies. (18RT:2651.)

In addressing the portrayal of appellant as a member of the Aryan Brotherhood, the court did not pause in finding that this too did not warrant a change in venue. Its reasoning was that there was once a case in which the defendant was portrayed in the media as being an Aryan Brotherhood member, and this Court upheld the trial court's ruling denying defendant's motion to change venue. (18RT:2652.) In its subsequent written ruling, the trial court noted that appellant's unpopularity was "universal" and not confined to Sonoma County. (18CT:3619.)

The court may well be correct that anyone who is an ex-felon, a career criminal, a person who local county jail officials believed could not be housed there due to his history of violence, and a member of a white supremacist group would indeed be "unpopular" anywhere. This misses the point of the need for a venue change. This information was disseminated throughout Sonoma County over the course of the year before appellant's trial commenced. Even if some information about appellant was publicized in the new venue, the amount of time alone, between the move to the new venue and the beginning of trial in that county, would result in far less publicity. It would also be highly unlikely that the press in the new venue would follow the case to the same degree as it did in Sonoma County, given its enormous local interest in Sonoma County. Moreover, as noted above, evidence about an alleged affiliation to a white supremacist gang and to the Aryan Brotherhood was inadmissible at trial. Thus, the "universal" unpopularity of an alleged member of a white supremacist organization would be an affiliation about which a jury pool in a new venue would likely

be unaware. The jury venire in a venue other than Sonoma County, in which so much was written about appellant, would likely not have read much, if anything, about an alleged affiliation with a racist organization, let alone be inundated by such inflammatory publicity as were the residents of Sonoma County.

As stated in detail above (see § C. 2. b. ii., *ante* (the nature of the publicity), there was a significant amount of press about appellant's alleged membership in a white supremacist prison gang. The court minimized the impact of this inflammatory publicity on the community and appellant's jurors. The trial court believed that appellant's case was no different than *People v. Price* (1991) 1 Cal.4th 324, in which this Court upheld the denial of a venue change, despite media references to that defendant's affiliation with the Aryan Brotherhood. (18RT:2652.) In fact, *Price* was unlike appellant's case in numerous ways. There, defendant was not a friendless outsider; the media reported that the defendant's mother lived in the county and that the defendant had lived with her; one victim did not live in the county and was not known there and the other was not at all prominent in the community; the media coverage in general was restrained and balanced; it prominently featured the defense evidence and arguments; the publicity abated almost entirely after the preliminary hearings; and the press references to the defendant's affiliation with the Aryan Brotherhood were intermittent and minimal. (*People v. Price*, *supra*, 1 Cal.4th at p. 392.)

Also in *Price*, two years had passed between the crime and the defendant's initial venue motion, in which the trial court noted that there had been "a nine-month span of near media blackout." (*People v. Price*, *supra*, 1 Cal. 4th at p. 392.) Particularly significant is that in *Price*, 78 percent of the prospective jurors indicated on their questionnaires that they

had not learned anything about the case from the media, and of the 530 who were ultimately considered as prospective jurors, more than 72 percent had no previous knowledge of the case. (*Id.* at pp. 391-393.)

The media coverage in *Price*, as well as the percentages of prospective jurors' knowledge of the case, stood in stark contract to that in appellant's case. Before voir dire in appellant's case, the defense expert's survey showed 83.3 percent of the respondents recognized appellant's case, and that of those who did, 78 percent thought appellant was either definitely or probably guilty. (12RT:1482-1483, 1493-1494.) The prosecution expert's survey showed a recognition rate among respondents of between 68 and 73 percent (13RT:1705-1706, 1716-1717) and the rate of respondents who believed appellant guilty was 70 to 72 percent (13RT:1731; 14RT:1799). Voir dire established that approximately 85 percent of the jury panel had at least some knowledge of appellant's case. (21CT:4278-4287.)

But the alleged prison gang membership was not the only prejudicial information about appellant to which Sonoma County citizens were exposed before appearing for jury duty. Nor was it the only inflammatory publicity against appellant that would have been unknown, almost in its entirety, had the venue been changed. For example, Sonoma County residents were barraged with information about the jail's security measures imposed upon appellant. (See § C. 2. b. ii., *ante* (the nature of the publicity).) None of this information was admissible at trial, and it was unlikely that information about appellant's housing and the security measures the county took would have been known by a jury pool in another county. Even if that county expressed similar concerns, and it was reported in the media, it was highly unlikely that the extent of the publicity would equal that disseminated in

Sonoma County over the course of the year before appellant's jury was selected.

In assessing whether appellant's status in the community warranted a change of venue, the trial court minimized the prejudice that can ensue from alleged "factual" recitations. In addressing the impact of the negative publicity about appellant's character as portrayed in the media, the court noted that the press accounts might have been true. (18RT:2651.) Even assuming, without conceding, that the publicity included "factual" recitations rather than hyperbole, much of the publicity included information that was not later admitted at trial. Thus, jurors who had not been exposed to media information about a case may find a defendant they are judging unpopular, but it would be from evidence, and not from having been inundated with negative and prejudicial publicity from outside sources.

> Indispensable to any morally acceptable system of criminal justice is a verdict based upon evidence and argument received in open court, not from outside sources. . . . The prosecution may never offer the "evidence" served up by the media. It may be inaccurate. Its inculpatory impact may diminish as new facts develop. It may be inadmissible at the trial . . . . If it is ultimately admitted at the trial, the possibility of prejudice still exists, for it had entered the minds of potential jurors without the accompaniment of cross-examination or rebuttal.

(*Corona v. Superior Court*, *supra*, 24 Cal.App.3d 872 at pp. 877-878.)

Moreover, the press accounts about appellant's character and status in the community did not merely relate factual details, but included opinions, editorials and letters to the editor. (See, e.g., 15CT: 2920; 14CT:2690-2691.)

In contrast to the community's connection to Deputy Trejo, appellant was the outsider, a transient who had intruded upon their pastoral community. Not a single potential juror knew appellant or anyone related to him, although by the time of trial almost all prospective jurors knew *of him* in the manner in which he had been portrayed in the media. Indeed, for months the press described appellant as an outsider, a violent criminal with a lengthy criminal record inside and outside of prison, someone so dangerous he could not be housed at the local jail and a violent and white-supremacist gang member, terms not only likely to fan the flames of emotion that obscure the ability to walk into a courtroom and fairly listen to the facts presented in court, but that risk a verdict based on revenge or other emotions rather than on evidence. Appellant, the dis-possessed outsider, represented exactly the kind of defendant that pretrial publicity can most effectively prejudice. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at pp. 584-585; *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 388.)

There were at least 124 media references to Pelican Bay State Prison (12RT:1443), making clear to the community that appellant was not only an outsider, but that *his* community was a prison for the most notorious of prisoners. The media also portrayed appellant's community as the Aryan Brotherhood, effectively associating him with an organization and hate group "that aroused community hostility." (See, e.g., *Frazier v. Superior Court*, *supra*, 5 Cal.3d at pp. 293-294 [media's portrayal of the defendants as hippies, a group disliked in the community, weighed in favor of a change of venue]; *People v. Famalaro*, *supra*, 52 Cal.4th at p. 23 [community status of the defendant weighs in favor of a change of venue where defendant is associated with a group, such as a gang, toward which the community was "likely to be hostile"]; *People v. Fauber* (1992) 2 Cal.4th

792, 818 [status of the defendant warrants change of venue when the defendant was associated with any organization or group that aroused community hostility].)

The media demonized appellant. Bronson testified that he had never had a case where there was not one positive statement or comment about the accused. (12RT:1464.) "The extraordinary thing about this whole publicity is I don't think I've ever had a case before where I found nothing [in the publicity] either exculpatory or positive about the defendant. . . . [T]here was nothing about childhood, a parent who said something, a witness who said he was okay." (12RT:1464.)

Bronson astutely recognized that the media coverage in this case "created a sense that the community . . . needed to avenge Officer Trejo's death." (12RT:1450.) Sonoma County was saturated with the fact that this case was a death penalty case which, as Bronson stated, "affects the emotional status" of the community and predisposed its members toward the death penalty. (12RT:1450.) Although moving the venue for appellant's trial would not have affected the state's decision to seek the death penalty, the community to which venue was moved would not have been barraged with media stories about the need to avenge Deputy Trejo's death and to execute the white supremacist gang member who infiltrated their community.

The inflammatory, emotionally-laden descriptions about appellant in the media were characterizations repeated in the disparaging remarks of numerous members of the venire. Appellant's status in the community was a factor that weighed in favor of changing venue.

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e. The Size of the Community

Sonoma County's population in January 1996, was only 421,500. (18RT:2650; 18CT:3616.) In finding that the size of Sonoma County was a factor that, in the court's opinion, did not support a change of venue, the court cited *People v. Coleman* (1989) 48 Cal.3d 112, noting that this Court upheld the Sonoma County trial court's denial of the defense change of venue motion, in part based on the explanation that Sonoma County was not rural and noting its population at that time was approximately 300,000. (18RT:2650; 18CT:3616-3617.) In *Coleman*, this Court acknowledged that Sonoma was not one of the state's major population centers, but concluded that its size was not a factor that weighed in favor of a venue change because it was at least larger than the rural counties in which this Court had previously ordered a venue change. (*People v. Coleman*, *supra*, 48 Cal.3d at p. 134.)

This Court and other appellate courts, however, have repeatedly declared that even in counties with relatively large populations, which Sonoma was not, population size is a fact that is not determinative in denying a change of venue where it had been demonstrated that the impact of the adverse publicity had not been overcome by the size of the community. (See *People v. Proctor* (1992) 4 Cal.4th 499, 525; *People v. Jennings*, *supra*, 53 Cal.3d at p. 363.) Specifically, "the critical factor is whether it can be shown that the size of the population is large enough to neutralize or dilute the impact of adverse publicity." (*People v. Proctor, supra*, 4 Cal.4th at p. 525.)

That was not shown here. The impact of the widespread, hostile and inflammatory publicity in appellant's case was not neutralized or diluted in Sonoma County. The evidence at the venue hearing, and later the

questionnaires and voir dire of the prospective jurors, showed that there was broad recognition of appellant and the case. Approximately 85 percent of the jury panel indicated some knowledge of the case (21CT:4273, 4286-4287), a percentage that confirmed the accuracy of that found pretrial by Bronson's survey, which indicated that approximately 83.3 percent of Sonoma respondents recognized appellant's case (12RT:1482). This high recognition rate is significant in comparison to cases in which this Court has concluded that the size of the population sufficiently diluted the impact of the adverse publicity.

In *People v. Fauber*, *supra*, 2 Cal.4th at p. 818, the defendant argued that his case could only be tried in an urban county because it was a capital case. In rejecting this argument, this Court commented that the size of Ventura County, the 13th largest in the state, did not weigh in favor of a change of venue. The court stated that such motions are seldom granted from large counties because their size reduces the chance that preconceptions about the case have become embedded in the public mind. In assessing the effect of the pretrial publicity in that case, this Court noted that "few of the 186 prospective jurors had any recollection of the media coverage." (*Id.* at p. 819.) Similarly, in *People v. Jennings, supra*, 53 Cal.3d at p. 362, this Court concluded that the relatively large population of Fresno County had acted to dilute the impact of the adverse publicity, stating that the media coverage "had no lasting effect on those summoned for jury duty." Not so here, where both the pretrial surveys and the voir dire revealed that the negative publicity and its impact remained in the county's public consciousness.

Sonoma County was a community that shared the grief from the loss of Deputy Trejo and the fear from what had occurred by an outsider in their

community. "'In counties geographically removed from the locale of the crime, lack of a sense of community involvement will permit jurors a degree of objectivity unattainable in that locale.'" (*People v. Davis*, *supra*, 46 Cal.4th at p. 577, quoting *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 883.) In appellant's case, the community's civic response to the crime revealed that the character of Sonoma County was one of a small town. The citizens of Sonoma County responded through public expressions of sympathy and generosity by establishing funds to help Deputy Trejo's family, scholarship funds, attending the memorial service in large numbers and erecting a permanent memorial in Deputy Trejo's honor.

The requisite "objectivity" that this Court stated might be unattainable unless the venue for the trial is removed from the locale of the crime (*People v. Davis*, *supra*, 46 Cal.4th at p. 577), was indeed unattainable in this case. This was revealed in both the pretrial surveys and the voir dire. Because the operative question upon "retrospective" appellate review is "whether, in light of the failure to change venue, it is reasonably likely a fair trial was not had" in fact (*People v. Douglas*, *supra*, 50 Cal.3d at p. 495), rather than as a matter of pretrial speculation, the significance of the size of the community diminishes, if not disappears, when jury questionnaires and voir dire *actually* revealed that the impact of the adverse publicity remained and had not been diluted.

This Court has recognized that a major crime in a small community is more likely to become embedded in the public consciousness than in large communities and that prejudice from pretrial publicity is therefore less likely to dissipate effectively, even with the passage of time from the defendant's arrest. (*Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 387; *Williams v. Superior Court*, *supra*, 34 Cal.3d at pp. 592-593; *Martinez v.*

Superior Court, *supra*, 29 Cal.3d at p. 581; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52 and fn. 1.) But even a large county can "become so hostile to a defendant as to make a fair trial unlikely." (*Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 387, fn. 13.)

In sum, the knowledge of the case and prejudice toward appellant from the publicity had not dissipated. This major crime, in Sonoma County, became embedded in the public consciousness despite, or because of, the size of the county. The size of the community was a factor that weighed in favor of changing venue.

Moreover, for the trial court to have denied appellant's motion to change venue to a county that had not been saturated by pretrial publicity, on the theory that Sonoma County was not "small enough," violated appellant's Sixth and Fourteenth Amendment guarantees to a fair trial and an impartial jury and the Eighth Amendment guarantee of reliability to which appellant was entitled. (See *Groppi v. Wisconsin* (1971) 400 U.S. 505, 509-510; *Skilling v. United States*, *supra*, 130 S.Ct. at pp. 2912-2913.)

In sum, all five factors weighed heavily in favor of granting appellant's initial and renewed motions.

3. Political Ramifications from Appellant's Case

There were also political ramifications from appellant's case based on the fact that appellant was a parolee from Pelican Bay State Prison who had committed a crime in Sonoma County. Legislators from Northern California had expressed concern in the past, and had introduced legislation to require the Department of Corrections to physically transport "dangerous criminals" released from Pelican Bay, to their parole destination, given the risk that these parolees would otherwise pass through the northern part of the state on their way home. (14CT:2677, 2679.) Assemblyman Dan

Hauser stated inmates such as Scully "are brought [north] in armored buses under guard, and they should leave here in armored buses under guard." (14RT:2677.)

The legislation, which had previously been vetoed by the Governor, was re-introduced after appellant's arrest, with news reports specifically naming appellant as the reason for the law's need. (14RT:2677.) The published stories about the legal battle for the law included political finger-pointing, with lawmakers accusing the Governor's actions as being politically motivated. (14CT:2706.) Appellant's name was used as a synonym for a "predator convict." (14CT:2706.) A Northern California county supervisor stated that "convicts, such as Scully, are predators . . . . We're lucky we haven't had more Scullys on the loose." (14CT:2706.) The bill's author commented that he did not understand the Governor's reluctance to endorse the bill as "he should be making all kinds of political hay from this issue." (14CT:2706.)

During appellant's trial, the Press Democrat published an editorial stating that testimony about Pelican Bay State Prison was "a chilling reminder" of the potential threat by Pelican Bay parolees to people in the Sonoma area." (129RT:20078-20079.) The editorial continued that the legislation was stalled, awaiting the "next Pelican Bay-related tragedy." (129RT:20079.)

The legislators pushing for this law went so far as to state that had the Governor not vetoed their prison transport legislation the previous year, Deputy Trejo "might very well be alive today," and claimed that the Governor's concern about the bill's costs failed to take into account the "costs to the Trejo family and Sonoma County." (14CT:2679.)

In sum, the political debate in Sonoma County that involved appellant and the circumstances surrounding his case also supported a change of venue. (See *People v. Tidwell*, *supra*, 3 Cal.3d at p. 71 [factor supporting a change of venue was publicity of the "political debate" concerning the trial's fiscal impact]; *Powell v. Superior Court*, *supra*, 232 Cal.App.3d at pp. 798-801 [publicity re recriminations between mayor, police chief, police commission and others, which arose as a result of the crimes, supported venue change].) Sonoma County was made well aware from the local press about the legislation proposed to stop "predators" like appellant. (See 14CT:2692-2694, 2705, 2711, 2712, 2740, 2744, 2745, 2748; 15CT:2929, 2939, 2940.)

4. Retrospective Review on Appeal Demonstrates the Reasonable Likelihood That Appellant Did Not in Fact Receive a Fair Trial

Appellant maintains that he demonstrated pretrial that there was a reasonable likelihood that he could not receive a fair trial unless venue was changed from Sonoma County. The jury selection process corroborated that he could not, and did not, receive a fair trial.

The standard of review is the same on appeal as when raised on a petition for writ of mandate. Appellant must show a "reasonable likelihood" that a fair trial could not be had in Sonoma County and that it was reasonably likely that a fair trial was not had in light of the failure to change venue. (§ 1033, subd. (a); *People v. Famalaro*, *supra*, 52 Cal.4th at p. 21.) On appeal after judgment, this Court's de novo review is retrospective and encompasses the actual entire jury pool, and not merely the actual jury panel selected. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 29; *People v. Williams*, *supra*, 48 Cal.3d at p. 1125; *Powell v. Superior*

Court, *supra*, 232 Cal.App.3d at p. 794, fn. 6, citing *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1157.) A showing of actual prejudice is not required. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1126.)

The jury selection of the "actual, available jury pool" confirmed, with remarkable accuracy, the recognition rates found in the pretrial surveys. Approximately 85 percent of the jury panel indicated some knowledge of the case. (21CT:4273, 4286-4287.) Of the eventual trial jurors who decided appellant's case, nine recognized the case from pretrial publicity and from the discussions that ensued throughout the county that had been generated by the massive publicity. Thus, a remarkable and intolerable 75 percent of the jurors who sat and ultimately decided appellant's fate had knowledge of the case from sources outside the courtroom. (See fn. 57, *ante*; see also *Daniels v. Woodford, supra*, 428 F.3d at pp. 1211-1212 [erroneous denial of change of venue where, inter alia, "[t]wo-thirds of those empaneled remembered the case from the press accounts"].)

Additionally, the kind and extent of the knowledge that many of the actual jurors had about appellant and the case, and the publicity close in time to the beginning of appellant's trial, were not merely basic uncontested facts. (Compare *People v. Famalaro*, *supra*, 52 Cal.4th at p. 22 [by time of trial the publicity was generally factual and contained no inadmissible or prejudicial material].) The publicity remained sensational, biased and inflammatory.

At the time they appeared for jury duty, at least five of appellant's actual jurors either leaned toward the prosecution or recalled the emotional impact from Deputy Trejo's death and memorial, based on what they had learned from publicity. For example, juror 3360 had read about the case

and had talked about it with friends and coworkers. He had read about Pelican Bay State Prison – which he knew to be for "problem prisoners" – and that appellant had been incarcerated there, which piqued his curiosity as to why appellant had ended up there. From what he had read and heard, he had formed the opinion that a "violent criminal committed another violent crime." (5CT:1309-1310; 35RT:4770-4773, 4784-4791.) The court had denied appellant's cause challenge as to this juror, which had been based on the juror's knowledge and prejudgment of the case from pretrial publicity. (35RT:4839-4840; 36RT:4991.)

Voir dire triggered the memory of juror 3971. She recalled information adverse to appellant that she had not initially reported on her questionnaire, including the prosecution version of how the shooting allegedly occurred, as reported in the Press Democrat. How the shooting occurred was a highly contested issue at trial. She also recalled personal information about Deputy Trejo, which was the kind of publicity that engendered animosity toward appellant. (15SuppCT:4037; 45RT:6716, 6721.)

Similarly, juror 4084's memory was triggered during voir dire. Although not noted in his questionnaire, 4084 recalled the moving photographs of Deputy Trejo's memorial service published in the Press Democrat and described the effects of having viewed them. He stated that when looking at the photographs, that what struck him most were the pictures of the family: "that's the part that . . . brings the emotion out . . . the deceased is gone and the family is there grieving." (43RT:6297, 6302, 6309; 16Supp CT:4471.)

These recollections occurred for 3971 and 4084 between the time they filled out their questionnaires, until something was said during voir

dire that led to additional recollections of what they had read about appellant, the case and Deputy Trejo. If the few questions posed to these jurors during voir dire triggered previously un-recollected information about the case, appellant and Deputy Trejo, there was little doubt that as the evidence unfolded during trial, their recollection of information about the case and appellant, from sources outside the courtroom, would continue during trial. Both Bronson and Dillehay testified about memory, and indicated that among the harmful effects from extensive pretrial publicity was that something can be introduced at trial that triggers a recollection of prior knowledge of the case that the juror had not previously remembered. (12RT:1548-1549; 15RT:2420.)

Juror 4393 leaned toward the prosecution based on the publicity. She was another regular reader of the Press Democrat. She initially stated that she assumed appellant was guilty based on what she had read in the paper. She later modified her answer to contend that from what she had read, appellant was at least the best suspect, and that "if she had to," she could keep an open mind. (41A-RT:5818.) Moreover, this juror had discussed the case and appellant with coworkers. (20SuppCT:5494-5495; 41A-RT:5812.)

Another actual juror, 3726, was one of the many from the jury pool who had watched Deputy Trejo's memorial service on television. (10SuppCT:2641.) She talked about Deputy Trejo's death with her brother, who had once wanted to be a police officer. Because of the way the deputy's death was meaningful to and affected her brother, it likewise affected her. (43RT:6450.) Moreover, this juror's work required her to be near where the crime had occurred, and a number of people at her work talked about the case. (43RT:6449.)

In sum, appellant faced a jury that could not fairly judge him due to the knowledge gained and taint from the prejudicial publicity. All of the factors this Court considers in deciding whether venue should be changed weighed in favor of changing venue. The recognition rate of the case among the pool of appellant's jurors, and ultimately the actual jurors, was extremely high. Appellant's case, and the community's hostility toward appellant had become deeply embedded in the Sonoma County community's public consciousness. What this community had learned, and what the jurors brought with them, was knowledge about the case from outside the courtroom. "'The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'" (*Skilling v. United States*, *supra*, 130 S.Ct., at p. 2913, quoting *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462.) The publicity about the case and the accused caused the crime and the Sonoma County community's antipathy for appellant to "become deeply embedded in the public consciousness" resulting in "more than a reasonable possibility that the case could not be viewed with the requisite impartiality." (*People v. Williams, supra*, 48 Cal.3d at p. 1129.) Appellant has shown a "reasonable likelihood" that a fair trial could not be, and was not had, in light of the failure to change venue. (§ 1033, subd. (a).)

a. Juror Assurances of Impartiality Did Not Justify the Trial Court's Refusal to Change Venue

Assurances of fairness by jurors do not automatically support a trial court's decision to deny a motion to change venue or show that a defendant received a fair trial. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31.) Nor

can they logically be deemed perforce supportive of a denial of such a motion. Any prospective juror acknowledging an inability to be fair would of course be excused. But mere assurances of fairness by jurors are not sufficient to deny a motion to change venue. (*Irvin v. Dowd*, *supra*, 366 U.S. at pp. 727-728 [although all jury members had declared they could be impartial, error to deny venue motion where the defendant's life was at stake and the community atmosphere was one of deep and bitter prejudice]; *Daniels v. Woodford, supra*, 428 F.3d at p. 1211 [venue motion improperly denied even with defendant's concession "that the record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside"].)

Indeed, cases are legion that juror assurances of impartiality are not dispositive of an ability to be a fair and impartial juror and are often entitled to little weight. (See e.g., *People v. Davis*, *supra*, 46 Cal.4th at p. 581 [juror's declaration of impartiality not conclusive]; *People v. Williams* (1981) 29 Cal.3d 392, 410 [general proclamation of fair-mindedness untrustworthy]; *People v. Riggins* (1910) 159 Cal. 113, 120 ["a prejudiced person usually believes himself fair-minded and impartial"]; *Hayes v. Ayers* (9th Cir. 2011) 632 F.3d 500, 511 ["little weight" should be given to a prospective juror's assurances of impartiality where the general atmosphere in the community or courtroom was inflammatory].) Moreover, any expectation that a juror can insulate his or her verdict from inadmissible knowledge is unrealistic. (See *Bruton v. United States* (1968) 391 U.S. 123, 128-130; *People v. Aranda* (1965) 63 Cal.2d 518, 525-526.)

In any event, the actual jurors' attestations of impartiality are only part of the equation. Indeed, this Court recently reiterated that even if all 12 jurors testified under oath that they could put aside outside influences and

fairly try the case, it does not necessarily establish that the defendant received a fair trial when the record of voir dire demonstrates that the pretrial publicity had a prejudicial effect. (*People v. Famalaro*, *supra*, 52 Cal.4th at p. 31; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1168.) As Justice Traynor cogently stated for a unanimous Court in *People v. McKay* (1951) 37 Cal.2d 792, 798: "In view of the prevailing atmosphere in the community, the fact that from 251 persons it was possible to select 14 who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had."

Both the defense and prosecution experts confirmed that assurances of impartiality cannot be accepted on their face. Bronson testified that research has shown that prospective jurors generally, likely without realizing it, provide answers they believe demonstrate their lack of bias or prejudice when in fact they had significant improper knowledge of the case that affected their ability to be fair. (12RT:1520-1521.) All three experts maintained that surveys tend to be more accurate than voir dire because people are more honest about their beliefs when responding to anonymous surveys. (See 11RT:1410; 12RT:1477-1478, 1502-1503, 1518-1519 [Bronson]; 14RT:1808, 1848, 1864-1865, 1868, 1783 [Ebbesen]; 16RT:2352 [Dillehay].) The surveys, like the voir dire in this case, demonstrated that in light of the massive publicity, a juror's mere assurance of impartiality and fairness was not credible, much less conclusive or dispositive that appellant was fairly tried in Sonoma County.

As is presumably true in every case, jurors ultimately selected to try the case assured the court, in one way or another, that they could give both sides a fair trial. The trial court here believed that it had been successful in convincing the 12 empaneled jurors and the 6 alternates to do so, noting that

it had "badger[ed]" these jurors . . . to keep an open mind." (51RT:7896.) The court concluded that the prospective pool of jurors did not demonstrate "that level of pretrial publicity necessary to disqualify them as a group" (51RT:7898), and that appellant had not met his burden of proving that he could not have a fair trial in Sonoma County based on the actual jurors who were selected. (51RT:7899.)

The trial court erred. As demonstrated in section C. 2. b. ii., *ante* (the nature of the publicity), the pervasive publicity and the circumstances of this case – a popular deputy sheriff's death at the hands of an outsider who had been vilified in the press – resulted in the case, and the community's hostility toward appellant, becoming embedded in Sonoma County's public consciousness. When the facts and circumstances in a case cause the crime and the community's antipathy for the accused to "become deeply embedded in the public consciousness," there is "more than a reasonable possibility that the case could not be viewed with the requisite impartiality." (*People v. Williams, supra*, 48 Cal.3d at p. 1129.)

In light of the massive and prejudicial county-wide publicity covering the time from appellant's arrest until the beginning of jury selection (and throughout trial), the jurors' mere assurances of impartiality and fairness – however sincere and well-intentioned – were not credible, let alone conclusive or dispositive. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner. . . . [However,] where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.'" (*Irvin v. Dowd, supra*, 366 U.S. at p. 728.)

The jurors' assurances of impartiality did not justify the trial court's decision to deny a change of venue. The same conclusion is compelled under federal law. Whether or not appellant can show "actual prejudice" from the seating of any particular juror or jurors, he has certainly made a showing "sufficient for a presumption of prejudice" because "the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." (*Daniels v. Woodford*, *supra*, 428 F.3d at p. 1211 [internal quotation marks omitted].) "The Sixth and Fourteenth Amendments 'guarantee[] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.'" (*Hayes v. Ayers*, supra, 632 F.3d at p. 507, quoting *Irvin v. Dowd*, *supra*, 366 U.S. at p. 722.) This, appellant was denied.

b. The Passage of Approximately 18 Months Between Appellant's Arrest and His Trial Did Not Diminish the Need to Change Venue or Lessen the Likelihood That a Fair Trial Could Not Be Had

The record shows that the time between appellant's arrest and the beginning of jury selection did nothing to ameliorate the harm that occurred from the extensive publicity. The publicity began with appellant's arrest and continued until the time of jury selection. Jury selection began approximately eighteen months after appellant's arrest. (31RT:3986.) This passage of time did little, if anything, to diminish the community interest in, and high recognition of, appellant's case. Indeed, one year after the crime the trial judge issued an order with multiple restrictions on the dissemination of information by the parties, public officials, potential and prior witnesses, and others. (12CT:2321-2322.) The court noted that the one-year anniversary of the incidents leading to the case was quickly

approaching, stated that appellant's case remained "of considerable public interest" and that there was a reasonable likelihood that public dissemination by any means of extra-judicial statements relating to the case could "interfere with a fair trial and may otherwise prejudice the due administration of justice." (12CT:2321.) The trial court's statements were prescient. The prejudicial publicity about appellant and this case continued, insuring that appellant could not be fairly tried in Sonoma County. The publicity marking the one-year anniversary of Deputy Trejo's death included information about a candlelight vigil and the dedication of a permanent memorial at the location where Deputy Trejo had died the year before.

In *People v. Williams, supra*, 48 Cal.3d 1112, this Court concluded it was error to deny the defendant's motion to change venue where the recognition rates of the prospective and trial jurors were deemed to have demonstrated "[t]he pervasiveness of the news coverage." (*Id.* at p. 1128.) In *Williams*, the recognition rate, which was based on whether the prospective juror had read or heard of the case, was approximately 52 percent. (*Ibid.*) The recognition rates in appellant's case, both those determined from the surveys and from voir dire, far exceeded those found to warrant a change of venue in *Williams*.

At the time of the surveys in this case, approximately 83 percent of the respondents in Bronson's survey recognized appellant's case (12RT:1482), and approximately 78 percent of those who recognized the case believed that appellant was either probably or definitely guilty (12RT:1492-1494). Even the prosecutor's own expert found an approximate 73 percent of Sonoma County respondents recognizing appellant's case (13RT:1716-1717), and 70 percent of the county's

respondents believing that appellant was probably or definitely guilty (13RT:1731).

These results were not surprising. When the venue motion was heard, close to 150 articles had appeared in Sonoma County about appellant and the case, over 100 of them in one newspaper: the Press Democrat. (12RT:1424.) There was also substantial radio and television coverage. (12RT:1465-1467.) As with the recognition rates, the publicity in appellant's case significantly exceeded the extensive publicity this Court in *Williams* found led to the substantial recognition rate of prospective jurors in that defendant's case. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1128.) In *Williams*, approximately 50 newspaper and radio reports appeared during the nine-month period between defendant's arrest and his venue motion. (*Id.* at p. 1127.) In appellant's case, it was triple that number. The publicity here was also far greater than in other cases from this Court in which it was found that the publicity was not sufficiently prevalent and the recognition rate not sufficiently high to conclude that the trial court erred in denying the defendant's motion. (See, e.g., *People v. Hamilton, supra*, 48 Cal.3d at pp. 1157-1158 [three local newspapers collectively published 20 stories; none of the local newspapers ran editorials about the case]; *People v. Weaver* (2001) 26 Cal.4th 876, 906-907 [12 newspaper articles; survey indicated 53 percent recognition rate, jury selection began over a year after the survey].)

Voir dire occurred several months after the hearing and the community's interest in appellant's case remained. That the publicity was prevalent and lasting was evidenced by the high recognition rate among the venire. Voir dire showed that 85 percent of the prospective jurors in appellant's case had some knowledge of the case. (21CT:4273, 4286-4287.) The passage of time did not lessen the need to change venue. (See

Steffen v. Municipal Court (1978) 80 Cal.App.3d 623, 627 [long-term publicity "so permeated" that part of the county in which the trial would take place that a change of venue was required].)

c. Appellant's Express Dissatisfaction with the Entire Venire, as Well as With the Composition of the Jury, Supported Appellant's Renewed Motion to Change Venue

Appellant expressed dissatisfaction with the jury venire, lost numerous challenges for cause based on prospective jurors' knowledge of the case from pretrial publicity, and stated in no uncertain terms that the jury as composed was unsatisfactory. (51RT:7886-7887; see also 33RT:4335-4336.) When appellant accepted the 12 prospective jurors and the six alternates, counsel made clear that he was not only dissatisfied with the jury, but felt compelled to stop exercising peremptory challenges because of the prospective jurors who were next to be called to the jury box. (51RT:7886-7887.)

Appellant knew who would be the next prospective juror because of the jury selection procedure the court had implemented. (See fn. 56, *ante*.) When counsel accepted the jury, he stated that not only were a large number of the remaining prospective jurors biased, but defense counsel had unsuccessfully challenged a number of them for cause. (51RT:7886-7887.)

Appellant's "acceptance" of the jury without having exercised all of his peremptory challenges does not support a finding that the jury as composed was fair or that it was reasonably likely that appellant could be fairly tried in Sonoma County.[65] It also does not preclude a finding that the

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[65] Appellant used six peremptory challenges during the selection of (continued...)

trial court erred in denying appellant's renewed venue motion. What it did indicate, in light of the court's refusal to change venue and its denial of numerous challenges for cause, was that counsel felt compelled to "accept" the jury when he did because had he continued to exercise his peremptory challenges appellant would have faced jurors with significant recall of the publicity about the case and strong feelings against appellant and for the death penalty.

This Court has referred to acceptance of a jury as indicating satisfaction with it as constituted, unless the record indicates otherwise by a reasonable explanation. (*People v. Davis*, *supra*, 46 Cal.4th at p. 581.) In *Davis*, the defendant had not used all of his peremptory challenges. Forty-two prospective jurors remained to be called. The parties had no idea as to who, of the remaining 42, might be called to the box if the parties continued to exercise their peremptory challenges. This Court was unpersuaded by the defendant's assertion that he was reserving his remaining challenges for those three possible jurors "still out there," stating that even if the prosecutor used one of its remaining challenges, the "probability that one of defendant's three disfavored jurors would be called from the remaining 42 prospective jurors was low." (*Ibid.*) Not so here, where appellant knew exactly who would next be called to the box.

Among the next ten prospective jurors to be called had appellant continued to exercise peremptory challenges were five jurors who defense counsel had unsuccessfully challenged for cause. During voir dire, 3295

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[65] (...continued)
the first twelve jurors and the prosecution used nine. The defense exercised one peremptory challenge during the selection of the alternate jurors, and the prosecution used two.

had said that she would not consider a life without parole sentence if someone "right out maliciously did something wrong" (35RT:4811), and would always vote for the death penalty if the defendant was convicted of first degree murder that had an element of malice or maliciousness and willfulness, deliberateness and premeditation (35RT:4812).

Juror 3817 was another juror who appellant had unsuccessfully challenged for cause. This juror had read news accounts of the case, discussed it with her coworker, who had been a friend of and had attended Deputy Trejo's memorial service, had become upset about the crime given her coworker's reaction, knew an anticipated prosecution witness, and heard about the hostage situation and that a school had been closed in the area of the crime. (44RT:6641-6642, 6649-6651; 11SuppCT:3076-3077.)

The court had also denied appellant's challenge for cause as to 3012, despite that juror's knowledge about the case from the extensive publicity, and his belief that if appellant were convicted he should get the death penalty. Juror 3012 had strong negative opinions about appellant based on what he had read and heard in the media. He had also discussed the case with others in the Sonoma community. (40RT:5582-5584, 5596-5599; 41A-RT:5784; 1SuppCT:38.)

Juror 3934 recalled information about the case from the publicity, commented that his mind and memory work in ways that hearing some information can later trigger a recall of other information, and admitted that he strongly favored the death penalty for defendants convicted of murder. Appellant's challenge for cause was denied. (14SuppCT:3758; 43RT:6442-6444; 45RT:6817.)

Juror 4446 was also kept as a potential juror over appellant's objection, and would have been the seventh called to the jury box.

Appellant had argued as to this juror that her answers during voir dire were not credible, but the court denied appellant's challenge for cause. (41A-RT:5883-5884.)

Three others on the list of the next ten to be called included jurors who had learned about the case from publicity and had discussed it with others in the community. Juror 4347, the first on the list, had read about appellant's case in the Press Democrat and heard about it from others in the community. (19SuppCT:5277; 41B-RT:5895-5898, 5903-5905, 5912.) A friend joked with juror 3655 when she was called for jury service that it was for appellant's case and told her information about it. (9SuppCT:2332.) Juror 3241 had concluded from the publicity that the prosecution had a good case, that it appeared the charges were true and commented that she believed that anyone in the community who read the newspaper would have the same feeling that she did. (36RT:5033-5036; 4SuppCT:937-938.) Juror 3761, ninth on the list, had read several stories in the Press Democrat, saw TV coverage, recalled the huge procession of police cars and helicopters on the day of Deputy Trejo's funeral and talked with his friends about the funeral that had shut down the highway. (11SuppCT:2889-2890.)

In *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 380, this Court recognized the unfortunate position in which an appellant may be when a pretrial venue motion was unsuccessful and trial counsel subsequently did not exercise all available peremptory challenges. This Court noted that it may well be that trial counsel did not use all peremptory challenges because the jurors examined may be comparatively less biased than those next to be seated. (*Ibid.*)

Moreover, this Court's rationale that the failure to exhaust peremptory challenges or complain about the jury's composition "strongly indicates" a fair trial was had (see, e.g., *People v. Davis*, *supra*, 46 Cal.4th at p. 581), would be wholly misplaced in appellant's case, given appellant's protestations regarding the jury's composition. In sum, the fact that appellant did not use all of his peremptory challenges does not preclude this Court from concluding that it was in fact reasonably likely that a fair trial was not had.

5. The Reasonable Likelihood That a Fair Trial Could Not Be Had Applied to Both the Guilt and Penalty Determinations

Asking a Sonoma County jury to decide appellant's sentence, given the inflammatory and prejudicial publicity, violated appellant's Eighth and Fourteenth Amendment rights to a fair and reliable penalty determination, as well as his rights under article I, sections 7, 15, 16, and 17 of the California Constitution. Just as there was a reasonable likelihood that appellant could not, and did not, have a fair guilt phase trial, he likewise did not have a fair penalty phase trial.

The evidence of guilt of the defendant does not figure in the analysis of whether a change of venue should be ordered. "'A fair trial in a fair tribunal is a basic requirement of due process' . . . regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." (*Irvin v. Dowd*, *supra*, 366 U.S. at p. 722 [citations omitted].) A showing of actual prejudice is not required. (*People v. Williams, supra*, 48 Cal.3d at p. 1126.) The evidence of the petitioner's guilt cannot be dispositive in assessing petitioner's change of venue claim.

(*Coleman v. Kemp* (11th Cir. 1985) 778 F.2d 1487, 1541; *People v. McKay*, *supra*, 37 Cal.2d at p. 798.)

With respect to the effect of publicity on the penalty phase, the reasonable likelihood that a fair trial cannot be had is not lessened by the fact that the defendant's guilt was no longer in issue.[66] (See, e.g., *Fain v. Superior Court*, *supra*, 2 Cal.3d at pp. 52-53.) Indeed, "'a fair and impartial jury is no less essential at the penalty phase than at the guilt phase.'" (*People v. Tidwell, supra*, 3 Cal.3d at p. 75, quoting *Fain v. Superior Court*, *supra*, 2 Cal.3d at p. 52.)

The publicity that tainted the guilt phase of appellant's trial, likewise tainted the penalty phase. (See *Daniels v. Woodford, supra*, 428 F.3d at p. 1212, fn. 31.) The jurors deciding whether the person who was convicted will live or must die for his crime express the conscience of the community. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 519.) It is during the penalty

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[66] The publicity continued to the time appellant's penalty phase was set to begin. After the codefendant's guilt phase verdicts were pronounced, the court commented that there had been print, radio and television publicity about the case. (117RT:18729-18730.) When the court inquired of appellant's jurors as a group whether they had "inadvertently" seen or heard the publicity, five jurors raised their hands. (117RT:18730.) Outside the presence of the other jurors, juror 3360 told the court that he saw, but did not read the article, and noted that his wife "cuts out the articles . . . so I get a paper full of holes." (117RT:18733-18734.) Juror 3726 stated that she saw on the front page a photo of the codefendant and her attorney, but put it aside, and added that her roommate got everything about the case out of the paper and keeps it. (117RT:18732-18733.) A newspaper "full of holes" shows the extent of the continued publicity and community interest in appellant's case. At the end of appellant's case, the court granted the request from the local television station to film appellant's sentencing, stating "I do believe that this again is the subject of interest in our community." (129RT:20116-20117.)

phase that the jury has the opportunity to see and consider the defendant as a human being, with human frailties, worthy of a life verdict, and not merely as a dehumanized stranger. (*People v. Williams*, *supra*, 48 Cal.3d at p. 1131 [risk was unacceptably high that jury would treat defendant as a "dehumanized stranger"]; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [a progressive and humanizing development in determining a just and appropriate sentence in a capital case requires consideration of the character and record of the individual offender]; *Lockett v. Ohio* (1978) 438 U.S. 586, 605 ["The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases"].)

The risk was unacceptably high that a Sonoma County jury would not be able to consider fairly appellant's mitigating evidence and would instead treat appellant, the quintessential outsider who was just released from prison and was passing through their town, as a "dehumanized stranger." As detailed above, in section C. 2. b., *ante* (nature and extent of news coverage), the media was riddled with references of dehumanizing slurs about appellant, comparing him to an animal, describing him as cold-hearted, referring to him, repeatedly, as a member of a hate group, and describing the homicide as a killing committed "execution-style," and as "cold-blooded."

These expressions of hate, fear and animosity toward appellant were not lost on the prospective jurors who, as detailed above, used terms like "scum," "white supremacist," "cop-killer," "scary" and "sleaze" when referring to appellant; and when stating what should happen to him, such as

"fry him" and "hang him."[67] (See § B. 2., *ante* (the questionnaires and voir dire).)

Appellant was publicly portrayed as associated with a group that aroused community hostility. In *Frazier v. Superior Court*, *supra*, 5 Cal.3d at pp. 293-294, this Court found that so long as there was hostility towards the group with which the defendant was identified, even if there was not hostility toward the individual defendant, there was the risk that he would be judged for what he "appeared to be," rather than who he was as an individual. (*Ibid.*) The risk of harm in appellant's case was exacerbated because the trial court had ruled that any alleged connections to these groups was inadmissible.

Bronson found 111 references to the death penalty in the publicity, eight of them headlines. (12RT:1449.) As Bronson explained, the impact of such publicity and its effect on the emotional status of the people sitting in judgment of the accused is particularly insidious because of the normative decision-making that occurs during sentencing in a capital case. (12RT:1450.)

Publicity saturated the county and created a shared experience of loss and sorrow for the Sonoma County community.[68] It was little wonder that

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[67] Bronson testified about the effect of emotional or "loaded" terms in the media, words and phrases that arouse and hit a nerve, such as "execution-style slaying" and "cold-blooded," as terms that can cause bias. (12RT:1557-1558.) In regard to the penalty phase, Bronson had testified that in light of the role of the jury, the impact of pretrial publicity is insidious because it affects emotions and feelings, and thus is more difficult to attempt to control through remedies such as instructions. (12RT:1449-1450.)

[68] Bronson referred to this as the salience factor. (12RT:1444.) He (continued...)

the recognition rate was so high and the feelings regarding the punishment so strong. There was the community's shared sense that the accused took one of their own, a deputy sheriff who protected them. Indeed, accompanied by the media, the county's District Attorney attended appellant's initial court appearances, along with the assigned district attorney, stating that "the killing of a police officer strikes at the community." (14CT:2686.) Moreover, the jurors were surrounded by Deputy Trejo's former colleagues. Deputies from the Sonoma County Sheriff's Department were with them daily in the courtroom as they were the bailiffs who supplied the security and who were in charge of the jury during the trial and when the jurors deliberated. This shared sense of loss would not have been present outside of Sonoma County.

In short, "'it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which [appellant] was entitled under the Sixth and Fourteenth Amendments.'" (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 53, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 518.)

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[68] (...continued)
testified that the emotional impact of the homicide of a law enforcement officer, while always strong, is greater in the community in which the officer worked and lived, where the deceased officer was known to the community and whose accomplishments and personal story appeared in local publicity. He noted that the publicity in this case referred to Deputy Trejo as "our cop." (12RT:1444-1445.) Deputy Trejo's death would not have been as salient to a community outside of Sonoma County.

D. The Erroneous Denial of Appellant's Motions For a Change of Venue Requires Reversal of The Entire Judgment

The erroneous denial of a motion for a change of venue requires reversal of the entire judgment. (*Irvin v. Dowd, supra*, 366 U.S. at p. 728; *People v. Williams, supra*, 48 Cal.3d at pp. 1131-1132.) "'Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, however, the standard of review is the same. *A showing of actual prejudice shall not be required.* . . . On appeal after judgment, the defendant must show a reasonable likelihood that a fair trial was not had. In either case, the phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 279, quoting *People v. Williams, supra*, 48 Cal.3d at pp. 1125-1126; emphasis added [internal quotation marks and citations omitted].)

The record amply shows that a fair trial was not had. Had appellant's venue motion been granted, he would not have faced a jury that had been inundated by the publicity in Sonoma County, including stories spelling out the prosecution's theory of the shooting, publicizing the codefendant's statements inculpating appellant, about the profound loss the community felt from the death of Deputy Trejo, and numerous vituperative stories condemning appellant. Instead, appellant would have faced a jury that would hear the evidence for the first time when presented and tested in court, and not filtered through the inaccuracies, misunderstandings and influence of the media.

This Court has stated that "the controlling consideration is whether the net effect of the coverage was to suggest to persons who are potential jurors" that the accused was guilty. (*Odle v. Superior Court, supra*, 3

Cal.3d at p. 939; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 580 [net effect of publicity suggested to potential jurors the probability that defendant was the actual killer].) In appellant's case, the critical issue was appellant's intent, which was subject to substantial factual dispute at trial. The defense presented evidence of, and argued that, Deputy Trejo's death was an accident, was not premeditated or deliberate and did not occur during the course of a robbery. It was, at most, a second degree murder. (110RT:17526-17531, 17535-17544, 17547 [evidence does not support premeditated murder]; 17519-17526 [evidence does not support charge of robbery].) The prosecution argued that appellant committed a first degree, premeditated "cold-blooded murder," with malice aforethought. (110RT:17252; 111RT:17574, 17601.) The prosecution argued that appellant thought it out, calculated it, and "executed" Deputy Trejo. (109RT:17252; 110RT:17349; 111RT:17577.) The prosecutor's closing argument strategically used the same language that prospective jurors had recollected from the publicity in appellant's case: "cold-blooded" and an "execution" murder. (109RT:17253,17601.) "This is a cold-blooded killing. And you can look past those wire rim glasses, look into his eyes, and you see a cold-blooded murderer. Don't be fooled." (111RT:17601.) He told the jurors that appellant had committed his crimes "in our county" (111RT:17570), that they were the conscience of the Sonoma County community and he knew that they would ensure "that justice will indeed be served here" (109RT:17253, 17601). At the close of his penalty phase argument, the prosecutor again used language similar to that used in the media, imploring the jury to make appellant pay with his life for "cold-bloodedly" killing Deputy Trejo. (128RT:19884.)

The goal of a fair trial in the locality where the crime occurred was unattainable. The jury panel had been "bathed in streams of circumstantial incrimination flowing from the news media." (*Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 878.) When Sonoma County residents reported for jury duty, the media had saturated the county with words, images and scenarios that painted appellant as the "cop killing" perpetrator of the "cold-blooded slaying" of a veteran Sonoma County Deputy Sheriff (14CT:2675; 15CT:2942, 2944, 2946), and there was a media blitz of circumstantial incrimination likely to create a belief in appellant's guilt under the prosecution's theory that was as effective as publicizing a confession across the headlines.

The publicity permeated and infected Sonoma County, the courthouse and the very courtroom in which appellant unfairly stood trial for his life. The media's thirst to cover appellant's case did not end after appellant's arrest or even the first few weeks following it.

When "the matter [is] analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected" (*People v. Williams, supra*, 48 Cal. 3d at p. 1125), it cannot be fairly concluded that "it is reasonably likely that the defendant in fact received a fair trial" (*id.* at p. 1126). Quite to the contrary, appellant has demonstrated far more than a "reasonable likelihood" that he could not be, and was not, fairly tried in Sonoma County. The only remedy was to change venue. In *Daniels v. Woodford, supra*, 428 F.3d 1181, the Ninth Circuit could have been describing appellant's case in disagreeing with the conclusion of this Court in *People v. Daniels* (1991) 52 Cal.3d 815, 849-854, that the defendant's venue motion had been properly denied:

> The nature and extent of the pre-trial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity warranted a change of venue. The trial court's denial of this motion for a change of venue violated Daniels's right to a fair and impartial jury and thus, his right to due process.

(*Daniels v. Woodford, supra*, 428 F.3d at p. 1212.)

Because appellant's case, in the venue in which he was tried, could not be viewed with the requisite impartiality that due process dictates, the court's error also violated appellant's fundamental right to an impartial jury. (U.S. Const., 6th & 14th Amends; *Skilling v. United States*, *supra*, 130 S.Ct. at pp. 2912-2913; see also *Morgan v. Illinois* (1992) 504 U.S. 719, 728; *Irvin v. Dowd*, *supra*, 366 U.S. at p. 728.) The error also violated appellant's Eighth and Fourteenth Amendment rights to a fair penalty trial and reliable penalty determination.

The entire judgment must be reversed.

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THE COURT PREJUDICIALLY ERRED WHEN IT ADMITTED EVIDENCE OF OTHER CRIMES TO PROVE THE CONSPIRACY AND ATTEMPTED ROBBERY COUNTS

A. Introduction

Appellant was prejudiced by the erroneous introduction of other-crimes evidence that was tethered to weak charges for which no substantial evidence ever existed. In fact, for lack of sufficient evidence, the magistrate in this case refused to hold appellant on charges of conspiracy to commit robbery and robbery – the counts for which the other-crimes evidence was eventually admitted at trial. The magistrate also correctly refused to admit evidence of two prior robberies committed in 1981, which the prosecution sought to introduce on the conspiracy and attempted robbery charges at the preliminary hearing.

Nonetheless, the prosecution recharged the attempts and the conspiracy on the same weak evidence, and again sought to introduce evidence of prior robberies by appellant to prove the charges at trial. The trial court found that sufficient evidence supported a re-charging of attempted robbery of Marian Wilson and conspiracy to commit robbery.[69] The court also admitted four prior robberies under Evidence Code section 1101, subdivision (b), as evidence of intent and common scheme or plan, but the prior robberies were so dissimilar to the charged conduct that they were inadmissible for any purpose.

The admission of the evidence undoubtedly prejudiced appellant despite the fact that the jury hung on the conspiracy count and the court

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[69] The trial court agreed that insufficient proof existed of the attempted robbery on the R&S Bar.

eventually dismissed the attempted robbery count under section 1118.1. The evidence portrayed appellant as a person of bad character who was violent and who robbed people, which predisposed the jury to reject his testimony entirely, regardless of the plausibility of his account that the shooting was an accident.

B. Procedural Background

1. Proceedings in the Preliminary Hearing Court

To fully illustrate the weakness of the evidence of the charged offenses to which the other-crimes evidence was tethered, and to demonstrate the trial court's error in ultimately admitting the evidence, appellant sets forth below a summary of the proceedings in the preliminary hearing court and in the trial court.

a. The Complaint

The complaint charged appellant and Moore in Count 3 with conspiracy to commit robbery (§§ 182, subd. (a)(1), 211) and alleged the following five overt acts: (1) defendants armed themselves with a loaded short-barreled shotgun, (2) defendants obtained a street map of Santa Rosa, "marking potential locations of robbery victims," (3) defendants obtained a mask and gloves to avoid identification as perpetrators of robberies, (4) defendants drove to 6940 Burnett Street, Sebastopol, "and surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves," and (5) defendants drove to 5338 Highway 12, Santa Rosa, and surveiled the area of the R&S Bar, armed with a shotgun and in possession of gloves and a mask. (9CT:1662.) The complaint also alleged in Counts 14 and 15 that appellant and Moore committed attempted robbery against Marian Wilson, and "the patrons and

employees of the R&S Bar," respectively, and that appellant personally used a firearm during those offenses. (9CT:1668.)

b. Evidence of the attempted robberies and conspiracy to commit robbery counts

Sushi Hana Incident

Regarding the purported attempted robbery alleged in Count 14 of the complaint, Marian Wilson testified at the preliminary hearing that on March 29, 1995 (the night of the homicide), she was at the Sushi Hana restaurant at 6930 Burnett Street, which she owned along with her partner, sushi chef Sung Wong Kim. (2CT:225, 235-236.) The restaurant was well lit at night and the cash register at the front of the restaurant was visible from the outside, through the restaurant's front window. (2CT:227, 237-238.) Adjacent to the restaurant and separated by an alleyway was a Round Table Pizza restaurant, which was still open. (2CT:231, 303, 322.) Behind the restaurant and on the other side was a bar called Jasper O'Farrell's that closed at 2 a.m. (2CT:231, 303, 323.)

That night, Sushi Hana closed at 9 p.m., but Wilson cleaned up until 10. She then put the day's receipts in a briefcase, though she did not handle the money in a place where anyone outside could have seen her. (2CT:239, 317.) While other employees remained in the restaurant cleaning, she left to run an errand. (2CT:226.) When she returned to the restaurant at about 10:45 p.m., she noticed a green pickup truck parked on the last parking space on Main Street, near Round Table and around the corner from Sushi Hana. (2CT:228.) However, the pickup truck did not have a view of Sushi Hana from that location. (2CT:325.) She saw that the passenger was female and had an unusually full head of blond hair, and that the driver was

male with dark hair. (2CT:232-234.) She turned left in front of the pickup truck, and parked on Burnett across the street from Sushi Hana. (2CT:235.)

She went back into the restaurant, collected some mail and the briefcase containing the receipts, and informed Kim she was going to the mailbox around the corner and would be back to pick him up. (2CT:238.) When she went outside, she saw that the pickup truck was now parked in front of her own truck. (2CT: 302.) This made her uneasy. (2CT:304.) She felt scared, but she did not know why. (2CT:307, 331.) She saw that the passenger side door was open but the people she had previously seen were still in the pickup truck, facing forward. (2CT:305.) She did not recognize them and did not think they had ever been in her restaurant. (2CT:318.) Because she felt scared, she threw her briefcase on the passenger side of her truck and got in. (2CT:305, 307.) Then she noticed the occupants of the car get out and walk toward her truck. (2CT:306.) She did not know how close they got. (2CT:329.) No one said anything to her or touched her in any way. (2CT:317, 329.) Although she reported that the pair had been walking toward her, she never saw the man's "full face,"and saw it only "partially from the side." (2CT:329.) She could not identify appellant in court as the man. (2CT:312.) She also could not tell if the woman she identified as Moore had been walking on the sidewalk when the pair walked in her direction. (2CT:306, 312.)

In any event, Wilson drove away, and did not see where the occupants of the green pickup went. (2CT:308.) When she turned onto Main Street, she stopped to see if the pickup was still sitting there, and when she looked down the street, she saw it pulling onto Petaluma Avenue. (2CT:309, 310.) After mailing her letters, Wilson returned to the restaurant, and the green truck was not there. (2CT:310, 311.)

The next day when she heard about the shooting of Deputy Trejo, and learned the description of the people involved and the green truck, she reported the events of the night before to the police. (2CT:316.)

Sung Wong Kim added that about two minutes after Wilson informed him she was going to mail some letters, he heard a car drive through the alley and stop in front of the restaurant for about 20 seconds. (2CT:336.) When the vehicle turned on Petaluma Avenue, he could see it was a truck, and he noticed the truck's lumber rack, though he could not tell what color the truck was or whether it was light or dark. (2CT:341.) When Wilson returned, she yelled at him from outside, "Get out of the restaurant." (2CT:344.) Kim stayed, however, and kept cleaning up. (2CT:344.) Kim explained that people often use the alleyway next to the Sushi Hana to access Burnett Road. (2CT:348.)

Events at the R&S Bar

As for the attempted robbery of the R&S Bar, the evidence was scant if not entirely absent. Detective Lisa Banayat testified that on the night of the homicide, Deputy Trejo had called dispatch to report a suspicious vehicle, a green Ford pickup truck with two occupants parked at the Saddlery. (7CT:1247-1248.) Detective Hemstock testified that about 15 minutes earlier, Brian Nelson had seen a green truck parked in the yard of the Aplum Trucking Company, which is about a one-minute drive to the Saddlery. (9CT:1582, 1584, 1989.) Nelson saw two people in the truck, and noticed that the driver had long blonde hair. (9CT:1586.) As Nelson drove by the yard of Aplum Trucking, the truck started up and drove toward Highway 12. (9CT:1586.) As he was driving east on Highway 12, Nelson saw the same truck in the Saddlery parking lot, with a deputy's car behind it. (9CT:1587.)

The alleged conspiracy

As evidence of the conspiracy, the prosecutor introduced the fact that Detective Tom Schwedhelm found in Moore's pickup truck three white latex gloves inside a "latex glove bag," though he did not say where in the truck they were located. (7CT:1280.) He also found a light brown "watchcap" under the right side of the seat of the truck. (7CT:1290.) He located a map of the Sonoma wine country as well, and though he could not remember where in the truck he had found it, he believed it was in a cardboard box. (7CT:1290.) He explained, too, that Detective Rainwater had found two more latex gloves in a large plastic bag in the field by 1400 Lloyd Avenue (the Cooper/King residence). (7CT:1282, 1285-1286; 8CT:1323-1324.) Those gloves appeared, if not "old," at least "used." Indeed, one of the fingertips of one of the gloves was missing. (8CT:1353.)

Several additional items were also in the large plastic bag found in the field, including a Sonoma/Napa wine country recreation map and a navy blue watch cap with the top cut off. (8CT:1324, 1335-1336; 9CT:1522.) Detective Banayat noticed debris and a four-inch long, light brown piece of hair on the hat. (9CT:1524, 1535.) The cut in the top of the hat was about the same size as the opening at the bottom. If someone put the hat on, she would be able to pull it all the way down onto her neck. (9CT:1523.) Banayat did not disagree that the hat could have been worn by a person with a large head of hair who pulled the hair through the top to wear it as a hat, and speculated that the hat could have been worn a number of ways. (9CT:1538.)

The map discovered in the field displayed Santa Rosa streets and had markings drawn on it. (8CT:1326.) None of the areas marked, however, were the subjects of the purported attempted robberies charged in the

complaint. (8CT:1331.) Nonetheless, the prosecutor spent considerable time describing these areas in which no crime or attempted crime occurred. (8CT:1326-1335.)

Among other places marked on the map was Mendocino Avenue, on which an auto shop called Grand Auto was located. (8CT:1352-1353.) The day before the shooting, Moore had called her friend Kim Barger to tell her she was en route to bring appellant to the airport, but that her truck had broken down; she needed her friend to wire $150 to the Western Union in Santa Rosa so she could fix her truck. (8CT:1336-1337.) Moore also provided her friend with the Santa Rosa Motel 6 address at which Moore was staying, and gave her the phone number there. (8CT:1351.) Barger wired the $150, and Moore picked it up. (8CT:1350-1351.) The cost of the repairs at Meineke Mufflers was about $96, and Moore paid it. (8CT:1338-1339.) The prosecutor presented evidence that appellant and Moore had no money on them when they were arrested, however. (7CT:1260.)

Detective Stuart Hemstock testified that in April of 1995, he talked with Brian Nelson about the night of March 29, 1993. (9CT:1581-1582.) Nelson told Hemstock that on that night two years ago, he saw Moore's truck with two people in it, parked halfway down the driveway of the Aplum Trucking Company, located at 6303 Highway 12. (9CT:1582-1584.) Nelson was driving into the trucking yard to use its restroom. (9CT:1591.) Although none of the truck's lights were on, he could see two people in the truck when his own headlights illuminated the truck. One of the people had long blonde hair. (9CT:1585-1586.) As he passed by, the truck started up, left the Aplum Trucking property, and headed east on Highway 12. (9CT:1586.) Nelson then entered the yard of Aplum Trucking to use the restroom and ensure that all was in order at the

property. Finding nothing amiss, he drove down Highway 12, and as he passed the Saddlery parking lot, he saw Moore's truck parked there with a patrol car parked behind it. (9CT:1586-1587.) Detective Hemstock believed that a Chevron station was located at the entrance of the Aplum Trucking driveway, but he did not know whether it was open at the time Nelson noticed Moore's truck halfway down the driveway. (9CT:1590.) He also did not ask any employees at the station whether they had noticed anything unusual on March 29, 1995. (9CT:1593-1594.) No bars or shopping establishments were near Aplum Trucking. (CT:1590.)

Detective Schwedhelm confirmed that no attempted break-ins had occurred at any of the businesses near the R&S Bar, including the Santa Rosa Saddlery, Lunardi Electric, Willie Birds and a veterinary hospital. (9CT:1538-1539.) Also, no equipment was known to be missing from Deputy Trejo's car. (9CT:154.)

Other-Crimes Evidence

As discussed in Argument 3, section B, the prosecution presented evidence of two 1981 robberies of an IHOP restaurant and a Blue Haven Bar, where appellant and another man ate and/or drank at the establishments until closing time and then ordered employees at gunpoint to hand over money from the safes.

c. No holding order on alleged attempts and conspiracy

The magistrate first found that the prior robberies were too dissimilar to the alleged attempts to be admissible for proof of intent or common plan or design. (9CT:1624, citing *People v. Ewoldt* (1994) 7 Cal.4th 380, and *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049.) The court also

found insufficient evidence of attempted robbery or conspiracy to rob and did not hold appellant and Moore to answer on those charges. (9CT:1657.)

2. Pre-Trial Proceedings in the Trial Court

a. Attempted Robbery and Conspiracy Recharged

In the information filed on July 11, 1995, the prosecutor recharged one count of conspiracy to commit robbery (Count 3) alleging the same overt acts that (1) defendants armed themselves with a loaded shotgun, (2) defendants obtained a street map of Santa Rosa, "marking potential locations of robbery victims," (3) defendants obtained a mask and gloves to avoid identification as perpetrators of robberies, (4) defendants drove to 6940 Burnett Street, Sebastopol, "and surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves," and (5) defendants drove to 5338 Highway 12, Santa Rosa, and surveiled the area of the R&S Bar, armed with a shotgun and in possession of gloves and a mask. (10CT:1721-1723.) The prosecutor also recharged an attempted robbery of Marian Wilson (Count 4), and an attempted robbery of the R&S Bar (Count 5). (10CT:1724.) Finally, the fourth special circumstance – that the homicide occurred during an attempted robbery of the R&S Bar – was also recharged. (10CT:1720.) The court denied appellant's motion to dismiss those charges under section 995. (7RT:899.)

b. 995 Motion Granted in Part and Denied in Significant Part

The defense moved to dismiss Counts 3, 4, and 5, as well as the fourth special circumstance, under section 995. (10CT:1761, 1765-1766, 1866-1888.) Because the evidence was insufficient to support a charge of

attempted robbery of the R&S Bar, the court granted the motion on Count 5, overt act 5 of the conspiracy, and the fourth special circumstance. (7RT:899, 902, 961.) The court denied the motion, however, as to Counts 3 and 4. (7RT:899, 961-962.)

c. Motion to Admit Prior Robberies as Evidence of Intent and Common Plan or Scheme

The prosecutor filed a motion to admit appellant's prior acts under Evidence Code section 1101, subdivision (b). (36SuppCT:9249-9272.) The motion stated essentially the same grounds for admissibility that had been rejected by the magistrate – that sufficient similarity connected the prior robberies to the charged attempt and conspiracy because on prior occasions, appellant and an accomplice, armed with a shotgun, robbed restaurants and bars at closing time. (36SuppCT:9250.) The prosecutor likewise argued that the anticipated trial evidence of the charged offenses would essentially include the identical evidence presented at the preliminary hearing, which was found insufficient for a holding order. (36SuppCT:9250-9251.) In sum, the anticipated evidence of the attempt and conspiracy charges was that appellant and Moore, traveling from Pelican Bay to San Diego, had Sonoma County maps in Moore's truck, one of which had markings on it, denoting areas where restaurants and bars were (as well as wineries and an auto shop). (36SuppCT:9250; 8CT:1328.) The marked map was in a plastic bag in a field near the Cooper/King residence, along with some latex gloves and the hat with its top cut off that the motion described as "a mask." (36SuppCT:9250.) More latex gloves were found in Moore's truck, and neither Moore nor appellant had any money when arrested. (36SuppCT:9250.) The same evidence of the

incident involving Marian Wilson described above was recited as evidence of the alleged attempted robbery of Wilson. (36SuppCT:9251.)

The prosecutor sought to admit eight prior robberies as evidence of intent and common plan or scheme, including those presented at the preliminary hearing. (36SuppCT:9255-9267.) Ultimately, the court found that evidence of the following four prior robberies would be admissible:

i. Bull Pen Bar

Linda Helton testified that on December 10, 1981, she worked as a bartender at the Bull Pen, a San Diego bar that served beer, wine and food. (16RT:2270-2271, 2293.) The bar was in a strip mall of businesses that were already closed when the bar closed at 2:00 a.m. (16RT:2270, 2274-2275.) At about 1:30 a.m., while more than a few customers were still in the bar, appellant and a woman came in, ordered a couple of beers, and were looking around the bar a lot. (16RT:1272-1273, 2283-2284, 2299.)

At closing time, Helton told everyone to leave, and as she was cleaning up, her friend Ray remained in the bar so she would not be alone. (16RT:2276.) Within a few minutes after closing time, appellant came back into the bar with a man who was taller than him. (16RT:2277.) As Helton stood behind the counter near the register, appellant announced, "[T]his is a robbery." (16RT:2278.) He brandished a handgun that appeared to be a .357, and the taller man had a short-barreled shotgun. (16RT:2279.) At one point, one of the men threatened to "blow[] [Helton] into the wall." (16RT:2283.) The taller man came behind the counter to get the money from the register. (16RT:2280.) After Helton handed over the money, both of the men took her to the closet where the safe was and told her to get down on the floor and open the safe, but Helton did not know the combination. (16RT:2281.) The men seemed to know exactly where the

floor safe was. (16RT:2299.) The men then took money from Helton's wallet, and told her and Ray to get down on the floor and lay there for five minutes or they would come back and kill them. (16RT:2282-2283.) Seconds after they left, she heard car doors slamming and tires squealing out of the parking lot. (16RT:2283.)

ii. Boll Weevil Restaurant

On December 16, 1981, Edythe Gardiner was the supervisor for a chain of Boll Weevil Restaurants located in San Diego County when appellant and a taller man robbed the restaurant in Ocean Beach where she was working. (15RT:2007-2009, 2010, 2012, 2013.) The restaurant was not located in a shopping area; it stood alone and was adjacent to residential buildings. (15RT:2018.) A Bank of America was a block away and some other restaurants were nearby. (15RT:2018.)

Appellant and a taller man had been customers in the Boll Weevil that night. They had ordered food and were eating and playing pool. (15RT:2012-2013, 2061, 2063, 2066.) Some time after 11:00 p.m., after all other customers had left, Gardiner told them it was closing time and they had to leave. (15RT:2015, 2039, 2040.) As the taller man was at the register paying the bill, appellant pointed a handgun with a foot-long barrel to Gardiner's head and said, "[T]his is a holdup." (15RT:2010, 2012, 2015, 2078.) He ordered the two other employees who were present to get on the floor, and told them not to move or he would blow their heads off. (15RT:2063.) He told Gardiner to open the register and when she complied, appellant took the money out. (15RT:2013.)

Meanwhile, the taller man, armed with a knife, was in the office in the back. (15RT:2013, 2017.) He apparently took money from Gardiner's purse. (15RT:2020.) As appellant and the other man left, he told Gardiner

and the two other employees that if they came outside, he would shoot them. He directed them to count to 100 before they got up. (15RT:2016, 2021.) Neither Gardner nor the waitress who testified heard anything after the men left. (15RT:2057, 2080.) The men did not wear hats, masks, or gloves. (15RT:2042.)

iii. Pizza Hut, December 23, 1981

On December 23, 1981, Mary Stephens and Terri Ticehurst were working at the Pizza Hut on Beyer Way in San Diego. (16RT:2207, 2300.) The restaurant was across the street from a high school and was surrounded by a parking lot on two sides. Across the parking lot was a strip mall that housed a few businesses, including a grocery store and bank, but only the doughnut shop at the far corner of the strip mall was open past the Pizza Hut's closing time of 11 p.m. (16RT:2208.) At about 10:15, appellant entered the Pizza Hut with a woman and a taller man. (16RT:2210-2211, 2219.) They ordered food and ate, and were still in the restaurant when it was preparing to close at 11:10 p.m. (16RT:2211-2212.) While Stephens was closing down the salad bar, appellant approached and pointed a pistol at her, while his taller companion held a sawed-off shotgun on Ticehurst. (16RT:2212-2214, 2225, 2307.) Appellant told Stephens to go to the register and the taller man demanded money from Ticehurst and ordered her to open the safe. (16RT:2213, 2216, 2217, 2309.) When she complied, he took money from it. (16RT:2217, 2309.) The men seemed to know that the restaurant had a safe, which was hidden from customers' sight. (16RT:2320, 2322.)

Someone also took the wallets from Stephens' and Ticehurst's purses in the back office. (16RT:2218, 2310.) The men ordered both women to lay on the floor and count to 100. (16RT:2216.) The women did

not hear any footsteps or cars leaving after the robbers left the restaurant. (16RT:2234.) Neither of the robbers wore a hat, mask, or gloves and they in no way tried to disguise themselves. (16RT:2234, 2323.)

iv. Pizza Hut, December 29, 1981

On December 29, 1981, Laura Hanssen was working as the assistant manager at a Pizza Hut Restaurant. (15RT:2173-74.) The restaurant stood alone in a parking lot and no businesses were nearby. (15RT:2181.) At 11:30 p.m., appellant and another taller man came into the restaurant and ate. (15RT:2175, 2183.) Hanssen believed the men had come into the restaurant earlier in the evening between 7:30 and 8:30 and inquired about ordering a pizza, but left shortly thereafter. (15RT:2188.) When they returned to eat later that night, the taller one was acting nervously, and between the two of them, they made several trips to the bathroom and frequently looked over in Hanssen's direction. (15RT:2190.)

They were still in the restaurant at midnight when the restaurant closed and no other customers were present. (15RT:2175, 2184.) When they approached the register to pay the bill, appellant revealed the sawed-off shotgun he had concealed underneath a sweatshirt laid across his arm. (15RT:2176.) Either appellant or the other man ordered the waitress who was in the restaurant to get down on the floor in the back room. (15RT:2177.) Appellant then asked Hanssen to go into the office in the back room and open the safe for him. (15RT:2177.) Hanssen complied and appellant took the money. (15RT:2178.) Hanssen was ordered to lay on the floor next to the waitress, but the taller man soon asked her to get up and help him open the register. (15RT:2178-2179.) After taking money from the register, the two men ordered Hanssen again to get on the floor, and they instructed her and the waitress to count to 100. (15RT:2179-2180.)

Neither of the men wore gloves or a mask or attempted to conceal their identity in any way. (15RT:2192.)

d. The Court's Reasoning For Admitting the Priors

The court found the previously-described incidents were sufficiently similar to the charged attempted robbery and conspiracy because (1) they all occurred in bars or restaurants, (2) appellant always used a firearm of some sort, (3) the robberies all occurred very late in the evening or early morning, (4) they all involved an accomplice.

The court also noted significant differences, including that all of the prior robberies "took place within the establishments, which [wa]s not the case here." (17CT:2564.) The court also acknowledged that while all of the prior robberies involved actual use of a firearm, Wilson did not see any firearm. (17CT:2564.) The court, however, used the prior robberies to draw a factual inference that appellant *could* have been holding a gun but that Wilson did not see it, because in some of the prior robberies, the victims did not see the gun until the robbery was in progress. The court also noted that when appellant and Moore were walking toward Wilson, she was carrying a briefcase of money (17CT:2565), though Wilson herself said she never placed the money in the case while in public view. (2CT:239, 317.)

3. Testimony Regarding the Prior Robberies at Trial and Related Proceedings

a. Objections Before Opening Statements

Before opening statements, defense counsel objected to the prosecutor's intended discussion of the prior robberies during opening statements and asked the court to prohibit testimony on the prior robberies

until the prosecutor had presented evidence of the alleged attempted robbery, so that the court could reconsider its ruling admitting the other-crimes evidence at that time. (54RT:8187.) Counsel argued that the other-crimes evidence should not come in because it was extremely prejudicial, was "a tail that wags the dog," and was a violation of due process and the Fifth, Eighth and Fourteenth Amendments, among other constitutional provisions. (54RT:8188.) The court overruled counsel's objection, despite the fact that the evidence on those counts was severely lacking. (54RT:8189.) Accordingly, during opening statements, the prosecutor informed jurors that they would hear about an attempted robbery, a conspiracy to commit robberies, and some completed robberies in support of those charges. (54RT:8272-8273). The prosecutor also described the evidence the jury would hear in that regard. (54RT:8272-8273.)

Before any witnesses testified defense counsel argued that the prosecutor should be prohibited from presenting evidence that in some of the prior robberies, appellant used a gun but did not produce it until the last minute because no evidence existed that appellant used a gun on Marian Wilson and the court in fact struck the personal use allegation with regard to that count. (55RT:8506.) The court overruled the objection based on its belief that the prior gun use evidence was the "precise type of evidence that would come in" under Evidence Code section 1101, subdivision (b). (55RT:8507.)

b. Evidence of Pizza Hut Robberies Presented to the Jury

The jury then heard testimony from two witnesses regarding the two Pizza Hut robberies. On the night of the robbery of a Pizza Hut where Ticehurst worked on December 23, 1981, two men and one woman who

had been dining at the restaurant for two hours, remained inside at closing time. (55RT:8512-8515.) After the woman left, the tall man approached Ticehurst with a sawed-off shotgun while she was in the dish room. (55RT:8515-8516.) He ordered her to give him cash from the cash register while the second man, using a handgun, ordered a waitress to get cash from the safe. (55RT:8517-8518.) After the robbers obtained the money, they ordered Ticehurst and the waitress to lay on the ground and count backwards from 100. (55RT:8518.) Ticehurst did not recall what kinds of other businesses were in the area, but does not believe other businesses were open at the time. (55RT:8522-8523.) Neither of the men wore a mask or gloves or made any attempt to disguise themselves. (55RT:8527-8529.) Mary Beth Stephens identified appellant as the shorter person with a pistol who robbed the Pizza Hut on December 23, 1981. (57RT:8873, 8876-8877.)

Lara Hanssen testified immediately thereafter that on December 29, 1981, the Pizza Hut where she worked closed at midnight, and at that time the car dealership nearby was also closed. She did not know whether the nearby liquor store was open. (55RT:8531-8532.) When she locked the restaurant at midnight, two men remained who had been in twice that night; they came in once around 7:30 p.m. and then again around 11:30 p.m., when they had dinner. (55RT:8533-8535.) One was short with dark hair, and the other was tall with lighter hair. (55RT:8533.) When they went to the register to pay at about 12:15, the shorter man displayed a sawed-off shotgun which he had hidden underneath a sweatshirt he had laid across his arm. (55RT:8536.) He ordered her to open the safe, and after she complied, he forcefully ordered her to keep her hands up where he could see them. (55RT:8539.) He took money from the safe, and the taller man

took money from the cash register. (55RT:8538-8539.) They were both then ordered to lay on the ground. (55RT:8538.) Ms. Hanssen identified appellant as one of the two men, but did not state which one he was. (55RT:8543-8544.) The two men did not try to disguise themselves in any way. They did not wear hats or use gloves. (55RT:8544-8546.)

c. Evidence Presented in Effort to Establish Attempted Robbery of Wilson

The next day of trial, Marian Wilson and her partner, Sung Won Kim, testified about their evening on March 29, 1995, and described in nearly identical detail the events of that night, which failed to result in a holding order at the preliminary hearing. On March 29, although the Sushi Hana restaurant closed at 9:00 p.m., Wilson stayed until all the customers paid their bills so she could conduct the check-out of the cash and credit receipts. (56RT:8600.) At about 10:00 p.m., she left the restaurant to go to Safeway, and her partner Kim remained behind with other employees to clean up; the door to the restaurant remained unlocked, even after the employees were gone and only Kim remained. (56RT:8600, 8741.) When Wilson returned approximately 45 minutes later, she noticed a green pickup truck parked on Main Street around the corner from Sushi Hana. (56RT:8603, 8608-8609.) A dark-haired man was in the driver's seat and a blond woman with a "very long" and "very big head of hair" was in the passenger seat. (56RT:8612.) Wilson turned left, parked across the street from her restaurant, and went in to pick up the mail and her briefcase with the day's receipts, intending to mail the letters and return to the restaurant to pick up Kim. (56RT:8614, 8667.) When she left the restaurant this time, she saw that the pickup truck was now parked in front of her own truck. (56RT:8617, 8619.) She could not have seen the pickup truck from inside

her restaurant, nor could someone in the pickup truck have seen inside when it was parked in front of her truck. (56RT:8678.)

When she saw the pickup truck again, Wilson felt scared, although she did not know why she felt scared. (56RT:8621.) The fact that the people she had seen on Main Street were in front of her truck just frightened her, though they did nothing to cause her fear. (56RT:8621, 8678.) She went quickly to her truck and as she was beginning to drive away, the two people in the pickup truck got out and walked in her direction. (56RT:8621.) At this point, they were too far away for her to see the man's face – she saw only the side of his face and the hair on the back of his head. (56RT:8709.) She did not know how close they got to her. (56RT8709.) They made no gestures, displayed no weapons and engaged in no act of aggression toward her in any way. (56RT:8679.) They did not speak to her, and did not try to get her attention. (56RT:8709.) She recalled nothing about their demeanor at all. (56RT:8637.) Wilson drove away without incident; the pickup truck was parked far enough ahead of her truck that she could easily pull out of her parking space without backing up. (56RT:8622.)

Two minutes after Wilson left to mail the letters, Kim noticed a truck stopped in the alleyway between Sushi Hana and Round Table Pizza, with its loud motor running and headlights on. (56RT:8729-8730, 8732.) It stopped there in front of the restaurant for about 20 seconds. (56RT:8731.) It then turned on Burnett Street toward Petaluma Avenue. (56RT:8731, 8734.)

Meanwhile, Wilson had driven around the block, and when she looked back at the intersection of Main and Burnett, she saw that the pickup truck was turning onto Petaluma Avenue. (56RT:8625-8626.) She then

mailed her letters and returned to the restaurant to pick up Kim. (56RT:8267.) She told him about the people in the pickup truck and that she wanted to leave right away. (56RT:8267.) They left within five to ten minutes. (56RT:8268, 8737.)

The next morning, Wilson read in the newspaper about a pickup truck fitting the description of the one she had seen and called the police to report her observations. (56RT:8631.) As for why she did not report it the night before, she explained, "I was scared and I felt very uneasy about these people, but in the end nothing had happened and so I felt uncomfortable saying somebody was going to do something to me when in actuality nothing had happened." (56RT:8630.)

Wilson also noted that on the night in question, other restaurants and bars in the area were open, including Round Table Pizza, which closed at 1:00 a.m., and Jasper O'Farrell's bar, which closed at 2:00 a.m. (56RT:8532-8533.) When describing the configuration of the streets around her restaurant, she explained that it is a confusing area for drivers unfamiliar with downtown Sebastopol because of the one-way streets, among other things. (56RT:8664-8666.)

d. Further Objections and Renewed In Limine Motion

Appellant renewed his objection to the admission of the prior crimes evidence because such evidence did not prove intent or common plan or scheme regarding the alleged attempted robbery. (57RT:8771-8772, 8780, 8783.) Counsel directed the court to CALJIC No. 6.00, which instructs among other things that an attempt requires the specific intent to commit a crime, as well as acts beyond "mere preparation" that "clearly indicate a certain, unambiguous intent to commit that specific crime." (57RT:8771;

CALJIC No. 6.00.) Counsel argued that permitting the evidence of the prior robberies violated due process because it was offered to prove an offense for which no evidence existed. (57RT:8777.)

In response, the prosecutor informed the court that it had not yet presented evidence that defendant and Moore had a shotgun in the truck. (57RT:8775-8776.) Defense counsel accurately predicted however, that even with such evidence, the court would grant a section 1118.1 motion on the attempt at the end of the prosecution's case. (57RT:8773-8775.) Indeed, the evidence about the shotgun added nothing more to the state of the evidence than that which the magistrate found insufficient for a holding order. Counsel therefore pleaded with the court to permit no more evidence of other crimes in order to avoid any further prejudice. (57RT:8775, 8777-8778.) Counsel explained that prejudice would result because the jury would likely consider appellant's repeated prior use of a shotgun as it determined whether appellant used a shotgun for the purpose of robbing and murdering Deputy Trejo. (57RT:8778-8779.) Accordingly, counsel proposed a compromise to avoid any further prejudice whereby the court could conditionally exclude evidence of the prior robberies not yet presented, until after the prosecutor had presented its case on the attempt and the defense could make its section 1118.1 motion. If the court denied that motion, the prior robberies could then be presented. The court simply stated, "Im not going to reverse my prior rulings at this time," despite its finding that "so far" the prosecutor did not make "a very strong showing on the attempted robbery." (57RT:8783, 8785-8786.) The court also admonished the prosecutor that "an attempt is not something that you can just have a gut feeling" about. (57RT:8785.)

Before the third and fourth witnesses testified about prior robberies, appellant again objected to their testimony as irrelevant. The court implicitly denied the motion and admonished the jurors once again pursuant to CALJIC No. 2.50, to limit their use of the testimony to Counts 3 and 4. (57RT:8869, 8771.)

e. Additional Evidence of Prior Robberies and Related Proceedings

Edythe Gardiner then described for the jury the December 16, 1981, robbery of the Boll Weevil Restaurant which was located in a residential beach community. (57RT:8878-8879.) Other than a bank, no other businesses were nearby. (57RT:8879.) On December 16, she arrived at 11:00 p.m. to perform her managerial duties at the restaurant, which closed at midnight. (57RT:8882.) She went into the back office to cash out the money. (57RT:8882-83.) When she finished just after midnight, she went out to the dining room. (57RT:8884.) The front door had been locked. (57RT:8884.) A tall, thin man asked if he could use the bathroom, and shortly thereafter, while she was at the register, another man, later identified as appellant, put a long-barreled gun to her head and said, "This is a holdup," and ordered her to get down on the floor. (57RT:8885-8887.) The barrel seemed very long, and looked similar to the barrel on the gun depicted in Peoples Exhibit No. 28. (57RT:8887.) Appellant told her to open the register and when she complied, appellant took out the money. (57RT:8888, 8890.) The taller man had a knife. (57RT:8888.) They took money out of the safe in the back office as well. (57RT:8891.) Appellant ordered Gardiner to get on the floor and count to 100. She heard no cars drive off after the thieves left. (57RT:8894.) They did not wear masks or gloves. (57RT:8894.)

At this juncture, defense counsel again objected to the other-crimes evidence and asked the court to strike all testimony in that regard and admonish the jury to disregard it. Counsel reiterated that the evidence of the purported attempt and conspiracy was insufficient, that the other crimes were not sufficiently similar to the charged offenses to permit their introduction, and that the prejudicial effect of the evidence far outweighed its probative value. (57RT:8899-8902.) The court denied the motion to strike. (57RT:8903.)

Linda Helton later testified about the robbery of the Bull Pen Bar, which was located in a shopping center. (63RT:9728-9729.) The bar usually had last call at 1:30 a.m., and although a nearby Jack-in-the-Box might have been open when the bar had last call, every other nearby business was closed at that time. (63RT:9731-9733.) At last call on December 10, 1981, appellant came into the bar with a woman while five or ten patrons were still in the bar. (63RT:9730-9731, 9733, 9742.) Appellant and the woman left when the bar closed at 2:00 a.m., but appellant returned a few minutes later with a taller man with red, frizzy hair, who wore a floppy hat. (63RT:9735-9736.) Appellant had a handgun and the taller man had a rifle with a short barrel. (63RT:9737.) The size of the rifle looked comparable to the gun depicted in People's Exhibit No. 28. (63RT:9738.) They pointed their guns in Helton's direction and announced they were committing a robbery. (63RT:9739.) They ordered Helton to give them the money from the register and she complied. (63RT:9739.) They also directed her into the room where the floor safe was but she did not know the combination. She was surprised they knew where the safe was because this information was known to employees only. (63RT:9740-9741.) They pointed their guns and directed her and the other person

present to get down on the floor. They ordered her to stay on the ground for five minutes or they would "blow [her] away." (63RT:9741.) They stole money from her purse before they left. (63RT:9742.)

f. Evidentiary Hearing and Stephen Jarret's Testimony

The prosecution next sought to introduce testimony from Stephen Jarrett, who was a perpetrator of the prior robberies that were introduced against appellant. Defense counsel objected to the testimony and argued that the prosecutor's alleged purpose for introducing the other-crimes evidence was to prove the attempted robbery of Wilson, but that no evidence showed appellant ever *entered* Sushi Hana, as he did with the prior robberies. In response, the prosecutor changed his theory and stated that he believed that appellant was surveilling the Round Table Pizza and that the attempted robbery of Wilson occurred because the opportunity presented itself. (74RT:11212-11222.)

At an Evidence Code section 402 hearing, Jarrett testified about four robberies he had committed with appellant, where they chose isolated restaurants and bars that had no open businesses close by. At the close of Jarrett's testimony at the 402 hearing, defense counsel argued among other things that the past robberies were committed in isolated areas, whereas the witnesses on the charged attempt testified that several businesses were open, including Jasper O'Farrell's, Round Table Pizza, the Main Street Bistro, the Greenhouse and the Main Street Bar. Two other businesses might also have been open. (74RT:11245.) Also in the four prior robberies, appellant and Jarrett entered the establishments before closing and ordered something to eat. (74RT:11243-11247.) Despite counsel's

argument, the court permitted the prosecutor to present Jarrett's testimony to the jury. (74RT:11241-11242, 11248.)

Thus, the jury heard from Jarrett that in December 1981, he and appellant committed robberies at pizza places, restaurants and bars. (74RT:11316.) They chose those establishments because they were open late at night or in the early morning and were isolated at that hour. (74RT:11316-11317, 11322.) They selected places where no other businesses were nearby, or where the other businesses were not open. (74RT:11317.) The robberies provided "easy money," because the establishments had more money at the end of the night. (74RT:11317.) Two of the establishments they robbed were near a hotel where they were both staying. Jarrett was familiar with the other two places they robbed, including the Boll Weevil Restaurant, as well as the Bull Pen Bar, where he "basically grew up." (74RT:11318-11319; 11323.) Sometimes they waited until the places were closed or until most people had left, to ensure less interference. (74RT:11319-11322.) They used a vehicle to get to the establishments and parked near the buildings. (74RT:11320-11321.) Jarrett was familiar with the streets of those places, and he could not recall having used a map in any of the robberies. (74RT:11319.)

The main purpose of the robberies was to get money for drugs. Jarrett was addicted to methamphetamine and cocaine, and appellant was addicted to heroin. (74RT:11323.) Jarrett testified that in 1982 he was convicted of four robberies and that he was currently incarcerated in Washington state for another felony. (74RT:11323-11329.)

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g. Motion for Judgment of Acquittal Granted on Count 4 and Denied on Count 3.

The court did not grant the motion for judgment of acquittal on Count 3 (conspiracy). In granting the motion on Count 4, however, the court candidly acknowledged, "[I]f [the attempted robbery of Marian Wilson] were the only count charged, I'd seriously doubt whether any jury could convict the defendants of attempted robbery. I have serious doubts about whether the People would have even charged it, but notwithstanding, I've even more serious and grave doubts whether any jury would convict the defendants of attempted robbery." (94RT:14931.) The court then noted, "There's simply no evidence that the defendants approached Miss Wilson. They barely got out of their door." The court added, "She didn't even see Mr. Scully's face." (94RT:14932.)

The court also observed that neither appellant nor Moore spoke to Wilson, brandished a weapon at her, threatened her, or tried to take anything from her. (94RT:14932.) Moreover, the court found that they had ample opportunity to do so because, although Wilson stated that she "jumped" into her truck to avoid appellant and Moore, the court had "rarely seen or heard a person . . . as slow as [Wilson] is." (94RT:14939.) The court believed that Wilson was not "capable of that much speed." (94RT:14939.) Further, the court noted, no evidence suggested they could see inside the Sushi Hana to know that Wilson's briefcase had the day's receipts inside. (94RT:14932.) Also, regarding the purported possession of a mask, the court told the prosecutor, "I mean, you keep calling it a mask. They had two hats. One that was cut off that Ms. Moore demonstrated perhaps could be worn just to keep her hair out of her eyes . . . it's different from a handkerchief with holes cut out." (94RT:14941.) More importantly,

the court noted that "there's no evidence that Mr. Scully ever used a mask to commit his robberies. He was completely open. His face was shown to all the victims." (94RT:14941-14942.)

C. Evidence of the Prior Robberies Was Not Admissible to Show Intent or Common Plan or Scheme

Evidence Code section 1101, subdivision (a), makes evidence of a person's character or a trait of his character inadmissible when offered to prove his conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Generally, evidence of other crimes is inadmissible when it is offered solely to prove criminal disposition or propensity to commit the crime charged, because the probative value of such evidence is outweighed by its prejudicial effect. (*People v. Kelley* (1967) 66 Cal.2d 232, 238-239.) The inherent danger of using other-crimes evidence to prove a fact in the charged offense is that it tempts the trier of fact to give excessive weight to a defendant's past criminal conduct, and to use that past conduct to prove the current charge, regardless of proof of guilt, or lack thereof. (*People v. Alcala* (1984) 36 Cal.3d 604, 631; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.)

However, evidence of other crimes may be admissible to prove a fact other than propensity, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." (Evid. Code, § 1101, subd. (b).) Although rulings under Evidence Code sections 1101 and 352 are reviewed for an abuse of discretion (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130), this Court has also instructed that trial courts must consider with great care whether to admit other-acts evidence: "The evidence should be received with extreme caution, and if its connection with the crime charged is not *clearly* perceived, the doubt should be

resolved in favor of the accused." (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724, emphasis added [internal quotes and citations omitted].) Moreover, "[t]he discretion of a trial judge . . . is subject to the limitations of legal principles governing the subject of its action . . . ." (*People v. Dean* (2009) 174 Cal.App. 186, 193.) Thus, given this Court's warning that doubts about other-crimes evidence must be resolved in favor of the accused, a trial court abuses its discretion by resolving such questions in favor of the prosecution, as happened here. This is particularly true in capital cases, where the Eighth Amendment imparts a "heightened need for reliability" in all phases of the trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, internal quotes omitted; accord *Beck v. Alabama* (1980) 447 U.S. 625, 638 [guilt phase verdicts in capital cases require heightened reliability]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [the qualitative difference between death and the other penalties calls for a greater degree of reliability when the death sentence is imposed].)

Whether evidence is admissible under Evidence Code section 1101, subdivision (b), depends primarily on three factors: "(1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315 [italics omitted].) Moreover, the relevance of other-crimes evidence depends on its degree of similarity to the charged offense. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 401-402.) The uncharged conduct must be "sufficiently similar" to the charged offense to permit its introduction on a material issue in dispute. (*Id.* at p. 402.) Increasing levels of similarity between the charged and uncharged conduct

are necessary to show intent, common scheme or plan, or identity, respectively. (*Ibid.*)

The *Ewoldt* Court further explained how such similar acts might be relevant to show intent. For example, if it was "conceded or assumed" from the facts that a defendant left a store without paying for certain merchandise, his "uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) That is because "[i]n proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it." (*Ibid.*) On the other hand, if it was "conceded or assumed" that defendant "was present at the scene of the alleged theft," evidence that he had "committed uncharged acts of shoplifting in a *markedly* similar manner. . . might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution." (*Ibid.*, emphasis added.) This is because in proving common plan or design, "the act is still undetermined. . . ." (*Ibid.*)

In this case, the priors were not admissible to show intent because appellant committed no act "conceded or assumed" or for which any evidence existed such that other crimes were relevant to show his intent; the prosecutor attempted to borrow facts from the priors to establish missing facts of the charged offenses. Further, the prior robberies were far too dissimilar to the charged offenses to satisfy even the lowest degree of similarity required by *Ewoldt* for proving intent. As such, the priors were also too dissimilar to show common design or plan, and were inadmissible for that purpose as well.

1. The Priors Were Inadmissible to Show Intent Because No Proof Existed That Appellant Committed Any Criminal Act for Which His Intent Was Relevant

"Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th Cal.4th at p. 394, fn. 2.) The trial court in this case however, admitted the evidence to support factual inferences of what *might have occurred* when Marian Wilson noticed appellant and Moore. For example, although absolutely no evidence was presented that appellant or Moore carried, pointed, or used a gun when walking toward Wilson, the court used the prior robberies to draw the factual inference that appellant *might* have been holding a gun when he approached Wilson because in the prior robberies, the victims did not see the gun until the robbery was in progress. (17CT:2565.) Such conclusions demonstrate that without gross speculation based on the facts of the prior offenses, no proof existed that any attempted robbery took place in the present case. The trial court apparently admitted the priors to establish the *act* for which appellant's intent could have been relevant, not for his intent.

In any event, although the court admitted the other-crimes evidence for the issue of intent, the evidence was inadmissible for that purpose. While other-crimes evidence may be introduced to prove any material issue actually in dispute, intent is *not* reasonably in dispute when the evidence that a criminal act occurred is weak, and a defendant denies that act. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 726.) Thus, while a not-guilty plea may place in dispute all elements of an offense (*People v. Roldan* (2005) 35 Cal.4th 646, 705), intent is not reasonably in dispute when the

prosecution offers little to no proof of any criminal act for which intent might be relevant. (*People v. Guerrero, supra*, 16 Cal.3d at p. 726.)

As the Court in *Guerrero* explained, the prosecution cannot compensate for lack of proof that a crime occurred by reliance on past crimes to prove the charged offense. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 726.) In that first degree murder case, the 17-year-old victim was walking to a party with her friend when the defendant and another male friend offered the girls a ride. Finding no party, the four "cruised" around, bought some alcohol, and stopped in a parking lot. The defendant dropped off his friend and the victim's friend and told them he would drive the victim home and return in an hour. A few hours later, the victim's body was discovered. She was fully clothed, but her blouse was up above her bra, which was in place. No evidence of molestation was present, such as the existence of sperm or vaginal trauma. (*Id.* at p. 723.) Cause of death was disputed; the defense's pathologist testified that the victim could have died from jumping or falling out of the car, and the prosecution's pathologist testified that only blows to the head with a blunt instrument, such as a lug wrench, could have caused death. (*Ibid.*)

Evidence that incriminated the defendant included the facts that (1) the defendant had blood on his clothes, (2) a wine bottle of the same brand the defendant had bought earlier that night was near the victim's body, (3) when he visited his girlfriend on the night of the crime, the defendant parked his car behind her apartment, instead of on the street where he usually left it, (4) the defendant had no alibi, (5) when arrested, the defendant told the police "I didn't kill her," which showed he knew of her death, and (6) the defendant was the last person seen with the victim before she died. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 725.)

To prove that the defendant killed the victim during an attempted rape, the trial court admitted evidence of a prior rape in which the defendant and various other young people, including a Ms. Lopez, had left a party and were "cruising" in the defendant's car. They stopped at a hamburger stand and some liquor stores, and at one point, Lopez was the only person left with the defendant and his male friend. The young men refused to accede to her requests to take her home, and instead took her to a secluded area and raped her. When they dropped her off, the defendant told her not to tell anyone what happened, and then brandished a lug wrench and smiled at her, which appeared to be a threat. (*People v. Guerrero*, *supra*, 16 Cal.3d at pp. 722-723.)

This Court held that the prior rape was inadmissible as evidence of intent. (*People v. Guerrero*, *supra*, 16 Cal.3d at pp.726-728.) The Court rejected the notion that "evidence of other crimes may be introduced to show the otherwise ambiguous intent behind an act even when there is little evidence that the act has in fact been committed." (*Id.* at p. 726.) As the Court noted, the prosecution presented "no evidence whatsoever of sexual intercourse or attempted sexual intercourse which the Lopez rape might explain." (*Id.* at p. 727.) The fact that the victim's blouse was positioned up over her bra was not indicative of sexual assault because it could have happened by a fall or a struggle to ward off a nonsexual attack. (*Ibid.*) Similarly, the court found "extremely speculative" the theory that sexual intent could be inferred because the defendant told his friend he would be back in an hour, but the drive to drop off the victim should have taken a half hour. The fact that he drove her to a secluded spot was "not inconsistent with activity unrelated to sex." (*Ibid.*)

Similarly here, the prosecution presented no evidence that an attempted robbery took place, as the trial court ultimately but belatedly concluded. The facts were that (1) appellant and Moore had stopped in Santa Rosa due to car trouble; (2) during the alleged offenses at issue, they were driving in Moore's truck, which contained a gun that no witness ever saw, a hat with a cut-out at the top that no one wore, some used latex gloves that no one wore, and a map noting business establishments, including an auto shop and tourist attractions (wineries) that did *not* include Sushi Hana or the R&S bar – the supposed targets in this case; (3) appellant and Moore parked near Sushi Hana restaurant, but they never went inside; (4) they walked toward Marian Wilson when she came out of Sushi Hana, but she did not see a gun, or report that they were gloved or masked in any way, and she experienced no interaction with them whatsoever.

As did the magistrate at the preliminary hearing, the trial court eventually concluded that this evidence failed to present any evidence of an attempted robbery. As for the presence of appellant and Moore in Santa Rosa, the evidence showed they were on a long road trip, had car trouble, and stayed the night in a motel. This is hardly evidence of a robbery plan. Also, the presence of Moore's hat with a cut-out at the top was also consistent with lawful activity; as Moore demonstrated at trial, the cutout permitted Moore to wear the hat while securing her indisputably thick, long hair. (94RT:14941.) Nor was the presence of latex gloves of any importance, particularly used gloves with a fingertip missing. Latex gloves are widely available and are used for any number of purposes, including but not limited to Moore's dog grooming; Holly Bostrom, a dog groomer for whom Moore babysat, explained that Moore always had a box of latex gloves in her truck and that the use of gloves during dog grooming is

necessary because of the various chemicals involved (medicated shampoos, flea products, etc.). Moore had three dogs, one of which was an Afghan that required frequent grooming. Further, Bostrom and Moore talked about opening a grooming business together. (102RT:16128-16133, 16139-16140.)

Further, a map noting restaurants and bars is completely consistent with lawful activity on a road trip. Any theory that the map denoted targets of the conspiracy was seriously undermined by the fact that neither Sushi Hana nor the R&S Bar – the only supposed targets mentioned in the alleged overt acts – were *not* noted on the map. As for the non-encounter with Marian Wilson, Moore's parking of her truck in two different spots was no indicator of criminal wrongdoing, and was consistent with any number of lawful situations such as a person's being lost or undecided about where to go, or as appellant explained, was the result of two travelers disagreeing about whether to continue on the agreed upon course, and pulling over to argue about it. (95RT:15115-15116.) As for their walking in Wilson's direction, that is *all* that occurred. No words were spoken, no gestures made, no money requested, no weapon brandished. As the trial court noted, they had ample opportunity to accost Wilson, but they did not do so. (94RT:14939.)

The only criminal activity that took place at all is that appellant possessed a gun in Moore's truck; while appellant's gun possession was an offense in and of itself given his felon status at the time, it was *not* connected to any of the other innocuous acts alleged by the prosecution.[70]

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[70] See Argument 3, section C explaining why the trial court erroneously denied the 995 motion on the attempt count. Because the

(continued...)

Thus, as in *Guerrero*, the argument in support of admitting the other-crimes evidence was "circular." (*People v. Guerrero*, *supra*,16 Cal.3d at p. 728.) In *Guerrero*, the court described the faulty argument as "(1) sexual activity must have taken place in the [charged] offense because defendant's [prior] rape . . . demonstrates his aggressive sexual tendencies (2) therefore, evidence of the [prior] rape may be introduced to show the intent with which defendant tried to engage in sex with [the victim of the charged offense]." (*Ibid.*) The same faulty argument predicated admission of the other-crimes evidence in this case: (1) Appellant must have been attempting to rob because his prior robberies demonstrate his tendency to rob, (2) therefore, evidence of appellant's prior robberies may be introduced to show the intent with which appellant attempted to rob. "Such proof is expressly prohibited by Evidence Code section 1101, subdivision (a)." (*Id.* at p. 728.)

Finally, the *Guerrero* court provided an apt illustration of the circumstances under which a defendant's arguably non-criminal act may lay the foundation for introduction of his other criminal acts: when there is no doubt that a crime in fact occurred. The Court provided the example of *People v. Schader* (1969) 71 Cal.2d 761, where the defendant indisputably was standing on the perimeter of a store while his uncle robbed it, but he later claimed he did not know the robbery was occurring. Evidence that he had previously committed robberies with his uncle where he held up the store while his uncle was the lookout, was admissible to show that he knew

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[70] (...continued)
evidence at trial was the same evidence presented at the preliminary hearing on this count, the discussion in that section further illuminates the deficiency in the evidence on this count at trial.

his uncle was robbing the store during the charged offense. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 726, citing *Schader, supra,* 71 Cal.2d 761.) The Court stressed that "[i]n *Schader* and all the cases in which other crimes evidence has been introduced to show the intent behind the act, there has been some independent evidence that the act was committed." (*Ibid.*) Thus, in *Schader*, the act at issue was not simply the defendant's standing at the perimeter of a store, but was his doing so *while a robbery was in progress*. Inherent in the *Schader* holding is the understanding that in order to use past criminality as proof of the defendant's criminal intent, the prosecution must present some evidence that a criminal act in fact took place during the charged conduct.

This is consistent with the *Ewoldt* Court's explanation of the type of charged acts that would put intent in issue. For example, if it was "conceded or assumed" from the facts that a defendant left a store without paying for certain merchandise, his "uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v. Ewoldt*, 7 Cal.4th at p. 394, fn. 2.) Thus, *Ewoldt* instructs that in a theft case, where the defendant commits a taking that depending on his intent may or may not be criminal, his prior similar thefts may be relevant to show that he committed the taking with an intent to steal. Here of course, no taking occurred. Nor did any act take place that would "clearly indicate a certain, unambiguous intent" to rob or steal from Wilson. (*People v. Dillon* (1983) 34 Cal.3d 441, 452-453, quoting with approval CALJIC No. 6.00.) Even Wilson herself understood this when she acknowledged, "I was scared and I felt very uneasy about these people, but in the end nothing had happened and so I felt uncomfortable saying somebody was going to do

something to me when in actuality nothing had happened." (56RT:8630.) In short, because the prosecution had no act from which an attempted robbery of Wilson could be inferred, it tried to supply the missing act by reference to the prior robberies, which was impermissible.

The same was true regarding the other-crimes evidence as it related to the conspiracy charge. In declining to issue a directed judgment of acquittal on Count 3, the court found the evidence of a conspiracy included the facts that appellant and Moore obtained a map and marked commercial areas with access to a freeway or major street. The marked areas contained bars and restaurants, including a number of pizza establishments, though the purported targets of the conspiracy *were not* on the map. The court noted that the map was found under some bags in a field and had been removed from the truck after Deputy Trejo was killed. (94RT:14946, 14955.) The court also considered that they had latex gloves, sunglasses, "head coverings" and Moore's shotgun. (94RT:14946.) Also, they had parked in the driveway leading to the yard of Aplum Trucking, which was across the street from a gas station, but left when a truck driver drove past them. (56RT:8753-8757; 57RT:8792, 8796.)

Missing from this evidence, however, was any overt act or other conduct that suggested appellant and Moore had agreed to embark on a crime. The evidence the prosecution did present was insufficient to show any agreement for which appellant's intent would have been at issue. As the Court explained in *Ewoldt*, other-crimes evidence of "intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) "In proving intent, the act is conceded or assumed; what is sought is the state of mind

that accompanied it." (*Ibid.*, internal quotes omitted.) For example, in *People v. Quartermain* (1997) 16 Cal.4th 600, evidence of the defendant's prior participation in a conspiracy to murder was admissible to show intent, because the defendant admitted that he agreed to kill the victim but claimed that his agreement was insincere and was a "sham" in which he engaged to curry favor with the other conspirators. Evidence of his prior participation in a murder-for-hire conspiracy was admissible because defendant "put in issue the sincerity of his admitted agreement to the conspiracy to kill [the victim]." (*Id.* at pp. 626-627.)

By contrast here, no evidence, circumstantial or otherwise, established that an agreement existed, which is the sin qua non of a conspiracy. Furthermore, no evidence suggested that Moore or appellant even *contemplated* committing any crime, either independently or jointly. Most often, an agreement to commit a crime and the intent to agree are proved by circumstantial evidence such as "the conduct of the defendants in mutually carrying out an activity which constitutes a crime." (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1734.) Here, where no crime or attempted crime was committed *and* no other evidence of any possible agreement existed, an inference that such an agreement existed was unreasonable.[71] Once again, the other-crimes evidence was admitted on a faulty, circular argument, in order to supply the missing proof of conspiracy: (1) appellant and Moore must have agreed to commit robberies

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[71] See Argument 3 explaining why the trial court erroneously denied the 995 motion on the conspiracy count. As with the attempt count, the evidence at trial was the same evidence presented at the preliminary hearing so the discussion sheds further light on the lack of evidence on this count at trial.

together because appellant's prior robberies show that in the past he has agreed with an accomplice (Jarrett) to commit robberies, (2) therefore, the prior robberies are admissible to show appellant and Moore agreed to commit robberies and specifically intended to enter into that agreement. Such evidence was inadmissible to show intent.

Indeed, the error in admitting the other crimes to show intent in this case is illuminated by this Court's explanation that the recurrence of a similar result tends to establish criminal intent (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402), because "the doctrine of chances teaches that the more often one does something, the more likely that something was intended . . . rather than accidental or spontaneous." (*People v. Steele* (2002) 27 Cal.4th 1230, 1244.) This rule illustrates what was missing here – a "similar result" that could not be explained by chance. The other crimes admitted in this case resulted in robberies at gunpoint, but the conduct underlying the charged offenses did not. The other crimes were admitted for the purpose of speculating about what *could* have happened, but did not, in fact, happen. (See, e.g., *People v. Earle* (2009) 172 Cal.App.4th 372, 389-390 [error to deny severance of charges because evidence of indecent exposure was not cross-admissible to show intent to commit rape on unrelated aggravated assault charge, where no sexual conduct occurred during the assault, and a conclusion that it was sexually motivated was therefore "purely speculative"].) No case has ever suggested that other crimes are admissible to compensate for a dearth of proof on the underlying charge, and indeed, the admission of such evidence under those circumstances is error.

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2. The Other Crimes Were Not Sufficiently Similar to the Charged Conduct to be Admissible on the Issue of Intent

Although the least degree of similarity between the charged and uncharged conduct is required to admit the latter as proof of intent, the charged and uncharged conduct "must be sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402, internal quotes omitted.) This threshold requirement of admissibility was absent here.

First, in all of the prior robberies, appellant and one or two accomplices went inside restaurants and bars, ordered food and drinks, and waited for the establishments to close before committing the robberies. However, the charged offenses involved *no* entry into any restaurant or bar and therefore no eating or drinking and no waiting inside the establishment for it to close.

Second, when committing the prior robberies, appellant pointed a gun at the employees, announced that a hold-up was in progress, and issued orders at gunpoint. No such conduct was alleged, proved or suggested in the charged offenses.

Third, although before two of the prior robberies a female went into the restaurant with appellant, he never committed the actual robberies with anyone other than an armed, male accomplice. In the charged offense, the alleged accomplice was an unarmed female.

Fourth, in the prior robberies, appellant and Jarrett specifically chose locations where the surrounding businesses were closed. In the charged offenses, the purported robbery target was surrounded by several businesses that remained open, including Jasper O'Farrell's, Round Table

Pizza, The Main Street bar or saloon, and the Greenhouse. (73RT:11163, 1171-1175.)

Fifth, appellant and Jarrett did not disguise themselves during their prior robberies (55RT:8527-8529, 8544-8546; 74RT:11232), but the alleged "overt acts" of the conspiracy claimed that appellant and Moore possessed a "mask" and gloves for the purpose of disguising themselves during robberies.

Sixth, although the conspiracy to rob alleged as an overt act that appellant and Moore possessed gloves, there was no evidence that either appellant or Jarrett wore gloves during the prior robberies.

Seventh, while appellant had marked a number of restaurants (and an auto shop and a winery) on a map, Jarrett did not remember ever using a map during robberies with appellant.

Eighth, while a shotgun was *used* in the past offenses, the evidence of the charged conduct showed only that appellant and Moore had a shotgun in the truck; no evidence suggested that they carried, concealed, or used a shotgun when walking in Wilson's direction. Moreover, the evidence suggested that they had ample opportunity to use a weapon on Wilson had they been carrying one: the trial court concluded that Wilson was moving very slowly when she walked to her truck. (94RT:14939.)

Ninth, Jarrett and appellant robbed establishments with which Jarrett was familiar, either because he frequented the businesses or it was near the hotel where he and appellant were staying. Here, appellant had just come from Pelican Bay, and neither he nor Moore were familiar with the

Sebastopol/Santa Rosa area. (96RT:15265.) Thus, they were completely *unfamiliar* with the business establishments in that area.[72]

Tenth, Jarrett explained that the main objective of the prior robberies was to obtain money for drugs, because both he and appellant were addicted at the time of the robberies. (74RT:11323.) No evidence suggested that appellant or Moore needed to rob to support a drug habit.

Thus, because the prior robberies shared no common features with the conduct alleged in Counts 3 and 4, they were insufficiently similar to be admissible on the issue of intent. (See, e.g., *People v. King* (2010) 183 Cal.App.4th 1281, 1300-1303 [in case involving sexual assault on a stranger by campus police officer, evidence that officer previously used his authority in attempt to establish sexual relationship with high school student but did not touch her was insufficiently similar to show intent]; *People v. Earle*, *supra*, 172 Cal.App.4th at pp. 389-390 [evidence of prior indecent exposure did not show intent to rape during assault in which no sexual conduct occurred].) The magistrate knew this early on when it determined that the prior robberies offered at the preliminary hearing were not admissible. The magistrate explained that although the prior robberies involved a shotgun, an accomplice, and businesses visited late at night, those robberies occurred while the businesses were still open to the public, "and the defendant and his confederate *actually entered*." (9CT:1622, emphasis added.) Moreover, "[t]hey remained in there for some period of time until the crimes were committed." (9CT:1622.) Thus, the error in

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[72] While Jarrett commented that Pizza Huts were good targets because they have similar layouts, no such evidence existed regarding Round Table Pizza restaurants.

admitting the prior robberies at trial was forecasted, and their earlier exclusion was well-reasoned long before trial.[73]

3. The Prior Robberies Were Inadmissible to Show Common Plan or Scheme Because The Charged Conduct Did Not Lead to a Similar Result and Was Not Markedly Similar to the Prior Robberies

The evidence was inadmissible to show common plan or design because the charged offenses did not share a "similar result" with the prior robberies and also shared no meaningful common features. To establish a common design or plan, the evidence must demonstrate "not merely a similarity in the results, but 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [citation]." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.) Thus, before a court even begins to analyze whether the other crimes share significant common features such that they are admissible to show a common plan or scheme, the court must first be presented with evidence of a common *result*. Here, of course, this threshold requirement was completely and indisputably absent. All of the other crimes presented to the jury resulted in actual robberies of victims at gun point. The charged conduct had no similar result; no robbery of Marian Wilson occurred, and no robbery, attempted robbery, or whisper of a robbery of anyone else resulted from the supposed conspiracy. Thus, no similar result occurred such that other crimes were admissible to explain that similar result. Further, as discussed above, the other crimes were so

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[73] Although the priors excluded at the preliminary hearing were different incidents than those introduced at trial, they were materially very similar to the ones admitted at trial. (9CT:1622.)

bereft of common features, they were inadmissible to show common plan or scheme.

The prosecutor in this case presented no evidence that appellant committed *any* acts of misconduct against the purported victim, and instead presented a speculative theory, based entirely on other-crimes evidence, that appellant *might* have intended to do so. Despite the prosecutions's theory that appellant was looking to rob the Sushi Hana, no entry occurred, no theft took place, no demand for money was made, and no victim was threatened or assaulted. Without any similar "results," the evidence was simply inadmissible to show common plan or scheme.

This point is illustrated in both *People v. Ewoldt*, *supra*, 7 Cal.4th 380, and *People v. Balcom* (1994) 7 Cal.4th 414. In *Ewoldt*, the victim testified that on one occasion she awoke to find the defendant fondling her breasts and when she asked what he was doing, he said he was "covering her with a blanket." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 389.) The prosecutor introduced evidence of an uncharged event where the victim's 23- year- old sister testified that when she was a child, she awoke to find the defendant fondling her, and that when she asked what he was doing, he said he was "straightening up the covers." (*Ibid.*) Thus, in *Ewoldt*, both victims reported the similar result of fondling, but a dispute existed as to whether defendant committed the act which led to that result. Evidence of uncharged conduct committed in a "markedly similar" manner was therefore admissible to show a common scheme or plan. (*Ibid.*)

Likewise, in *People v. Balcom*, *supra*, the defendant was accused of robbing and raping a woman at gunpoint in her apartment, and requiring her to give him her ATM card and PIN. (*People v. Balcom, supra*, 7 Cal.4th at pp. 420, 424.) The defendant conceded that he had intercourse with the

victim but denied that he threatened her at gun point and claimed she voluntarily consented. (*Id.* at p. 420.) Evidence of the defendant's similar robbery and rape at gunpoint of a victim in another apartment complex was admissible to show common design or plan. (*People v. Balcom, supra*, 7 Cal.4th at p. 425.) Again, as in *Ewoldt*, the victims of the charged and uncharged offenses in *Balcom* experienced the same result – unwanted sexual contact with the defendant – but the issue was whether the defendant in fact committed the charged act of rape at gunpoint.

The present case, however, was not one where a dispute existed as to whether appellant committed a similar act resulting in a similar harm; there simply was no harm, no result, and indeed, no act. Appellant's past robberies could not substitute for proof of any conduct in the charged offenses. This hardly satisfies the requirements set forth in *Ewoldt* for the use of such evidence.

Moreover, by no stretch of the imagination did the prosecution meet the requirement that proof of a common plan consist of "markedly similar acts of misconduct against similar victims under similar circumstances." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 399.) In *Ewoldt,* the defendant's uncharged molestation satisfied this test because (1) it was "almost identical" to the charged molestation; (2) both complaining witnesses were the defendant's stepdaughters; (3) the victims were the same age when the acts occurred; (4) all of the acts occurred in the defendant's home; and (5) the defendant offered exactly the same excuse for his misconduct on each occasion; he claimed that he was simply adjusting the girls' blankets when they caught him touching them.

In reaching the conclusion that the uncharged conduct in *Ewoldt* satisfied the "markedly similar" test, Chief Justice George discussed a

number of examples found in other cases that show the degree of similarity required to show common plan or scheme. For example, in *People v. Lisenba* (1939) 14 Cal.2d 403, the defendant, after securing a life insurance policy on his wife that named him as beneficiary, placed a poisonous snake in her path, but then drowned her when that plan failed. The court properly admitted evidence he had obtained a life insurance policy on his previous wife, and then drowned her after staging a car accident that failed. (*Id.* at p. 432.)

In *People v. Peete* (1946) 28 Cal.2d 306, the defendant was charged with the death of the wife of an elderly man she took care of, but whom she helped place in a mental health facility after the wife mysteriously disappeared. Defendant had forged financial documents in the wife's name, and moved into her house. The wife was later found dead from a gunshot just above her fourth vertebra. Evidence that the defendant had previously moved in with a landlord who mysteriously disappeared was admissible to show common scheme or plan because the landlord was also found with a shot just above his fourth cervical vertebra, and the defendant had forged the landlord's name and taken over his property. (*Id.* at p. 318.)

In *People v. Ing* (1967) 65 Cal.2d 603, the defendant was charged with raping three women who went to his medical office for an abortion. The defendant confirmed they were pregnant, administered a soporific which made them feel dizzy and then had sex with them. Testimony from two other victims with nearly identical accounts was admissible to prove a common scheme or plan to commit rape. (*Id.* at p. 612.)

In *People v. Archerd* (1970) 3 Cal.3d 615, the defendant was charged with murdering two of his wives and a nephew by administering a lethal dose of insulin. Evidence that he had used the same means to murder

a third wife, the ex-husband of another wife, and a friend, was admissible to show a common plan or scheme. (*Id.* at pp. 638-639.)

As the above examples from this Court illustrate, *marked similarity* must exist between the charged offense and the other crimes offered to prove common plan or scheme. No such similarity was established in this case. Given the huge disparity between the facts of the charged conduct and evidence of the prior robberies, the latter was plainly inadmissible to show common plan or scheme.

4. The Probative Value of the Evidence Did Not Outweigh its Prejudicial Effect

Even if prior acts evidence is admissible on a theory other than the defendant's criminal disposition, it may nonetheless be inadmissible under Evidence Code section 352. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Here, defense counsel objected to the evidence under section 352 (17RT:2553-2554) which provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Whether the admission of evidence in violation of section 352 has the additional legal consequence of violating state and federal due process rights is a question of law (or a mixed question of law and fact), to be reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, 900; see *People v. Partida* (2005) 37 Cal.4th 428, 435 [inherent in alleged 352 error is the question of whether the error had "legal consequence" of violating due process].) A section 352 error violates due process when it renders the trial "fundamentally unfair." (*Id.* at p. 432.)

This Court has recognized that "substantial prejudicial effect [is] inherent" in other-crimes evidence, which is why the evidence must first meet the threshold of having "substantial probative value" to be admissible. If that threshold is met, the court should still exclude the evidence if its prejudicial effect substantially outweighs the substantial probative value. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

Here, as discussed above, the evidence did not have substantial probative value on either count. Furthermore, the risk of prejudice was great and unavoidable. Although it is true that the court belatedly removed count 4 from the jury's consideration and the jury ultimately reached no verdict on the conspiracy count, the risk of spillover prejudice as to the other counts, was certain. As discussed in section D below, the evidence of appellant's other crimes painted him in an extremely unfavorable and violent light, making it far more likely that the jury would have concluded he was an inherently violent person. Thus, the other-crimes evidence predisposed the jury to reject appellant's testimony on any material issue. Moreover, the other-crimes evidence likely confused the issues and predisposed the jury to thinking that because appellant had robbed often in the past, this must have been what he was doing during the confrontation with Deputy Trejo. Such a conclusion would have caused the jury to reject appellant's testimony that he only meant to disarm Deputy Trejo and that the shooting was an accident.

Thus, because the probative value of the evidence was so low, and the risk of prejudice so high, the trial court abused its discretion in admitting it. In order to exercise its discretion reasonably, the trial court must consider whether to admit the evidence with "extreme caution, and if its connection with the crime charged is not *clearly* perceived," the court

must resolve the doubt "in favor of the accused." (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724, internal quotes and citation omitted.) The other-crimes evidence in this case created an undue risk of prejudice and confusion of the issues, and should have been excluded under section 352.

D. Prejudice Resulted and Appellant's Right to Due Process Was Infringed

The admission of evidence offends the Due Process Clause of the United States Constitution when the evidence is so prejudicial that it renders the defendant's trial fundamentally unfair. (U.S. Const. 5th & 14th Amends.; *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 562-564.) A federal constitutional error requires reversal unless the prosecution can demonstrate the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Although this Court and the United States Supreme Court have expressly left open the question whether the introduction of other-crimes evidence violates due process principles (*People v. Falsetta* (1999) 21 Cal.4th 903, 913-915; *Estelle v. McGuire, supra*, 502 U.S. at p. 75, fn. 5), the Ninth Circuit has correctly concluded that the introduction of character evidence to show propensity can violate the Due Process Clause, and this Court should find the same. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.) In *McKinney*, the court found support for its holding in the United States Supreme Court case of *Brinegar v. United States* (1949) 338 U.S. 160, where the Court explained,

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and

> unjust convictions, with resulting forfeitures of life, liberty and property.

(*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381, citing *Brinegar v. United States*, *supra*, 338 U.S. at p. 174.) The *McKinney* Court noted that since 1684, "[t]he rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence." (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381.) Indeed, as Justice Corrigan has explained, "allowing a defendant to be convicted because of his bad character is generally impermissible not only under California law (§ 1101(a)) and the Federal Rules of Evidence (Fed. Rules Evid., rule 404(b), 28 U.S.C.), but is also 'contrary to firmly established principles of Anglo-American jurisprudence.'" (*People v. Villatoro* (2012) 54 Cal.4th 1152, quoting *McKinney v. Rees*, *supra*, 993 F.2d at p. 1380.) This is because bad character evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*People v. Villatoro, supra,* 54 Cal.4th at p. __, quoting *Michelson v. United States* (1948) 335 U.S. 469, 475-476.) Thus, the introduction of emotionally charged character evidence can cause a trial to become "so infused with irrelevant prejudicial evidence as to be fundamentally unfair," in violation of the Due Process Clause. (*McKinney v. Rees, supra,* 993 F.2d at p. 1386.) Similarly here, the erroneous introduction of what can only be regarded as character evidence was an error of federal constitutional magnitude, triggering the *Chapman* standard of prejudice.

Furthermore, even in the absence of federal constitutional error, reversal is required on state grounds under the *Watson* standard of prejudice. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 22, applying

prejudice standard established in *People v. Watson* (1956) 46 Cal.2d 818, to character evidence error.) Under the *Watson* standard, reversal is required if it is "reasonably probable" that the result at trial would have been different. (*People v. Watson* , *supra*, 46 Cal.2d at p. 836.) A reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, citation omitted; *In re Willon* (1996) 47 Cal.App.4th 1080, 1097-1098.) Here, under either the federal or state standard, reversal is required.

1. The Evidence Impermissibly Suggested That Appellant Was Engaged in an Armed Robbery of Deputy Trejo and Had Finally Delivered on His Prior Threats to Shoot

The jury heard detailed testimony from six witnesses about appellant's prior armed robberies where he threatened them with a pistol or shotgun. Further, the jury heard that in one of the robberies he and his accomplice ordered the victim to get on the floor and stay there or they would "blow [her] away." (63RT:9741.) The jury also heard that appellant pointed a gun at the victim and "forcefully" told her to keep her hands up where he could see them. (55RT:8539.) The jury was left to conclude that during the incident with Deputy Trejo – who was likewise instructed at gunpoint to keep his hands up and then to get down on the ground – appellant was engaged in a robbery and had finally made good on his prior threats to shoot.

In fact, although no evidence suggested that appellant similarly threatened Deputy Trejo, the prosecutor tried to suggest as much when he asked appellant, "Did you tell him to get on his knees or you'd blow his fucking head off?" (95RT:15161.) Appellant answered, "no," but the

prosecutor ignored appellant's answer, asking again, "Do you remember that?" (95RT:15161.) Such questioning shows the prosecutor's attempts to tie appellant's past conduct (robbing people at gun point, ordering them to get on the ground, and threatening to blow them away) to the shooting of Deputy Trejo, in order to suggest that the shooting was not an accident, but rather was a robbery where appellant finally followed through with his threats to shoot. Indeed, in arguing that appellant's actions were not impulsive but were deliberate and premeditated, the prosecutor referred to the fact that after the shooting, appellant immediately went to the Cooper/King residence and ordered Frank Cooper to get on his knees or appellant would "blow his head off." (111RT:17576-17577.) As with the prosecutor's questioning of appellant discussed above, this argument undoubtedly reminded the jury of appellant's similar conduct in the past, and invited the jury to tie the other-crimes evidence to the murder charges on which it was inadmissible. These tactics no doubt inflamed the jurors' emotions, encouraged the conclusion that appellant's prior threatening behavior showed his deliberateness in the charged murder, and encouraged jurors to conclude that appellant had a propensity to shoot people who did not comply with his orders. Thus, despite the court's admonishments and the prosecutor's reminder to the jury that it should consider the other crimes in determining counts 3 and 4 only, such efforts could not "unring a bell" so loudly and consistently rung.[74] (*People v. Hill* (1998) 17 Cal.4th 800, 845.)

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[74] Moreover, although the jury learned that appellant was convicted of these robberies for purposes of impeachment, in this regard the jury heard only that "on April 12 of 1982, [he was] convicted of four counts of robbery in the county of San Diego." (96RT:15265.) Thus, although the jurors would have heard about the procedural *fact* of these convictions had

(continued...)

2. Prejudice Resulted Because The Evidence of First Degree Murder Was Very Weak, and the Question of Appellant's Guilt or Innocence Depended Substantially on the Jury's Acceptance of his Testimony

This was a close case on the issue of first degree murder, under both the intentional, premeditated murder theory, and the felony murder theory. Appellant testified to a plausible explanation of how he accidentally shot Deputy Trejo, and the prosecution eyewitnesses presented hazy and wildly divergent accounts of the shooting. As explained below, these eyewitnesses were unreliable at best, and appellant's testimony that the shooting was accidental depended significantly on his credibility. The other-crimes evidence destroyed that credibility by demonizing appellant and suggesting that he was robbing Deputy Trejo instead of disarming him, because in the past he had used a shotgun to rob people for money. The evidence also impermissibly suggested that appellant was poised to deliberately shoot a victim for noncompliance with his orders, since this is what he had threatened to do in the past.

Against this prejudicial backdrop, appellant nonetheless took the stand and testified. He immediately acknowledged that he was responsible for Deputy Trejo's death and that he was to blame for the shooting. (95RT:15028.) He explained, however, that he did not plan to shoot Deputy Trejo, and that although he disarmed the deputy, he did not intend to keep the gun belt when he disarmed him. (95RT:15028-15029.) In fact, at no

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[74] (...continued)
the Evidence Code section 1101 error not occurred, they would not have heard all the inflammatory details of the robberies that came in under section 1101, subsection (b).

time did he demand money or a wallet from Deputy Trejo. (95RT:15029.) He never went through the deputy's pockets or patrol car looking for items of value to steal. (95RT:15029.)

Appellant explained that when Deputy Trejo approached the side of Moore's truck, his mind was racing and he was not thinking straight. (95RT:15030.) In this confused and panicked state, he pointed the shotgun at the deputy and instructed him to freeze and put his hands up. (95RT:15030-15031.) Once Deputy Trejo was on his knees, appellant ordered him to hand over his gun because appellant wanted to disarm him. (95RT:1532, 15147.) After Deputy Trejo handed over his gunbelt, appellant threw it in the back of Moore's pickup (a logical place to keep the gun out of the deputy's reach). (95RT:1532, 15147-15148.) Then he told Deputy Trejo to lay down, and after Trejo complied, appellant ran to the patrol car to throw away the key to the ignition. (95RT:15032.) As he headed back toward Moore's truck and the deputy, he stumbled on something in the dark parking lot, and as he fell, the gun hit his upper leg, causing him to accidentally discharge the weapon. (95RT:15033.)

Peter Barnett, a criminalist with 30 years experience testifying in cases for both the prosecution and the defense, opined that Deputy Trejo was likely laying on the ground when he was shot. (95RT:15796-15802, 15819.) As the prosecution acknowledged, this was consistent with appellant's testimony that appellant accidentally shot Deputy Trejo when the deputy was laying down. (110RT:14349.) However, the prosecution's expert opined that Deputy Trejo was likely on his knees when the shot was fired, which was more consistent with the prosecution's theory that Deputy Trejo was not in a prone position when the gun went off. (89RT:13908-13910.) During closing arguments, both sides argued for the

expert theories that supported their case, and against the ones that did not, though the prosecutor spent much more time arguing against the defense expert's theories than he did espousing the views of his own expert. (110RT:17345-17352, 17472-17512.) With two contradictory scientific explanations before the jury, the question truly came down to whether the jury accepted appellant's testimony and was not predisposed to prejudge him or disbelieve him. This was particularly true given the failure of the eyewitness testimony to shed any reliable light on the circumstances of the shooting.

Indeed, an examination of each eyewitness's testimony reveals just how shaky the prosecution's case was on the issues of premeditated and deliberate murder and robbery felony murder. Beginning with the prosecution's first eyewitness Jesus Ramirez, the only conclusion that emerges from a fair reading of his testimony was that he was either lying or was profoundly and inexplicably mistaken about the events he reportedly witnessed. For one thing, he claimed he saw appellant shoot Deputy Trejo in the back, which was undeniably wrong. (58RT:9034; 59RT:9162-9163.) Ramirez did testify however that after appellant ordered Deputy Trejo to get down, the deputy laid face down on the ground. (58RT:9029, 9032.) Ramirez saw that Deputy Trejo was lying prone, but on his elbows, though he could also have been lying completely flat on the ground with his palms facing up. (59RT:9161-9162, 9188-9190.) Then Ramirez heard and saw a shot go off. (58RT:9032.) Ramirez claimed that the light from the muzzle flash allowed him to see the position of Deputy Trejo's body. However, he later testified that he could not see Deputy Trejo once the deputy was on the ground, because the light was poor. (59RT:9032; 61RT:9427-9428.) He also said he believed appellant was standing when the gun went off, and

that he did not see appellant ever fall. (58RT:9032, 9034-9035; 61RT:9427-9428.) He claimed that Moore took the gun belt off of Deputy Trejo before he was shot, and was the only eyewitness to say so. (61RT:9440-9441.)

However, Ramirez's testimony must be read through the prism of the fact that he was certain appellant was behind Deputy Trejo when the shot was fired, and that Deputy Trejo was shot in the back. (58RT:9034; 59RT:9162-9163.) This fact alone conflicted so completely with the indisputable physical evidence that it necessarily called into question all of Ramirez's purported observations.

Indeed, Ramirez was impeached so often during cross-examination that almost none of his story remained intact. He was so defensive and evasive about inconsistencies in his testimony that his answers read like nonsensical doublespeak. For example, he agreed he might have been able to identify appellant as the shooter even if appellant had a bag over his head, based on "his height probably." (58RT:9056-9058; 59RT:9076.) He claimed this was how he was able to identify appellant at the preliminary hearing when he supposedly saw appellant stand up; in fact, he gave elaborate details on how and where appellant was standing when he identified appellant at the preliminary hearing based on his height and body type. (59RT:9076-9078.) However, he was impeached with his own admission at the preliminary hearing that he had never seen appellant standing during that hearing and that he had identified appellant while appellant was seated. (59RT:9081.) When asked whether he lied when he said he saw appellant standing at the preliminary hearing, he offered, "Well, the way you're asking about the questions that – whether I saw them that way or not – I – I feel like I'm being pressured. I feel that that was the

reason that the answers came out that way." (59RT:9082.) After this answer, he was immediately asked whether he lied because he felt pressured, and he answered:

> No, no. And to pressure, no. You were asking whether I had a problem identifying before. You mean, in other words, the use of the cloud,[75] and that's the way I understood you, you know, about this, in between this person and that, and when I said that he was standing. So I answered that if I had seen him sitting at the table, yes I had. And then here, whether I saw him standing up also, how is it?

(59RT:9083.)

He was evasive on the most basic questions:

> Q: Mr. Ramirez, with respect to your recollection of the person you saw with the gun on the night in question, do you remember testifying about that yesterday and what he looked like?
>
> A: You mean how he was in regards to his person or – I really – I guess I don't understand you.
>
> Q: Do you recall testifying yesterday, Mr. Ramirez, about what the man with the gun looked like?
>
> A: How he – what he looked like?
>
> Q: Yes.
>
> A: Well, what I recall is what I told you.

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[75] Ramirez was referencing his earlier testimony where he explained that his preliminary hearing testimony was inaccurate because he was fearful at the preliminary hearing as a result of having seen the shooting. Counsel then clarified that what Ramirez meant was that at the time of the preliminary hearing 18 months earlier, when he identified appellant at the preliminary hearing, his memory was "clouded by fear," to which Ramirez responded, "No, but as to certain things it was." (59RT:9070.)

(59RT:9074.)

The above examples are just a few of the several episodes during Ramirez's testimony that demonstrate the complete unreliability and near-ludicrousness of his testimony.

Further, because he had assaulted his pregnant girlfriend and had a court date pending in connection with that incident at the time he first contacted the police about this case, Ramirez had motive to fabricate his story to curry favor with the police in exchange for his cooperation in the investigation. Ten days before he called the police on April 24, 1995, to relay his story about the shooting, Ramirez had been served with a restraining order in connection with his assault on his pregnant girlfriend earlier that month. (59RT:9177-9180.)[76] The restraining order required him to appear in court on April 27, three days after the date he called the police about the shooting, but almost a month after the shooting itself. (59RT:9180.) Ramirez was aware of the penal consequences of assaulting his girlfriend, because he had previously served time for having assaulted a different woman in 1992. (59RT:9184-9185.) Ramirez repeatedly dodged the question of whether, at the time he first spoke to the police about this case, he recognized Detective Schwedhelm to whom he spoke, because Schwedhelm was the officer who had arrested him in 1992. (59RT:9181-9183.)

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[76] A cite to four pages is necessary here because Ramirez spent considerable time and effort avoiding the questions posed to him, which resulted in several pages of testimony to establish a couple of factual points. The questioning on this point actually began on 59RT:9174; it took seven pages of transcript for the facts of the assault and restraining order to emerge. Again, this is another example of several where Ramirez's avoidance tactics were on plain display.

Moreover, Ramirez's motive to fabricate was not the only reason his testimony was untrustworthy and made no sense. On the night of the shooting, Kellie Jones was in Guerrero's car in the R&S Bar parking lot when Ramirez got in. (63RT:9782-9783; 70RT:10746.) Jones remembered that Ramirez smelled strongly of alcohol when he got in the car and that he was slurring his words so badly that she could not tell whether he was speaking English or Spanish. (70RT:10594; 71RT:10746.) In short, for a variety of reasons, Ramirez appeared to have invented much of what he purported to witness.

Another eyewitness, Oscar (Miguel) Aguilar (61RT:9456), saw the events leading up to the shooting and saw what occurred after, but did not actually see the shooting. He saw Deputy Trejo standing between his patrol car and the pickup truck, with the patrol car's spotlight shining on the truck. (61RT:9524, 9526.) He saw a woman at the driver's side of the truck, who appeared to be searching for something inside the truck for about 10 minutes. (61RT:9525, 9527.) Then Aguilar saw Deputy Trejo open the passenger side door of the pickup truck, and shine his flashlight inside the cab for about seven seconds. (62RT:9572.) Appellant then got out and pointed a shotgun at the deputy's stomach or chest, while the deputy backed up. (61RT:9477-9480, 9548.) Appellant held the shotgun at his waist. (61RT:9548.) Aguilar heard appellant tell Deputy Trejo to "hurry up," as they walked between the pickup and the patrol car. (61RT:9481-9482.) He saw appellant make a motion with the gun and saw the deputy kneel down. (62RT:9503, 9505.) Aguilar then got out of the car he was in and walked toward the phone with his back to the scene; when he turned back around 37 seconds later he saw white and heard a gunshot. (61RT:9492, 9497; 62RT:9555-9556.) The next thing he saw was appellant get into the truck

and leave the scene, but he did not see what position appellant was in immediately after the shooting. (61RT:9497, 9499.)

Onecimo Guerrero also did not see the shooting. He testified that after arriving at the R&S parking lot with Rhonda Robbins and Kellie Jones, he walked over to the taco truck parked in the lot. (63RT:9748-9749.) He saw Moore in the truck and saw appellant outside of the truck holding a gun on Deputy Trejo. (63RT:9757-9758, 9765.) He saw Moore walk over to the patrol car and change the position of the spotlight toward the sky, and then saw her carry something from the patrol car back to the truck. (63RT:9770-9771.) Guerrero walked over to talk to Aguilar and Ramirez, and at some point heard appellant tell the deputy to "lay down on the ground." (63RT:9790.) As Guerrero returned to the taco truck, he heard a gunshot. (63RT:9772-9774.) He did not see the shot fired. (63RT:9818.) After the shot, he saw appellant bent over, carrying the gun and walking toward the truck, and then saw the truck leave. (63RT:9776, 9778.)

Guerrero testified to several details at the preliminary hearing that he later claimed were incorrect at trial. (65RT:10021-10024.) He also told the police, and testified at the preliminary hearing, that he never saw Moore get out of the truck during the incident but then he said at trial that she got out of the truck and moved the patrol car's spotlight toward the sky. (65RT:10033, 10035-10036.) He told Detective Banayat that the man with the gun in the parking lot had blond hair, and that it was white, which was similar to the woman's hair. (65RT:10666.) He also described the man as taller than 5' 8 ½". (65RT:10067-10068.) Yet at trial, Guerrero identified appellant, who stood five feet four inches (95CT:15054), and had the same dark hair he had on March 29, 1995, as the person he saw aiming the gun.

These are just a few examples of the inconsistencies between what Guerrero told the police and the new story he told at trial. Remarkably, Guerrero even offered conflicting reasons for his inconsistencies. He claimed that when he finally spoke with the police 23 days after the incident, he did not tell them everything he knew because people told him he could have problems from talking to the police. (65RT:10071.) Thus, he "didn't want to say too much about it . . . ." (65RT:10071.) However, he then told defense counsel that this was not the reason for his recalcitrance, because although people were telling him not to tell anyone what he saw, he "didn't pay too much attention to them." (65RT:10092.) According to Guerrero, the vast disparity between what he told the police and what he stated at trial existed because when he talked to the police, he had witnessed a tragedy and had not yet "cleaned out [his] system" from it. (65RT:10067.)

Guerrero admitted to extensive methamphetamine use between September or October of 1995 until June of 1996. (65RT:10001-10002.) Although he testified at an evidentiary hearing that he had used methamphetamine regularly since March 29, 1995 (63RT:9833), he claimed at trial that the transcript of that hearing was wrong and that he had never said that. (65RT:9999-10000.) Guerrero also claimed that when he spoke to the police about the events in question he was nervous, not because he was on methamphetamine, but because he had drunk coffee. (65RT:10003.) Similarly, he said that when he testified at the preliminary hearing he had difficulty answering questions because he had drunk too much coffee and he was nervous from having to remember the events. (65RT:9990; 10079-10080.) According to Guerrero, one cup of coffee "caused [him] not to be able to concentrate very well," but

methamphetamine had no similar effect. (65RT:10083-10084; 10107.) He changed this answer when confronted with his prior testimony, to "sometimes" methamphetamine caused him confusion. (65RT:10108.) He admitted that he had sold methamphetamine to support his drug habit when it escalated to the point where he could not stop using. (65RT:9998.)

At the time of his trial testimony, Guerrero was awaiting sentencing on his convictions for felony possession and sales of a controlled substance. (63RT:9792-9793; 65RT:9991-9992.) His sentencing date had been postponed until after his testimony was complete. (65RT:9991-9992.) Guerrero claimed that although his attorney advised him to waive time for sentencing until after he testified at appellant's trial, he was expecting no benefit from his testimony. (65RT:9992, 9995.)

Although Guerrero insisted that he had never used any methamphetamine until November, 1995 (65RT:10098), teenaged eyewitnesses and best friends Rhonda Robbins and Kellie Jones, had used methamphetamine with Guerrero during the month before the shooting in March of 1995. (69RT:10368; 10407.) While Guerrero testified that he did not start selling drugs until April of 1996 (65RT:10090-10091), Robbins knew Guerrero as a drug dealer for about a year before March, 29, 1995; he began by selling cocaine and then graduated to selling methamphetamine. (69RT:10407.) However, she and Jones received their methamphetamine from Guerrero for free. (69RT:10368, 10407-10408; 10412-10413; 70RT:10636.) Both Robbins and Jones thought Guerrero was under the influence of methamphetamine on the night of the shooting, though they claimed not to have used it that night. (69RT:10505, 10410; 70RT:10607-10608.)

They admitted, however, that they smoked marijuana about an hour, or two hours, or a half hour before they arrived at the R&S parking lot in Guerrero's car to use the payphone and get tacos. (65RT:10122-10123, 10133; 69RT:10310; 70RT:10603, 10643.) As for their testimony regarding the events that unfolded that night, both girls offered similar stories that appeared to be affected less by their actual observations than by their conversations with each other and with Guerrero, and by their consumption of news accounts.

One fact that was consistent between both girls' accounts was that after they pulled into the lot and Guerrero got out of the car, Jones moved into the front seat with Robbins so they could talk and listen to the radio. (65RT:10123-10124; 70RT:10701.) Both girls also claimed that they saw appellant and Deputy Trejo get into an argument and then wrestle, a fact that no other eyewitness claimed to have seen. (65RT:10133; 69RT:19448-19449; 70RT:10564.) Neither man had a weapon in his hands at that time. (65RT:10133.) Jones and Robbins both claimed that at one point, they saw Deputy Trejo on his knees and saw appellant shoot him in the face with a sawed-off shotgun. (65RT:10136; 70RT:10566, 10569.) Jones said this took place from seven feet away, but then stated she did not know how far apart the men were, and Robbins said it happened from less than a foot away, adding that she had no doubt about that. (70RT:10520-10521, 10566, 10569; 71RT:10733.) According to the prosecution's expert, Robbins' account of the distance was an impossibility. (89RT:13956.)

Robbins also said that after the shooting, Moore went over to the patrol car, pointed the spotlight toward the bar, and took a black, square-shaped object from the patrol car. (65RT:10134.) Jones believed this occurred before the shooting. (70RT:10567.) Both girls believed the item

was a CB radio, though Jones was not sure. (69RT:10461;70RT:10596.) However, when asked during a police interview whether Moore ever had anything in her hands, Jones told the officer, "No." In fact, Jones could not remember having told anybody – the police, the prosecutor, or the court during preliminary hearing – that she had seen Moore with a CB radio. (71RT:10719-10721.) Robbins, on the other hand, reached the conclusion that Moore was carrying a CB radio because that is what she saw and heard on the news. (69RT:10461.)

Robbins also explained that the view from Guerrero's car was obstructed; from the front seat of the car, she had to look through Guerrero's back window and through the front windshields and rear windows of two cars parked between Guerrero's car and the area of the confrontation. (69RT:10354-10355.) A row of cars against the fence and a row of cars in the parking lot obstructed the view. (69RT:10355.) Jones agreed that she witnessed the events while sitting in the front seat and looking through the back window of Guerrero's car, but she could not recall if she had to look through other cars' windshields to see the events. She also could not recall how many cars were between Guerrero's car and the area where the altercation took place. (71RT:10712-10713.) But because she was in the same location as Robbins, she too must have had to look through the windows of the two parked cars to witness the events.

More importantly, Robbins effectively retracted her testimony of the shooting itself. On cross-examination, she agreed that after she saw the men wrestle to the ground, she did not see Deputy Trejo again because the lights went out. (65RT:10399-10400.) In fact, she could no longer see either man at all after they wrestled to the ground. (69RT:10451.) The only thing she saw after she saw them wrestle to the ground was appellant's

getting up off the ground after the shooting. (69RT:10400.) This testimony completely negated her account of seeing Deputy Trejo shot while on his knees.

Indeed, Robbins' testimony on cross-examination was far more consistent with what she had told the police just nine hours after the incident, during an interview in which she was treated well by the police, and was made to feel safe and comfortable. (69RT:10401.) Robbins agreed that when she talked to the police, she specifically said that she saw Deputy Trejo get wrestled to the ground and that she *heard* a shot, but she did not actually *see* it. (69RT:10358.) In fact, she told the police that she was glad she did not actually see the shooting. (69RT:10359.)

Although she described appellant as "little" at trial, she told the police that the man wrestling with Deputy Trejo was "very tall." (65RT:10128; 69RT:10350.) She also agreed that she had remembered the lighting conditions incorrectly; the spotlight was shined on the bar *after* the shooting occurred, not before, as she had originally testified. (69RT:10357.)

Despite having just told defense counsel that she did not see anything after the men wrestled to the ground (69RT:10400, 10451), Robbins remarkably claimed on redirect that she was certain she saw appellant shoot Deputy Trejo from six inches to a foot away, while the officer was kneeling. (70RT:10519-10520, 10525-10526.) She stuck to this new version of what she had witnessed, despite acknowledging that she had tried to be as honest and helpful to the police as she could during the interview the day after the events, and that she had told them a version nothing like her testimony on redirect examination. (70RT:10526-10527.)

Furthermore, Robbins testified that after the incident, she, Jones, and Guerrero left the scene and Guerrero dropped her off at her house, but that two hours later, he picked her and Jones up and brought them to a farmhouse on the coast. (69RT:10298-10299.) At the farmhouse, Robbins sat next to Jones in the bedroom. (69RT:10300.) The girls talked about what they thought they had each seen, until Jones told Robbins to "shut up" about it. (69RT:10300, 10414; 70RT:10639.) Both girls heard a radio account of the incident the next morning. (69RT:10325-10326.)

Inexplicably, Jones had no recollection of having traveled to the coast with Robbins and Guerrero. According to Jones, Guerrero brought her and Robbins to Robbins' house after the shooting, and the girls remained there all night. Jones said she did not leave Robbins' house until the following morning, when her mother picked her up at 8:00 a.m. (70RT:10585.) They went directly to a payphone to contact the Sheriff's office. (70RT:10585-10586.) Jones claimed that when she first spoke to the police at home that morning, Robbins was there with her. (70RT:10588.) However, she stated that Robbins did not ride with her and her mother to her house, and that Robbins did not come to her house at a later point that day. (70RT:10588.) She then stated she did not recall whether Robbins was at her home when the police talked to her. (70RT:10621.)

Jones' account of the shooting was also contradictory. She said that at the moment Deputy Trejo was shot, she and Robbins were still talking in the front seat of Guerrero's car. (71RT:10707; 71RT:10723.) She claimed that she saw appellant standing and Deputy Trejo on his knees. (71RT:10725.) However, she also said that she could not remember whether she could *see* Deputy Trejo at the moment he was shot, which

contradicted her testimony that she saw him on his knees at that moment. (71RT:10725.)

Jones also testified that just before the shooting, Robbins had called over to Guerrero, who was near the payphone, to give her the keys so she could listen to the radio. (70RT:10559.) According to Jones, Robbins got out of the car to do this, and Guerrero then threw the keys to Robbins. (70RT:10559.) Jones later testified on cross-examination that *she* had called over to Guerrero and asked for the keys. (71RT:10705.) She also remembered specifically that Guerrero then walked halfway to the car and threw the keys to *her*, not Robbins. (71RT:10706.) These two versions of who asked for the keys and who received them were remarkable on their own for their irreconcilability. More astounding, however, is that *neither* version was true. After reviewing her preliminary hearing testimony, Jones said she never received the keys because Guerrero told her to wait after she requested them. (71RT:10709.) This was consistent with Robbins' recollection that Robbins opened the car door and requested the keys while seated in the car, but that Guerrero told her to wait. (69RT:10425-10426.) When defense counsel reminded Jones of her earlier testimony about Guerrero's throwing the keys to her, and asked, "That didn't happen; did it?," Jones answered, "No, I guess not." (71RT:10709.)

Also, although she insisted that Robbins had gotten out of the car at some point after they arrived at the R&S Bar parking lot, Jones again changed her story after reviewing her preliminary hearing testimony to the contrary. Thus when asked again whether Robbins ever got out of the car, she conceded, "No, I guess she didn't." (71RT:10707, 10711.) Further, Jones testified that *after* the shooting, Moore told appellant that people were watching, only to contradict herself later and say that this happened before

the shooting. (60RT:10571; 71RT:10734.) She agreed that this was another "mistake" she had made. (71RT:10735.) She also claimed that she saw appellant take a gun belt from Deputy Trejo, but she did not know at what point this occurred and did not know whether Deputy Trejo was kneeling or lying on the ground when this happened, which suggested she did not in fact see it happen. (71RT:10735.) She later said that appellant took the belt from Trejo *after* Trejo was shot. (71RT:10803.)

Moreover, Jones admitted that some of the details she reported to the police were not her own observations, but rather were details she had learned from Guerrero when they discussed what they had seen that night. (70RT:10640-10641.) After the night of the shooting, Jones and Robbins continued to discuss the events with each other. (69RT:10413.)

In sum, both girls' accounts were internally contradictory and at odds with each other. Most importantly, their testimony that they saw appellant shoot Deputy Trejo while the deputy was on his knees was contradicted by the facts that (1) Robbins testified that she did not actually see Trejo at the point he was shot and (2) Jones could not remember whether she could see Deputy Trejo when he was shot. (69RT:10400, 10458-10459; 71RT:10725.) Further, the fact that both girls provided very different details at trial than they provided at either the preliminary hearing or at interviews with the police (including, among other things, Robbins' reporting that she had not seen the shooting and was glad for that), likewise cast significant doubt on the reliability of their testimony in general.

The only other witness to the shooting was then 15-year-old Raul Espinoza, who, asleep in his father's truck while his father was in the R&S Bar, was awakened by the sound of a gunshot. (74RT:11335-11338.) He looked up and saw Deputy Trejo's patrol car with its spotlight shining in the

same direction the patrol car was facing. (74RT:11351.) He tried to go back to sleep, but within 5 to 10 minutes, people were running out of the bar and his father knocked on his window to point out the deceased deputy to Raul. (74RT:11341.) Raul looked at Deputy Trejo on the ground, and then reclined his seat again. (74RT:11341, 11345.) Although he saw the green pickup truck leave the scene, he did not see it before then. (74RT:11345.)

As the above-described testimony shows, the prosecution did not have a single reliable witness who actually saw the shooting and testified to a trustworthy account of what took place in the parking lot on March 29, 1995. The lay witnesses, just like the expert witnesses, could not agree on the position Deputy Trejo was in when the shooting took place, which was a key fact relevant to the defense of accident. One witness, Ramirez, said Deputy Trejo was shot while he was laying on the ground and propped up on his elbows; this was consistent with the defense that the rifle accidentally discharged as appellant tripped and fell. (59RT:9161-9162, 9188-9190.) Two others, Robbins and Jones, claimed they saw Deputy Trejo shot while on his knees (65RT:10136; 70RT:10566, 10569), though as noted above they each contradicted this testimony; Robbins said she could not actually see him when he was shot, and Jones said she could not remember seeing him when he was shot. (69RT:10400, 10458-10459; 71RT:10725.) Robbins also said that after she heard the shot, she saw appellant get up off the ground, which was also consistent with the defense, because it suggested he did in fact fall at some point. (69RT:10400.) Two other witnesses, Guerrero and Aguilar, saw appellant and Deputy Trejo in the parking lot but did not see the shooting, though Guerrero heard appellant

tell Deputy Trejo to "lay down on the ground," which, again, was consistent with the defense. (63RT:9790.)

As such, the issue of intentional first degree murder turned on whether the jury believed appellant's testimony that he accidentally shot Deputy Trejo while the deputy was laying on the ground when appellant tripped, fell, and inadvertently fired the gun when he landed. Because both the defense and the prosecution offered expert opinions of how the physical evidence supported or refuted appellant's account, the ultimate question of what happened at the moment Deputy Trejo was shot depended almost entirely on whether the jury trusted appellant. The introduction of evidence of appellant's past violent robberies severely damaged any chance that appellant had in that regard.

Further, the issue of felony murder likewise turned on the jury's willingness to accept appellant's testimony without impermissible judgment of his propensity to rob. Unfortunately, the other-crimes evidence predisposed the jury to conclude that appellant was robbing Deputy Trejo, when the evidence was extremely weak on that count. The only evidence of the alleged robbery was that appellant had taken off Deputy Trejo's gun belt and thrown it in the back of Moore's truck (though Ramirez attributed this activity to Moore). He took no money or valuables from Trejo, though he had the opportunity to do so; investigators found $55 in Deputy Trejo's left shirt pocket, $27 in his right shirt pocket, $2.36 in his rear pants pocket, a watch on his wrist, and $12 in an open briefcase in his patrol car. Appellant agreed that he took the gun belt from Deputy Trejo, and explained that his intent at that time was to disarm the deputy. This was logical, given that appellant was holding a gun on an armed police officer in order to figure out how to deal with the trouble he knew he was in. The other explanation

was illogical – that appellant decided to rob Deputy Trejo at gunpoint in order to steal something he already had – a gun, and not to steal something he did not have – money.

However, the jury was primed to accept this illogical account because it had heard that in the past, when appellant had ordered people at gunpoint to get down on the ground (57RT:8894; 55RT:8518, 8538; 63RT:9741) and keep their hands up where he could see them (55RT:8539) or he would "blow [them] away," (63RT:9741), he did so for the specific purpose of committing robberies. Indeed, the prosecutor's questioning of appellant allowed the jury to connect those prior robberies and threats to the incident involving Deputy Trejo; the prosecutor asked appellant whether, similar to his conduct with past robbery victims, he told Deputy Trejo, "to get on his knees or [he'd] blow his fucking head off," when no such evidence had been introduced or suggested. (95RT:15161.) And indeed, after hearing that appellant had previously ordered people to lay down at gunpoint for the express purpose of committing four robberies, it would have taken great feats of mind to block out that evidence when deciding whether appellant had the same intent when he ordered Deputy Trejo down at gunpoint and took an item from him.

Without the other-crimes evidence, however, the jury was reasonably likely to reach the more logical conclusion that appellant took Deputy Trejo's gun belt because he wanted to disarm him. This explanation is supported by the fact that appellant took no money, or valuables from Deputy Trejo or his car. Absent any intent to rob Deputy Trejo, appellant was not guilty of first degree murder under a felony murder theory. Thus, both of the prosecution's murder theories benefitted substantially from the inflammatory other-crimes evidence that should not have been admitted.

Certainly, the evidence against appellant on both theories was far from overwhelming, as evidenced by the length of the jury's deliberations. Deliberations commenced just before the lunch hour on Thursday, April 3, and ended the morning of Monday, April 14. (114RT:18220, 18224.) Just before the evening recess on Tuesday, April 8, [the date on which the verdict forms were signed (24CT:4986-4998)], the jury informed the court that it had reached a verdict on all of the counts but was deadlocked on count 3. (114RT:18134-18137; 25SuppCT:6747.) After encouragement from the court to continue deliberations on that count, the jury requested readback on April 10, of all of appellant's testimony. (114RT:18150.) The court granted the request, and the jury heard appellant's testimony again (114RT:18182, 18185, 18187), which may well have triggered new discussion on any of the counts on which the jury had already reached a verdict. Thus, the jury may have deliberated on one, some, or all of the counts during the entire period of deliberations before it finally delivered its verdicts to the court on April 14. Accordingly, the length of the deliberations on the murder and robbery counts was anywhere between 3 and a half days to 7 and a half days. "According to data compiled by the National Center for State Courts, the average length of jury deliberations for a *capital* murder trial in California is 12 *hours*." (*Fry v. Pliler* (2007) 551 U.S. 112, 123 fn. 2 [Stevens, J. concurring in part and dissenting in part].) Thus, the length of the deliberations in this case suggests that the jury struggled to some degree with the evidence before it.

In sum, under any standard of prejudice, the error was prejudicial. Because the evidence of first degree murder was so weak and equivocal given the contradictory and untrustworthy eyewitness accounts, a reasonable likelihood exists that appellant would not have been convicted

had one or more jurors not been predisposed to reject his testimony. For the same reasons, the error certainly was not harmless beyond a reasonable doubt. Thus, under either the federal or state standard of prejudice, reversal of appellant's murder and robbery convictions and death sentence is required. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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THE COURT ERRED WHEN IT FAILED TO DISMISS UNDER SECTION 995 TWO COUNTS ON WHICH THE MAGISTRATE HAD FOUND INSUFFICIENT EVIDENCE, AND PREJUDICE RESULTED BECAUSE THOSE COUNTS WERE THE SOLE VEHICLES FOR INTRODUCTION AT THE GUILT PHASE OF PREJUDICIAL EVIDENCE OF OTHER ROBBERIES

A. Introduction

The evidence on Counts 3 (conspiracy) and 4 (attempted robbery)[77] was so weak that the preliminary hearing judge properly refused to hold appellant and Moore to answer on those charges. However, when the prosecutor recharged those offenses and appellant moved to dismiss them under section 995, the trial court denied the motion. These counts were the sole means by which the prosecutor introduced the prejudicial evidence of other criminal acts by appellant, discussed in Argument 2 above. Thus, the erroneous denial of the motion to dismiss under section 995 ("995 motion") was prejudicial because it led to the introduction of evidence of prior armed robberies by appellant, which predisposed the jury to conclude that appellant was robbing Deputy Trejo, and to reject his testimony that the shooting was an accident. As such, reversal is required.

B. Procedural Background

In addition to the procedural facts discussed herein, this argument is based on the procedural facts set forth in Argument 2. C .1. a. and b., and 2. a., *ante*, which sets forth the evidence at the preliminary hearing, among other things. The facts discussed below are also relevant to this argument.

After the preliminary hearing, the magistrate refused to admit the uncharged robberies of an IHOP restaurant and Blue Haven Bar, because

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[77] In the Complaint these were counts 3 and 15.

although they involved a shotgun, an accomplice, and the theft of businesses late at night, those robberies occurred while the businesses were still open to the public, "and the defendant and his confederate *actually entered*." (9CT:1622, emphasis added.) Moreover, "[t]hey remained in there for some period of time until the crimes were committed." (9CT:1622.) The court noted that at Sushi Hana, however, no actual confrontation occurred. (9CT:1623.) Further, after Wilson drove away, appellant directed no actions toward Sushi Hana. Instead, he and Moore drove away. (9CT:1623.) Also, the one striking similarity of the priors – that appellant waited until the businesses were ready to close such that few patrons were present – was conspicuously absent in the alleged attempted robbery of the R&S Bar; when appellant was parked near the R&S Bar at about 11:30 at night, a number of people were in the bar, as evidenced by the band that was playing and the number of cars in the lot. (9CT:1623-1624.) As such, the court did not admit the prior robberies on any counts. (9CT:1622-1624.)

The court then found that on both of the attempted robbery counts (Counts 14 and 15 of the Complaint), the evidence failed to prove specific intent to commit the robbery and a direct, unequivocal act toward its commission. (9CT:1657, citing *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.) The court also found insufficient evidence of a conspiracy to commit robbery (count 3) and insufficient evidence of the fourth special circumstance (murder committed during the attempted robbery of the R&S Bar). (9CT:1653, 1654.) Accordingly, appellant and Moore were not held to answer on those counts and that allegation.

After the prosecution recharged those counts and allegations, the defense moved to dismiss Counts 3, 4, and 5, as well as the fourth special

circumstance, under section 995.[78] (10CT:1761, 1765-1766, 1866-1888.) The court granted the motion on Count 5, overt act 5 of the conspiracy, and the fourth special circumstance. (7RT:899, 902, 961.) The court denied the motion, however, as to Counts 3 and 4. (7RT:899.) Although the court agreed that appellant and Moore had absolutely no physical or verbal contact with Wilson, the court found the evidence somehow supported an inference that the defendants harbored an intent to rob Wilson. (7RT:901.) The court placed great emphasis on the fact that Wilson subjectively felt fearful of appellant and Moore, though Wilson did not know why she felt fearful. (7RT:954-955.)

C. Applicable Law

As a preliminary matter, appellant notes that the denial of a 995 motion is subject to review on direct appeal. Although a defendant may seek pretrial writ review of the denial of a 995 motion, that procedure is optional, and the decision not to exercise that right does not preclude review on direct appeal. (*People v. Webster* (1991) 54 Cal.3d 411, 435.)

On appeal of the trial court's ruling, "the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer." (*People v. Laiwa* (1983) 34 Cal.3d 711, 718.) This is because in pretrial proceedings under section 995, the magistrate is the finder of fact, and the trial court sits as a reviewing court. (*Ibid.*) A reviewing court "must draw

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[78] The defense also moved to dismiss the information in its entirety on the grounds that shackling measures forced appellant's involuntary removal from preliminary hearing proceedings, though that portion of the motion is not at issue in the claim under discussion. (10CT:1761; 12CT:1268-1285.)

every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate." (*Ibid.*) The court must "resolve the issue in light of the whole record" and "may not limit [its] appraisal to isolated bits of evidence" selected by the prosecution. (*People v. Johnson* (1980) 26 Cal.3d 557, 577.)

Under section 995, an information must be set aside if "the defendant had been committed without reasonable or probable cause." (§ 995.) The term "reasonable or probable cause" means "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (*People v. Mower* (2002) 28 Cal.4th 457, 473.) Thus, at the preliminary examination, "the burden is on the prosecution to produce evidence that there is a reasonable probability, enough to induce a strong suspicion in the mind of a man of ordinary caution or prudence, that a crime has been committed, and that defendant is guilty." (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124, 126-127.)

To establish probable cause sufficient for a holding order, the prosecution must make some showing as to the existence of each element of the charged crime, and although this may be accomplished with circumstantial evidence, probable cause exists only when the inferences drawn from that evidence are reasonable. (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.) "A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Morris* (1988) 46 Cal.3d 1, 21, internal quotes and citations omitted.) Reasonable or probable cause does not exist when the prosecution fails to prove an essential element of

the crime charged in the information. (*Williams v. Superior Court*, *supra*, 71 Cal.2d at p. 1148.) Likewise, if the evidence shows it is as probable that the defendant did not commit the crime as that he did, no probable cause exists and the charge must be dismissed. (*Malleck v. Superior Court* (1956) 142 Cal.App.2d 396, 399.) In other words, probable cause requires something more than a "50-50" chance that the defendant committed the crime. (*People v. Montoya* (1981) 114 Cal.App.3d 556, 562 [lack of probable cause to search where a "50-50 chance" existed that the item searched belonged to the defendant]; see also *In re Watson* (1972) 6 Cal.3d 831, 836 [the quantum of proof required for arrest is the same as it is for a holding order].) Accordingly, even when there is "strong reason to suspect" that the defendant has committed a crime, this is insufficient in itself to establish probable cause. (*People v. Triggs* (1973) 8 Cal.3d 884, 895; citing *Henry v. United States* (1959) 361 U.S. 98, 101.)

Although a determination of probable cause for a commitment order requires less evidence than for a finding of guilt for a conviction, the "binding [of] a defendant over for trial is not a perfunctory exercise." (*People v. Herrera* (2006) 136 Cal.App.4th 1191, 1202, quoting *People v. McRae* (1947) 31 Cal.2d 184, 187 [disapproved on other grounds in *People v. Tobias* (2001) 25 Cal.4th 327, 337].) Among other things, preliminary hearings serve to "weed out groundless . . . charges of grave offenses." (*People v. Herrera*, *supra*, 136 Cal.App.4th at p. 1202, internal quotes omitted, and citing *People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754, 759.) Preliminary hearings "operate as a judicial check on the exercise of prosecutorial discretion, and help ensure 'that the defendant [is] not ... charged excessively.'" (*Ibid.*)

D. Count 4 Should Have Been Dismissed Because the Evidence Did Not Establish Probable Cause to Believe That Appellant and Moore Attempted to Rob Marian Wilson

"[A]n attempt to commit a crime requires proof of a specific intent to commit the crime and of 'a direct but ineffectual act done toward its commission.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 452, 453, quoting CALJIC No. 6.00.) Thus, an attempted robbery requires proof of specific intent to commit a robbery – an intentional taking by means of force or fear with the intent to permanently deprive – and a direct act committed in furtherance of the intended robbery. (*Ibid.*) Certainly, the evidence failed in this regard. Under no theory did the prosecution establish probable cause to believe that appellant and Moore "clearly indicate[d] a certain, unambiguous intent" to rob Marian Wilson. (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 452-453.) And the only "acts" appellant and Moore performed were that they had parked their truck across from the Sushi Hana and Round Table restaurants, and had walked in Wilson's general direction at the same time Wilson got into her own truck. Any conclusion that this conduct amounted to an attempted robbery necessarily involved speculation, guesswork and conjecture.

1. No Evidence Suggested That Appellant and Moore Had a Specific Intent to Rob Wilson

As the magistrate correctly found, no evidence showed an intent to rob Marian Wilson. (9CT:1657.) To establish that a defendant had the specific intent to commit the target offense of an attempt, direct proof of his state of mind is not required. (*People v. Neal* (1950) 97 Cal.App.2d 668, 672.) As this Court has noted, evidence of a defendant's state of mind is usually circumstantial, and circumstantial evidence is as sufficient as direct

evidence to support a conviction. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) However, the circumstantial evidence "must be such as would justify the court in inferring the intent with which the act was done." (*People v. Neal*, *supra*, 97 Cal.App.2d at p. 672.)

Here, no inference of intent arose from the scant circumstantial evidence presented on Count 4. The only facts and circumstances of the incident at issue were that appellant and Moore parked in two different spots in a commercial area, and that they walked in Wilson's general direction when she was walking to her truck. Although appellant had been traveling with a concealed shotgun in Moore's truck, the evidence showed that neither he nor Moore were armed as they walked toward Wilson. Further, they did not speak or gesture to her. Under no circumstances was there sufficient proof of an intent to rob Wilson.

This is no doubt why the prosecution sought to introduce other-crimes evidence of the 1981 robberies of an IHOP restaurant and the Blue Haven Bar. But that evidence also failed to establish intent, because the preliminary hearing court correctly refused to admit that evidence. (9CT:1622-1623.) As such, the other-crimes evidence should not have entered into the trial court's assessment of the sufficiency of the evidence under section 995. (See, e.g., *People v. Sullivan* (1963) 214 Cal.App.2d 404, 409 [noting that a "full-scale review of the evidentiary rulings of the magistrate is not provided by section 995"]; *People v. Daily* (1996) 49 Cal.App.4th 543, 550-551 [explaining that when deciding a 995 motion,

trial court must apply a "deferential standard of review" of the magistrate's evidentiary rulings].)[79] (17RT:2566.)

Also, the other acts evidence did not supply the missing proof of intent, because both of the prior robberies were too dissimilar to the alleged attempt to be probative on that issue. Most notably, neither of the prior robberies involved thefts from people on the street. Instead, they took place inside restaurants, with cash registers and safes as the primary targets. So the prior robberies of a bar and a pancake restaurant provided for no inference that appellant intended to engage in a street robbery of Wilson. Further, since both of the prior robbery victims reported that their assailants pointed a gun at them and issued hostile commands, the absence of such conduct toward Marian Wilson only underscored the fact that no robbery was ever intended. Appellant and Moore engaged in no acts, in Wilson's presence or otherwise, from which an intent to rob could be reasonably inferred; they simply parked in a commercial area, and walked in Wilson's direction. Such everyday conduct cannot be explained by prior criminal behavior without engaging in gross speculation and conjecture. As such, neither the circumstances of the incident, nor the prior robberies showed an intent to rob Wilson.

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[79] The record is unclear whether the trial court relied on the other-crimes evidence. The court said it could "come to different legal conclusions on . . . the priors . . . under *Ewoldt*" (7RT:957), but never stated that it had done so. The trial court's later ruling showed agreement with the magistrate's exclusion of that evidence, however; in response to the prosecution's motion to admit eight prior robberies, the court excluded the robbery of the IHOP restaurant that was presented at the preliminary hearing because it was too dissimilar. The prosecution later withdrew its request to admit the robbery of the Blue Haven Bar. (17RT:2534-2535.)

2. No Evidence Established a Direct but Ineffectual Act in Furtherance of a Robbery

In determining whether a direct but ineffectual act ("direct act") took place in furtherance of a crime, the trier of fact must "distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 452.) "Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt." (*Ibid.*) Rather, "some appreciable fragment of the crime must have been accomplished." (*People v. Gallardo* (1953) 41 Cal.2d 57, 66.) An attempt is proved only when the acts alleged "clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design . . . ." (*People v. Dillon, supra*, 34 Cal.3d at p. 452.) However, "[i]f it is not clear from a suspect's acts what he intends to do, an observer cannot reasonably conclude that a crime will be committed." (*Id.* at p. 455.) An attempt is apparent only "when the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force." (*Ibid.*)

Here, the magistrate was not persuaded that a holding order was warranted under *People v. Vizcarra*, *supra*, 110 Cal.App.3d 858, 861, on which the prosecution (and later the trial court) relied. (9CT:1657; 7RT:902.) This conclusion was appropriate, as *Vizcarra* demonstrates the type of proof – missing here – that shows a direct act in furtherance of a robbery. In *Vizcarra*, the defendant approached a liquor store visibly armed with a rifle. When a customer passed him on the walkway leading to the store, the defendant stopped and hid his face from the customer in a

"peculiar" manner, by turning his head so that his nose was pressed up against a wall. (*Id.* at p. 862.) This conduct was sufficient to establish a direct act toward an attempted robbery of the liquor store. (*Id.* at pp. 861-862.)

Vizcarra illustrates the kind of evidence that will establish the direct act element of an attempted robbery, which was missing in this case. No evidence showed that appellant and Moore (1) were armed as they approached Wilson, (2) were attempting to conceal themselves at any time during the alleged conduct, or (3) were acting in *any* way out of the ordinary as they approached Wilson. They neither requested nor demanded any money, and in fact said nothing to Wilson. They made no odd movements or gestures. Although appellant had been traveling with a shotgun in Moore's pickup truck, neither he nor Moore brandished the gun or any other weapon as they walked in Wilson's direction. In fact no evidence suggested that they had brought the gun out of the truck at all.

Further, an examination of this Court's "slight acts" cases reveals the failure of proof of the direct act element in this case. This Court has held that when a defendant's intent to commit a crime is "'clearly shown, slight acts in furtherance of the design will constitute an attempt.'" (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 8, quoting *People v. Anderson* (1934) 1 Cal.2d 687, 690; *People v. Memro* (1985) 38 Cal.3d 658, 698.) In other words, "[w]here the intent to commit the crime is clearly shown, an act done toward the commission of the crime may be sufficient for an attempt even though that same act would be insufficient if the intent is not as clearly shown." (*People v. Bonner* (2000) 80 Cal.App.4th 759, 764.) This Court's slight acts cases demonstrate the insufficiency of the evidence here because even though no clear evidence of

intent existed in this case and something more than a slight act was required, the acts in this case did not even rise to the level of slight acts.

For example, in *People v. Anderson*, *supra*, the defendant's intent was clearly shown when he freely admitted while testifying that he intended to rob the Curran Theater. (*People v. Anderson*, *supra*, 1 Cal.2d at p. 689, 690.) This intent, coupled with the "slight acts" of the defendant's walking into the theater he planned to rob, pulling out a gun two feet from the cashier, and readying himself to place it inside the cashier's cage, were enough to support an attempted robbery conviction. (*Id.* at p. 690.)

In *People v. Memro*, *supra*, 38 Cal.3d 658, the defendant's intent to commit a lewd act on a child was clearly shown by his confession admitting his intent to photograph the child nude. (*Id.* at p. 697.) This Court found, however, that the defendant had engaged in mere preparation by arranging in his bedroom pornographic materials, other paraphernalia, and strobe lights to entice the boy. (*Id.* at p. 699.) Likewise, the defendant's luring of the boy into his (defendant's) apartment was also preparation. (*Ibid.*) It was not until the defendant brought the boy into his bedroom and turned on the strobe lights that his conduct became an "actual commencement of the plan" and therefore crossed the line from preparation to a direct, slight act. (*Ibid.*)

Also, in *People v. Decker*, *supra*, 41 Cal.4th 1, the defendant's intent to murder was clearly shown when he hired an assassin to kill his sister, saved money to pay the assassin, and conducted surveillance of her daily routines to share with the assassin. (*Id.* at pp. 7-8.) Accordingly, his "slight" act of making a down-payment to the assassin was sufficient to meet the direct act requirement of attempt. (*Id.* at pp. 8-9.)

Given that the above cases represent the outer limits of what will qualify as a direct act sufficient to establish an attempt, they plainly demonstrate that no acts in furtherance of a robbery occurred in this case. Appellant and Moore engaged in no conduct that suggested they were putting any criminal plan into action. Unlike the defendant in *Anderson*, *supra*, they displayed no weapon and made no gestures indicating an attempt to rob. They engaged in no conduct whatsoever against Wilson, and only walked in her general direction. Such conduct does not even rise to the level of mere preparation or planning, absent some evidence of intent. (See, e.g., *People v. Memro*, *supra*, 38 Cal.3d at p. 699.) As this Court's slight acts cases show, the acts in this case did not even rise to the level of "slight," and therefore were not direct acts of an attempt under any circumstances.[80]

Given the dearth of any evidence of an intent to rob and a direct but ineffectual act toward commission of a robbery, the magistrate correctly found insufficient evidence to hold appellant to answer on an attempted robbery. In concluding otherwise, the trial court's inferences were necessarily based on "imagination, speculation, supposition, surmise, conjecture, or guess work" (*People v. Morris*, *supra*, 46 Cal.3d at p. 21,

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[80] In the absence of such conduct, the trial court erroneously substituted Wilson's subjective fear of the defendants for any direct acts on their part. (17RT:954-955.) When trial counsel explained that the focus should be on "the actual conduct of the [defendants]" and not the subjective feelings of the victim, the court replied that the evidence is assessed under "a much different standard" at the preliminary hearing. (17RT:957.) Under any standard, however, Wilson's fear did not amount to conduct by appellant and Moore, particularly where Wilson herself said she felt scared but she did not know why. (2CT:307, 331.)

internal quotes omitted), and the denial of appellant's 995 motion on Count 4 was error.

E. Dismissal of Count 3 Was Necessary Because The Evidence Did Not Establish Probable Cause to Believe That Appellant and Moore Were Engaged in a Conspiracy to Commit Robbery

The crime of conspiracy results when "two or more persons conspire . . . [t]o commit any crime," and at least one of the conspirators commits an overt act in furtherance of the agreement. (§§ 182, subd. (a)(1), 184.) Conspiracy is a specific intent crime, which requires the dual intent to (a) agree, and (b) commit the offense that is the object of the agreement. (*People v. Swain* (1996) 12 Cal.4th 593, 600.) Thus, to prove a conspiracy, "the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense.*" (*Ibid.*, italics in original.) Accordingly, the conspiracy charge in this case required some proof of (1) intent to agree and an actual agreement to commit a robbery, (2) intent to commit the elements of robbery, and (3) one or more overt acts in furtherance of a robbery. (See § 182, subd. (a); CALJIC No. 6.10.) Here, the prosecution failed to prove an agreement to commit robbery as well as the mutual intent to commit the elements of robbery, and also failed to prove that any of the so-called overt acts were in furtherance of a robbery.

1. No Proof of an Intent to Agree and an Intent to Commit Robbery Existed

No direct evidence established an agreement between appellant and Moore to commit robberies. The prosecution introduced no statements, admissions, confessions, writings or other evidence that showed an agreement to rob. In the absence of any direct proof of an agreement, the

prosecution bore the burden of establishing that element with circumstantial evidence, which it failed to do.

While proof of a conspiracy may "be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 [internal quotes and citation omitted]), "mere suspicion is not enough." (*People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 419 [upholding trial court's dismissal of conspiracy count under section 995].) Although circumstantial evidence can supply proof of an agreement between conspirators, an agreement may not be inferred merely by a party's awareness of the conspiracy or its intended goal. (*People v. Roy* (1967) 251 Cal.App.2d 459; *Lavine v. Superior Court* (1965) 238 Cal.App.2d 540.) The proof must show the alleged conspirators took an active interest in the goals of the conspiracy. (*People v. Lauria* (1967) 251 Cal.App.2d 471, 476.)

An agreement "may be inferred from the conduct of the defendants in mutually carrying out a common purpose in violation of a penal statute" (*People v. Cockrell* (1965) 63 Cal.2d 659, 667), and the overwhelming majority of cases are proved this way. Conspiracy cases typically involve evidence of a crime that has in fact occurred, coupled with proof of the defendant's conduct, interests, and relationship to coconspirators, which shows his assent to commit that crime. (See, e.g., *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 57 [indictment on conspiracy supported by evidence that police captain conspired with thugs who beat the victim, a public enemy of the captain]; *People v. Robinson* (1954) 43 Cal.2d 132, 136 [prima facie case of conspiracy proved where appellant and middleman convicted of illegal bookmaking]; *People v. Osslo* (1958) 50 Cal.2d 75, 85,

94-96 [conspiracy to commit assault on union member proved at trial where beating committed by five "observers" hired by rival union officers]; *People* v. *Lipinski* (1976) 65 Cal.App.3d 566, 576 [holding order for conspiracy to sell LSD upheld where coconspirator agreed to sell large amount of LSD to undercover officer, arranged a meeting with defendant, and obtained the drugs from defendant to sell to the officer]; *People v. Martin* (1983) 150 Cal.App.3d 148, 163 [conspiracy to extort and to assault established by the assault and proof that defendant directed acquaintance to beat victim and collect money]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 741-742 [robbery conspiracy proved by robbery itself, plus proof that one coconspirator provided the gun, and other coconspirators knew of defendant's plan, and joined him in a search for the victim]; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464 [conspiracy proved where defendant and driver twice passed by location where rival gang members were, and at each pass, several shots were fired at rival gang]; *People v. Jurado* (2006) 38 Cal.4th 72, 121 [conspiracy proved where defendant killed victim in back seat of car owned by passenger and driven by third party, driver had motive to kill victim, and neither driver nor passenger reported the murder].) In sum, the overwhelming majority of conspiracy cases, all of which cannot practicably be cited herein, are proved by evidence of the crime itself, coupled with proof of the defendants' conduct in relation to the crime.

Here, however, no inference of an agreement could be inferred from a joint violation of the law, because appellant and Moore committed no robberies of Wilson, or her restaurant, or any other business establishment for that matter. Thus, no crime took place during which the conduct of appellant and Moore revealed an agreement to commit that crime together.

The same was true in *People v. Powers-Monachello*, *supra*, 189 Cal.App.4th 400, where the court of appeal upheld a trial court's dismissal of a conspiracy count under section 995. (*Id.* at p. 419.) In that case, the defendant stored a safe containing a sellable amount of cocaine at a particular house, that he regularly visited with another codefendant. He often returned from out of town trips to the house and engaged in counter-surveillance driving techniques before entering. He was often at the house when the codefendant arrived, and on one occasion, he handed the codefendant two boxes. Also, the codefendant's residence contained cocaine in an amount sufficient for sale. (*Id.* at pp. 403-404, 411.) Although this evidence supported a charge that the defendant and codefendant each independently possessed cocaine for sale, no evidence of a joint agreement to do so existed, absent "pure speculation." (*Id.* at pp. 412, 414-415.) The court noted that although an agreement may be inferred from the defendants' conduct in mutually carrying out a common purpose in violation of a penal statute, no such inference was reasonable because "the defendants . . . did not engage in any observed sales or transfers of cocaine." (*Id.* at p. 415.)

This is not to suggest that an agreement cannot be proved where the conspirators fail to accomplish the target offense, or are acquitted of that offense, but in such cases, very clear proof of the agreement to commit the offense must exist in order to support a conspiracy charge. (See, e.g., *People v. Darnell* (1950) 97 Cal.App.2d 630, 635-636 [acquittal on grand theft did not require reversal on conspiracy conviction where defendants fraudulently induced the victim to part with his money and had a "definite plan or system" for doing so].)

Indeed, rare are the cases where an agreement is proved despite the fact that the target crime was neither committed nor attempted. The best example of such a case, given the one presently before the Court, is *People v. Dewitt* (1983) 142 Cal.App.3d 146, where the court of appeal reversed the grant of a 995 motion on a charge of conspiracy to commit robbery. Like this case, no robbery or attempted robbery actually occurred in *Dewitt*, although that case illustrates the kind of evidence – missing here – that proves an agreement to rob nonetheless. In *Dewitt*, the defendants were both convicted felons who were parked in a stolen car in front of a gated residence in an affluent residential neighborhood at 1:00 a.m. The passenger was shirtless, appeared to have long hair, and wore a watch cap and sunglasses. But when an officer pulled up, the passenger bent down out of sight, and reappeared with a bald head, no cap, and no sunglasses. (*Id.* at p. 148 & fn. 2.) When the officer approached, the driver said they were "just taking a break," but the passenger, wiping mascara from his head, told the officer they were having car trouble. A search of the car revealed two paper bags, each containing a gun and gloves, near each of their seats. The officer also found "a bundle of plastic handcuffs" in the passenger's rear pocket. (*Id.* at p. 149, fn. 3.)

In reversing the grant of the 995 motion, the court concluded, "While the record contains slight direct evidence of an explicit agreement to commit robbery, the existence of such an agreement is adequately established by the reasonable inferences drawn from the facts and circumstances . . . ." (*People v. Dewitt*, *supra*, 142 Cal.App.3d at p. 150.) The court explained,

> The presence of two convicted felons, each in possession of stolen, loaded handguns while either wearing or in possession of

> disguises, parked in a stolen automobile at the entrance to an expensive residence located in a remote area, with immediate access to gloves and numerous sets of handcuffs, leads to virtually no other conclusion than [defendants'] having agreed to and embarked upon a robbery foray. Their conflicting statements as to their purpose in the area lend further support to such a conclusion.

(*Id.* at p. 151.)

Dewitt illustrates precisely what was missing in the present case – evidence that appellant and Moore were jointly armed, were in a suspicious area, were disguised, or were otherwise engaged in conduct suggesting a conspiratorial agreement. As discussed below, none of the circumstances of this case, taken alone or together, gave rise to a reasonable inference that appellant and Moore intended to agree to commit robberies, and did in fact agree to commit them.

a. The Presence of a Gun in the Truck Did Not Support an Inference of an Agreement

The fact that appellant and Moore were driving in a truck containing a shotgun did not indicate any agreement to rob because, among other things, nothing established that Moore possessed the shotgun or even knew of its presence at any time before the events that took place in the Saddlery parking lot. As the *Dewitt* Court noted, when under sufficiently suspicious circumstances, two ex-felons *each* possess handguns, this adds to the reasonableness of inferring a conspiracy to rob. (*People v. Dewitt*, *supra*, 142 Cal.App.3d at p. 151.) This makes sense because possession by two people of stolen handguns combined with other highly suspicious circumstances, supports an inference of something more than mere incidental possession of handguns. Logically, the same inference would be reasonable if under sufficiently suspicious circumstances, coconspirators

jointly possessed a single weapon, since each person's possession would entitle him or her to use and control the weapon for the target crime of the conspiracy. (See e.g., *People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084 [a defendant constructively possesses an item by knowingly exercising a right to control the item, either directly or through another person].) But the same is not true when only one of two people possesses a single weapon. Absent some evidence that the other party possessed the weapon or at least *knew* of its presence and knowingly exercised a right to control it, an inference that she intended it be used to aid a robbery is patently unreasonable. "Mere association" with a person possessing contraband "does not make a conspiracy." (*People v. Powers-Monachello, supra*, 189 Cal.App.4th at p. 419.)

Appellant's possession of the gun during the road trip in no way gave rise to a reasonable inference that Moore had agreed to commit robberies with him, because no evidence established that Moore possessed the gun with appellant at that point. (See, e.g., *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 [possession of a weapon may be shared with others but mere proximity to the weapon is insufficient evidence of possession]; cf. *People v. Nieto* (1966) 247 Cal.App.2d 364, 368 and *People v. Hunt* (1963) 221 Cal.App.2d 224 [in both cases where defendants were the owner/drivers of the cars in which guns were found, possession was established where the weapons were on the floor near the front seat readily accessible to the driver]). Moreover, even if Moore knew the gun was in the truck, no evidence established that she intended for it to be used for robbery. (Cf. *People v. Austin* (1994) 23 Cal.App.4th 1596,1607 [explaining that a supplier of goods that are ultimately put to illegal use is not a coconspirator unless she had knowledge of the illegal use and the

intent to further that use].) Accordingly, whatever inference that may attach to the joint possession of weapons (see *People v. Dewitt, supra*, 142 Cal.App.3d at p. 151), was inapplicable here.

However, even if the evidence at the preliminary hearing did support a reasonable inference that appellant and Moore jointly possessed the shotgun during the conduct alleged in Count 3, that is all it established. As discussed below, the record contained insufficient evidence of additional suspicious circumstances to show that such joint possession was part of a shared specific intent to commit robberies.

b. The Presence of Appellant and Moore in a Commercial Area Did Not Supply Evidence of an Agreement to Rob

Appellant and Moore were not in a suspicious area during the events comprising the purported conspiracy, and nothing about their presence near the Sushi Hana gave rise to a reasonable inference that they had agreed to commit robberies together. When they were parked near the Sushi Hana restaurant, they were in a commercial area during regular business hours at 10:45 pm; at least two other establishments next to the Sushi Hana restaurant were open for business (Round Table Pizza and Jasper O'Farrell's). (2CT:228, 231, 303-304.) Thus, they were not in a remote or suspicious area late at night, such that their presence could not otherwise be explained. (Compare *People v. Dewitt, supra*, 142 Cal.App.3d at p. 151 [defendants' presence in stolen car parked in affluent, gated, and remote residential area at 1:00 a.m was one of many suspicious circumstances indicating a joint intent to rob].)

Moreover, although the prosecution claimed appellant and Moore had "surveiled" Sushi Hana (9CT:1662), Wilson explained that her restaurant was not even visible from the location where the green pickup

truck was initially parked. (2CT:325.) They could not have been engaged in any such surveillance of the restaurant at that time. As for their second parking spot across from Sushi Hana, nothing established that this act of parking was somehow a 'surveillance' of the restaurant. No evidence showed that appellant or Moore were somehow focused on the Sushi Hana restaurant. In fact, when Wilson came out of the restaurant, she saw them parked directly across from her restaurant, but they were looking straight ahead, not toward her or the restaurant. (2CT:305.) So while the prosecution characterized appellant's and Moore's presence in the area as a surveillance of the Sushi Hana restaurant, it utterly failed to prove that assertion. If the mere parking in front of a business establishment is surveillance, all citizens are engaged in surveillance on a daily basis. It is certainly not reasonable evidence of an agreement to commit robbery, particularly where nothing indicates whether appellant had control over where Moore drove or parked at that time. (See e.g., *People v. Powers-Monachello, supra*, 189 Cal.App.4th at p. 412 [defendant's driving patterns near codefendant's house, which were consistent with both countersurveillance and a search for parking, provided no evidence of an agreement between the parties to sell cocaine].)

c. The Presence of Appellant and Moore in the Aplum Parking Lot Did Not Show an Agreement to Rob

Although appellant and Moore were temporarily parked in the driveway of the Aplum Trucking yard with a Chevron station in view, the detective who testified on this point did not know whether the Chevron station was even open when they were parked there. (9CT:1590.) Thus, an inference that they intended to rob people in the Chevron station was unreasonable, because no proof existed that there were any people in that

store. But even if the Chevron was open, no conduct by the defendants suggested that the Chevron was a robbery target, and indeed, no one even questioned the Chevron employees to investigate such a theory.[81] (9CT:1590.) The fact is that anyone on a road trip driving on the main roads of a city or town in America would be hard-pressed to do so without at some point parking near a restaurant, service station, or other business establishment for any number of reasons. The presence of appellant and Moore in the Aplum driveway, which happened to be near a service station, could have been explained by any number of unremarkable reasons other than the unreasonable inference that they were conspiring to rob. And the most obvious and reasonable inference that arose from their departure when Brian Nelson approached, was that as trespassers on private property, they drove away because they had no right to be there.

d. The Hats Were Not Disguises and Therefore Provided no Evidence of a Conspiracy to Rob

Although the prosecution placed great emphasis on the presence of a knit cap found in Moore's truck and a modified cap found in a bag in the field, neither defendant nor Moore was ever disguised during any of the conduct alleged as part of a conspiracy. Not only were these hats regular items of clothing (i.e., not a wig, makeup and sunglasses worn by a man late at night as in *People v. Dewitt*, *supra*, 142 Cal.App.3d at p. 151), but no witness ever saw appellant or Moore wear any caps during the events at issue. Marian Wilson, owner of the Sushi Hana restaurant, described

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[81] Given that the prosecution sought to establish this count by significant reliance on appellant's past robberies, the failure to question the Chevron employees about whether appellant ever entered the Chevron (i.e., to survey the landscape) suggests that the prosecution never entertained any serious suspicion that the Chevron was a robbery target.

Moore's "very, very full head" of "blonde" hair, and appellant's "very normal dark hair." (2CT:232, 330.) She saw the same heads of hair both times she saw the truck. (2CT:304.) In the Aplum Trucking driveway, Nelson spotted Moore's long, blonde hair. (9CT:1586.) Shortly thereafter, from the parking lot of the R&S Bar, Gustavo Aguilar could see that Moore had long, blonde hair, and that appellant had "dark" or "black" hair. (4CT:725, 726; 5CT:793.) Alejandro Ramirez likewise noticed Moore's blonde hair (6CT:1002) and appellant's "short" and "dark" hair. (5CT:903.) He also said that appellant was not wearing a hat, and more specifically, that he was not wearing the modified watch cap that was People's Exhibit No. 51. (6CT:1071; 8CT:1336.) Onecimo Guerrero, the methamphetamine user/dealer who was high as he watched the events in the Saddlery parking lot (9CT:1462), could not remember what the man and woman there looked like (though he nonetheless identified appellant and Moore at the hearing). He agreed, however, that he had told the police the man with the gun had "hair" that was "reddish." (6CT:1124-1126, 1187.) Most importantly, he made no mention of any hat. The same was true of Kellie Jones, who saw that Moore had long blonde hair and that appellant had brown hair. (8CT:1384, 1396.)

So, none of the preliminary hearing witnesses testified that appellant or Moore wore a hat during or after any of the events comprising the alleged conspiracy. In fact, both defendants' physical attributes were on plain display at all relevant times. There was no evidence to support an inference that they had brought the hats as disguises as part of a conspiracy to rob. Unlike the defendant in *DeWitt* who actually wore sunglasses and donned a wig, cap, and black makeup on his bald head, appellant and Moore wore no items to conceal or obscure their features. The two hats at

issue were in Moore's truck as she and appellant traveled for several days in March through Northern California. Any inference that they were "disguises" rather than simply warm, functional clothing was wholly speculative absent some evidence that they wore them as disguises or that they ever wore them *at all* during the relevant conduct.[82] As in *Powers-Monachello*, where the conclusion that the box exchanged between two drug dealers contained cocaine required "pure speculation," the conclusion that the hats were 'disguises' required the same. (*People v. Powers-Monachello*, *supra*, 189 Cal.App.4th at p. 412.)

e. The Presence of Latex Gloves in Moore's Truck Did Not Support an Inference of an Agreement to Rob

No reasonable inference of an agreement between appellant and Moore arose from the existence of latex gloves found in Moore's truck and in a plastic bag in the field; absent some evidence that appellant or Moore ever *wore* the gloves at any time during the conduct at issue, an inference that the gloves were for use during crimes involved pure conjecture. As an initial matter, the fact that two gloves were found in the field was not relevant to the conspiracy count because the acts comprising the so-called robbery conspiracy were complete when the gloves made it to the field.[83] Also, appellant and Moore had only one pair of gloves with them in the

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[82] Indeed, even the trial judge eventually recognized this when, during argument on the motion for directed verdict, he told the prosecutor, "I mean, you keep calling it a mask. They had two hats. One that was cut off that Ms. Moore demonstrated perhaps could be worn just to keep her hair out of her eyes . . . ." (94RT:14941.)

[83] Moreover, those two gloves would have been a poor choice for obscuring fingerprints because they appeared already used and one of the gloves was missing a fingertip. (7CT:1282, 1285-1286; 8CT:1323-1324.)

field; presumably, a conspiring duo would choose to obscure both sets of fingerprints. (Compare *People v. Dewitt, supra*, 142 Cal.App.3d at p. 151 [each defendant had stashed pair of gloves with a handgun underneath his seat].) Moreover, the gloves were in a large plastic bag that contained several other items. (8CT:1324, 1335-1336; 9CT:1522.) Given that they were used and one was damaged, they could easily have been trash that happened to be in the bag that appellant and Moore used to carry items. More importantly, they did not wear these gloves when they broke into the Cooper/King residence. So any theory that they intentionally placed the gloves in the bag for use during crimes was significantly undermined by the fact that neither of them wore the gloves while committing a burglary.

As for the gloves found in the truck, they were inside a "latex glove bag" (7CT:1280), so they apparently were the last remnants of what was once a full bag of latex gloves used at some unknown time for any number of purposes. Notwithstanding the leap of logic required to conclude that these gloves were instruments of a conspiracy, no evidence established *where* in the truck the gloves were found. Unlike the two pairs of gloves in *Dewitt, supra*, 142 Cal.App.3d at pp. 148-149, that were stored with guns in paper bags directly under each defendant's seat, here no evidence established where in the truck the gloves were found, i.e.,whether they were in the glove compartment, under a seat, in the cab of the truck, outside in the bed of the truck, etc. (7CT:1280 [Det. Schwedhelm noting that gloves were located "within the truck" but providing no further explanation of where in the truck they were located].) Thus, no evidence gave rise to the inference that appellant and Moore jointly possessed the gloves, or that if only one of them possessed the gloves, the other one even knew the gloves were in the truck. (Cf. *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336

[evidence insufficient to infer defendant as a passenger possessed stolen chain saw found in rear seat of car]; see also *People v. Myles* (1975) 50 Cal.App.3d 423, 429 [passenger in car not presumed to possess the contents therein because "(m)ere access or proximity to (the items) is not sufficient to infer possession; dominion and control must be shown"].)

Moreover, no witness in the R&S Bar and Saddlery parking lots or near the Sushi Hana restaurant reported seeing appellant or Moore wearing any gloves. Given the lack of proof of the location of the gloves or that appellant and Moore ever wore the gloves during any of the alleged conduct, an inference that they jointly planned to use the gloves during a robbery was unreasonable. (Compare *People v. Dewitt*, *supra*, 142 Cal.App.3d at p. 151 [occupants of car reasonably charged with conspiracy to rob where passenger actually wore the odd items of disguise found in the car, and they both stored stolen guns and accompanying pairs of gloves underneath their seats].)

f. Evidence That Appellant and Moore Were Traveling with a Road Map and Had Little Money Was Not Evidence of an Agreement to Rob

The presence of a Sonoma wine country map in Moore's truck did not supply the missing proof of an agreement to rob. None of the events in this case occurred at any locations marked on the map. The possession of a marked map while on a road trip was not evidence of a conspiracy, especially where none of the marked locations were the alleged targets of the conspiracy.[84]

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[84] Nonetheless, even if appellant *had* marked robbery targets on the map (though this conclusion is not supported in the record at preliminary

(continued...)

Further, although the prosecutor relied on evidence that appellant and Moore had only 46 cents between them at the time of arrest, the evidence also showed that Moore had access to funds when she needed them; Moore's friend had already wired her $150 to fix her car. (8CT:1337.) Also, Moore still had food stamps left at the end of the month. (3CT:454.) The inference that Moore would resort to robbery rather than seek additional funds by wire transfer, was unreasonable given the complete lack of evidence that she intended to commit robberies, coupled with the very solid evidence that she had access to funds when needed.

g. The Evidence as a Whole Did Not Support an Inference That Appellant and Moore Had Agreed to Commit Robberies

All of the factors discussed above, when considered together, amount to nothing more than speculation and conjecture on the issue of intent. Given the paucity of evidence that appellant and Moore agreed to commit robberies, and the ample evidence refuting such a theory, the magistrate correctly refused to hold appellant to answer on Count 3, and the trial court erroneously denied the 995 motion. "Conspiracies cannot be established by suspicions." (*People v. Hardeman* (1966) 244 Cal.App.2d 1, 41.) The prosecution presented a number of facts in support of its suspicions, but none of those facts, individually or cumulatively, gave rise to a reasonable inference that appellant and Moore had agreed to commit robberies together and that they each shared the intent to commit them. Just as in *Powers-Monachello*, *supra*, 189 Cal.App.4th 400, such a conclusion

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[84] (...continued)
hearing), no evidence suggested that Moore had knowledge of the markings and their alleged significance.

required pure speculation at every step, and was therefore unreasonable. (See also *People v. Herrera, supra*,136 Cal.App.4th 1191, 1195-1197, 1204-1206 [grant of 995 upheld where evidence of defendant's shoplifting of large amounts of pseudoephedrine, combined with absence of drug manufacturing equipment in his home, failed to prove he was middleman in agreement to manufacture methamphetamine with unknown coconspirator].)

2. The Evidence Failed to Establish Any Overt Acts in Furtherance of a Conspiracy

The alleged overt acts were that appellant and Moore (1) armed themselves with a loaded shotgun, (2) obtained a street map of Santa Rosa, "marking potential locations of robbery victims," (3) obtained a mask and gloves to avoid identification as perpetrators of robberies, (4) drove to 6940 Burnett Street, Sebastopol, "and surveiled the area of the Sushi Hana Restaurant, while armed with a loaded shotgun and in possession of a mask and gloves," and (5) drove to 5338 Highway 12, Santa Rosa, and surveiled the area of the R&S Bar, armed with a shotgun and in possession of gloves and a mask. (9CT:1662;10CT:1721-1723.) Some of the conduct alleged in the acts was not proved, and the conduct that was proved was so unconnected to any agreement to commit robberies that it could not be considered to be in furtherance of a conspiracy.

The prosecution did prove that at least appellant had armed himself with a shotgun, but as explained above, his possession (with or without Moore's knowledge) was not tied to any conduct that proved a specific intent to commit robbery as alleged in counts 3 and 4. Appellant's possession of a shotgun was certainly illegal, but his plans for the gun, if any, could have been completely unrelated to robbery. (See e.g., *People v.*

Austin, *supra*, 23 Cal.App.4th at p. 1607 [no conspiracy proved as to third party because he may have furnished money to defendant "intending to further an agreement between them to commit an unlawful act other than" the one alleged in the conspiracy].) Moreover, the prosecution failed to prove that Moore was also armed. As such, the prosecution did not prove the alleged conduct in overt act 1, and likewise failed to prove that it was in furtherance of a conspiracy.

As for the possession of a map, the prosecution failed to prove that the markings on it were robbery targets. Indeed, the other alleged overt acts named targets (Sushi Hana and R&S Bar) that were *not* marked on the map, and named no locations that *were* on the map. Nor did the evidence at the hearing show that the locations marked on the map had been targeted in any way. So while the prosecution did in fact introduce a marked map in an attempt to prove Overt Act 2, it failed to connect that map to any wrongdoing and certainly failed to connect it to a specific intent to agree to commit robberies.

The prosecution also failed to prove that the hats found in Moore's truck and in the field were "masks" as alleged in overt act 3, and failed to show that possession of the hats and the latex gloves were "to avoid identification as perpetrators of robberies." In fact, the evidence at the hearing belied those allegations. As discussed at length above, appellant and Moore did not wear hats or gloves during the conduct charged in counts 3 and 4, or at any other time, for that matter. The allegation that they possessed these items for the purpose of disguise during robberies, when they never wore them during the so called attempt and 'surveillance,' is nonsensical. The non-use of the gloves and hats undermined any contention that they were disguises.

As for overt act 4, no proof existed that appellant and Moore had "surveiled" the area of the Sushi Hana; the only time they were in a position to see the Sushi Hana, they were seen looking straight ahead, not toward the restaurant or toward Wilson. While shortly thereafter, Wilson's partner Kim saw a sedan or a truck stop for 20 seconds in the alley next to Sushi Hana before turning onto Petaluma Avenue, he also explained that drivers often used the alleyway when traveling to and from Sushi Hana, Round Table Pizza, and Jasper O'Farrell's; they would normally pause there for about 5 or 10 seconds before turning onto the main road. (2CT: 339, 341, 342, 347.) Kim did not see the occupants of the sedan or truck and therefore did not see what they were doing or on what they were focused as they paused in the alley, i.e., whether they were looking inside the restaurant, were talking, or were simply looking at the road (or a map) to see which way to turn. In any event, the evidence suggests the sedan or truck was not surveilling the Sushi Hana for the purpose of robbing it, because it drove away despite the fact that Kim was alone in the closed restaurant. Accordingly, while the prosecution established that appellant and Moore were in the area of the Sushi Hana restaurant, it completely failed to prove they were engaged in surveillance. Though the prosecution apparently sought to bolster this allegation by alleging that the purported surveillance took place while appellant and Moore were "armed with a loaded shotgun and in possession of a mask and gloves," this simply repeated the deficient allegations in overt acts 1 and 3.

Lastly, overt act 5 was dismissed by both the magistrate and the trial court, and therefore had no bearing on the holding order. That said, nothing established that appellant and Moore were engaged in surveillance when they were parked in the Saddlery parking lot.

In conclusion, because the prosecution failed to show an agreement to commit robberies, intent to commit robberies, and an overt act in furtherance of a robbery, the magistrate correctly refused to hold appellant to answer on the conspiracy count. The trial court erroneously refused to dismiss the count when the prosecution recharged it, and because prejudice resulted, reversal is required.

F. Appellant Was Prejudiced by the Erroneous Denial of his 995 Motion Because Counts 3 and 4 Were the Sole Means by Which the Jury Heard Extensive Evidence of Appellant's Prior Robberies

Although the erroneous denial of a 995 motion is not prejudicial when a defendant is convicted of the charges at issue and the evidence was sufficient to support the conviction (*People v. Letner* (2010) 50 Cal.4th 99, 140), prejudice does exist when no conviction occurred and the jury heard prejudicial evidence resulting from the court's failure to dismiss the charges. (*People v. Arjon* (2004) 119 Cal.App.4th 185, 192-193.) This is precisely what occurred in this case.

As discussed at length in Argument 2. D., *ante*, the jury heard inflammatory evidence of appellant's prior robberies where he pointed a sawed-off shotgun at his victims while demanding money and threatening, either overtly or implicitly, to shoot them. This evidence came in solely to bolster the prosecution's painfully weak charges of attempt and conspiracy that the court should have dismissed under section 995. Although the jury was instructed to consider the prior robberies only as they related to Count 3 (111RT:17626), this was nearly impossible, given the similarity between the conduct of the robberies and the events immediately preceding the shooting of Deputy Trejo (i.e., pointing a loaded shotgun at the victims and yelling at them to get down on the ground). Thus, although the other-

crimes evidence was not admissible on the murder and robbery counts, it was almost certainly considered for that purpose. The jury was invited to conclude, based on the prior robberies, that appellant was pointing a gun at Deputy Trejo because he was robbing him, and that he shot him deliberately, as he had threatened to do to past robbery victims. This contrasted with appellant's explanation that he was only trying to disarm Deputy Trejo and that he shot him by accident. For these reasons, as well as those set forth in Argument 2. D., *ante*, prejudice flowed from the denial of appellant's section 995 motion, and reversal of appellant's murder and robbery convictions and sentence is required.

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THE ERRONEOUS ADMISSION OF APPELLANT'S REFUSAL TO PARTICIPATE IN A LINEUP DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

A. The Proceedings Below

The prosecution stated its intention to present evidence that appellant refused to participate in a lineup, and to argue that the refusal constituted proof of appellant's consciousness of guilt. (53RT:8081-8082.) According to the prosecution, law enforcement requested that appellant participate in a lineup; appellant was told that if he did not participate, that fact could be used against him; and that when appellant was asked, he refused. (53RT:8082, 8090.)

Appellant objected that because identification would not be an issue in the case, his decision not to participate in a lineup was irrelevant, and that to the extent the court found it relevant, its probative value was far outweighed by its prejudicial impact. (53RT:8083, 8088-8089.) The prosecution's case would not be undercut by virtue of appellant not participating in a lineup and the prosecution would not be deprived of being able to make its case. Appellant further argued that the prosecution wanted to present the evidence only to show that appellant was uncooperative. (53RT:8085, 8089.) Given that the probative value of evidence has to be paramount to its prejudicial impact, appellant argued that this minimal, if any, probity must be weighed against the highly prejudicial impact of alleged consciousness of guilt evidence. (53RT:8088-8089.) At minimum, appellant continued, the court should preclude the evidence unless and until the issue of identification somehow became a question or an issue during the trial. (53RT:8083-8084.) Appellant argued further that should the court

decide to admit it even though the issue of identity was not an issue, that the court conduct a hearing pursuant to Evidence Code sections 402 and 403 to determine whether the prosecutor could establish as a preliminary fact that appellant's conduct constituted a refusal, and if so whether appellant's conduct was sufficient to trigger prosecutorial comment or instruction that would justify a reasonable inference being drawn by the jury showing an alleged consciousness of guilt. (20CT:4024; 53RT:8084, 8109.)

The court acknowledged that this evidence was highly prejudicial. (53RT:8090, 8108.) Nonetheless, the court decided to admit the evidence unless appellant stipulated that there would be no requirement that any witness identify appellant *and* stipulated to the intent requirements for all the charged crimes. (53RT:8100-8101.) The court agreed to first hold a hearing pursuant to Evidence Code section 402.

That hearing was held after opening statements. During opening statements appellant admitted that he was the one responsible for Deputy Trejo's death. At the Evidence Code section 402 hearing, Santa Rosa Police Sergeant Thomas Schwedhelm testified that on two occasions – one two days after appellant's arrest, the other a week later – he asked appellant, who was housed at the jail, to participate in a lineup and that on both occasions appellant said "no." Schwedhelm told appellant that his "failure to cooperate in a live lineup process may be used against you in court to show consciousness of guilt." (59RT:9199-9202.) Schwedhelm did not tell appellant why he was being asked to participate in a lineup (59RT:9203-9204), that is, he was not told whether he was being asked to participate for purposes of charges against him or whether he was being asked to participate in a lineup regarding another case, not involving him but in

which he may have resembled the defendant in that case. (59RT:9203-9204.)

After the hearing, appellant argued that in light of his opening statement, in which appellant stated that he was the perpetrator and that identification was not an issue, appellant's decision not to participate in a lineup was irrelevant to identity, guilt or consciousness of guilt. (59RT:9204.) Further support as to its irrelevance for purposes of alleged consciousness of guilt was that appellant had not been told the purpose of the lineup. He was not told whether it was regarding the crimes for which he had been arrested or to assist in another case in which appellant was not involved. (59RT:9206-9207.) The court overruled appellant's objections to the evidence. It also ruled that it would instruct the jury under CALJIC No. 2.06 regarding efforts to suppress evidence, overruling appellant's objection to that instruction as well.[85] (59RT:9208.)

The prosecution then called Sergeant Schwedhelm to testify before the jury. He testified similarly to what he had stated at the hearing: on two occasions he asked appellant to participate in a lineup and told him that his failure to do so would indicate a consciousness of guilt. On both occasions appellant refused. Schwedhelm testified that before making the second contact he asked appellant's attorney about appellant participating in a lineup, and the attorney also said "no." (93RT:14815-14818.)

Immediately following Schwedhelm's testimony the court instructed the jury with CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by refusing to participate

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[85] Appellant argues *post*, in Argument 7, that the trial court erred in instructing the jury with CALJIC No. 2.06.

> in a line-up, this attempt may be considered by you as a circumstance tending to show consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(93RT:14828.)

The prosecution also called Sonoma County Sheriff's Department Correctional Officer Meredith Helton, who testified that she asked appellant to participate in a lineup two days after appellant's arrest. Appellant asked to speak to an attorney. After consulting with her supervisor, Helton told appellant a representative from the public defender's office would be present, although she was aware that appellant was not at that time represented by anyone from that office. (93RT:14829-14832.) Following Helton's testimony the court told the jury that the instruction regarding consciousness of guilt applied to Helton's testimony as well. (93RT:14832.) At the conclusion of the guilt phase, the court again instructed the jury with CALJIC No. 2.06. (111RT:17611; 24CT:4852.)

For the reasons set forth below, the trial court committed prejudicial error by admitting the evidence of appellant's decision not to participate in a lineup. The court's error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

B. The Trial Court Erred in Admitting Evidence of Appellant's Non-Participation in a Lineup Offered to Prove Appellant's Alleged Consciousness of Guilt

Under Evidence Code section 352, a trial court must exclude even relevant evidence if "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury." "Evidence is prejudicial within the meaning of Evidence Code section 352 if it 'uniquely tends to evoke an emotional bias against a party as an individual' [citations] or if it would cause the jury to '"prejudg[e]" a person or cause on the basis of extraneous factors' [citation]." (*People v. Cowan* (2010) 50 Cal.4th 401, 475.) In *People v. Mendoza* (2011) 52 Cal.4th 1056, this Court stated that evidence is "unduly prejudicial" for purposes of Evidence Code section 352 "if it tends to evoke an emotional bias against the defendant as an individual and has a negligible bearing on the issues." (*Id.* at p. 1091.) "Put another way, evidence should be excluded 'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose' [citation]." (*Id.* at pp. 1091-1092, quoting *People v. Howard* (2010) 51 Cal.4th 15, 32.) That was precisely the circumstance facing the trial court in appellant's case.

Evidence of appellant's decision not to participate in a lineup, admitted to show appellant's consciousness of guilt, should have been excluded because its prejudicial impact far outweighed any probative value it may have had. A lineup is an investigative procedure used for purposes of identifying a suspect. (See, e.g., *United States v. Wade* (1967) 388 U.S. 218, 236-237; *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) Lineups may be conducted at the request of law enforcement, or at the request of a defendant. (*Evans v. Superior Court*, *supra*, 11 Cal.3d at p. 625.) To avoid the pitfalls that can occur when a witness is asked to observe only one person for purposes of identifying a possible suspect, a

lineup usually consists of several people ("fillers"), and an attempt is made to have the persons in the lineup look similar to each other. (See, e.g, *Eyewitness Evidence: A Guide for Law Enforcement* (1999) Technical Working Group for Eyewitness Evidence, National Institute of Justice, U.S. Department of Justice, at pp. 29-30; *California Commission on the Fair Administration of Justice* (2006), citing *California Commission on Peace Officers Standards and Training*, Ch. 6.) Often, an inmate housed in a jail is asked to participate in a lineup, not because he is a suspect of the crime being investigated, but as "filler" because he may look similar to the actual suspect, who is also in the lineup.

If an individual who is asked to be in a lineup because he is a suspect, or because he is an inmate asked to provide filler to the lineup, chooses not to participate in the procedure, that fact alone is generally not directly relevant to a charged crime. To become relevant, and potentially admissible, the fact of choosing not to participate in a lineup needs a probative purpose. This Court has found such evidence can be probative in certain circumstances in cases where identity is an issue, because refusal to participate tends to show a consciousness of guilt. (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1221-1224.)

When a defendant refuses to participate in a lineup, in a case in which identity is the pith of the defense, the defendant's attempt to hide or suppress his identity may be a circumstance that tends to show a consciousness of guilt. (See *People v. Johnson*, *supra*, 3 Cal.4th at pp. 1221-1224.) The defendant's refusal to participate in a lineup in which he may have been identified shortly after his arrest, in a case where identity was the crux of the defense (*id.* at pp. 1209-1210), may indicate that the defendant's attempt to hide his identification could be a circumstance

tending to show consciousness of guilt. (*Id.* at pp. 1221-1224; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140 [consciousness-of-guilt instruction appropriate where the defense relied on an all-or-nothing strategy to cast doubt solely on the issue of identity].) In the present case appellant admitted that he was the one with the shotgun and was responsible for Deputy Trejo's death. His decision not to participate in a lineup, conducted to determine identity, shed no light on any issue that the jury was to decide.

The prosecutor knew that appellant had conceded identity by the time he presented his evidence of appellant's decision not to participate. (43RT:8303-8304 [appellant's opening statement]; 59RT:9199 et seq. [prosecution's first witness regarding the lineup].) Nonetheless, despite appellant's acknowledgment that he was the shooter, the court admitted the fact of his decision not to participate in a lineup and instructed the jury that they may consider it as tending to prove appellant's consciousness of his guilt.

Even assuming, without conceding, appellant's refusal to participate in a lineup was evidence of a consciousness of guilt of something, this evidence was not relevant to the issue of identification, or of an attempt to suppress an identification given that appellant admitted identity. By admitting that he was the shooter responsible for Deputy Trejo's death, appellant caused any marginal probity of his refusal to evaporate. At the time of trial, the evidentiary issue of the identity of the person who had committed the act, was resolved.

A lineup, or the refusal to participate in a lineup, was irrelevant here. The prosecution alleged that appellant was guilty of a first degree murder. Appellant presented evidence and claimed that he had committed, at most, a

second degree murder. Appellant's guilt of some crime was uncontested. Appellant's refusal did nothing to clarify the particular crime for which appellant was culpable. Specifically, the refusal provided nothing of evidentiary value which would assist the jury in deciding whether appellant intentionally or accidentally shot Deputy Trejo, or whether or not he intended to rob him.

Weighed against this lack of probative value was the prejudicial impact of the evidence. The trial court itself stated that this evidence was "highly prejudicial," and stated a second time that such evidence was "very prejudicial." (53RT:8088-9089, 8108.) Indeed, consciousness-of-guilt evidence is the kind of evidence about which this Court warned in *People v. Mendoza*, *supra*, 52 Cal.4th 1056, that is "of such nature as to inflame the emotions of the jury." (*Id.* at p. 1091; see also *People v. Howard*, *supra*, 51 Cal.4th at p. 32.) Evidence is unduly prejudicial and should be excluded if it tends to evoke an emotional bias against the defendant while at the same time has a negligible bearing on the issues. In such circumstances there is a substantial likelihood that the jury will use the evidence for an illegitimate purpose. (*People v. Mendoza*, *supra*, 52 Cal. 4th at pp. 1091-1092.) Given that consciousness-of-guilt evidence is highly prejudicial, and of the kind that has a tendency to inflame the emotions of the jurors, there was a substantial likelihood here that the jury would use it for an illegitimate purpose. In light of appellant's admission that he was the person responsible for Deputy Trejo's death, there was essentially no purpose for which his conduct could logically show a circumstance tending to show a consciousness of guilt because the only purpose of the lineup was to prove identity. The risk of the jury using the evidence for an illegitimate purpose was therefore extremely high. In sum, the evidence admitted here was

precisely the kind of unduly prejudicial evidence which *Mendoza* and *Howard* warned must be excluded.

C. Reversal is Required

The trial court's abuse of discretion in admitting this highly prejudicial evidence with no legitimate probative value whatsoever was so prejudicial that it rendered appellant's trial fundamentally unfair in violation of the due process clause. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Partida* (2005) 37 Cal.4th 428, 439.) Reversal is also required under state law. It is reasonably probable the verdict would have been more favorable to appellant absent the error. There was a genuine dispute as to appellant's culpability, that is, whether the crime that occurred was as the prosecution argued, that appellant intended to deprive Deputy Trejo of his gun belt permanently at the time it was taken and that the deputy's death was a first degree murder, or, as appellant argued, Deputy Trejo's death was the result of an unintentional death during a resisted detention and at most, a second degree murder. Had the trial court excluded this highly prejudicial evidence and not instructed the jury that the evidence indicated a "consciousness of guilt" (see Argument 7, *post*), when the only issues the jury had to decide regarding Deputy Trejo were appellant's intent and mental state, it is reasonably probable that appellant would not have been convicted of robbery and would have been convicted of an offense lesser than that of first degree murder. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, appellant had a constitutionally-protected liberty interest in the correct application of state evidence laws, and the trial court's error deprived him of the process due to him under state law, in violation of his federal due process rights. (U.S. Const., 5th & 14th Amends.; *Hicks v.*

Oklahoma (1980) 447 U.S. 343, 346-347.) For all the reasons stated above, appellant's robbery and murder convictions and the special circumstance findings must be reversed.

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THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY ADMITTED INFLAMMATORY AND HIGHLY PREJUDICIAL PHOTOGRAPHS

Over appellant's objections, the trial court erroneously permitted the prosecution to introduce into evidence during the guilt phase of appellant's trial 18 photos of Deputy Trejo's body as it appeared at the scene of his death and as it appeared at the coroner's office during autopsy. To the extent that any of the photographs were relevant to a contested or disputed issue, they were nonetheless more prejudicial than probative and should have been excluded. The admission of each and all of these inflammatory photos was prejudicial error and violated appellant's state statutory and constitutional rights as well as his federal constitutional rights. (Evid. Code §§ 350, 352; Cal. Const., art. I, §§ 7, 15, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

A. The Proceedings Below

Appellant moved pretrial to exclude from the prosecution's case-in-chief the crime scene and autopsy photos, arguing that they were irrelevant and, to the extent that they had some marginal relevance, were more prejudicial than probative. (20CT:4013-4016.) Appellant also moved that, should the trial court admit any of the photos, they be "sanitized" to reduce their inflammatory nature by converting them from color to black-and-white. (20CT:4016.)

At a subsequent hearing, appellant objected to 25 photos that the prosecutor sought to introduce that showed Deputy Trejo's body at the scene and at the autopsy. (Peo. Exh. Nos. 163 through 187.) Appellant had categorized the objectionable photos into three categories: (1) thirteen

photos of Deputy Trejo's body at the scene (Exh. Nos. 163 through 175); (2) three photos of his body at the scene, after he had been turned over from his front to his back (Exh. Nos. 176, 177 and 178); and (3) nine autopsy photos (Exh. Nos. 179 through 186). (72RT:10844.) In the end, the court admitted 18 of the 25 photos,[86] the prosecution subsequently introduced them, and all 18 of them were later provided to the jury during their deliberations.

1. Category One: Crime Scene Photographs

Appellant objected to each of the photos in the first category, Exhibit Nos. 163 through 175, arguing that they were irrelevant and to the extent the court found them relevant, they should be excluded under Evidence Code section 352 as they were cumulative to the anticipated testimony as well as cumulative to each other, given that many of the photos depicted similar images, and were also more prejudicial than probative. (72RT:10845; 10851-10852.) The court admitted ten of the thirteen photographs. The admitted photographs depicted Deputy Trejo lying dead in a pool of his own blood, some of which also depicted various debris on his hands and body, including brain matter.

The court admitted Exhibit Nos. 163, 164, 166, 167 and 168, accepting the prosecutor's arguments that these five photographs were needed to show Deputy Trejo's position in the parking lot and stated that they were not "overwhelmingly gruesome." (72RT:10846-10849, 10879, 10854-19855.)[87]

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[86] The court excluded Exhibit Nos. 165, 169, 174, 179,181, 185 and 187.

[87] The prosecutor had attempted to admit seven photographs for this (continued...)

The other six photographs from this category also showed Deputy Trejo lying in his blood in the parking lot, depicting close-up views of the blood, brain matter and other debris on the deputy's head, body and hands. (Exh. Nos. 170 through 175.) The court admitted all but one of them, accepting the prosecutor's arguments that Exhibit Nos. 170 and 171 were necessary because they were relevant to the position of Deputy Trejo's hands when the shooting occurred (72RT:10850, 10860); that Nos. 172 and 173 were necessary because they provided the jury with a good view of the debris and fragments on the deputy, as well as showed a defect in his jacket consistent with a shot pellet (72RT:10850); and that No. 175, a graphic photo showing a significant amount of blood and tissue, and which included a metric scale, was needed to assist the jury in "making a comparison as to the size of those items."[88] (72RT:10851.)

The trial court ruled that ten of the thirteen photos in the first category were admissible, and the prosecution proceeded in its case-in-chief

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[87] (...continued)
purpose (Exh. Nos. 163 through 168), many of them depicting similar angles of Deputy Trejo lying in his blood in the parking lot, but the court excluded two of them, Nos. 165 and 169. The court excluded Exhibit No. 165 as cumulative to Nos. 163 and 164 and because it was "more inflammatory and gruesome than probative" (72RT:10855), and excluded Exhibit No. 169, questioning its relevance, finding it cumulative to Exhibit No. 168 and because it was "very gruesome." (72RT:10855-10856.)

[88] The court excluded Exhibit No. 174, a close view of the deputy's face in a pool of blood, finding it "extremely gruesome and shocking and inflammatory," more prejudicial than probative and "unduly inflammatory." (72RT:10856; 10859.) The prosecutor had argued that the photo was admissible to show the jury where a pellet may have penetrated Deputy Trejo's jacket (72RT:10851), a dubious argument given that the photo did not depict the area of jacket penetrated.

to introduce them. The prosecution presented these gruesome photos during the testimony of nine of the state's witnesses, as described in Section B.

2. Category Two: Crime Scene Photographs After Deputy Trejo's Body was Moved

Appellant had objected to the photos in the second category (Exh. Nos. 176-178) on the same grounds as those in the first. (20CT:4013-4016.) Exhibit Nos. 176, 177 and 178 were photos of Deputy Trejo at the crime scene, after he had been moved from his front to his back. They depicted blood and brain matter on his face, abdomen and chest.

The court accepted the prosecutor's argument that all three were needed to illustrate the pathologist's testimony about blood and brain matter on Deputy Trejo. (78RT:11870-11872.) After the prosecution agreed to crop one of the photos (Exh. No. 177) in an attempt to minimize its prejudicial impact, the court found all three of the photographs in this category admissible. (78RT:11871-11872.)

3. Category Three: Autopsy Photographs

Appellant objected to the photographs in category three on the same grounds as to the photos in categories one and two. Appellant also argued that these photos should be excluded because not only was the cause of death not in dispute, but the autopsy photos were particularly gruesome and inflammatory. (20CT:4013-4016.) Appellant additionally argued that some of them were cumulative to each other (Exh. Nos. 180, 184 and 186). (78RT:11875-11877.) Four of the five autopsy photographs found admissible displayed graphically gruesome close-up images of Deputy

Trejo's facial wounds.[89] The images were bloody and showed deep into his skull, including two front views depicting the facial wounds and showing the state's pathologist's hand holding back the skin on Deputy Trejo's face and placing a metric measure next to the wound.

The court found five of the autopsy photographs admissible. (78RT:11874-11875, 11878.) The court made this ruling despite finding these photographs "graphic and gruesome." (78RT:11877.)

In the end, the court admitted 18 of the 25 proffered color photographs and as delineated below, the prosecutor introduced them during the testimony of multiple witnesses.[90]

B. The Trial Court Committed Reversible Error

1. Applicable Principles

The trial court committed reversible error in admitting multiple inflammatory and prejudicial photographs that were at best of minimal relevance, and in any case, insufficiently probative in comparison to their prejudicial impact.

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[89] The court found Exhibit No. 182 more prejudicial than probative (78RT:11875), but the prosecutor agreed to crop it, so that it no longer showed the deputy's facial wounds and depicted instead an injury to Deputy Trejo's shoulder, at which point the court found it admissible. (78RT:11874-11875.)

[90] The photos were generally displayed on a poster board during the witness's testimony or otherwise shown to the jury during the witness's testimony. (See, e.g. 80RT:12196; 81RT:12452, 12280, 12286; 87RT:13536; 89RT:13912.)

Appellant acknowledges that this Court has interpreted Evidence Code section 210 extremely broadly regarding the relevance of photos.[91] (*People v. Cowan* (2010) 50 Cal.4th 401, 476; *People v. Scheid* (1997) 16 Cal.4th 1, 14-17 [trial court did not err in admitting single photo of crime scene as it supported prosecution's theory that a robbery was planned and it bolstered the credibility of witnesses].) Nonetheless, except for People's Exhibit Nos. 163 and 170, 171, 172, 173, 176 and 177, about which the prosecution's criminalist and pathologist testified regarding Deputy Trejo's position at the time of the shooting, appellant stands by his objections made at trial that the admitted photos were irrelevant.

In any event, the photos should have been excluded because their probative value was clearly outweighed by their prejudicial impact, particularly given that they were cumulative to other evidence, and many were cumulative to each other. As a general rule, evidence should be excluded when "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.) Thus,

> Where the inevitable effect of introducing a photograph is to arouse the sympathy or prejudice of the jury, and the fact in proof of which it is offered is not denied, or where its introduction serves no purpose other than to inflame the jurors' emotions, it is not admissible.

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[91] Evidence Code section 210 reads in pertinent part, that relevant evidence means "evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

(*People v. Redston* (1956) 139 Cal.App.2d 485, 490.) In *People v. Gonzales* (August 2, 2012, S067353) 54 Cal.4th 1234 (2012 WL 3116943), this Court stated that while a gruesome offense will beget gruesome photos, a jury must "be shielded from depictions that sensationalize an alleged crime, or are unnecessarily gruesome," or that play upon the emotions of the jurors. (*Id.*.) This is so even when the photo is an accurate depiction of the charged crime and is relevant to the question of deliberation and premeditation or to the aggravation of the crime and the appropriate penalty. (*Id.*)

This Court has "described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against [the defendant] as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden* (1994) 9 Cal.4th 83, 134; see also *People v. Karis* (1988) 46 Cal.3d 612, 638.)

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court stated that if photographic evidence is largely cumulative to other evidence, the trial court should consider that fact in assessing its admissibility. (*Id.* at p. 1257 ["the necessity of admitting such evidence is a relevant factor in assessing its probative value"].) Here, the trial court refused to consider the cumulative aspect of the photos in assessing their admissibility. When rejecting appellant's argument that the gruesome photos should be excluded because they were cumulative to testimony, the trial court stated that it would not on that ground "deem [that a photograph] would merit exclusion." (72RT:10845-10846; 78RT:11876.) This was error. "'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.'" (*People v.*

Cardenas (1982) 31 Cal.3d 897, 905, quoting *People v. De La Plane* (1979) 88 Cal.App.3d 223, 242.) "If evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 318.) In making its Evidence Code section 352 analysis, the trial court erred by failing to consider the necessity of admitting the photos given that they were cumulative to testimony and to other, properly-admitted evidence. (See *People v. Anderson*, *supra*, 43 Cal.3d at p. 1137 [photos were cumulative of expert and lay testimony regarding the cause of death, the crime scene and the position of the bodies]; *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [error to admit photos cumulative to autopsy testimony regarding location of the bodies and the wounds, which needed no clarification or amplification]; see also *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 133-134 [a trial court is not *required* to exclude a photo cumulative to testimony, indicating that trial court should consider whether a photo should be excluded because it is cumulative to testimony].)

In *People v. Scheid*, *supra*, 16 Cal.4th 1, while this Court broadly interpreted relevance for purposes of admissibility of photographs that were an adjunct to testimony, it reiterated that when other, properly-admitted evidence is available to support the same point or fact for which potentially prejudicial evidence is offered, that the trial court not only has the authority to exclude such cumulative evidence under Evidence Code section 352 (*id.*, at p. 16), but under that same section must exclude it, when its alleged probative value is outweighed by its prejudicial effect (*id.*, at p. 18). Indeed, despite the broad discretion given trial courts, appellate courts will

find error when the prejudicial impact clearly outweighs the probative value of the evidence. (See *Ibid.*)

The prejudicial impact of the photos was powerful and strong, clearly outweighing any probative value they may have had, and particularly so given that they were cumulative to other, properly-admitted evidence. Regarding Exhibit Nos. 184 and 186, the court itself stated that they were "graphic and gruesome." (78RT:11877.) Indeed, the best the trial court could say about the photos it ultimately admitted was that they were not "overwhelmingly gruesome" (72RT:10854-10855 [Exh. Nos. 166, 167, 168]), and in admitting Exhibit No. 183, that it was at least "not more gruesome" than the other photos it had already admitted (78RT:11878). The photos to which appellant objected should have been excluded.

2. The Photographs Were Inadmissible

a. Category One: Crime Scene Photographs

The prosecution introduced ten of the eighteen photos during Deputy Quinn's testimony. Quinn, a seventeen-year veteran with the Sonoma County Sheriff's Department, testified that Deputy Trejo had been with the force about the same amount of time that he had, that he was the first to have arrived at the scene after his colleague had been shot and he described his observations at the scene. (71RT:10807-10821; 72RT:10875-10884.) He testified about Exhibit Nos. 163, 164, 166, 167, 168, 170 through 173 and 175. All of the photos he identified showed Deputy Trejo lying in his blood, in front of his vehicle. (72RT:10878-10879; 10882-10900.) Many of the photos were close-ups showing blood, brain and tissue matter on Deputy Trejo's head and body. None of these photos, however, were necessary to assist the jury, particularly given that other, non-gory, properly-admitted evidence provided the same information about the deputy's

location and the position of the spotlight on the patrol vehicle.[92] For example, the prosecutor had argued that Exhibit No. 173, a photo depicting part of Deputy Trejo's head and the blood in which he lay, was needed to show a defect in his jacket which was allegedly consistent with a shot pellet. (72RT:10850.) However, the prosecutor introduced the jacket itself during the criminalist's testimony to show the defect (Exh. No. 239; 89RT:13827), and other photos of the jacket (Exh. Nos. 601 and 602) provided the same information, without the blood and a dead body. (89RT:13825-13828 [criminalist's testimony].) Exhibit Nos. 601, 602 and 239 were exhibits that provided the information for which the prosecutor allegedly wanted the gruesome photo (Exh. No. 173) admitted, but would not have caused the prejudice that came from the gory, inflammatory photo that was No. 173.

Moreover, the probative value of these photographs was minimal, at best. First, the location of Deputy Trejo's body on the pavement, having fallen in front of his patrol vehicle, was not an area of dispute or a confusing point for the jury to grasp or understand. Second, Deputy Trejo's location, as well as the position of the spotlight on his vehicle,[93] were

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[92] Some of the witnesses who had been at the bar next to the parking lot in which the shooting occurred had testified about the position of the spotlight on the deputy's patrol car, and had testified about whether it had been on or off.

[93] Quinn testified about the position of the spotlight on top of Deputy Trejo's patrol car when referring to Exhibit Nos. 163 and 166. He also testified that Exhibit Nos. 133 and 134 provided the same information (72RT:10910), as did Exhibit Nos. 192 and 193, which depicted the deputy's position as well as the position of the spotlight. (72RT:10892; see also 77RT:11779-11780 [evidence specialist Rainwater's testimony on

(continued...)

visible in other exhibits the prosecution introduced which were not gruesome or inflammatory. For example, Exhibit Nos. 141, 142 and 143 depicted the position of the deputy's body in relation to his vehicle, from an aerial view, and were not particularly inflammatory. In sum, the probative value of these gruesome photographs (Exh. Nos. 163, 164, 166, 167, 168, 170 through 173 and 175) was minimal, offering little, if any, needed clarification to Quinn's testimony. Moreover, they were cumulative to other, properly-admitted evidence.

Exhibit Nos. 163 through 168. The prosecution used these gory and graphic photos taken at the scene during the testimony of other witnesses. Detective Paul Lozada, another of Deputy Trejo's colleagues, testified that he was the officer who took the photographs that are Exhibit Nos. 163 and 164. (82RT:12520, 12523 12540.) Scott Dunn, a Sonoma County Sheriff's Department crime scene investigator who helped process the crime scene (87RT:13519), testified that No. 163 depicted part of the saddlery parking lot, Deputy Trejo's body and his vehicle, a white parking line and that the letter "X" written on the photo appeared to be where the body bag was later placed.[94] (87RT:13606.) The state's pathologist, Dr. Jindrich, told the jury that Exhibit Nos. 163, 164, 166 and 168 depicted the crime scene (81RT:12448-12449), a fact to which others had testified, but did not use them to illustrate his testimony regarding his area of expertise. Diana Long,

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[93] (...continued)
spotlight position, referencing Exhibit Nos. 191, 192 and 193].) These exhibits provided the same information that the challenged photos offered, but without the gore.

[94] One of the state's witnesses, John Jaynes, had previously testified that he placed an "X" on Exhibit No. 163, next to where he recalled the body bag later being placed. (86RT:13422-13423.)

a technician in field support for crime scene investigation, was asked to identify the place for the "keeper" on Deputy Trejo's belt, by using gruesome photo No. 168. (74RT:11358; 75RT:11403.) Quinn had previously testified that a "keeper" is the snap that is worn around the gun belt and the trouser belt to keep the gun belt in place, and had identified where it belonged on the belt using Exhibit No. 138 (72RT:10885-10886), which was the gun belt itself, and not gruesome or inflammatory.

Exhibit Nos. 170 through 175. The prosecutor asked five of his witnesses to testify about Exhibit No. 170. The witnesses to testify about this gruesome crime scene photo were Quinn, John Rainwater, Diana Long, Jindrich and criminalist Richard Waller. This photo was a close-up of the back of Deputy Trejo's head and hands, as he lay in a pool of his blood, and showed brain tissue on his hands. The prosecutor claimed it was relevant to show the position of the deputy's hands when the shooting occurred. (72RT:10850.) Waller testified that in Exhibit Nos. 170 through 173 he saw what appeared to be blood spatter on and around Deputy Trejo's hands and that the spatter he observed was from a wound caused by a high velocity impact, and was consistent with high velocity spatter. (89RT:13903-13904.) There was no question, however, that Deputy Trejo had been shot and that a gunshot causes high velocity impact. Waller had so testified early in his testimony. (88RT:13740.) The prosecutor next had Waller use the photos to show the jury that the spatter on Deputy Trejo's hands indicated that his hands were likely in front of his wound, given that they caught the spatter. (89RT:13905.) The position of the deputy's hands at the time of the shooting, however, was not in dispute. (See 99RT:15824 [criminalist who testified on behalf of appellant agreed that the evidence suggested that Deputy Trejo's hands were in front of the wound to the

forehead at the time of the shooting].) Thus, the minimal probative value these photographs may have offered was clearly outweighed by their prejudicial impact. The trial court erred in admitting them.

As noted above, appellant acknowledged that some of the photos about which Waller and Jindrich testified were relevant to the position of Deputy Trejo's body at the time of the shooting. The position of Deputy Trejo's body at the time of the shooting was an issue in dispute. The defense presented evidence that Deputy Trejo had been prone. (98RT:15819.) The prosecution contended that he was not. (89RT:13908-13910.) Waller testified that if the deputy had been in a prone position, among the evidence he would have expected to see was a "cone-shaped" pattern of blood spatter in front of and near the entry wound (89RT:13906-13908), a pattern he explained based on his expertise, and testified that he did not see such a pattern in Exhibit No. 163. (89RT:13907.) Thus, the prosecutor used this graphic photo of Deputy Trejo lying in his blood to have Waller testify about the absence of a pattern for which his expertise was needed to identify such a pattern. The probative value of using this gruesome photo, which did *not* depict a "cone-shaped" spatter about which his criminalist had testified was not there, was at best minimal.

In addition to Quinn and Waller, three other state's witnesses were asked about Exhibit No. 170, none of whom testified about the position of Deputy Trejo's hands when the shooting occurred, its purported purpose when the prosecutor argued for its admission. John Rainwater, an evidence specialist with the Santa Rosa Police Dept (77RT:11772), testified that he had gathered glass fragments from the deputy's sleeve and the prosecutor had his witness show, on Exhibit No. 170, where on this photo the glass was found. (78RT:11858-11859.) Diana Long, the field support technician

for crime scene investigation, identified the small pieces of rubber visible in Exhibit Nos. 170 and 171, which she testified she had collected from the deputy's right hand. (75RT:11399.) Jindrich referred to both Exhibit Nos. 170 and 171, stating that they showed glass fragments on Deputy Trejo's sleeve and brain tissue on his hands. (81RT:12450-12451.) Thus, these photos were not only gruesome, but were cumulative to testimony for which the same images were not needed for illustration, again demonstrating the minimal probative value of this evidence.

Six of the state's witnesses testified about Exhibit No. 171, a photo depicting images similar to No. 170, but showing a closer view of Deputy Trejo, including part of his face in a pool of blood, his broken eyeglasses, glass fragments and brain tissue. (See 72RT:10850.) Among the witnesses who testified regarding No. 171 were Quinn, Jindrich, Long and Waller.[95]

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[95] As stated above, Waller testified that the blood spatter that appeared by Deputy Trejo's right hand in No. 171 suggested that the deputy's hands were in front of the wound (he testified to the same as to No. 172, further minimizing the probative value of at least one of them). Waller also referred to Exhibit Nos. 626 and 627 when testifying about the blood spatter and tissue that were on the deputy and in the parking lot where his body lay. (90RT:14070-14072.) Exhibit No. 626 is similar to No. 172. It is a closer view of Deputy Trejo's hand than No. 172, showing the images about which Waller testified, but with less prejudicial impact. Thus, Exhibit No. 626 provided the purported probative value of Nos. 171 and 172, which was already at a minimum given that the position of Deputy Trejo's hands at the time of the shooting was not in dispute, with even less value. The result was that the prejudicial impact of Nos. 171 and 172 clearly outweighed their evidentiary value.

Additionally, the prosecution took the opportunity to focus the jury's attention on No. 171 for yet another non-issue. Waller had testified that Exhibit No. 231 was a small piece of material, the tip of which appeared to

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John Jaynes, a Santa Rosa Police Department evidence specialist, testified that Nos. 171 and 175[96] were photos taken before he conducted a gun shot residue test. (80RT:12244.) The probative value of these photographs to accompany this aspect of Jaynes' testimony was minimal, if not nil. Scott Dunn, who helped process the crime scene of his colleague's death, testified that Exhibit Nos. 171 and 172 showed glass fragments that he saw on Deputy Trejo's hands and sleeves and showed blood (87RT:13536-13537), information testified to by others, including Waller and Jindrich,[97] and not a contested issue.[98] Exhibit No. 172 depicted a close-up of Deputy Trejo's

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[95] (...continued)
be a rubber glove. (88RT:13778.) The prosecutor then asked Waller to confirm whether the item that was circled on the photograph (No. 171) was consistent with the small piece of material that was Exhibit No. 231, to which Waller stated "it could be." (88RT:13783.) Even giving the benefit of the doubt that there may have been some probative value to showing the jury No. 171 when a witness testified that Exhibit No. 231 may be the small item in No. 171, it was clearly outweighed by the prejudicial impact of this gruesome photograph.

[96] Exhibit No. 175 showed Deputy Trejo's hand and part of his head, laying in a significant amount of blood, and also showed brain tissue and brain fragments. It includes a metric scale next to the deputy's hand. The prosecutor argued it should be admitted as it would assist the jury in "making a comparison as to the size of those items, as well as the view from the left side of Deputy Trejo." (72RT:10851.)

[97] Dr. Jindrich testified that No. 172 showed blood and brain tissue, as well as glass fragments and other debris, including a fragment of brain. (81RT:12451-12453.)

[98] Other than testifying that the images in Nos. 163, 171, 172, 175, 176, 177 and 178 depicted what he had observed, they offered no other purpose to clarify or otherwise assist the jury during Dunn's testimony. Indeed, the court precluded the prosecution from having Dunn testify about
(continued...)

right hand and arm, along with a metric scale next to the debris on his uniform. The prosecutor had argued that No. 172 was needed to provide the jury with a "better view" of the debris and fragments as their criminalist and pathologist would be testifying about them in regards to the position of the deputy's hands at the time of the shooting. (72RT:10850.) Even assuming probative value as to Exhibit Nos. 171 and 172 during Waller's and Jindrich's testimony, it was minimal given that the presence of blood and other debris and the position of Deputy Trejo's hands at the time of the shooting were uncontested issues. Moreover, the gruesome photos were cumulative. They had limited probative value, were cumulative and were unduly gruesome. They should have been excluded.

Exhibit No. 175 is a close-up view of the side of Deputy Trejo's head in a pool of blood, showing pieces of his brain and brain tissue. In addition to Quinn's testimony, noted above, Jindrich testified that this photo showed blood and brain tissue, including brain fragments, glass fragments and other debris. (81RT:12451-12452.) Also, as noted above, Jaynes testified that No. 175 was taken before he conducted a gun shot residue test. (80RT:12244.) Dunn testified that No. 175 depicted the observations he made at the crime scene. (87RT:13538.) The prosecutor had argued for its admission stating that Exhibit No. 175, which included a metric scale, would assist the jury in "making a comparison as to the size of those items, as well as the view from the left side of Deputy Trejo." (72RT:10851.)

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[98] (...continued)
possible blood spatter because the prosecution's expert, the criminalist Richard Waller, was going to testify about it and because Dunn's qualifications for such testimony were dubious. (87RT:13571-13576.)

The four state's witnesses who testified about this photo did not use it during their testimony to make comparisons in size to the brain tissue, brain fragments, glass, blood or other debris displayed in the photo. (See 87RT:13538 [Dunn]; 81RT:12451-12452 [Jindrich]; 80RT:12244-12245 [Jaynes]; 72RT:10884 [Quinn].) And, as is plainly visible from viewing it, No. 175 is graphic and unduly gruesome.[99]

In sum, the above photographs from the first category, those from the crime scene, before Deputy Trejo was turned from his front to his back, should have been excluded. In *People v. Turner* (1984) 37 Cal.3d 302, 321, this Court concluded that the trial court erred in finding four crime scene photos admissible to show the positions of the bodies and the manner in which the wounds were inflicted, because those issues were not relevant.[100] The challenged photos here were not only similarly lacking in probative value, but their prejudice outweighed any minimal probative value they may have offered. There was no dispute that when the shooting occurred, Deputy Trejo fell in front of his patrol vehicle and was in that position when law enforcement arrived at the scene. "'[T]he prosecution has no right to present cumulative evidence which creates a substantial danger of prejudice

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[99] Exhibit No. 175 was, as the prosecutor stated, a closer view of No. 174, showing "the degree of tissue and blood" on Deputy Trejo's hand. (72RT:10851.) The court had excluded No. 174 for being "extremely gruesome and shocking and inflammatory." (72RT:10856; 10859.) Appellant submits that No. 175 was as unduly gruesome and inflammatory as No. 174.

[100] In holding that the erroneous admission of the four photos in *Turner* was harmless, this Court stated, in apparent agreement with the trial court, that the photos were "far from gruesome," and found that the evidence of guilt was overwhelming. (*People v. Turner*, *supra*, 37 Cal.3d at p. 321.)

to the defendant.'" (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 905, quoting *People v. De La Plane*, *supra*, 88 Cal.App.3d at p. 242.) As delineated above, the prosecution presented other, properly-admitted evidence that provided the purported need for the challenged photos. (See, e.g., fns. 93 and 95, *ante*). Moreover, the photos offered little, if any, additional probative value to the testimony during which they were offered. The trial court, however, rejected appellant's argument that the challenged gruesome photos were cumulative to testimony, stating that on that ground it would not "deem [that a photograph] would merit exclusion." (72RT:10845-10846.) Although the trial court was not required to exclude evidence cumulative to testimony, this Court has held it to be a factor to consider when weighing the probative value of evidence against its prejudicial impact. (See *People v. Smith*, *supra*, 33 Cal.App.3d at p. 69 [error to admit photos cumulative to autopsy testimony regarding location of the bodies and the wounds, which needed no clarification or amplification]; see also *People v. Crittenden*, *supra*, 9 Cal.4th at pp. 133-134 [a trial court is not *required* to exclude a photo cumulative to testimony, but suggesting it should consider that fact in assessing its admissibility].) Exhibit Nos. 163, 164, 166, 167, 168, 170, 171, 172, 173 and 175 should have been excluded as they were cumulative to other, properly-admitted evidence and many were cumulative to each other. All were highly prejudicial and the prejudice exceeded any probative value.

b. Category Two: Crime Scene Photographs After Deputy Trejo's Body was Moved

Exhibit Nos. 176, 177 and 178 were also photographs of Deputy Trejo at the crime scene, after he had been moved from his front to his back. Exhibit No. 176 was another profoundly gruesome photo and five

state's witnesses were asked to identify and refer to it during their testimony. When the prosecutor asked the court to admit No. 176, he contended that it was needed to provide the jury with a direct view of Deputy Trejo's face.[101] (78RT:11871.)

Jindrich testified that he was present when Deputy Trejo was turned from his front to his back, at which time he observed blood and brain matter on the deputy. (81RT:12452-12453.) He testified that Exhibit Nos. 176, 177 and 178 showed the blood and brain tissue on the front of the deputy's body, as well as showing glass fragments and other debris, including a fragment of brain. (81RT:12452-12453.) He testified that the brain matter on Deputy Trejo's jacket, as shown in No. 177, may have ended up there due to a reason other than blood flow. (82RT:12574.) The state's criminalist, Waller, also referred to all three of these photos during his testimony. Referring to Nos. 176 and 177, he testified that the amount of blood and tissue he observed on Deputy Trejo's upper chest and on his jacket and shirt was not consistent with what he would have expected to see if the deputy was, as the defense contended, in a prone position and up on his elbows with his head parallel to the ground. (90RT:14117-14118.) The criminalist's conclusion was based on what his experience had taught him,

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[101] The prosecutor had also argued that No. 177 was necessary to illustrate the pathologist's testimony about blood and brain matter on Deputy Trejo and he wanted to show the jury details of the blood and brain tissue on the deputy's jacket. When the court stated it found No. 177 to be cumulative to No. 176, as well as more prejudicial than probative, the court permitted the prosecutor to crop it, so that it no longer depicted Deputy Trejo's face. (78RT:11872.) It remained gruesome, however, as it still depicted blood, brain and tissue on the deputy. Five state witnesses testified about it. Exhibit No. 178 showed blood and brain matter on Deputy Trejo's abdomen, about which four state's witnesses testified.

in terms of amount of expected blood and tissue and body position. The jury, on the other hand, had no basis to assess how much blood or brain matter would be present with the body in a particular position. Therefore, it was not necessary for the jury to see the blood and tissue in these graphic photos. The prosecutor had Waller use Exhibit No. 178 during his testimony to show the jury where blood appeared on Deputy Trejo's pants. (88RT:13735.) However, Waller had already testified about where he had found blood on the deputy's pants using Exhibit No. 569, a diagram that he had sketched of Deputy Trejo's pants. (88RT:13735.) The diagram well-illustrated his testimony, making the inflammatory photograph, at best, of dubious probative value. Moreover, Waller testified that as to much of the blood found on the pants, it was not visible without use of a stereomicroscope, which he used to confirm the presence of blood on parts of the deputy's uniform.[102] (88RT:13736-13737.)

The prosecution also used these photos from the crime scene (Exh. Nos. 176 through 179) during the testimony of Rainwater, Dunn, Jaynes and Michael Potts, a criminalist for the Department of Justice. All four testified that the photos depicted Deputy Trejo after he was turned from his front to his back. Rainwater testified that No. 177 showed the eyeglasses that were removed from Deputy Trejo.[103] Jaynes testified that he took the photos that

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[102] Using Exhibit Nos. 570 through 576, enlargements of photos taken by way of a stereomicroscope, Waller showed the jury the spots that he detected to be blood on Deputy Trejo's pants. He then used his sketch of the pants (No. 569) to show the jury where those microscopic spots of blood appeared on the pants, when viewing the whole pair of pants as depicted in the diagram. (88RT:13740-13749.)

[103] Exhibit No. 177, even before it was cropped (see Exh. No. 177-

(continued...)

are labeled Exhibit Nos. 176 and 177.[104] (80RT:12240.) Dunn testified that visible in Nos. 176 and 178 was a "disaster pouch," which is part of the body bag, and not visible was a cardboard barrier between the body bag and the pavement. (87RT:13541-13542l.) He testified that Nos. 177 and 178 show the items he observed on Deputy Trejo's jacket. (87RT:13542-13543.) None of these photos were otherwise tied to the witness's testimony regarding a fact that needed clarification or that addressed an issue in dispute. The prosecutor referred Potts to No. 176, and asked him if he knew whose rubber-gloved hand was in the bottom corner of the photo, to which Potts responded that he did not. (81RT:12288.) Other than that one specific question, Potts' testimony regarding the challenged photos was no more than that they depicted what he saw at the crime scene. (81RT:12286.) Indeed, Potts testified that he did not make any inspection of the trace evidence on the front of the deputy's body. (81RT:12289.) Other than prejudice toward appellant, there was absolutely nothing the jury gained from the prosecutor's use of these photos during Potts' testimony.

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[103] (...continued)
A) does not appear to depict eyeglasses. They are, however, visible in No. 176, about which Rainwater testified that the deputy's eyeglasses were removed after he was rolled onto his back. (80RT:12196.) Nos. 176, 177 and 178 were displayed on a poster board for the jury to see during the testimony. (80RT:12196.)

[104] There was certainly no need to display Nos. 176 and 177, both of which were unduly gruesome, only to have Jaynes testify that he was the photographer. The prosecutor also had Dunn testify to this fact. Dunn testified that the photographs at the scene were taken by Jaynes, Lozada and Rainwater. (87RT:13533-13534.)

c. Category Three: Autopsy Photographs

The court admitted five of the nine proffered autopsy photographs, Exhibit Nos. 180, 182, 183, 184 and 186, which were then used during both Jindrich's and Waller's testimony. These two witnesses described the images in these photos.[105] Jindrich testified that No. 180 showed Deputy Trejo's brain and the wounds, stating that the brain itself is visible in that photo (81RT:12461), and that No. 183 showed the same wound from the right side of his face (81RT:12463). Exhibit Nos. 184 and 186 showed the jury graphic images of Deputy Trejo's face and gunshot wound after Jindrich had pulled back the scalp to examine inside the skull, to which Jindrich testified only that they depicted the way the wound appeared.[106]

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[105] As stated above, when the court found Exhibit No. 182 more prejudicial than probative (78RT:11875), the prosecutor agreed to crop it so that it no longer showed the deputy's facial wounds and depicted instead an injury to Deputy Trejo's shoulder, at which point the court found it admissible. (78RT:11874-11875.) In its cropped form, it was not particularly gruesome, but appellant submits that for its purported probative value, it was not necessary. For example, during Waller's testimony about the distance from the gun that was fired, to Deputy Trejo, the prosecutor asked Waller the role that intermediate targets may play in determining the distance. The prosecutor used No. 182 to refer to the pellet wound in the deputy's shoulder to ask, again, whether the area of Deputy Trejo's shoulder circled in green marking pen showed the wound. (89RT:13897.) However, for this point, there was no need to show Deputy Trejo's body with the wound, when his shirt and jacket provided the precise same information, without having to display the deputy's shoulder wound to the jury.

[106] The court again refused to consider whether a photograph should be excluded when its probative value is diminished due to it being cumulative to testimony, stating that it was admitting Exhibit Nos. 184 and 186 because "photographs are not cumulative of testimony." (78RT:11876.) This was error. (See *People v. Anderson*, *supra*, 43 Cal.3d

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(81RT:12464-12465.) None of these photos were needed to supplement, clarify or explain Jindrich's testimony. They were not needed to establish cause of death. To the extent that the jury needed to see the location of the wound, also not an issue in dispute, other exhibits provided that information. The X-rays about which Jindrich also testified provided the same information (81RT:12454-12456; 12465; 12482-12485; Exh. Nos. 342 A, B & C), without having to expose the jury to inflammatory photographs.

Waller referred to Exhibit Nos. 180, 183, 184 and 186 when he testified about the tests he conducted to measure the distance between the gun and Deputy Trejo, which he estimated to be somewhere about nine to ten feet. (89RT:13896-13897.) Waller testified that he compared the images in these photos with the targets at which he had fired to make his determination about the distance. But the distance between appellant and the deputy was not an issue in dispute. (54RT:8275; 8303-8305 [opening statement]; see also 101RT:15978 [defense expert agreed with Waller's estimate that the shot was fired at a distance of about 9 to 10 feet].) In any event, the prejudicial impact of these photos far outweighed any probative value to be gained during Waller's testimony about the distance from the gun to Deputy Trejo. Autopsy photos are often "particularly horrible, and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's

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[106] (...continued)
at p. 1137 [photos were cumulative of testimony regarding the cause of death, the crime scene and the position of the bodies]; *People v. Smith*, *supra*, 33 Cal.App.3d at p. 69 [error to admit photos cumulative to autopsy testimony regarding location of the bodies and the wounds, which needed no clarification or amplification].)

emotions against the defendant." (*People v. Marsh* (1985) 175 Cal.App.3d 987, 997-998; see also *People v. Gonzales*, *supra*, 54 Cal.4th 1234 [WL 3116943, 24] [trial court should exclude photos where depiction of crime scene or of victim are unduly gruesome, sensationalize the crime or unnecessarily play upon the jurors' emotions]; *People v. Cowan*, *supra*, 50 Cal.4th at p. 475 [photos of the victim found to be relevant should nonetheless be excluded when their probative value is clearly outweighed by their prejudicial effect]; *People v. Scheid*, *supra*, 16 Cal.4th at p. 18 [same].) In sum, as to the four autopsy photos, they should have been excluded because they were remarkably gruesome and their prejudicial impact clearly outweighed their probative value.

d. The Prejudicial Impact of the Admitted Photographs Clearly Outweighed their Probative Value

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis*, *supra*, 46 Cal.3d at p. 638; see also *People v. Crittenden*, *supra*, 9 Cal.4th at p. 134 [same].) This was the exact circumstance in appellant's case. Not only did the photos offer little in the way of probative value, but the prejudice from the photos was palpable. Photographs of brain matter and parts of the brain strewn on the victim's body, large color images of a bullet wound showing deep into the skull and displaying a gaping wound are the kind of evidence that evoke an emotional bias against a defendant. In *People v. Cowan*, *supra*, 50 Cal.4th at pp. 475-476, this Court, in distinguishing the kinds of photos in that case which were found not to be "unduly prejudicial," indicated the kinds of photos that would be

"unduly gruesome," such as photos that show a body laid out and cut up, those showing the inside of organs, ones that depict the victim's face and those that depict close-up views of the fatal wounds and that include large amounts of blood. In other words, the precise kinds of photos admitted here.

Given the nature of the photos – Deputy Trejo lying in his blood, with brain fragments and brain tissue on his body, and the graphic, inflammatory autopsy photos showing the inside of Deputy Trejo's head – coupled with the fact that they were cumulative to other, properly-admitted evidence, including descriptive testimony by multiple witnesses, and that most of them concerned facts not in dispute, it was error to admit the photos. In *People v. Smith*, *supra*, 33 Cal.App.3d 51, the court found it was error to admit three color, crime-scene, gruesome photos given that there had been ample descriptions of the positions and appearances of the bodies and there was no need for clarification or amplification of the location and nature of the wounds. (*Id.* at p. 69.) In so concluding, the court found that the admitted photos were therefore no more than a blatant appeal to the jury's emotions. (*Ibid.*; compare *People v. Scheid*, *supra*. 16 Cal.4th at p. 19 [no error in admitting *single* photo given that it was not particularly gruesome]; *People v. Anderson*, *supra*, 43 Cal.3d at p. 1137 [no harm in admitting photos of the victims' bodies at the crime scene noting that even defendant indicated they were not unduly gruesome].)

Exacerbating the prejudicial impact was that the admitted photos were in color. Appellant had moved that the photos be converted to black-and-white, to minimize their prejudicial impact. (20CT:4016.) In *People v. Smith*, *supra*, 33 Cal.App.3d 51, the court recognized that the impact on the jury of the crime scene photos was "heightened by vivid coloration." (*Id.* at

p. 69.) Similarly here, admitting graphic photos of blood and brain matter, while admittedly gruesome in any depiction, were heightened by their color images. In *People v. Jackson* (1996) 13 Cal.4th 1164, the defendant argued that the trial court had erred in denying his motion to convert gruesome, color photos to black-and-white to diminish their prejudicial impact. This Court, in a footnote, gave short shrift to appellant's argument, stating Evidence Code section 352 does not impose a duty on the trial court to order the alteration of relevant photographic evidence to lessen potential prejudice. (*Id.* at p. 1216, fn. 7.) As to two of the admitted photos discussed above (Exhibit Nos. 177 and 182), the court had initially ruled to exclude them given their gruesome nature, but after prodding from the prosecutor agreed to admit them after they were altered. Exhibit Nos. 177 and 182 were cropped to eliminate some of their more profoundly gruesome aspects while retaining their alleged probative value, based on the prosecution's ostensible reason for their admission. That is all that appellant requested when it asked the court to have the prosecutor convert the photos to black-and-white to minimize their prejudicial impact.

It was the powerful prejudicial impact that these images imposed on the jury that was the true reason the prosecution wanted to present them. (See *People v. Marsh, supra*, 175 Cal.App.3d at p. 998 ["the jury was not enlightened one additional whit by viewing" gory photographs].) That this is so is evident from their utter lack of probative value as to most of the photographs during most of the state's witnesses' testimony, their minimal probative value when referred to during the pathologist's and the criminalist's testimony, and that other available evidence, that was not inflammatory, established the points testified to by the state's witnesses. The trial court erred in admitting the challenged photographs.

In addition to violating state law, the court's rulings deprived appellant of his federal constitutional rights to due process, a fair trial, an impartial jury and a reliable determination of guilt and special circumstance allegations. (U.S. Const., 6th, 8th & 14th Amends; see *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548 [admission of photos of blood-spattered crime scene that did not illuminate any issue in the case could render trial fundamentally unfair as only conceivable reason for placing them in evidence was to inflame the jury against the defendant].) The improper admission of the photographs also violated appellant's state and federal constitutional rights to a fair and reliable penalty determination. The unduly gruesome images in the photographs carried with them the kind of evidence that evokes an emotional bias against the convicted defendant and inflames a jury deciding between life and death. The graphic and cumulative portrayal of the photographs surely remained with the jurors throughout their review of the evidence. This could not help but prejudice the penalty determination. To be constitutional, penalty determinations must be based on reason rather than emotion, caprice or vengeance. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion"]; see also *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1225-1230 [crime-scene photos introduced at penalty phase showing victim's mutilated body deprived defendants of a fundamentally fair sentencing proceeding as guaranteed by the Eighth and Fourteenth Amendments]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error found harmless at guilt phase but prejudicial at penalty phase].) To the extent the error in admitting these photos was solely one of state law, it nevertheless violated appellant's right to due process by depriving him of a state-created

liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.)

3. The Admission of The Gruesome Photographs Requires Reversal of Appellant's Convictions and Death Judgment

The erroneous admission of these photographs was prejudicial. The issue that the jury had to decide was whether Deputy Trejo's death was a first degree murder or a tragic accident that resulted in, at most, a second degree murder. Who caused the death was not an issue. Appellant testified that he was to blame for the shooting and responsible for the deputy's death. Likewise, what caused his death was not in issue. There was no dispute whatsoever that the gunshot wound was the cause of death. The issue of whether the shooting was a first degree murder or an accident turned significantly on whether the jury believed that appellant accidentally shot Deputy Trejo when appellant tripped, fell, and the gun unintentionally fired. The ultimate question of what happened at the time of the shooting depended considerably on whether the jury trusted appellant. Anything to taint or damage that trust, such as evidence in which the probative value is clearly outweighed by its prejudicial impact, would unfairly inure to the prosecution's benefit, and as with the erroneously admitted photographs, prejudice appellant.

The prejudice from the erroneously admitted photos was particularly acute in this case. Appellant faced a jury that had been inundated with publicity about the community's loss of one of their own and barraged with media stories hostile toward appellant and about the need to avenge Deputy Trejo's death. Viewing these graphic photos would further the jury's antipathy toward appellant for causing Deputy Trejo's death, an antipathy

that was fostered in the press from the moment appellant was arrested and continued long after the crime. Indeed, three-fourths of the jury who decided appellant's fate recognized the case before their first day of jury duty from publicity and other sources outside the courtroom. (See Argument 1, *ante*.) Admitting these photos, particularly where their probity was minimal, advanced that antipathy. Their graphic nature was the kind of evidence that damaged and tainted appellant's ability to present his defense and have the jury consider it fairly, despite its evidentiary support.

Under either the federal standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24) or the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836), the erroneous admission of these gruesome and inflammatory photographs was prejudicial, whether considered by themselves or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [state law errors that may not amount to deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair].)

The photos focused the jurors on gruesome and inflammatory depictions of Deputy Trejo lying in a pool of blood, of his gaping head wound and his strewn and scattered brain matter and blood at the scene. The harm from these erroneously admitted photos was exacerbated by the prosecutor repeatedly using them during the testimony of multiple witnesses. Repeated display of gruesome and gory photographs, as occurred here, was exactly the kind of evidence that can, and did, bias and otherwise "inflame the passions" of the jury. (See *People v. Scheid*, *supra*, 16 Cal.4th at pp. 20-21 [prejudicial effect from photos that can engender an emotional response among the jurors exacerbated when the prosecution reinforced the potential impact with multiple exposures of similar views or

unduly belabored the issue by using the photos extensively or repeatedly in examining witnesses]; see also *People v. Burns* (1952) 109 Cal.App.2d 524, 541-542 [abuse of discretion to admit gruesome photos where there was no necessity for exhibiting the images depicted, they offered no help to the jury in solving the facts of the case and the only value was to inflame the minds of the jurors].)

The prosecutor referred to the photos in his closing argument, again displaying them to the jury. (110RT:17346-17348 [opening]; 111RT:17578-17583 [rebuttal].) The pictures, which the jury had before them during their deliberations (25SuppCT:6738A; 112RT:17883), provided multiple depictions of similar views that repeatedly drew the jury's attention to graphic, gory and powerful images that were not only unnecessary, but could not help but inflame the jury and evoke an emotional bias against appellant. Appellant could not fairly counter the highly emotional impact from these images that undoubtedly had an effect on the jury's attitude toward appellant and his defense. The prosecutor's repeated use of them, calculated to arouse passion and prejudice against appellant, did just that.

Appellant's conviction and death judgment must be reversed.

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THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON APPELLANT'S DEFENSE THAT HE ACCIDENTALLY SHOT DEPUTY TREJO

A. Introduction

Appellant's defense to the killing of Deputy Trejo was that the shooting was an accident and unintentional. More specifically, appellant testified that during his encounter with Deputy Trejo, appellant tripped, fell towards the officer, and the shotgun discharged. (95RT:15033, 15177-15178.) Indeed, since his arrest appellant has consistently taken responsibility for the killing, but has maintained – with equal consistency – that the shooting was unintentional and accidental.

To give the jurors a legal framework to consider his defense, appellant requested instructions aimed at explaining how his testimony – if accepted – would affect the prosecutor's theories of murder liability. Thus, in response to the prosecutor's theory that the shooting of Deputy Trejo was the product of premeditation and deliberation and therefore constituted a first degree murder, appellant asked that the jury be instructed that if they believed the shooting was accidental they should deliver, at most, a second degree murder verdict. Similarly, in response to the prosecutor's felony-murder special-circumstance theory that there existed a dual and concurrent intent to rob and to kill Deputy Trejo, appellant asked that the jury be instructed that they could not find true the special circumstance allegation if they found the shooting was accidental.

The requested instructions were necessary to ensure that appellant's jury was armed with the law necessary to evaluate his defense. Because the requested instructions accurately reflected the law, and were aimed at the

crux of the defense theory, the trial court's refusal to give them violated due process and state law, as well as appellant's Eighth and Fourteenth Amendment rights to fair and reliable guilt and penalty determinations.

B. The Trial Court Refused To Instruct On Defendant's Accident Defense As It Applied To Premeditation And Deliberation

At the first conference regarding jury instructions, appellant sought a "pinpoint" instruction to focus the jury's attention on the legal principles attendant to his defense that the killing of Deputy Trejo resulted from the accidental discharge of the shotgun that appellant was holding. The requested instruction – labeled "Accidental Killing As No More Than Second Degree Murder" – was a modification of CALJIC No. 4.45 [Accident & Misfortune]. (108RT:16975; 23CT:4810.) The initial requested instruction provided:

> If there is a reasonable doubt as to whether or not the killing of Deputy Trejo was an accident, you must resolve the doubt in favor of the defendant and bring in a verdict of no more than second degree murder.

(23CT:4810.) Appellant explained that the legal concept of "accident" as used in an unmodified CALJIC No. 4.45 would provide a complete defense to murder, in that an accident in that regard would negate all criminal intent and purpose. (108RT:16975.) That was not the defense theory in this case. Rather, appellant's pinpoint instruction would tell the jury that if they found that the killing occurred due to an accidental discharge of the shotgun, that finding would negate premeditation and deliberation, and thereby prevent the jury from finding first degree murder on that theory. (108RT:16975-16976, 16979-16980.)

The prosecutor objected to the instruction on the grounds that the jury could believe the gun discharged accidentally and still convict appellant of first degree murder on the prosecutor's felony-murder theory. (108RT:16976.) Appellant agreed that the prosecutor had a point, and that the jurors had to be told that the pinpoint instruction applied only to the prosecution's premeditation and deliberation theory. Appellant offered the following modified instruction to correct the defect identified by the prosecutor:

> In considering the prosecution theory of first degree premeditated murder[,] if there is a reasonable doubt of whether or not the killing of Deputy Trejo was an accident, you must resolve the doubt in favor of the defendant and bring in a verdict of no more than second degree murder.

(108RT:16980 [descriptive narrative of punctuation omitted].)

The trial court initially stated that it was not inclined to give CALJIC No. 4.45 or appellant's formulation of the instruction, adding: "I'm not familiar with 4.45. It's not been offered in any case I've tried." (108RT:16980.) But after considerable discussion during which appellant re-emphasized that the accidental-shooting defense went only to the prosecution's theory of premeditation and deliberation, the trial court agreed that the instruction must be given: "Somehow the jury needs to be told that accident can negate the intent required for the first of the People's theories." (108RT:16987.) The court requested that appellant draft an instruction which made clear that the accident defense applied only to the prosecution's theory of premeditation and deliberation, and not to felony murder. (*Ibid.*)

At the next jury instruction conference, the court changed course again. Stating that she feared confusing the jury, the court refused

appellant's requested pinpoint instruction, but offered to give either an unmodified version of CALJIC No. 4.45 or no instruction on accident at all. (109RT:17234.) Appellant again explained that the unmodified version of 4.45 would be irrelevant because the defense theory was not that the accidental shooting was without "criminal intent or purpose" – which completely exonerates a defendant – but that if the jurors believed the gun discharged accidentally appellant would be "exonerated" as to premeditated and deliberate murder. (109RT:17235.) Finally, appellant repeated that the request complied with the pinpoint instruction requirements of *People v. Sears* (1970) 2 Cal.3d 180, 190. (109RT:17235.) The court was unswayed, and so appellant asked that the unmodified CALJIC No. 4.45 not be given. (*Ibid.*)

The law requiring instructions on the defense theory is clear. Under federal law, due process requires that criminal prosecutions "... 'comport with prevailing notions of fundamental fairness' and that 'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" (*Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714, as amended on denial of reh'g and reh'g en banc, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485; *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325.) "The right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098, internal quotation marks omitted.) For this reason, a state trial court's "[f]ailure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable." (*Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 577, as amended; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739, as amended.)

Under state law, too, a criminal defendant is entitled to instructions on the defense theory of the case. This Court has consistently held that a jury instruction relating particular facts to a legal issue in the case – that is, facts that "pinpoint" the crux of the defendant's case – must be given upon request when substantial evidence supports the defense theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885; *People v. Sears*, *supra*, 2 Cal.3d at p.190.) Indeed, even where the standard instructions address the relevant legal principles, the defendant is entitled to have a requested instruction given if it correctly states applicable law. (See *People v. Kane* (1946) 27 Cal.2d 693, 698, 700 [error to refuse pinpoint instruction that was correct statement of law pertinent to defendant's theory of the case and which showed its application to the evidence presented]; *People v. Mayo* (1961) 194 Cal.App.2d 527, 537; *People v. Sears, supra,* 2 Cal.3d at p. 190; *People v. Thompkins* (1987)195 Cal.App.3d 244, 256-257 [error to refuse defendant's proposed pinpoint instructions "intended to supplement or amplify more general instructions" on ground they were incomplete and duplicated standard CALJIC instructions]; see also § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue, if requested by either party"].)

Here, the trial court erred by failing to give the requested pinpoint instruction, leaving the jury without the necessary and complete legal framework by which to consider appellant's defense. Long ago, this Court first explained that deliberate and premeditated first degree murder requires not only a specific intent to kill, but also proof of a careful weighing of considerations – thought over in advance – resulting in the decision to kill. (*People v. Bender* (1945) 27 Cal.2d 164, 183; *People v. Thomas* (1945) 25

Cal.2d 880, 900; *People v. Perez* (1992) 2 Cal. 4th 1117, 1123-1124 [approving CALJIC No. 8.20, which states ". . . the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill"]; *People v. Stanley* (1995) 10 Cal.4th 764, 795 [premeditated means "considered beforehand"].) Appellant's defense was not that the accidental nature of the shooting made him not guilty of any crime, but rather that the jury could not find true that the shotgun discharged accidentally *and* that appellant committed an intentional killing with premeditation and deliberation. That is simply impossible under the law, and it has been so for more than 100 years. (See, e.g., *People v. Garnett* (1908) 9 Cal.App. 194, 203-204, disapproved on other grounds [it would not have been murder if the shot that killed the victim resulted from the accidental discharge of the defendant's gun].) Accordingly, appellant was entitled to the requested instruction.

In addition, the trial court's offer to give an unmodified version of CALJIC No. 4.45 would not have addressed the defense theory, which was the very point of appellant's request for a pinpoint instruction. That is because there is a legal distinction between the defense of accident as an absolute and affirmative defense to criminal conduct, and the defense of accident that negates an element of the crime or the prosecution's required proof. The former finds its roots in section 26(5), and would have told the jurors: "When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose, nor criminal negligence, *he does not thereby commit a*

crime." (CALJIC No. 4.45, emphasis supplied.)[107] By contrast, appellant's instruction was aimed squarely at negating an element of the prosecution's theory of deliberate and premeditated murder.[108] This Court's recent decision in *People v. Jennings* (2010) 50 Cal.4th 616 (hereafter, "*Jennings*") is instructive on this point.

In *Jennings*, the prosecutor claimed the child victim was intentionally murdered by torture and poison,[109] while the defendant claimed the victim was accidentally killed after receiving an overdose of sleeping pills. On appeal, the defendant argued that the trial court erred by failing to instruct the jury, sua sponte, on his "complete defense" of accident. (*People v. Jennings, supra,* 50 Cal.4th at p. 673.)

This Court explained that "[a] claim of accident in response to a charge of murder . . . is not an affirmative defense that can trigger a duty to instruct on the court's own motion." (*People v. Jennings, supra,* 50 Cal.4th at p. 674.) Rather, "the claim that a homicide was committed through misfortune or by accident 'amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a

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[107] Section 26(5) states: "All persons are capable of committing crimes except those belonging to the following classes: . . . Five – Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

[108] Although the trial court expressed concern that appellant's instruction might confuse the jury, the general instruction that the court offered to give would have been far more confusing because it would have focused the jury on the theory of accident as complete exoneration for the shooting, and would have raised the theory of "criminal negligence." Neither party relied on either of those theories.

[109] The jury rejected the poison special circumstance allegation.

crime.'" (*Ibid.*, quoting *People v. Lara* (1996) 44 Cal.App.4th 102, 110.) Thus, where the defendant proffers an accident defense to raise a doubt on an element that the prosecution must prove beyond a reasonable doubt, he must request a pinpoint instruction that relates particular facts to a legal issue in the case, and the court must give that requested instruction when it is supported by substantial evidence. (*People v. Jennings*, *supra*, 50 Cal.4th at pp. 674-675.) This Court concluded that because the burden was on the defendant to request a pinpoint instruction on his accident defense, his failure to do so forfeited any claim of error in that regard. (*Id.* at p. 675.)

Here, appellant's own testimony constituted the substantial evidence in support of his defense theory, and there was no such forfeiture. To the contrary, appellant explained to the trial court exactly the point this Court makes in *Jennings*: that the proffered accident defense was aimed at raising a doubt as to an element of the prosecution's first-degree murder theory, and the requested instruction would have related that defense to the prosecution's theory. Appellant was entitled to that instruction.

In *People v. Anderson* (2011) 51 Cal.4th 989, 996-997, this Court further clarified the difference between the "special defense" of accident under section 26(5), and the defense of accident proffered by the defendant to counter an element of the prosecution's case. In *Anderson*, the defendant claimed he accidentally ran over and killed the robbery victim as he stole her car. Rejecting Anderson's claim that the trial court had a sua sponte duty to instruct the jury on his accident defense, this Court explained:

> Penal Code section 26 states the statutory defense: "All persons are capable of committing crimes except those belonging to the following classes: [¶] ... [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design,

> intention, or culpable negligence." The defense appears in CALCRIM No. 3404, which explains a defendant is not guilty of a charged crime if he or she acted "without the intent required for that crime, but acted instead accidentally." That the law recognizes a defense of accident does not, however, establish that trial courts have a duty to instruct on accident sua sponte. "In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) That duty extends to "'instructions on the defendant's theory of the case, including instructions "as to defenses '"that the defendant is relying on . . . , or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) But "'when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking sua sponte instructional duties. While a court may well have a duty to give a "pinpoint" instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such "pinpoint" instructions are not required to be given sua sponte and must be given only upon request.'" (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

(*People v. Anderson, supra,* 51 Cal. 4th 989, 996-97.)

Again, this distinction is precisely the one appellant made below, albeit not in the context of whether the trial court had a sua sponte duty to instruct on appellant's defense. On this record, it is clear the trial court erred by failing to give the requested pinpoint instruction, leaving the jury without the necessary and complete legal framework by which to consider appellant's defense that the gun discharged accidentally, resulting in Officer Trejo's death. And because it cannot be determined whether one or more of

the jurors found appellant guilty of first degree murder solely on the prosecution's theory of premeditation and deliberation, reversal is required.

This Court often finds no prejudice from instructional error where it appears the issues covered by omitted instruction were resolved adversely to the defendant under other proper instructions. (See *People v. Flood* (1998) 18 Cal.4th 470, 484.) In this case, the jury found true the allegation that appellant personally used a short-barreled shotgun during the crime (§ 12022.5), and found true an allegation that appellant intentionally killed Trejo while the latter was engaged in the performance of his duties (§ 190.2, subd. (a)(7)). While both of these findings required the jury to find an intent to shoot the officer, both findings were attendant to the underlying murder conviction. But as to that conviction the jury was uninformed about the legal significance of the defense theory that the gun accidentally discharged, and the legal relevance of appellant's testimony. The reference in the felony murder context to the legal effect of appellant's testimony that the shooting was an accident, that whether it was "accidental" simply did not matter. (See, e.g., 111RT:17632, 17633, and 17641.)

And we know that the jury wrestled with the defense theory and appellant's testimony because they asked for read back of his testimony. (114RT:18150-18152; 42CT:10716.) The requested pinpoint instruction would have provided the jurors with accurate and necessary legal guidance as to how the jurors were to consider his testimony and defense that the shooting was an accident. Without an instruction that a reasonable doubt as to whether the shooting was an accident must result in a finding that the prosecution had not proven *the element of premeditation and deliberation*, the jury was not fully instructed on the defense theory of their case, and that

at most the killing was a second degree murder. Appellant was entitled to a pinpoint instruction on the defense theory that was supported by the evidence.

Defense counsel argued that what occurred was not "a robbery and [was not] an intentional killing." (110RT:17404.) Defense counsel presented evidence and argument that Deputy Trejo's death was an accident, but not one that fully absolved appellant of any wrongdoing. Yet the court refused to instruct the jury with the defense proffered instruction that was the thrust of the defense case. By contrast, appellant's jury was instructed on all aspects of the prosecution's theory of the case.

Under the conditions in this case, the trial court's failure to instruct on appellant's defense theory to the underlying murder charge cannot be excused by the instructions and findings on the enhancements and special allegations attendant to that charge. Reversal is required.

C. The Trial Court Refused To Instruct The Jury On How Appellant's Defense Applied To The Robbery-Murder Special-Circumstance Allegation

During the jury instruction conference, appellant proposed a pinpoint instruction that related particular defense facts – specifically, his testimony that he accidentally shot Deputy Trejo – to the legal elements of the robbery-murder special-circumstance allegation. The instruction appellant offered, identified by appellant as special instruction 8.81.17B, would have added the following language to the standard CALJIC No. 8.81.17:

> To find that the special circumstances, referred to in these instructions as murder in the commission of a robbery [], it must be proved: [¶] 1. The murder was committed while defendant was engaged in the commission or attempted commission of a robbery []; and [¶] 2. Defendant committed the act resulting in the victim's death in order to advance an independent felonious

> purpose. ¶ An act committed by accident is not committed in order to advance an independent felonious purpose. If you have a reasonable doubt whether the act resulting in the victim's death was committed by accident, you must give the defendant the benefit of that doubt and find the special circumstance untrue.

(23CT:4737.)

The district attorney objected to the proposed instruction, claiming it was an inaccurate statement of the law. (108RT:17078.) The trial court agreed: "True. That doesn't seem to be correct, Mr. Ingram." (*Ibid.*) Defense counsel began responding, "Judge, we –", but was cut off when the trial court continued: "I understand there are many arguments against the felony murder rule, but think what we might have -- it's the law, so I'm not going to give the instruction." (*Ibid.*) The trial court immediately declared a recess, and when the hearing continued later that afternoon, the court reiterated that the requested pinpoint instruction had been denied. (108RT:17081.)

For more than 30 years, this Court has maintained that a critical legal distinction exists between first degree felony murder (found in section 189), and the felony-murder special circumstance (found in section 190.2, subdivision (a)(17)). While any killing during the commission of an enumerated felony in section 189 can qualify under the felony-murder rule as a first degree murder, the special circumstances in section 190.2, subdivision (a)(17) requires that the underlying felony be more than "merely incidental to the murder," and that it must "advance an independent felonious purpose." (*People v. Green* (1980) 27 Cal.3d 1, 61, overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.) This distinction is critical because the purpose of the special circumstance is to

single out those felony murderers "who killed in cold blood in order to advance an independent felonious purpose . . . ." (*People v. Green, supra,* 27 Cal.3d at p. 61; see also *People v. Thompson* (1980) 27 Cal.3d 303, 322.) Indeed, the federal courts have recognized that this distinction is constitutionally required. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476 [the requirement that the felony advance an independent felonious purpose is an element of constitutional necessity].)

Here, the trial court failed to understand this critical distinction between the felony-murder rule and the requirements of the felony-murder special circumstance. In fact, the trial court specifically cited "the felony murder rule" as the reason she believed the proffered instruction was inconsistent with the law. (108RT:17078.) The court was simply wrong.

As appellant explained in his written motion requesting the pinpoint instruction (23CT:4737-4738), his testimony that the gun discharged accidentally – if believed by the jury – was a defense to the felony-murder special circumstance because, as this court has explained, the special circumstance allegation requires proof that "the defendant commit the act resulting in death in order to advance an independent felonious purpose." (*People v. Berryman* (1993) 6 Cal.4th 1048, 1088, overruled on other grounds in *People v. Hill* (1998) 17 Cal .4th 800, 823, fn. 1.) Although this Court no longer requires that the prosecution prove a *specific intent* to kill to establish a felony-murder special circumstance (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, overruling *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 153–154), this Court has never held – and it would make no logical sense to so hold – that an act committed by accident can be found to advance "an independent felonious purpose." If that were the law, the

critical distinction between the felony-murder rule and the felony-murder special circumstance would no longer exist.

Appellant recognizes that *Green's* independent felonious purpose requirement can be satisfied where the purpose of the murder and purpose of the felony were concurrent to each other. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 183-184 [special circumstance finding upheld where arson and murder were committed with "independent, albeit concurrent goals"].) The prosecutor argued concurrent intent to appellant's jury (110RT:17341), and the jury was instructed on that theory (111RT:17658).

Appellant simply sought parity with the prosecution when he requested a pinpoint instruction on *his* theory that the jury must find that the murder and the underlying felony were committed for independent purposes whether concurrent or not (*People v. Berryman, supra,* 6 Cal.4th at p. 1088; *People v. Bonin* (1989) 47 Cal.3d 808, 850), and that if the jurors accepted his testimony that the shooting was accidental, there could be no factual basis on which to conclude that Deputy Trejo was shot for any purpose at all. Appellant was entitled to the requested instruction because it was legally correct, it was aimed at the crux of his defense to the special circumstance allegation, and it was supported by substantial evidence. (*People v. Saille, supra,* 54 Cal.3d at p. 1119.)

The trial court's refusal to give appellant's requested pinpoint instruction left the jury without the necessary legal framework by which to consider how appellant's testimony that the gun discharged accidentally, resulting in Deputy Trejo's death, applied to the robbery-murder special-circumstance allegation. And because it cannot be determined whether one or more of the jurors would have found true the robbery-murder special-

circumstance allegation had they been properly instructed on appellant's defense, reversal is required.

Once again, appellant acknowledges that the jury found true the allegation that appellant personally used a short-barreled shotgun during the crime (§ 12022.5), and found true an allegation that appellant intentionally killed Trejo while the latter was engaged in the performance of his duties (§ 190.2, subd. (a)(7)). But as pointed out above, these findings were attendant to the underlying murder conviction, and appellant's jury was uninformed about the legal significance of the defense theory to the murder charge that the gun accidentally discharged. That is because the trial court systematically denied appellant's requested pinpoint instructions aimed at the crux of his defense, as it applied to the underlying charges as well as the special circumstance allegations.

On this record – where it is clear that the jury wrestled with appellant's testimony that the shooting was accidental (114RT:18150-18152: 42CT:10716) – the requested pinpoint instruction would have provided the jurors with accurate and necessary legal guidance as to how to consider appellant's defense to the robbery special-circumstance allegation. Under the unique conditions in this case, the trial court's failure to instruct on appellant's defense theory cannot be excused by the instructions and findings on other enhancements and special allegations. Reversal of the felony-murder special-circumstance finding is required.

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THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON EVIDENCE OF APPELLANT'S FLIGHT AND HIS NON-PARTICIPATION IN A LINEUP AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

A. The Proceedings Below and the Instructions Given

Over defense objection, the trial court instructed the jury with two related instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt. The court instructed with CALJIC No. 2.06, regarding efforts to suppress evidence and with CALJIC No. 2.52, regarding flight after crime.

1. CALJIC No. 2.06

Appellant argued *ante*, in Argument 4, that the trial court committed prejudicial error by admitting evidence of appellant's decision not to participate in a lineup. Assuming that evidence was properly admitted, the instruction on how the jury could use that evidence – CALJIC No. 2.06 – was flawed.

The court instructed with CALJIC No. 2.06, as modified, on two separate occasions. The instruction read as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by refusing to participate in a line-up, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(93RT:14828; 111RT:17611; 24CT:4852.)

2. CALJIC No. 2.52

The court also instructed the jury with CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime or after he is accused of a crime is not sufficient in itself

> to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilt or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(111RT:17616; 24CT:4865.) Appellant had objected to the instructions. (107RT:16930.)

The court also rejected appellant's modification to both of the above instructions that would have combined them, that is, that only one consciousness-of-guilt instruction would be given in which both flight and refusal to participate in a lineup were included. (23CT:4799 [proffered instruction]; 107RT:16886-16887 [court's denial].)

For the reasons set forth below, in giving these instructions the trial court committed prejudicial error that deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

Appellant is aware that this Court has upheld CALJIC Nos. 2.52 and 2.06 on several occasions. (See e.g., *People v. Loker* (2008) 44 Cal.4th 691, 706 [CALJIC No. 2.52]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [same]; *People v. Johnson* (1992) 3 Cal.4th 1183, 1235-1236 [CALJIC No. 2.06]; *People v. Jackson* (1992) 13 Cal.4th 1164, 1224-1225 [same].) However, as delineated below, this court should reconsider its previous opinions.

B. The Consciousness-of-Guilt Instructions Were Unfairly Partisan and Argumentative

The consciousness-of-guilt instructions given in this case were impermissibly argumentative. A trial court must refuse to deliver any

instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight isolated facts favorable to one party, intimating to the jury that special consideration should be given to those facts. (*In re Martin's Estate* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations]." (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence," as opposed to the theory of the case (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871), or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9), are argumentative and hence must be refused. (*Ibid.*)

Using these criteria, the two consciousness-of-guilt instructions here were impermissibly argumentative. Structurally, they were almost identical to the defense "pinpoint" instruction that this Court found to be argumentative in *People v. Mincey*, *supra*, 2 Cal.4th at p. 437. That instruction read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.) The instructions here told the jury that if they found certain facts (flight and refusal to participate in a lineup in this case, and a misguided and unjustified attempt at discipline in *Mincey*), then they may consider that evidence for a specific purpose (showing consciousness of

guilt in this case, and concluding that the murder was not premeditated in *Mincey*). This Court found the defense-proffered instruction in *Mincey* to be argumentative (*id.* at p. 437), and it should likewise hold that CALJIC Nos. 2.06 and 2.52 are impermissibly argumentative.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation]." However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527; accord *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (see *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon* (1973) 412 U.S. 470, 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsey v. Normet* (1972) 405 U.S. 56, 77).[110]

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[110] In response to the defendant's complaint in *People v. Johnson*, *supra*, 3 Cal.4th at p. 1235, that the jury should not have been instructed with CALJIC No. 2.06, this Court stated that a defendant should not

(continued...)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1991)1 Cal.4th 103, 128 [CALJIC Nos. 2.03 and 2.52 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence" (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137).

Courts in other states have held that consciousness-of-guilt instructions should not be given because they unfairly highlight isolated, circumstantial evidence. Finding that a consciousness-of-guilt instruction based on flight unduly emphasized a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction will always be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, that court joined a number of other state courts that have found similar flaws in the flight instruction. Other states'

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[110] (...continued)
complain about this instruction because it benefitted the defendant by telling the jury that his refusal to participate in a lineup, which in his identity case was a circumstance indicating a consciousness of guilt, may not, by itself, establish the defendant's guilt. The theory advanced in *Johnson*, that this instruction, and impliedly other consciousness-of-guilt instructions benefit the defendant, was later abandoned. In *People v. Seaton* (2001) 26 Cal.4th 598 this Court held that consciousness-of-guilt instructions benefit the prosecution, not the defense. (*Id.* at p. 673 [the failure to give CALJIC Nos. 2.03 and 2.06 was harmless because the instructions would have benefitted the prosecution, not the defense].)

courts have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)

The reasoning of two of those cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case disapproving a flight instruction (*id.* at p. 748), and extended the reasoning of that case to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [reasons for disapproving flight instructions applied equally to an instruction on a defendant's false statements].)

The argumentative consciousness-of-guilt instructions in this case invaded the province of the jury, focused the jury's attention on evidence favorable to the prosecution, placed the trial court's imprimatur on the prosecution's theory of the case, and lessened the prosecution's burden of proof. Therefore, they violated appellant's Fourteenth Amendment due process rights to a fair trial and equal protection, his Sixth and Fourteenth Amendment right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and his Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

C. The Consciousness-of-Guilt Instructions Permitted the Jury to Draw Irrational Permissive Inferences about Appellant's Conduct

The consciousness-of-guilt instructions given in this case suffer from an additional constitutional defect of embodying improper permissive inferences. The instructions permitted the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., non-participation in a lineup and flight. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.)

A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead

them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to question the effectiveness of permissive inference instructions. Permissible inferences are most effective when least appropriate, i.e., "where the evidence supporting the inference is sparse and the inference is most crucial to the government's case." (*Ibid.*) "[I]nference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury." (*Id.*, at p. 900 (conc. opn. of Rymer, J.).)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*County Court of Ulster County Court, New York. v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 296.) The due process clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313, 316 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to

depend'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, the permissive inferences inherent in the instructions primarily, if not solely, affected the jurors' consideration of the charges involving Deputy Trejo. As to those charges, there was no dispute that appellant was responsible for the deputy's death. The issue was appellant's intent when he disarmed Deputy Trejo and when the gun discharged, that is, was Deputy Trejo's death a first degree murder, a second degree murder or the result of an accidental shooting that occurred during a resisted detention. On this issue, neither appellant's flight or his failure to participate in a lineup, shed light.

Under the facts here, irrational inferences were permitted. The irrational inferences concerned appellant's mental state at the time the charged crimes allegedly were committed. The improper instructions permitted the jury to use the consciousness-of-guilt evidence – the undisputed evidence that appellant fled the scene and unchallenged evidence that he did not participate in a lineup – to infer, not that appellant was responsible for Deputy Trejo's death, to which appellant had admitted, but that Deputy Trejo was killed while appellant harbored the intents or mental states required for robbery and for a conviction of first degree murder. Although consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the crimes were committed, it is not probative of his state of mind immediately prior to or during the crimes. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) Professor LaFave makes the same point: "Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of

showing premeditation and deliberation, as it only goes to show the defendant's state of mind at the time and not before or during the killing." (LaFave, *Substantive Criminal Law* (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics.)

Appellant's flight after the crime, and his decision not to participate in a lineup, upon which the consciousness-of-guilt inferences were based – were not probative of whether he harbored the intent to steal or the mental states for first degree murder at the time of the shooting. There was no rational connection – much less a link "more likely than not" – between appellant's conduct (flight and refusing to be in a lineup) and an alleged consciousness of having harbored the requisite intent and mental state for either a robbery or a homicide that rose to the level of a first degree murder (the inferred fact). Given appellant's admission that he was criminally culpable for the homicide, the consciousness-of-guilt instructions were irrelevant. Appellant's flight as well as his declining to be in a lineup cannot reasonably be deemed to support an inference that appellant had the requisite mental state for first degree murder, as opposed to second degree murder or the crime of resisting a peace officer that resulted in death.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning a defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC Nos. 2.03 & 2.06]; *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicholas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 & 2.06].) Appellant respectfully asks this Court to reconsider and overrule these holdings and to

hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The trial court also refused appellant's modifications to CALJIC Nos. 2.06 and 2.52. The modifications would have told the jury that if consciousness of guilt was found (from flight or refusal to participate in a lineup) it was relevant to the question of whether the defendant was afraid of being convicted of a crime and/or whether appellant was conscious of some wrongdoing and that consciousness of wrongdoing may not be considered in determining the nature or the degree of the defendant's wrongdoing, that is, in determining intent to deprive Deputy Trejo permanently of his property at the time it was taken from his person or the requisite mental states for a first degree murder. (22CT:4653-4654; 23CT:4799-4800 [proffered modifications]; 107RT:16884-16888 [court's denial].)

The foundation of this Court's rulings rejecting the claim that the consciousness-of-guilt instructions permit irrational inferences is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, 871, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that, "[a] reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged." However, *Crandell's* analysis is mistaken, and inapplicable here, for three reasons. First, consciousness-of-guilt instructions do not speak of "consciousness of some wrongdoing," but of "consciousness of guilt," and *Crandell* does not explain why jurors would interpret such instructions to mean something they do not say. Elsewhere in the standard instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g.,

111RT:17619; 24CT:4878 [CALJIC No. 2.90].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship* (1970) 397 U.S. 358, 364; see *Jackson v. Virginia* (1979) 443 U.S. 307, 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences, or otherwise hint that there are any applicable limits on the jury's use of the evidence. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad since they expressly advise the jurors that the "weight and significance" of the consciousness of guilt evidence, if any, is for the jury to decide.

Third, this Court has itself drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness of guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.) Since this Court considered consciousness of guilt evidence in finding substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same. Appellant specifically requested that CALJIC Nos. 2.06 and 2.52 be modified to read consciousness of "some wrongdoing" as opposed to consciousness of "guilt," but those requests were denied.

Because the consciousness-of-guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, the instructions

undermined the reasonable doubt requirement and lightened the prosecution's burden of proof, thereby denying appellant his Fourteenth Amendment rights to a fair trial and due process of law. The instructions also violated appellant's Sixth and Fourteenth Amendment rights to have a properly instructed jury find that all the elements of the charged crimes have been proven beyond a reasonable doubt, and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated his Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

D. The Consciousness-of-Guilt Instructions Unconstitutionally Lowered the Prosecution's Burden of Proof

The consciousness-of-guilt instructions lowered the prosecution's burden of proof, and as such violated the due process clause of the federal Constitution. (See *In re Winship*, *supra*, 397 U.S. at p. 364.) The constitutional violation lies in the fact that while the instructions say that consciousness of guilt evidence is not sufficient by itself to prove guilt, it does not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. It thus permits the jury to seize on one isolated piece of evidence and use that in combination with the consciousness of guilt evidence to conclude that the defendant is guilty. This is an unconstitutional lessening of the burden of proof.

E. The Consciousness-of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instructions

This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6

Cal.4th 1048, 1080, overruled on other grounds, *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01, 2.02, 8.83, 8.83.1. (111RT:17610-17611, 17623-17624, 17638-17640; 24CT:4850-4851, 4887, 4922-4923.) These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e. that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of a permissive inference of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary and unfair benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474 [holding that state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet*, *supra*, 405 U.S. 56, 77 [holding that arbitrary preference to particular litigants violates equal protection].)

F. Reversal is Required

Giving the consciousness-of-guilt instructions was error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's robbery and murder convictions and the special circumstance findings must be reversed unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316

[applying *Chapman* standard to a constitutionally-deficient jury instruction].)

The errors in this case were not harmless beyond a reasonable doubt. It was almost certain that the jury found both instructions applicable given that flight was not disputed and appellant did not challenge the state's evidence regarding the lineup. The effect of both of the consciousness-of-guilt instructions was to tell the jury that appellant's own conduct, by fleeing the scene and not participating in a lineup, showed that he was aware of his guilt of the very charges he disputed. Exacerbating the harm was that the trial court instructed the jury twice with CALJIC No. 2.06, at the time that one state witness testified about appellant and the lineup and again at the end of trial. (93RT:14828; 111RT:17611.) The court also reminded the jury during testimony that CALJIC No. 2.06 was applicable to a second witness the prosecutor called about the lineup. (93RT:14832.) By giving CALJIC No. 2.06 specially during the witnesses' testimony as well as at the end of the trial suggested to the jury the importance of the evidence and placed the trial court's imprimatur on the prosecution's theory of the case.

In this case, where appellant's intent at the moment Deputy Trejo was shot depended largely on whether the jury believed and trusted appellant, the consciousness-of-guilt instructions, which were partisan, argumentative and permitted irrational inferences, were not harmless beyond a reasonable doubt. The judgment on the robbery, the murder conviction and the special circumstance allegations must be reversed.

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THE INSTRUCTIONS DESCRIBING THE PROCESS BY WHICH JURORS REACH A VERDICT ON LESSER OFFENSES UNCONSTITUTIONALLY SKEWED THE JURORS' DELIBERATIONS TOWARD FIRST DEGREE MURDER

The trial court gave flawed instructions on the process by which the jury was to decide the degree of murder. It gave CALJIC No. 8.71, which was inaccurate, and failed to give CALJIC No. 17.11, which was accurate. These errors skewed the jury's deliberations toward first degree murder and lowered the prosecution's burden of proof in violation of appellant's rights to due process and trial by jury. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16.)

A. The Proceedings Below and the Instructions Given

Appellant's jury was instructed on first degree murder and second degree murder. The trial court also instructed the jury with CALJIC No. 8.71, which told the jurors that if they found appellant guilty of murder, they must determine the degree. (111RT:17640; 24CT:4925-4926.)

The trial court instructed appellant's jurors that if they agreed that the unlawful killing of Deputy Trejo was a murder, they must "unanimously" agree that there was a reasonable doubt about the degree of murder before giving appellant the benefit of the doubt and finding that the murder was of the second degree. The trial court's instruction was as follows:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second

degree, as well as a verdict of not guilty of murder in the first degree.

(CALJIC No. 8.71 (6th ed.); 111RT:17640; 24CT:4926.)

Appellant had objected to the court instructing the jury with CALJIC No. 8.71 from the current Sixth Edition (published in 1996), and requested that the court instead use the Fifth Edition, given that the prior version was clearer and there had been no legal basis for the revisions. (107RT:16881; 108RT:17052-17053, 17059.) The previous version told jurors to give a defendant the benefit of the doubt without reference to whether they unanimously agreed. (See CALJIC No. 8.71, 5th ed., 1988.)[111] The court denied appellant's request. (108RT:17053.)

During the hearings regarding jury instructions, the trial court recognized, and the prosecutor agreed, that the jury must be instructed with CALJIC No. 17.11, "in terms of murder in the first degree and the second degree." (108RT:17102.) CALJIC No. 17.11 read as follows: "If you find the defendant guilty of the crime of murder, but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." Before the jury was instructed, defense counsel informed the court that he could not find CALJIC No. 17.11 among the prepared packet of instructions to be given. (110RT:17422.) The court assured counsel that CALJIC No. 17.11 was among them, but when the court looked it too could not find it. (110RT:17422-17423.) Rather than include this sua sponte instruction the court stated that CALJIC No. 17.11

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[111] CALJIC No. 8.71 (5th ed.): "If you are convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree."

was sufficiently covered by CALJIC No. 8.71, with No. 8.71 only "being a little wordier." (110RT:17423.) The jury was thereafter not instructed with CALJIC No. 17.11.

B. The Inaccurate Instruction Under CALJIC No. 8.71 Combined With the Trial Court's Failure to Give CALJIC No. 17.11 Skewed the Jurors' Deliberations Toward First Degree Murder and Undermined the Requirement of Proof Beyond a Reasonable Doubt

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" (*In re Winship*, *supra*, 397 U.S. at p. 363, quoting *Coffin v. United States* (1895) 156 U.S. 432, 453.) It also is central to the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

1. CALJIC No. 8.71

CALJIC No. 8.71 as given in this case lightened the prosecution's burden of proof, distorted the fact-finding process and denied appellant his right to a unanimous verdict because the instruction required jurors to return a verdict on the greater offense unless they unanimously doubted whether the greater offense had been proven. Thus, if they did not unanimously agree that they had a reasonable doubt as to whether the murder was first or second degree, they were not required to give the defendant the benefit of that doubt and find him guilty of a second degree murder. Under this flawed instruction, jurors who thought appellant was guilty of murder, but not necessarily of first degree murder, would likely believe that first degree murder had to be the jury's verdict unless the jurors unanimously agreed that they had a reasonable doubt about the degree of murder.

In *People v. Moore* (2011) 51 Cal. 4th 386, this Court addressed the claim that the revised version of CALJIC No. 8.71 (6th ed.) violated the defendant's due process and jury trial rights by suggesting that jurors must return a first degree murder verdict unless they unanimously doubted whether it had been proven. (*Id.* at pp. 409-411.) The defendant complained that the instruction required the jurors to return a verdict on the greater offense unless they unanimously doubted whether it had been proven. (*Id.* at p. 410.) "As defendant puts it, 'a juror who believed that [defendant] was guilty of some offense, but not necessarily first degree murder, would also believe that first degree murder must apply in the face of any disagreement. In other words, first degree murder became the default verdict.'" (*Ibid.*)

Agreeing that the unanimity requirement was confusing, this Court concluded the "better practice" was to not use the 1996 revision of CALJIC

No. 8.71. The *Moore* Court explained that the unanimity requirement potentially confused jurors about the role of their individual judgments in deciding between first and second degree murder.[112] (*People v. Moore*, *supra*, 51 Cal.4th at p. 411.) The Court further noted that the 1996 revisions to CALJIC No. 8.71 were "unnecessary" because CALJIC No. 8.75 explained that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury may return a verdict on the lesser. (*Id.* at pp. 411-412.)

Instructing appellant's jury with the 1996 revision of CALJIC No. 8.71 was error. The instruction as given failed to guide the jury accurately on the role of each juror's individual judgment and would have led a reasonable juror to conclude that the jury must reach unanimous agreement that there was a doubt as to appellant's guilt of first degree murder before he could be convicted of second degree murder.

2. CALJIC No. 17.11

The trial court's failure to give CALJIC No. 17.11 compounded the error of giving CALJIC No. 8.71 and constituted an additional error itself.

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[112] The relevant CALCRIM instruction (CALCRIM No. 521) does not contain the same potentially confusing unanimity requirement as the 1996 revisions of CALJIC No. 8.71. (See *People v. Moore*, *supra*, 51 Cal.4th at p. 412, fn. 8.)

Moreover, the Fall 2011 revision of CALJIC No. 8.71, revised in response to *People v. Moore*, also deleted the confusing and misleading language that was in the Sixth Edition volume of CALJIC. The instruction currently reads as follows: "If any juror is convinced beyond a reasonable doubt that the crime of murder has been committed by a defendant, but has a reasonable doubt whether the murder was of the first or of the second degree, that juror must give defendant the benefit of that doubt and find that the murder is of the second degree."

CALJIC No. 17.11 provides, "[i]f you find the defendant guilty of the crime of [murder], but have a reasonable doubt as to whether it is of the first or second degree, you must find him guilty of that crime in the second degree." The instruction must be given sua sponte when, as in appellant's case, the crime has separate degrees. (*People v. Dewberry* (1959) 51 Cal.2d 548, 555-557; see also *People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704 [sua sponte instruction], disapproved on another ground in *People v. Lines* (1975) 13 Cal.3d 500, 512-513; Use Note to CALJIC No. 17.11 (6th ed. 1997) p. 572; § 1097.)

Although the trial court initially agreed to give CALJIC No. 17.11 and indeed recognized its sua sponte obligation to do so (108RT:17102), when defense counsel pointed out that CALJIC No. 17.11 was missing from the packet of instructions that were to be given, the trial court failed to correct the omission (110RT:17423). CALJIC No. 17.11 would have provided the jury with clear language similar to the previous version of CALJIC No. 8.71. This instruction emphasizes that if a jury determines that the defendant is guilty of murder, a reasonable doubt as to whether it is a first degree murder requires a finding of second degree murder. Additionally, CALJIC No. 17.11 would have reinforced the role of each juror's individual judgment in deciding between first and second degree murder. Unlike the version of CALJIC No. 8.71 which was given, CALJIC No. 17.11 did not direct that the jury must unanimously agree to reasonable doubt as to the degree of murder before an individual juror who has such a reasonable doubt must give a defendant the benefit of that doubt.

By failing to give CALJIC No. 17.11, the trial court violated its sua sponte duty to instruct on the separate degrees of the crime. (See *People v. Dewberry*, *supra*, 51 Cal.2d at pp. 555-557; *People v. Aikin*, *supra*, 19

Cal.App.3d at pp. 703-704.) The court's failure left appellant's jury without the guidance of CALJIC No. 17.11, and with the flawed version of CALJIC No. 8.71 that misled jurors into believing that unless jury unanimity existed concerning reasonable doubt, an individual juror could not give the defendant the benefit of the doubt in determining the degree of murder. Appellant was entitled to have the jury instructed with clear instructions that did not confuse the jury about when it could give appellant the benefit of the doubt in determining the degree of murder. (See *People v. Moore*, *supra*, 51 Cal.4th at pp. 411-412.) The instructions given to appellant's jury failed to provide that clarity. Because the court failed to instruct with CALJIC No. 17.11, the harm from instructing the jury with the inaccurate and confusing revised version of CALJIC No. 8.71 was not remedied.

C. In Light of the Instructions Given as a Whole, No Other Instruction Remedied the Misleading Instruction Under CALJIC No. 8.71

1. CALJIC No. 17.40

None of the other instructions given in appellant's case remedied the trial court's errors. In *People v. Moore*, *supra*, 51 Cal.4th at pp. 410-412, this Court noted two Court of Appeal decisions which had addressed the same version of CALJIC No. 8.71 with which appellant's jury was instructed, *People v. Pescador* (2004) 119 Cal.App.4th 252 and *People v. Gunder* (2007) 151 Cal.App.4th 412. As this Court noted, the courts of appeal rejected the defendant's challenge to CALJIC No. 8.71 in part because the trial court had instructed with CALJIC No. 17.40, the pattern instruction on the duty of individual jurors to decide the case for

themselves.[113] (*People v. Moore*, *supra*, 51 Cal.4th at p. 411; *People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257; *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425 & fn. 10.) This Court, however, did not decide whether CALJIC No. 17.40 adequately dispelled the confusion of CALJIC No. 8.71, finding that in any event the error in *Moore* was harmless beyond a reasonable doubt. (*People v. Moore*, *supra*, 51 Cal.4th at p. 412.)

Although appellant's jury received CALJIC No. 17.40,[114] that instruction did not cure the defect in CALJIC No. 8.71. CALJIC No. 17.40 told the jury that the People and appellant "are entitled to the individual opinion of each juror," to "reach[] a verdict if you can do so," to "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." (111RT:17653-17654; 24CT:4954.) The court in *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425 found that

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[113] The court in *Pescador* had also relied in part on CALJIC No. 17.11 in rejecting the defendant's challenge of the Sixth Edition version of CALJIC No. 8.71. (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 257.) As stated above, appellant's jury was not instructed with CALJIC No. 17.11.

[114] Appellant's jury was instructed pursuant to CALJIC No. 17.40 as follows:

> The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination.

(111RT:17653-17654; 24CT4954.)

given that the jury was instructed with CALJIC No. 17.40, it was not reasonably likely that jurors interpreted CALJIC No. 8.71 to require unanimous agreement that there was a doubt as to the defendant's guilt of first degree murder before the defendant could be convicted of second degree murder. Appellant respectfully disagrees.

First, the *Gunder* court did not have the benefit of this Court's decision in *Moore* finding that CALJIC No. 8.71 was potentially confusing. Second, the court of appeal focused on a single part of CALJIC No. 17.40, in which the jury was directed to deliberate individually and not to decide any question because a majority or any jurors favor that decision. (*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425.) In so doing, the *Gunder* court essentially ignored those parts of the instruction that told the jury that they are to make their decision only after discussion with the other jurors and that specifically told them not to hesitate to change an opinion if convinced otherwise. Applying CALJIC No. 17.40 in its entirety, a minority juror who had a reasonable doubt as to whether the murder was of the first or second degree would likely have believed that he could not give effect to his view, given the language in CALJIC No. 8.71, that the jury must "unanimously" agree that there was a reasonable doubt about degree before giving the defendant the benefit of that doubt, and thus not give the benefit and instead join the majority in voting for first degree murder.

For example, assume first that the jurors agreed unanimously that the prosecution had proved murder beyond a reasonable doubt, but were not unanimous whether the prosecution had proved first degree murder beyond a reasonable doubt, that is, that a minority juror (or jurors) had a reasonable doubt about the degree. Assume that the jurors followed the instruction of CALJIC No. 1.00, that they were to find the facts and apply the law to the

facts according to the judge's instructions. (See 111RT:17606-17607; 24CT:4845 [CALJIC No. 1.00 as given at appellant's trial].) Also, as directed by CALJIC No. 17.40, presumably each juror decided the case for himself or herself, but did so "only after discussing the evidence and instructions with other jurors" and did "not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision." At the same time, however, CALJIC No. 17.40 instructed that a juror should "not hesitate to change an opinion if you are convinced it is wrong." (See 111RT:17653-17654; 24CT:4954 [CALJIC No. 17.40 as given at appellant's trial]; see also 111RT:17607; 24CT:4846 [CALJIC No. 1.01: consider the instructions as a whole; do not single out any particular sentence or any individual point or instruction and ignore the others].)

If the jurors disagreed about the degree of murder, they would look to the instructions for guidance. Without CALJIC No. 17.11, that guidance would come from CALJIC No. 8.71. The jury would see that they had satisfied the first part of CALJIC No. 8.71 in that they unanimously agreed that the defendant committed murder, which means at least a verdict of second degree murder. But not having agreed "unanimously" whether they had a reasonable doubt whether the murder was of the first or second degree, the precondition for giving the defendant the "benefit of that doubt," and returning a verdict of second degree murder, the minority juror could not give effect to that reasonable doubt. (See 111RT:17640; 24CT:4926 [CALJIC No. 8.71 as given at appellant's trial].) Such a juror was required to accept and follow the law as stated by the court, regardless of whether the juror agreed with the law. (111RT:17606-17607; 24CT:4845.) Thus, because the minority juror's reasonable doubt as to degree was not shared "unanimously" by the other jurors, but the jury had

agreed unanimously that a murder had occurred, the minority juror would conclude that a second degree murder verdict was impossible and, following the only available alternative, would surrender his own reasonable doubt and vote for first degree murder. The language of CALJIC No. 8.71 prevented the minority juror from giving effect to his reasonable doubt and thus giving the defendant the benefit of the doubt that the murder was of the second degree. CALJIC No. 17.40 did not dispel the confusion or harm resulting from the version of CALJIC No. 8.71 given at appellant's trial.

Moreover, in determining how jurors would understand a series of instructions, the more specific charge prevails over the general charge. (*People v. Stewart* (1983) 145 Cal.App.3d 967, 975.) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is *general.* [Citation.]." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, original italics.) Nothing in CALJIC No. 17.40, nor in the instructions as a whole dispelled the specific, and erroneous direction in CALJIC No. 8.71.

D. The Trial Court's Instructional Errors Violated Appellant's Constitutional Rights

The trial court's refusal to give the defense-requested version of CALJIC No. 8.71 and instead instruct appellant's jury with the confusing and misleading version of CALJIC No. 8.71, and its failure to give CALJIC No. 17.11, violated appellant's right to due process and lightened the prosecution's burden of proof. Without proper direction on what to do in the case of non-unanimous doubt as to the degree of murder, but in which the jury has concluded that a murder had occurred, a jury will likely fail to

give full effect to the reasonable doubt standard, resolving its doubts in favor of the greater degree. (See *Keeble v. United States* (1973) 412 U.S. 205, 213; U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15.) In *Keeble*, the trial court failed to instruct on a lesser offense. The high court pointed out that if a jury is convinced that a crime occurred, but not convinced that the prosecution had established beyond a reasonable doubt every element of the offense charged, and no lesser offense instruction was offered, "the jury must, as a theoretical matter, return a verdict of acquittal." (*Keeble v. United States*, *supra*, 412 U.S. at p. 212.) The Court held that the defendant was entitled to a lesser offense instruction "because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (*Id.* at pp. 212-213.)

The Ninth Circuit in *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466 similarly recognized how jurors without proper instruction may wrongly yield to the majority. In *Jackson*, overwhelming evidence demonstrated that the defendant had committed a crime, but a rational jury may have had doubt about the nature of the offense. The challenged instruction required the jury to unanimously acquit on the greater charge before considering the lesser-included charge. (*Id.* at p. 1469-1470 & fn. 1.) The Ninth Circuit recognized that if jurors were unable to reach a unanimous verdict on any charge, in theory the result would be a mistrial. Practically, however, the risk was substantial that jurors harboring a doubt as to defendant's guilt of the greater offense, but at the same time convinced that defendant had committed some offense, might wrongly yield to the majority and vote to convict of the greater offense rather than not

convict defendant of any offense at all. (*Id.* at p. 1470.) Indeed, the Ninth Circuit concluded that the risk that *Keeble v. United States*, *supra*, 412 U.S. at pp. 212-213 recognized, that a jury is likely to resolve its doubts in favor of conviction when the defendant is plainly guilty of some offense, but one of the elements of the offense charged remains in doubt, is equally present when a jury is instructed that a lesser offense cannot be considered unless the jury first agrees unanimously that the defendant is not guilty of the greater offense. (*United States v. Jackson*, *supra*, 726 F.2d at p. 1470.)

In this case, the faulty and absent instructions also left appellant's jury without proper direction, which distorted the factfinding process. (See *Cool v. United States* (1972) 409 U.S. 100, 104 [instruction that reduces burden of proof is "plainly inconsistent with the constitutionally rooted presumption of innocence"].) Under the version of CALJIC No. 8.71 given in this case, before jurors could give appellant the benefit of the doubt, they had to first unanimously agree that there was a reasonable doubt as to degree. If some, but not all, jurors believed that there was reasonable doubt about the nature of the offense, the instruction nonetheless directed them to first degree murder.

While the ultimate verdict must be unanimous, it is the process by which a juror reaches such a verdict that is at issue. In appellant's case, that process directed the jurors to first degree murder and failed to instruct the jurors that a reasonable doubt as to degree required them to give appellant the benefit of that doubt and return a verdict of second degree murder. Accordingly, the errors resulted in the kind of juror confusion that implicated constitutional standards. (See *Smith v. Texas* (2007) 550 U.S. 297, 316 [recognizing that instructions can create "jury-confusion error"]; see also *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-700 [safeguards of

due process apply to determination of defendant's criminal culpability, such as between murder and manslaughter].)[115]

The court's errors also violated appellant's right to a unanimous verdict. The state Constitution protects a defendant's right to "a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged." (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298; *People v. Traugott* (2010) 184 Cal.App.4th 492, 499-500; *People v. Collins* (1976) 17 Cal.3d 687, 692-693; Cal. Const., art. I, § 16.) This right, while embodied in the state Constitution, also implicates appellant's federal due process right to this state-created liberty interest. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; U.S. Const., 14th Amend.)

The court's errors affected the fundamental framework of appellant's trial and require reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) For all intents and purposes, the essential disputed issue the jury had before it was whether Deputy Trejo's death was a first degree murder or a second degree murder. Appellant did not contest that he was the one responsible for the deputy's death, indeed he admitted it. The defense disputed the prosecution's circumstantial evidence of a first degree murder and argued for a second degree murder conviction. The defense presented evidence that appellant had been drinking, that he was under stress, and

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[115] *Mullaney v. Wilbur* noted that the defendant's interests in the reasonable doubt standard were implicated more in *Wilbur* than in *Winship*: in *Winship*, petitioner faced an 18-month sentence, with a potential extension of four and a half years, while in *Wilbur* the defendant faced a differential in sentencing ranging from a nominal fine to a mandatory life sentence. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at p. 700; see *In re Winship*, *supra*, 397 U.S. at p. 360.) Here, of course, a second degree murder conviction, rather than a first degree murder conviction, would have precluded the death penalty.

distress from the years he was housed in solitary confinement and that he had no intention to kill Deputy Trejo.

The defense presented expert testimony regarding appellant's state-of-mind at the time that he left Pelican Bay State Prison (PBSP), including the days after he was released and until the time that appellant was confronted by Deputy Trejo. (97RT:15488.) Based upon appellant's prolonged solitary confinement, at the time that appellant left PBSP, his thinking was narrow, tunnel-visioned, rigid, compulsive and obsessional. (97RT:15491.) His ability to plan, look into the future, or even to the next hour or day was virtually gone. (97RT:15493.) He suffered from racing thoughts, which has been described as one's mind being like a freight train out of control, in which one cannot keep track of his mind because everything is moving too fast and the person suffering from this surge of racing thoughts and panic, cannot make his mind, or himself, slow down. (97RT:15508-15509.) Given appellant's impairments, adding something that effected the central nervous system, like alcohol, would exacerbate appellant's inability to plan, shift attention or slow down his thoughts, and would increase the hyper-vigilance from which he suffered. (97RT:15504.)

The jury had to decide whether the shooting that resulted in Deputy Trejo's death was a first degree murder or a tragic accident that resulted in a second degree murder, but they were instructed erroneously and in a manner that denied appellant the benefit of any reasonable doubt a juror may have had about the degree of murder. In light of the evidence of appellant's mental state at the time of the shooting, one or more jurors likely had a reasonable doubt as to whether the murder was of the first or second degree.

In *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, the trial court erroneously instructed the jury on the definition of reasonable doubt. The

high court explained that there are certain errors that defy traditional harmless error review. These are errors that cannot be measured by weighing the strength of the evidence. "[W]here the instructional error consists of a misdescription of the burden of proof . . . . [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, "'the wrong entity judge[s] the defendant guilty.'" (*Id.* at p. 281, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) Thus, a deprivation of an important right "with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Id.* at pp. 281-282.) Accordingly, this Court should find that the instructional errors were structural and that reversal is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.)

Even assuming harmless error applies, the errors were not harmless beyond a reasonable doubt. This Court cannot be confident about the jury's application of CALJIC No. 8.71, particularly in light of the trial court's refusal to give CALJIC No. 17.11. A rational juror who had a reasonable doubt about whether appellant had committed a first degree murder would have abandoned that position because of CALJIC No. 8.71's erroneous requirement of jury unanimity. These instructional errors undoubtedly affected how the jury viewed the evidence and contributed to the verdict of first degree murder. The errors were not harmless beyond a reasonable doubt. Reversal is required. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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THE TRIAL COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

Appellant requested that the trial court instruct the jury that, as to Count I, before they could return a verdict of guilty of first degree murder, they had to agree unanimously on whether appellant was guilty of committing a premeditated murder or a felony murder. (108RT:17057.) The court denied appellant's request. (108RT:16960-16961, 17057.) Thereafter, the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 24CT:4905; 111RT:17631-17632) and on first degree felony murder predicated on robbery (CALJIC No. 8.21; 24CT:4906; 111RT:17632). The court also instructed the jury that if they found either one, or both of the types of first degree murder beyond a reasonable doubt, it was not necessary for them to agree whether the evidence supported a conviction for premeditated murder or whether it supported a conviction for killing during the commission of a robbery. (24CT:4903; 111RT:17630; see also 109RT:17211-17212 [defense objection to multiple theory instruction].) The prosecutor took advantage of this instruction by arguing to the jury that they did not have to have "what they call unanimity of this particular verdict . . . as long as [they] agree that it's one or the other." (110RT:17337.)

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony murder was erroneous, and the error deprived appellant of his right to have

all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has previously rejected similar claims. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1221; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394.) Appellant requests that this Court reconsider its conclusion in light of appellant's arguments below.

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *Sandstrom v. Montana* (1979) 442 U.S. 510, 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) It then declared that "in this state the two kinds of murder

[felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23 and pp. 476-477.)[116]

Following *Dillon*, this Court has continued to hold that the elements of felony murder and of premeditated murder are not the same. In *People v. Carpenter*, *supra*, 15 Cal.4th at page 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, quoted above, "meant that the *elements* of the two types of murder are not the same" (original emphasis). Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131). Despite these holdings, this Court has retreated from the logical conclusion that felony murder and premeditated murder are not the same crime. (See, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712 [holding that "[f]elony murder and premeditated murder are not distinct crimes]".)

"Calling a particular kind of fact an 'element' carries certain legal consequences," including the consequence that a jury cannot convict unless it unanimously finds that the Government has proved each element. (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of

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[116] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . ." (*People v. Dillon*, *supra*, at pp. 476-477, fn. omitted.)

the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.) and discussion at p. 416 and fn. 124, *post)*, and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

The "elements" test announced in *Blockburger* was later elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S.

162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[117] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

Malice murder and felony murder are defined by separate statutes and each requires proof of an additional fact which the other does not. (See *Blockburger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in section 189 and the specific intent to commit that felony; malice murder does not. (§§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to contend, as this Court stated in *People v. Carpenter*, *supra*, that the language in *People v. Dillon*, *supra*, on which appellant relies, "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first

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[117] "The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence--including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.), original emphasis.)

italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, then malice murder and felony murder are different crimes. (See *United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra,* 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623 [state and federal due process require that all elements of the charged offenses be proven to the jury beyond a reasonable doubt].) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, quoting *Jones v. United States* (1999) 526 U.S. 227, 243, fn. 6; *id.* at p. 490.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Moreover, due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the

defendant has been charged. (*In re Winship*, *supra*, 397 U.S. at p. 364.) The right to jury unanimity in a criminal case is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638; see also *Ring v. Arizona* (2002) 536 U.S. 584, 605-606). As such, in a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This conclusion cannot be avoided, despite this Court's previous rulings attempting to do so by recharacterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160 citing *Schad v. Arizona* (1991) 501 U.S. 624, 630-645 (plur. opn.) [unanimity not required as to whether a killing was premeditated or deliberate, or that it occurred in the commission of an enumerated felony].) There are three reasons that this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are

essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, it declared:

> We have held, 'By conjoining the words "willful, deliberate, and premeditated" in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill.' [Citation.]

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[118]

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[118] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written [*sic*] by the Legislature" (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839). Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes (continued...)

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular *means* used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by evidence that the defendant used a knife or by evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the *elements* specified in the statute defining first degree murder (§ 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 301-307; *Ring v. Arizona*, *supra*, 536 U.S. at pp. 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in

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[118] (...continued)
purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought.'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, referencing §§ 187, subd. (a) & 189, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Malice is a true "element" of murder in anyone's book.

Accordingly, it was error for the trial court to deny appellant's request and to fail to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. The harm was exacerbated when the prosecution argued that the jury must return a verdict of first degree murder even if only some of them believed that what occurred was a premeditated, deliberate murder, and others of them believed that what occurred was a felony murder. (110RT:17337.) They did not, he argued, have to agree unanimously on which theory the prosecution presented, but only as to whether what occurred was a first degree murder. (110RT:17337.) Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless-error analysis can operate. The failure to so instruct, the harm from which was exacerbated by the prosecutor's argument, was a structural error, and reversal of the entire judgment is therefore required. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

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THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF SECTION 187

At the conclusion of the guilt phase of appellant's trial, the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 24CT:4905; 111RT:17631-17632) or killed during the commission or attempted commission of a robbery (CALJIC No. 8.21; 21CT:4906; 111RT:17632). The jury found appellant guilty of murder in the first degree. (24CT:4986.) The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[119]

Count 1 of the information alleged that "[o]n or about the 29th day of March, 1995, in the County of Sonoma, State of California, the said defendant[] did violate Section 187(a) of the Penal [Code], in that [he] did willfully and unlawfully and with malice aforethought, murder FRANK VASQUEZ TREJO, a human being." (21CT:4247.) Both the statutory

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[119] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 1 of the information was an entirely correct charge of second degree malice murder in violation of section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony-murder in violation of section 189.

reference ("section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought, murder") establish that appellant was charged exclusively with second degree malice murder in violation of section 187, not with first degree murder in violation of section 189.[120]

Section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[121] "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,'

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[120] The information also alleged a robbery-murder special circumstance. (21CT:4248.) However, this allegation did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[121] Subdivision (a) of section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[122]

Because the information charged only second degree malice murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court*

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[122] At the time the homicide at issue occurred, section 189 provided in pertinent part:

> 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, carjacking, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

(1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[123] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence.

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "subsequent to *Dillon*,

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[123] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

supra, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge the offense of murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at pp. 107-108.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other statute purports to define premeditated murder (see § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense

defined by section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[124]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant

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[124] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

respects to sections 187 and 189 and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[125]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

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[125] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *Ex parte Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

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THE CUMULATIVE EFFECT OF A SERIES OF INSTRUCTIONAL ERRORS WAS PREJUDICIAL, VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements and those of their state constitutional analogs if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United

States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed.[126] (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

B. Instructions That Impermissibly Undermined and Diluted the Requirement of Proof Beyond a Reasonable Doubt

1. The Instructions on Circumstantial Evidence

The trial court instructed the jury that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (111RT:17619-17620; 24CT:4878.) The jury was also given four interrelated instructions – CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 – that addressed the relationship between the reasonable doubt requirement and circumstantial evidence. (111RT:17611; 24CT:4851 [CALJIC No. 2.01, Sufficiency of Circumstantial Evidence–Generally]; 111RT:17623, 24CT:4887 [CALJIC No. 2.02, Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental State]; 111RT:17638-17639; 24CT:4922 [CALJIC No. 8.83, Special Circumstances–Sufficiency of Circumstantial Evidence–Generally]; 111RT:17639-17640; 24CT:4923 [CALJIC No. 8.83.1, Special Circumstances–Sufficiency of Circumstantial Evidence to

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[126] Appellant's arguments in the trial court, in support of instructions denied and/or modifications to instructions denied, and in response to instructions given over appellant's objection were based both on state law and the federal Constitution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., Art. I §§ 15 & 16; 23CT:4625; see 107RT:16854.)

The court deemed appellant to have objected to an instruction when appellant submitted the matter to the court for determination without further argument. (107RT:16854-16855.)

Prove Required Mental State].)[127] These instructions, addressing different evidentiary issues in almost identical terms, 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." (111RT:17611, 17623, 17639; 24CT:4851, 4887, 4922, 4923.) These instructions informed the jurors that if appellant reasonably appeared to be guilty, they were to find him guilty – even if they entertained a reasonable doubt as to his guilt of the charged crimes. This four-times repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty of the charged crimes and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence

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[127] Although defense counsel did not object to the court instructing the jury with CALJIC Nos. 2.01, 8.83 and 8.31.1, the claimed errors are cognizable on appeal. Claims of instructional error are reviewable on appeal to the extent they implicate a defendant's substantial rights. (§ 1259; see *People v. Famalaro* (2011) 52 Cal.4th 1, 35.)

if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 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" (emphasis in original)].) The instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) Mandatory presumptions, even ones that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

The instructions had the effect of significantly lightening the burden of proof because they required the jury to find appellant guilty of the charged counts and the special circumstances true unless appellant presented evidence reasonably explaining the prosecution's incriminatory

evidence. Appellant told the jury that he had no intent to permanently deprive Deputy Trejo of his gun or gun belt and that he had no intent to shoot him. (95RT:15028-15029.) He took Deputy Trejo's gun belt only to disarm him. The shooting occurred when appellant tripped and fell and the gun accidentally discharged. (95RT:15033.) This evidence contested the prosecution's theory of a robbery and an intentional killing. The prosecution argued that appellant "never ever intended to do anything but deprive Deputy Trejo of that gun belt" (109RT:17290), that his intent to take permanently the gun and gunbelt was there as soon as he pointed that weapon at Deputy Trejo and that appellant's testimony to the contrary was to protect his codefendant, Moore (109RT:17298).

Even if the jury rejected aspects of appellant's defense, it may still have harbored serious questions about the sufficiency of the prosecution's case. However, under the erroneous instructions, the jury was required to convict appellant if he "reasonably appeared" guilty, even if the jurors entertained a reasonable doubt of his guilt. The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences prejudiced appellant by suggesting that appellant was required to prove his defense was reasonable before the jury could deem it credible. The instructions 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, citing *In re Winship*, *supra*, 397 U.S. at p. 364; *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

Here, all four instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you must accept the

reasonable interpretation and reject the unreasonable." (111RT:17611, 17623-17624, 17639-17640; 24CT:4851, 4887, 4922, 4923.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 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 the existence of that element. Similarly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes that were supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

Contrary to the instructions, the jury did not have to accept the prosecution's theory – even if they believed it was reasonable. There was no question that appellant caused Deputy Trejo's death. The entire case centered on the dispute as to how that death occurred. The defense presented evidence that Deputy Trejo's death was the result of an accidental shooting that occurred during a resisted detention, which included disarming the deputy. The prosecution contended that the deputy's death was either the result of a deliberate and premeditated killing or alternatively, occurred during a robbery, contending that Deputy Trejo's gun was taken with the intent to permanently deprive him of it, and not simply to disarm him. The prosecution's case rested in part on inferences from circumstantial evidence. In this context, the circumstantial evidence instructions permitted, and indeed encouraged, the jury to convict appellant of a robbery and of a first degree murder and to find true the three alleged special circumstances upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The harm from these instructions was exacerbated by the prosecutor's argument that appellant's testimony about disarming Deputy Trejo was "not realistic" and was "unreasonable" (110RT:17336-17338), that appellant's testimony should be looked at "with great suspicion and distrust," as it "doesn't ring true" or "make sense" (109RT:17293) and that the defense evidence regarding the deputy's position at the time of the shooting "defies reasonableness" (110RT:17349). These arguments told the jury that appellant's evidence should be rejected because it failed to reasonably explain the prosecution's incriminatory evidence and the instructions suggested that appellant was required to prove his defense was reasonable before the jury could deem it credible.

The defects in the circumstantial evidence instructions were therefore likely to have affected the jury's deliberations. Appellant did not immediately shoot Deputy Trejo when, as the prosecutor argued, he "took Deputy Trejo by surprise" and "suddenly [sprang] out at him." (109RT:17312-17313.) Appellant did not, from this position of advantage, first shoot and then take the gun that had been on the deputy. Indeed, appellant did not take the shotgun from the patrol car, the money on Deputy Trejo's person or any other item of value. (95RT:15029.) The forensic evidence supported appellant's description of Deputy Trejo's position at the time of the shooting, which accounted for where he was hit when appellant tripped and fell and the gun accidentally discharged and which supported the defense that the shooting was not intentional. In sum, there was substantial evidence supporting appellant's defense, but the defense case was undercut by the instructions that directed the jury to find appellant guilty of robbery, a first degree murder and to find true the special circumstances if the prosecution's theory was "reasonable," unless appellant

presented evidence reasonably explaining the prosecution's incriminatory evidence. For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty of Counts 1 and 2, and the special circumstances true on a standard less than the federal Constitution requires.

2. Provisions of CALJIC Nos. 2.21.1, 2.21.2, 2.22, 2.27 and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard, as well as magnified the harm arising from the erroneous circumstantial evidence instructions. The court instructed appellant's jury with the following CALJIC instructions: No. 2.21.1, regarding discrepancies in testimony (24CT:4858; 111RT:17613); No. 2.21.2, regarding wilfully false witnesses (24CT:4859;111RT:17613-17614); No. 2.22, regarding weighing conflicting testimony (24CT:4860; 111RT:17614); and No. 2.27, regarding sufficiency of evidence of one witness (24CT:4863; 111RT:17615). Each of these instructions urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof than that of beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-280.)

CALJIC No. 2.21.2 authorized the jurors to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they] believe the *probability* of truth favors his or

her testimony in other particulars." (111RT:17613-17614; 24CT:4859; italics added.) 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"].)[128] Similar to the defendant in *Rivers*, the instruction as applied to the prosecution witnesses in appellant's case, who testified about their observations, provided critical evidence as to the prosecution theory as to what had transpired during the confrontation between Deputy Trejo and appellant. Much of the testimony of the prosecution's witnesses was not only contradictory, but it involved observations made under circumstances in which the witnesses, most of whom were inebriated, were watching a stressful situation, in poor lighting, from many yards away, and while looking through cars and a fence. Thus, the witnesses' credibility on the issue of what transpired during the confrontation – whether it was resisting an officer, including disarming him, and that the shooting occurred by accident, or was, as the prosecution contended, both a robbery and a premeditated and deliberate murder – was crucial. An instruction which told the jury that the prosecution witnesses' testimony could be accepted based on a "probability" standard was, as the court stated in *Rivers*, "suspect." (*Id.* at p. 1046.)

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[128] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, which found no error in an instruction that arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

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; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 also improperly created a burden of proof for appellant. If the jury found some part of appellant's testimony not to be true, he had not merely to create a reasonable doubt about the prosecution's case, but he had to establish that "the probability of truth favor[ed] his [own] testimony." It is well-established that a defendant has no burden of proof, even as to his own defense. (*People v. Gonzales*, *supra*, 51 Cal.3d at pp. 1214-1215.) The requirement in CALJIC No. 2.21.2 violated that principle. In addition, to the extent that the instruction appeared to be directed at appellant's exculpatory testimony about the circumstances surrounding Deputy Trejo's death, it improperly lessened the prosecution's burden by singling out appellant's testimony for suspicion.

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(111RT:17614; 24CT:4860.) The instruction informed the jurors that their ultimate concern was to determine which party had presented evidence that was comparatively more convincing than that presented by the other party. It directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. Thus, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364; see also CALJIC No. 2.50.2 [defining preponderance of the evidence as "evidence that has more convincing force than that opposed to it"].)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (111RT: 17615; 24CT:4863), was likewise flawed. The instruction 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.) Appellant admitted that he caused Deputy Trejo's death and testified to the circumstances of the homicide. His testimony would negate a first degree murder conviction and true findings of the special circumstances. However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is

sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of that fact depends" – without qualifying this language to apply only to prosecution witnesses – permitted reasonable jurors to conclude that appellant himself had the burden of convincing them that the homicide was not a first degree murder and that the special circumstances were not true, and that it was a difficult burden to meet given the "careful review" to be given to that evidence. Indeed, this Court "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court was correct in that the instruction needed improvement.[129] As given at appellant's trial, the instruction permitted reasonable jurors to conclude that appellant had the burden to prove his case. CALJIC No. 2.27 violated appellant's Sixth and

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[129] In *Turner*, the defendant's jury was instructed with a modified version of the then extant CALJIC No. 2.27. The jury was instructed as follows: "Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact to be proven solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends." (*People v. Turner*, *supra*, 50 Cal.3d at p. 696, fn. 12.) This Court suggested that an improvement to the instruction might be to include the following: "you are free to give the uncorroborated testimony of a single witness whatever weight you think it deserves. However, before crediting the uncorroborated testimony of a single witness, you should review such testimony carefully." (*Id.* at p. 696, fn. 14.) Subsequent to *Turner*, the Sixth Edition of CALJIC was issued, which was the edition used at appellant's trial. The Sixth Edition version of CALJIC No. 2.27 included the Court's recommended language. This modification, however, did not save the instruction from being unconstitutional by shifting the burden of proof.

Fourteenth Amendment rights to due process and a fair jury trial and his Eighth Amendment right to a reliable determination of death eligibility.[130]

CALJIC No. 8.20, defining premeditation and deliberation, misled appellant's jury regarding the prosecution's burden of proof by instructing that 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. . . ." (111RT:17631; 24CT:4905, italics added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "absolutely prevent"].) Among the modifications appellant proffered as to CALJIC No. 8.20 was one that would have deleted "precluding" and replaced it with "which negates" (23CT:4708), and another that would have instructed the jury that a reasonable doubt as to whether the homicide was an accident negated premeditation and deliberation. (23CT:4710.) The court denied the modifications. (108RT:17018-17019.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the

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[130] Appellant's request to modify CALJIC No. 2.27 would have at least diminished some of the harm from this instruction. Appellant's request, which was denied (107:RT:16913), would have told the jury that "[t]he prosecution bears the burden of proof as to each material element of the offense charged beyond a reasonable doubt. If that proof depends on a single witness, the testimony of that witness must be believed beyond a reasonable doubt." (23CT:4803.)

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." 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 disputed offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellants constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17).

3. The Motive Instruction 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 crime 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.

(111RT:17616; 24CT:4864.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive alone and shifted the burden of proof to appellant to show an absence of motive to establish that he is not guilty, thereby lessening the prosecution's burden of proof. As a matter of law, however, it is beyond question that motive alone, which is speculative, is insufficient to prove guilt. 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].)

The motive instruction stood out from other evidentiary instructions given to the jury that addressed an individual circumstance and which expressly admonished that it was insufficient to establish guilt. The court instructed the jury with CALJIC No. 2.52 with regard to flight, and with CALJIC No. 2.06 with regard to alleged efforts to suppress evidence, and in both instances instructed them that such evidence was not sufficient by itself to prove guilt. (111RT:17616; 24CT:4865 [flight]; 111RT17611; 24CT:4852 [non-participation in a lineup].) With regard to the flight instruction, it was read to the jury immediately after the motive instruction, highlighting their different standards and thereby allowing the jury to determine guilt based on 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 underlying the Latin phrase inclusio unius est exclusio alterius could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. For example, in *People v. Dewberry* (1959) 51 Cal.2d 548, the trial court instructed as to the effect of reasonable doubt as to the two highest offenses, and as between the lowest offense and justifiable homicide, but had failed to so instruct as between any of the

included offenses. (*Id.* at p. 557.) This failure left the instructions with the "clearly erroneous implication" that the rule did not apply to the omitted choice. (*Id.* at pp. 557-558.) Similarly, in *People v. Salas* (1976) 58 Cal.App.3d 460, prejudicial error occurred when the trial court created an inconsistency by giving a generally applicable instruction to only one aspect of the charge and failed to repeat it with respect to another aspect. (*Id.* at p. 474.) In *Salas*, the trial court presented the law as to how circumstantial evidence must be considered by the jury, but only as it applied specifically to the intent in robbery to permanently deprive the owner of his property. The court failed to so instruct as to the additional element charged with that count – robbery with the specific intent to inflict great bodily injury on the victim. The court found it "inescapable" that the trial court's error would have led the jury to conclude that it could find that defendant possessed such an intent by the circumstantial evidence introduced, without giving consideration to the requirement that the proved circumstances were not only consistent with the hypothesis that he had such specific intent, but were irreconcilable with any other rational conclusion. (*Id.* at pp. 474-475.) In the present case, the motive instruction, particularly given that it was read to the jury immediately preceding the flight instruction, would have led the jury to determine guilt based only upon a speculative presence of an alleged motive. The flight instruction told the jury that they may infer a consciousness of guilt if they found flight, but may not rely on it alone to establish guilt. The juxtaposition of these instructions exacerbated the harm from the motive instruction as it would have led appellant's jury to conclude that it could find appellant guilty based only on a speculation of motive. As stated above, such speculation is insufficient alone to establish guilt.

Moreover, the instruction, by informing the jurors that the presence of motive could be used to establish the defendant's guilt and that the absence of motive could be used to show the defendant was not guilty, effectively placed the burden of proof on appellant to show an absence of motive. (109RT:17290,17312, 17315; 110RT:17332, 17335; 111RT:17570 [prosecutor repeatedly argued appellant committed the crime to avoid returning to prison].) As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 364 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

C. 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 and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to the instructions discussed here. (See, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059 [addressing circumstantial evidence instructions as well as CALJIC Nos. 2.21.2, 2.22 and 2.27]; *People v. Myles* (2012) 53 Cal.4th 1181, 1216-1217 [addressing 2.01 and 8.83]; *People v. Solomon* (2010) 49 Cal.4th 792, 825-827 [addressing circumstantial evidence instructions and CALJIC Nos. 2.21.2 and 2.51]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions].) While recognizing the shortcomings

of some of the instructions, this Court has consistently concluded that 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, 386.) The question is whether there is a reasonable likelihood that 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 that 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 standard of proof beyond a reasonable doubt 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*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to

overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as they were given in this case, explicitly told the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to reasonable doubt. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943 [citations].) The effect of the "entire charge" in appellant's case was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by the reasonable doubt instruction.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions permitted convictions on a standard of proof less than proof beyond a reasonable doubt, delivery of the instructions was structural error and is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because the challenged instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the errors were harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here. The instructions directly related to the essential disputed facts, that is, whether Deputy Trejo's death was the result of an accidental shooting that occurred during a

resisted detention, which included disarming the deputy, or as the prosecution contended, an intentional shooting and robbery. Expert testimony explaining evidence at the scene supported appellant's description that Deputy Trejo was in a prone position at the time of the shooting, which supported the defense of accident. Although the prosecution sought to prove otherwise, even their own experts could not rule out that Deputy Trejo's body was in the position testified to by appellant. The prosecution was hard-pressed to find a single reliable witness who actually saw the shooting and could testify to a trustworthy account of what took place in the parking lot on March 29, 1995. The challenged instructions distorted the jury's consideration and use of circumstantial evidence and diluted the reasonable doubt requirement, undermining the reliability of the jury's findings. In light of the questions the jury had to decide, the dilution of the reasonable doubt requirement 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*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at pp. 504-505.) This is particularly true in this case when considered cumulatively with the other instructional errors set forth in Arguments 6 and 7, *ante*.

Moreover, CALJIC No. 2.51 not only allowed the jury to determine guilt based on alleged motive alone, but shifted to appellant the burden of proving the absence of motive, a faulty instruction particularly harmful in this case. Appellant admitted that he was the one responsible for Deputy Trejo's death. The crux of the case was appellant's intent at the time of the confrontation with the deputy. Appellant presented substantial evidence of, as well as argued that what had occurred at the time of the shooting was an

unintentional killing, either the felony of causing the death of a peace officer while resisting a detention (110RT:17528-17530 [defense closing argument]) or a second degree felony murder, a killing that occurred when appellant brandished a weapon (110RT:17530-17531 [defense closing argument]). Appellant also had testified that he did not want to return to prison. (95RT:15162.) Given that the motive instruction allowed the jury to determine guilt based only on an alleged motive, unless appellant proved its absence, the prosecutor was able to exploit the harm from this instruction by arguing that appellant's desire not to return to prison established appellant's "decision" to kill. (See, e.g., 109RT:17312 [prosecutor closing argument – appellant testifying that he was concerned about going back to prison if caught with the shotgun shows that he gave "careful thought" to what he was doing during confrontation with Deputy Trejo].) This error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's conviction. Accordingly, the judgment of conviction, the special circumstance findings and sentence must be reversed.

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APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY WHEN THE COURT ERRONEOUSLY EXCLUDED A JUROR WHO DISFAVORED THE DEATH PENALTY BUT WAS WILLING TO VOTE TO IMPOSE IT IF WARRANTED

A. Introduction and Summary of Proceedings Below

Before general voir dire, the court conducted individual sequestered voir dire of potential jurors to assess their willingness to consider imposition of a death sentence as well as life without parole ("LWOP"). Over defense objection, the court excused prospective juror 3727 based on her responses to questioning by the court and counsel, as summarized below. Because the record does not support the trial court's ruling, the removal of this juror violated appellant's rights to an impartial jury, a fair and reliable capital sentencing hearing, and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution.

1. Juror 3727's Questionnaire

The juror questionnaire provided a very general explanation of the bifurcated proceedings in capital cases. Prospective jurors were informed that if they found the defendant guilty of the offense and found one or more special circumstances true, the case would proceed to the sentencing phase. They were also informed that they would be asked to weigh mitigating and aggravating factors, which "may relate to the facts of the crime or to the defendant," and that the jury would be instructed on such factors if the case proceeded to a penalty determination. (10SuppCT:2686.)

In response to the inquiry about her general feelings about capital punishment, juror 3727 stated her belief that the death penalty does nothing

to deter murder and that it may be more expensive than LWOP due to appeals and court costs. (10SuppCT:2686.) She also stated, "However, there are crimes in which my knee-jerk reaction is to give the death penalty." (10SuppCT:2686.) She added, "I believe it should be used sparingly, in the most heinous cases, considering the remorse of the criminal and considering his/her background." (10SuppCT:2687.)

Regarding how her views have changed over time, juror 3727 stated, "I used to be opposed to the death penalty, period. But as I get older, and see that our society is becoming less respectful of life, and that more thoughtless, violent crimes are occurring, I am more susceptible to emotional reactions." (10SuppCT:2687.) She continued, "If I were to murder someone, I would not be surprised to pay for it with my life – that would be fair and responsible." (10SuppCT:2687, 2697.)

She thought LWOP was a more humane punishment, allowing the defendant to feel remorse and providing a "loophole" in the event of a wrongful conviction. (10SuppCT:2687.) Asked to choose among seven ideological stances regarding the death penalty, she picked "moderately against," forgoing "always against," and "strongly against." (10SuppCT:2687.) "Moderately against" was one step away from "neutral." (10SuppCT:2687.)

When asked whether her views on the death penalty would always lead her to impose a death sentence or would always lead her to impose a sentence of LWOP, she answered, "No," to both questions and explained again that she would consider the defendant's capacity for remorse, as well as the heinousness of the crime. (10SuppCT:2688.) She stated she would vote against the death penalty in a California election, because the penalty is too costly, is too final (in the event of a wrongful conviction), and is applied

disproportionately against people of color. (10SuppCT:2689.) When asked whether she could set aside her personal beliefs about LWOP and the death penalty, and apply the law, she chose, "Do not know." She explained, "I would certainly try – but I am subject to emotions like anyone else, and I do rely on intuition to guide me through much of life." She also questioned whether jurors have the right to decide another person's fate in general, but then concluded that they do, and noted that if our society was smaller, this notion would be self-evident. (10SuppCT:2689.)

2. *Hovey* Voir Dire

During sequestered voir dire, after inquiring into juror 3727's exposure to pretrial publicity, the court began asking about her attitudes regarding the death penalty. (42RT:6257.) The court reviewed with the prospective juror her beliefs that the death penalty is an ineffective deterrent to murder, that it may be more expensive than LWOP, and that it fails to provide a "loophole" in the event of a wrongful conviction. (42RT:6257-6258.) The court confirmed that the juror also believed that some crimes may warrant the death penalty, and that "it should be used sparingly in the most heinous cases, considering the remorse of the criminal and considering his or her background." (42RT:6257-6258.)

In explaining the penalty trial procedure, the court informed the juror that one of the instructions she would receive was that she could only vote for death if she was convinced that the factors in favor of death substantially outweighed the factors in favor of LWOP. (42RT:6259.) The court asked if she could agree with this principle, and the juror said, "It would depend on what the factors are and if I agreed with those factors." (42RT:6259.) Her further responses revealed her misunderstanding that if

she was a penalty juror, she would be obligated to impose death if certain factors were proved:

> PROSPECTIVE JUROR: I mean, I don't know if I would agree to be bound by factors that somebody else was saying are factors that should determine death or not.
>
> COURT: Let me explain.
>
> PROSPECTIVE JUROR: Okay.
>
> COURT: All we – all I will do – I need to wait to hear what factors are presented. That's why I can't go into all – there are many factors that might be presented. After I hear the evidence, the attorneys and I will discuss which jury instructions then I will be reading to you and you take them into the jury room with you. Factors in aggravation, factors in mitigation, but they generally involve criminal – the defendant, and who is at that point convicted, and they involve other circumstances about the crime that just aren't relevant in the first phase. It's for you to decide what weight to give them.
>
> PROSPECTIVE JUROR: Okay.
>
> COURT: Or any weight at all; whether you find they're neutral. That's the weighing process. It's not mathematical. You can't just count them up on one side or the other. It's what weight you give them. You see?
>
> PROSPECTIVE JUROR: Uh. Huh.
>
> COURT: So your judgment is there?
>
> PROSPECTIVE JUROR: Right.

(42RT:6260.)

After this exchange, the court explained that it could not in advance provide prospective juror 3727 with all of the jury instructions at this point,

and asked her whether she would nonetheless decide the case in accordance with the instructions and based on what weight she gave those factors. She responded that she would. (42RT:6261.)

Juror 3727 still remained unclear on the discretion she would have as a penalty juror, however, as evidenced by the following exchange:

> COURT: And I also need to know whether, understanding that at that phase, there's only the two choices, for each juror to vote for.
>
> PROSPECTIVE JUROR: Right.
>
> COURT: If you believed the evidence warranted it after hearing all the evidence and the instructions, arguments by the lawyers and hearing the views of the other jurors, if you believed it was warranted, could you vote to impose death?
>
> PROSPECTIVE JUROR: I would have a hard time doing that.
>
> COURT: And I can certainly appreciate that. But –
>
> PROSPECTIVE JUROR: You need a yes or a no?
>
> COURT: I do, because I – I don't ask whether – you could say it would be very hard to be on this jury. I would assume it would be.
>
> PROSPECTIVE JUROR: Well, it would be hard to say that someone should be put to death because then I would be guilty of killing that person. You know, if we all agreed, I would have to share in that responsibility, and I don't know. I mean, there might be times when – I'd have to hear the factors. There might be times when I would say yes, I think it's warranted. But it would be a hard decision, so I mean, I can't say – I mean –
>
> COURT: I'm not asking how you are going to vote, of course.

PROSPECTIVE JUROR: I know.

COURT: And to precommit.

PROSPECTIVE JUROR: Well, I can't – I can't say. I don't know. My knee-jerk reaction is to say no, it would be very hard for me to vote for the death penalty. I would be more apt to argue for life, but you say that there's cases – there's factors in which you have no choice but to vote?

COURT: No. I'm not saying that.

PROSPECTIVE JUROR: You do have the choice.

COURT: I'm not ever going to say you don't have the choice. But in order for you to vote for death you would have to be convinced that the factors in favor of death substantially outweighed factors in favor of life without parole, or the instruction is, you couldn't vote for death. That is the instruction. That's an example of the guidelines. . . . So the question is: Under those circumstances could you vote to impose the death penalty.

PROSPECTIVE JUROR: No, I don't think so.

(42RT:6262.)

After clearer questioning, however, juror 3727 explained that she would consider the death penalty in cases where the she felt the factors were serious enough to warrant it. During voir dire by the prosecutor, she explained that she had heard of some cases where the death penalty was imposed and that she had found the sentences appropriate and "good judgment[s]." (42RT:6263.) She agreed that she is philosophically opposed to killing in general and discussed her vegetarianism in that regard, but she did not adopt the prosecutor's suggestion that she was "unable" to vote for death. She instead explained, "[T]he factors. . . would have to be

extremely severe for me to feel that I could vote, yes, for death." (42RT:6264.) When the prosecutor asked her if in all honesty she could sentence anyone to death, she said, "I can't give you just yes or no . . . probably 85 percent no, or 90 percent no . . . [but] it would depend on what I heard about the crime and about the person." (42RT:6264.) She hypothesized that she could vote for death where "somebody that had repeatedly committed a crime" such as murder or rape "or something like that." (42RT:6264-6265.) She also wondered, "if it's life without parole, why kill them?," but she again explained that she had previously heard of death sentences that she thought were the right outcome. (42RT:6266.) She agreed that she would not want to be the one making that decision, and opined that it would not be good for her mental health. (42RT:6266.)

Juror 3727 ultimately reiterated to defense counsel that she could weigh the aggravating and mitigating factors, and if warranted, consider voting for the death penalty. (42RT:6272.) When asked whether a death sentence was "a reasonable possibility" such that she "would consider voting for the death penalty," she said "I would consider it." (42RT:6272.) When the court resumed voir dire and asked her straightforwardly whether she could actually vote for death, she said she "could consider it." (42RT 6274.) When the court then asked, "Consider it, meaning it is still – it is a possibility?," she said, "It would be a possibility. So I guess that says yes. I mean, it would be a consideration. It would be a possibility." (42RT:6274.)

3. Argument and Ruling

The court ultimately granted a cause challenge on the grounds that juror 3727 never "unequivocally stated that she could consider the death penalty as a reasonable possibility." (46RT:6961.) The prosecutor had

challenged juror 3727, arguing that she expressed an inability to impose the death penalty. The court responded that the juror had said many different things, but that its strongest impression was she could not impose the death penalty. (43RT:6499-6500.) Defense counsel argued that under *People v. Ashmus* (1991) 54 Cal.3d 932, the juror was death-qualified. (43RT:6500.) The court delayed ruling and continued the matter for argument the next court day. (43RT:6500.)

At the continued hearing, the court twice announced its tentative ruling to *deny* the challenge for cause. (44RT:6558, 6593.) After both sides argued, the court stated, "I need to take this one under consideration," and indicated it needed to read the transcript again. (44RT:6597.)

On the next court date, appellant argued in favor of retaining juror 3727, noting several places in the questionnaire and voir dire transcript where the juror stated she could engage in the weighing process and that a death sentence was a possibility for her. (45RT:6765-6772.) The trial court ultimately concluded that the juror was substantially impaired in her ability to impose the death penalty, and granted the challenge. (46RT:6959.)

B. Summary of Controlling Law

A defendant's right to a jury trial includes the right to a fair and impartial jury, which includes the right to "diffused impartiality," otherwise referred to as "neutrality." (*Hovey v. Superior Court* (1980) 28 Cal.3d 1,19 [overruled on other grounds as recognized in *People v. Roldan* (2005) 35 Cal.4th 646, 691], citing *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 227, fn. 43 (dis. opn. of Frankfurter, J.); *Taylor v. Louisiana* (1975) 419 U.S. 522, 530.) "A neutral jury is one drawn from a pool which reasonably mirrors the diversity of experiences and relevant viewpoints of those

persons in the community who can fairly and impartially try the case." (*Hovey v. Superior Court*, *supra*, 28 Cal.3d at pp. 19-20.)

Accordingly, a defendant cannot be sentenced to death if the penalty jury was chosen by excluding prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 522.) Such a procedure violates a defendant's rights to due process and a fair and impartial jury under the Fourteenth and Sixth Amendments, as it would produce "a jury uncommonly willing to condemn a man to die." (*Id.* at pp. 518, 521.) Accordingly, a prospective juror may be excluded for cause only when his or her views on capital punishment would "prevent or substantially impair" the performance of his or her duties as a juror. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ghent* (1987) 43 Cal.3d 739, 767.) Under that test, "[a] prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Stewart* (2004) 33 Cal.4th 414, 441 [internal quotes and citations omitted].) The prosecution, as the moving party, bears the burden of demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*Id.* at p. 445.)

"But neither *Witherspoon* nor *Witt* requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law." (*People v. Avila* (2006) 38 Cal.4th 491, 529, citing *Lockhart v. McCree* (1986) 476 U.S. 162 and *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146.)

Furthermore, "a juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Kaurish* (1990) 52 Cal.3d 648, 699.) Indeed, under California's death penalty scheme, jurors must consider "their *own* values in determining whether aggravating factors outweigh mitigating factors" in deciding penalty. (*People v. Stewart, supra,* 33 Cal.4th at p. 447, italics added, citing *People v. Kaurish*, *supra*, 52 Cal.3d 648, and *Wainwright v. Witt*, *supra*, 469 U.S. 412.)

Thus, a juror cannot be excluded because her opposition to the death penalty would lead her "to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty." (*People v. Stewart, supra*, 33 Cal.4th at p. 447.) The fact that the juror's opposition to the death penalty "would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt* [citation]." (*Ibid.*) "A juror might find it very difficult to vote to impose *the death penalty*, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*Ibid.*, italics in original.)

If a prospective juror equivocates on whether she can fulfill her oath in a capital case, the trial court's determination of substantial impairment is

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

The erroneous exclusion of a juror for cause based on her death penalty views requires automatic reversal. (*Gray v. Mississippi* (1987) 481 U.S. 648, 661, 668.) Reversal is required even if the prosecutor had remaining peremptory challenges and could have excused the prospective juror. (*People v. Tate* (2010) 49 Cal.4th 635, 666.) Accordingly, as discussed below, appellant is entitled to reversal of his death sentence.

C. The Court Erroneously Removed Juror 3727 for Cause, and Reversal Is Required

The removal of juror 3727 violated appellant's Sixth, Eighth and Fourteenth Amendment rights to impartiality, to a fair and reliable death verdict and to due process. Throughout voir dire, the juror stated that she

would weigh the aggravating and mitigating factors, and she concluded that she would consider voting for death and that such a vote was "a possibility" for her. Although the juror initially stated that she did not think she could impose the death penalty, she made this statement after she experienced confusion about whether she was permitted to exercise her own discretion in the weighing process, and after the court conducted ambiguous questioning. (42RT:6262.) Once she better understood her role as a penalty juror and comprehended the discretion she would have in deciding between death and LWOP, juror 3727 consistently affirmed that she would consider a death sentence if the facts of the case and characteristics of defendant called for such a sentence. Because no substantial evidence supported the removal of this juror, reversal is required.

As an initial matter, the court's stated reason for granting the challenge is not supported by the record. After twice indicating its intent to deny the motion (44RT:6558, 6593), and then expressing a need to read the transcript again (44RT:6597), the court granted the motion on the grounds that juror 3727 "never unequivocally stated that she could consider the death penalty as a reasonable possibility." (46RT:6961.) However, juror 3727 had said that a death vote "would be a possibility" and "a consideration" for her. (42RT:6272, 6274.) Moreover, juror 3727 was not asked to qualify the possibility of her voting for death as a "reasonable" one. When defense counsel asked, "[I]s it a reasonable possibility for you in your mind, that you would consider voting for the death penalty," the gist of that question (and the last thing the juror heard) was whether she would consider voting for the death penalty, as evidenced by her answer, "I would consider it." (42RT:6272.) When the court then asked, "Could you vote in favor of death?," she responded, "I can only say, as I said to [counsel], I

would consider it, you know. I would consider it." (RT 6274.) When the court asked, "Consider it, meaning it is a still – it is a possibility?," she answered, "It would be a possibility. So I guess that says yes. I mean, it would be a consideration. It would be a possibility." (44RT 6274.) The juror was not asked to then qualify whether the "possibility" or the "consideration" would be a "reasonable" one. Thus, the court's conclusion that she never unequivocally stated she could consider the death penalty a "reasonable possibility" was insufficient to support her removal; her answers to the questions actually posed, did reflect a willingness to consider the death penalty as a reasonable possibility, and an ability to "conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 441.)

Moreover, in concluding that the juror did not unequivocally state that she could vote for the death penalty, the court placed the burden on the juror, and the defense, to establish that she was a death qualified juror. But it was the prosecution that bore the burden of showing that juror 3727's views prevented or substantially impaired her duties as a juror. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 445 [internal quotes and citations omitted].)

No substantial impairment was shown, however, because juror 3727 was clear that she would not automatically vote for life or for death, and that her decision would involve among other things a weighing of (1) the heinousness of the crime; (2) the defendant's background; and (3) "what [she] had heard about the crime and about the [defendant]." (10SuppCT:2687, 2688; 42RT:6257-6258, 6264.) She supported the death penalty in certain factual scenarios – so much so that her "knee-jerk" reaction was to favor it in some cases. (10SuppCT:2686.) She rejected the

notion that she "would not be able to . . . impose the death penalty," and explained instead that such a vote would require "severe" factual circumstances. (42RT:6264.)

While she initially stated in voir dire that she did not think she could impose the death penalty, this stemmed from some initial confusion about the governing law and her discretion as a penalty juror. (42RT:6272, 6274.) She first revealed her confusion regarding her role as a prospective penalty juror during the court's initial voir dire. After the court informed her that she could vote for death if she was convinced that the factors in favor of death outweighed the factors in favor of life, and asked her if she agreed to be bound by those guidelines, the juror said, "It would depend on what the factors are and if I agreed with those factors." (42RT:6259.) Thus, the juror's first answer to a question regarding her willingness to impose the death penalty indicated no refusal to do so, but reflected a misunderstanding of what the court meant by "factors" and a reluctance to prejudge before hearing what those factors were.

Shortly thereafter, juror 3727 said she would "have a hard time" voting to impose death, but explained again that she would first "have to hear the factors," and added, "There might be times when I would say yes, I think it's warranted. But it would be a hard decision, so, I mean, I can't say. . . ." (42RT:6262.) The court explained that it was not asking the juror how she intended to vote, and the juror explained again that she could not predict what she would do, and stated, "no, it would be very hard to vote for the death penalty. I would be more apt to argue for life, *but you say. . . there's factors in which you have no choice to vote* [for the death penalty]?" (42RT:6262.)

Thus, at this juncture, the juror again expressed appropriate reluctance to prejudge the case and to participate in a procedure that would *require* her to automatically vote for death if certain factors were present. Her equivocal answers up to this point reflected a misunderstanding of the penalty phase deliberation process as described by the court, not her general ability or inability to vote for death if appropriate.[131]

In an attempt to correct this misunderstanding, the court said, "[I]n order for you to vote for death you would have to be convinced that the factors in favor of death substantially outweighed factors in favor of life without parole, or the instruction is, you couldn't vote for death." The court immediately followed this explanation with the question, "Under those circumstances could you vote to impose the death penalty?" (42RT:6262.) To this, the juror responded, "No, I don't think so," – but the meaning of that answer is entirely unclear because she was responding to a discussion of the circumstances under which she "couldn't vote for death." When the court asked whether "under those circumstances," she could impose death, the "circumstances" to which the court was referring were ambiguous; the circumstances could have been "that the factors in favor of death substantially outweighed factors in favor of life without parole," or conversely, that no such outweighing occurred and she "couldn't vote for

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[131] Juror 3727 was not the only juror who initially labored under the misconception that the existence of certain factors automatically required a death sentence. Juror 3340 likewise revealed a similar misunderstanding more than half way through his *Hovey* voir dire. That juror said to the prosecutor, "I mean, the law states that in certain types of crime the death penalty is the punishment, is that correct?" After then hearing a better explanation of his duties and discretion as a juror, he told the court, "I understand this clearer right now than I did a few minutes ago." (42RT:6197-6199.)

death." Thus, the juror's answer, which she later retracted in effect when presented with clearer questions by counsel, was not the type of 'equivocation' that triggers deference on review. (See *People v. Heard* (2003) 31 Cal.4th 946, 967; see also, CJER, Bench Handbook and Jury Management (Revised 2008) Jury Selection, p. 29 [instructing that the court's voir dire examination should be comprised of questions that "are simply phrased"].)

Indeed, the record demonstrates that once juror 3727 better understood the discretion she would have as a penalty juror, she consistently expressed a willingness to vote for death, but explained that such an outcome would depend heavily on the factors under consideration and would weigh solemnly on her conscience. For example, when the prosecutor asked whether her general opposition to killing was the reason she "would not be able to . . . impose the death penalty," juror 3727 rejected the notion that she was "unable" to do so when she answered, "[T]he factors, or whatever, would have to be extremely severe for me to feel that – that I could vote, yes, for death." (42RT:6264.) Then, when the prosecutor asked "[D]o you think in all honesty that you would be able to sentence anyone to death?," she answered, "Well I can't give you just yes or no . . . probably 85 percent no, or 90 percent no. I mean, it would depend on what I had heard about the crime and about the person." (42RT:6264.)

Thus, at this point juror 3727 established herself as a pro-life juror willing to vote for death in that narrow class of cases in which it should apply, but only after weighing the relevant factors. She opined that such a case would "probably" involve "somebody that had repeatedly committed a crime" such as rape or murder, or someone who did not show any remorse. (42RT:6264-6265.) While she did not think she would "equally consider"

both LWOP and the death penalty, she re-estimated that she would consider life without parole the better choice 80 percent of the time (42RT:6265), and thus necessarily showed a 20 percent willingness to impose death. Juror 3727 therefore indicated she would have "impose[d] a higher threshold before concluding that the death penalty [was] appropriate," and removal on such grounds was impermissible given her willingness to weigh the factors and consider the death penalty if warranted. (*People v. Stewart, supra*, 33 Cal.4th at p. 447; see *Gray v. Mississippi*, *supra*, 481 U.S. at p. 658 [the exclusion of jurors other than those who will not follow their oaths "unnecessarily narrows the cross section of venire members" and "'stack[s] the deck against the petitioner'"], quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 523.)

Moreover, after further explanation by defense counsel of the discretion she would have as a penalty juror, juror 3727 concluded that she could weigh the aggravating and mitigating factors, and consider the death penalty as a possible sentence. (42RT:6269-6272.) In response to further court questioning, she reiterated that she would consider death as a possibility. (42RT:6274.) These last answers were the best indicators of juror 3727's fitness as a penalty juror. (See *Gray v. Mississippi*, *supra*, 481 U.S. at pp. 653-659 [error to excuse juror who initially equivocated but ultimately said she could vote for death].)

Given her consistent clarification that she could weigh the factors and was neither unwilling nor unable to impose the death penalty if warranted, juror 3727 was a death qualified juror. In fact, she was similar to the prospective juror in *People v. Heard*, *supra*, 31 Cal.4th 946, who was erroneously excluded. (*Id.* at p. 964.) In *Heard*, this Court explained that "[d]espite the trial court's imprecise questioning, [the juror] made it quite

clear that he would not vote 'automatically' – in other words, 'no matter what the evidence showed' – either for life imprisonment without the possibility of parole or for death . . . ." (*Ibid.*) When the trial court asked the juror whether he would vote automatically for LWOP if evidence showed that the defendant had experienced psychological problems or abuse, the juror stated, "'Well, whatever the law states." (*Ibid.*) When the court further asked whether "if there were past psychological factors ... they would weigh heavily enough that you probably wouldn't impose the death penalty," the juror, after a long pause, stated, "I think they might." (*Id.* at p. 965.) He agreed that such factors would "auger toward life without the possibility of parole," and when asked "Are you absolutely committed to that position?," he said "Yes." (*Id.* at p. 961.) But when the court then asked, "Are you saying that if there were psychological factors, without naming what they might be, you would automatically vote for life without possibility of parole?" the juror answered, "Without naming them, I don't think so." (*Ibid.*)

This Court found the excusal of the *Heard* juror error because he indicated that he had no predisposition on the death penalty and that he could follow the law and fulfill his oath. (*People v. Heard, supra,* 34 Cal.4th at p. 967.) This Court did not defer to the trial court's findings, because to the extent that his answers were otherwise ambiguous, the trial court's "unclear inquiries," were to blame for any vagueness. (*Ibid.*) Here, too, juror 3727 expressed a willingness to weigh the factors and consider the possibility of a death sentence; to the extent that her initial answers on voir dire were ambiguous, this resulted from unclear questioning and/or misapprehension of the law governing penalty determinations.

Furthermore, although juror 3727 did express disfavor of the death penalty generally and was "moderately" opposed to it, such views were not grounds for excusal because she stated she would weigh the factors in making her determination and she considered a death vote a possibility for her. (*People v. Stewart, supra*, 33 Cal.4th at p. 447, citing *Wainwright v. Witt, supra*, 469 U.S. 412.) Indeed, the inclusion on capital juries of persons with such views who can nonetheless weigh the factors and follow that law, is necessary to achieve impartiality under the Sixth Amendment. (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 522.)

Although this Court has noted, "[W]e previously have held it permissible to excuse a juror who indicated he would have a 'hard time' voting for the death penalty or would find the decision 'very difficult,'" the Court also warned that such responses are not "magic phrases" requiring excusal, but rather are indications of "a degree of equivocation." (*People v. Roldan, supra*, 35 Cal.4th at p. 697 [no error for excusal of juror who said she "can't live with" the death penalty and would "probably never" vote to impose it], discussing *People v. Pinholster* (1992) 1 Cal.4th 865, 917.) The Court was referring to its earlier case of *Pinholster, supra*, where the juror's equivocation went far beyond his having a "hard time" with the death penalty generally; the juror in that felony-murder case stated specifically that he would have a "hard time" imposing death in a case involving a "burglar who stabs an adult victim." (*People v. Pinholster, supra*, 1 Cal.4th at p. 917.) Further, he said he "would find it very difficult to find a defendant guilty if the penalty would be death in a case *such as this*." (*Ibid.*, emphasis added.) He also "affirmed unequivocally that he could not return a death penalty in a burglary-murder case regardless of the aggravating circumstances," and that "he could not under any circumstance

impose the death penalty in such a case." (*Ibid.*) Thus, the *Pinholster* juror was appropriately removed not because he generally found it difficult to impose the death penalty, but because he was unequivocally opposed to doing so in a felony-murder case. (*Ibid.*) His removal was therefore consistent with the principle enunciated by this Court that, "[t]he real question is 'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*.'" (*People v. Heard*, *supra*, 31 Cal.4th at pp. 958-959, internal citations omitted, emphasis in original.)

Here, however, juror 3727 never indicated a similar unwillingness to impose the death penalty in the case before her. She may have had "difficulty" or a "hard time" with the death penalty *generally*, but she certainly never suggested that she was unwilling to return a death verdict on the theories advanced in this case. Moreover, her answers suggested that she *would* have considered the death penalty in this case; juror 3727 thought she might vote to impose death in a case where the defendant had repeatedly committed crimes such as rape or murder, "or something like that." (42RT:6264-65.) Given that the penalty phase evidence included lengthy recitations of appellant's priors, including a rape, five armed robberies, and three assaults, and that appellant was on trial for murder with a shotgun, among other charges, appellant was not far from the type of recidivist defendant juror 3727 contemplated. Thus, while juror 3727 expressed a conscientious (though not absolute) opposition to the death penalty in general, she did not express an unwillingness to impose it in this case.

Furthermore, the court could not remove juror 3727 for expressing concern about the death penalty's finality and the problem of wrongful

convictions. A juror's "concern regarding the risk of error in the criminal justice process" is not in itself disqualifying. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 449.) Regardless, despite her concerns, juror 3727 was not even "firmly" opposed to capital punishment; she did not "always" or "strongly" oppose the death penalty, but only "moderately" opposed it. (10SuppCT:2687.) She believed the death penalty should be used "sparingly," and despite her unease with the penalty in general, she sometimes thought it reflected "a good judgment." (10SuppCT:2686; 42RT:6257-6258, 6263.) As this Court has made clear, "many members of society – and thus many prospective jurors" who express "generalized opposition to the death penalty, and approval of the sentence of life in prison without possibility of parole," will "remain qualified to sit as a juror under the standard set out in *Witt* [citation]." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 448, citing *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

Moreover, although the trial court's opportunity to observe a witness's demeanor is usually the primary reason for deference on appeal, here the record shows that the juror's answers, not her demeanor, were the deciding factors for the trial court. After noting that juror 3727 had said "many different things" and stating that its strongest impression was that she could not vote to impose death, the court revisited the matter the next day and twice announced that it intended to *deny* the challenge for cause. (42RT:6558, 6593.) The subsequent arguments by counsel for both sides, as well as by appellant, reveal that the focus of all parties was on the content of the juror's answers, not her demeanor. The prosecutor cited to eight of the juror's statements, and provided transcript citations for them. (42RT:6593-6594.) Defense counsel then cited to the juror's questionnaire and to several statements she made on voir dire, and likewise provided

citations to the transcript. (42RT:6594-6596.) No one discussed demeanor. After this, the court indicated its need to "take a look at the transcript again on her." (42RT:6597.) Later, appellant also cited to several places in the questionnaire and the transcript showing that juror 3727 was death-qualified. (45RT:6764-6772.) The court responded, "I will continue to consider 3727. I do, of course, have the transcript myself and have read over her answers. I will take another look at her... ." (45RT:6772.) Again, no discussion of demeanor took place.

On a later court date, the court excused the juror, stating, "I did not believe that 3727, on total balanced view *of reviewing again all her answers*, indicates that she could fulfill her duties as a juror." (46RT:6959.) When the court ultimately concluded that it did not believe juror 3727 "unequivocally stated that she could consider the death penalty as a reasonable possibility," it again made no mention of the juror's demeanor. (46RT:6961.) Thus, the court made it clear that its decision resulted from its review of the record, not juror 3727's demeanor during questioning.

In sum, given that juror 3727's initially ambiguous answers flowed from a misunderstanding of the procedures for determining penalty and she otherwise consistently indicated a willingness to weigh the factors and remain open to the possibility of a death sentence if appropriate, the prosecution did not meet its burden to show substantial impairment. Juror 3727 could not be removed "simply because [she] voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v Illinois, supra*, 391 U.S. at p. 522.) She was an appropriate penalty juror – one who found the death penalty applicable in the worst cases, and who was willing to consider it in such cases, but who would not rush to impose it without restraint and without conscience.

She was the kind of juror who is necessary in a capital trial in order to avoid the assembly of "a jury uncommonly willing to condemn a man to die." (*Ibid.*) Depriving appellant of this juror violated his constitutional rights to impartiality, due process, and a reliable death verdict. The error requires automatic reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 668; *People v. Tate, supra*, 49 Cal.4th at p. 666.)

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THE COURT ERRONEOUSLY ADMITTED EVIDENCE THAT APPELLANT THREW URINE AT A PRISON GUARD BECAUSE THE INCIDENT DID NOT INVOLVE FORCE OR VIOLENCE AS CONTEMPLATED IN SECTION 190.3, FACTOR (B)

A. Introduction

During the penalty trial, over defense objection, the court permitted the prosecutor to present evidence that appellant had thrown a milk carton of urine on correctional officers while he was in custody during trial. The evidence was inadmissible because although the incident resulted in a technical battery, it did not involve "force or violence" within the meaning of section 190.3, factor (b). The error prejudiced appellant because the jury likely focused on the repulsiveness of the act, when it should have been limited to considering only violent conduct.

B. Procedural Background

After the defense objected to the admissibility of evidence that appellant had committed a battery against a custodial officer on October 13, 1996 (115RT:18379-18380), the prosecutor made an offer of proof on that item of alleged aggravation. (115RT:18524.) He said the evidence would show that appellant threw a liquid onto three correctional officers, that appellant told them it was urine, and that it tested positive for urine. (115RT:18524-18526.)

During argument on the admissibility of that evidence, the defense requested, and the court denied, a *Phillips* hearing.[132] (116RT:18618.)

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[132] See *People v. Phillips* (1985) 41 Cal.3d 29, 72, fn 25 [expressing preference for in limine hearing before penalty phase to determine whether substantial evidence exists of violent crimes alleged as aggravation under (continued...)

Given that denial, the defense requested that the court at least limit the testimony by permitting witnesses to testify only that a "liquid" was thrown, but not that the liquid was urine. (116RT:18619.) Counsel argued that since the only issue under factor (b) was whether the assault was an act of violence, the fact that urine was involved was irrelevant. Specifically, counsel argued that unless the substance was a caustic liquid that would increase the harm caused by the assault, the jury need not hear that the liquid was urine, and that such testimony would be more prejudicial than probative under Evidence Code section 352. (116RT:18619-18620, 18621.) The court denied the request that jurors hear only that the substance was liquid, and overruled the section 352 objection on the grounds that the probative value of urine evidence was "very high." (116RT:18621.)

The jury then heard from Officers Basurto and Williams that while appellant was in custody in the Sonoma County jail on October 13, 1996, four officers went to appellant's cell to conduct a search. (119RT:19009-19012.) When Basurto opened the food port to the cell, appellant yelled profanities and threw a milk carton of urine though the food port. Some of the urine hit Basurto on the arms, chest and face, and hit two other officers in the waist and leg areas. (119RT:19012-19019.)

C. The Trial Court Erred In Admitting Evidence Of The Assault With Urine Because The Incident Involved No Force Or Violence As Required By Factor (b)

The United States Supreme Court has held that the phrase "force or violence" under factor (b) is not unconstitutionally vague because that subsection is phrased in "conventional and understandable terms," and has a

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[132] (...continued)
section 190.3, factor (b)].)

"common-sense core of meaning . . . that criminal juries should be capable of understanding." (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-976; accord, *People v. Dunkle* (2005) 36 Cal.4th 861, 922; *People v. Davis* (1995) 10 Cal.4th 463, 541.) Consistent with the stated purpose of factor (b) and its common-sense meaning, "'force' is 'such a threat or display or physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death.' (Webster's 3d New Internat. Dict. (2002) p. 887)." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.) A common definition of "violent" is "characterized by extreme force . . . marked by abnormally sudden physical activity and intensity." (Webster's 3d New Internat. Dict. (2002) p. 2554; see also Oxford American Dict. (1980) p. 774 [defining "violent" as "involving great force or strength or intensity"].)

In keeping with these common definitions, this Court has recognized that "force or violence" under factor (b) refers to conduct causing, threatening to cause, or likely to cause pain, serious bodily harm, or death. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 392 [threatening arson and throwing burning sheet in trash can inside jail amounted to conduct involving threat of force or violence under factor (b) because of the "physical danger" it posed to the life and limb of other inmates and correctional officers]; *People v. Mason* (1991) 52 Cal.3d 909, 955 [simple, attempted escape does not involve force or violence or the threat of force or violence, but when escape plan calls for use of gun to subdue guard, its danger to life or limb suffices to qualify under factor (b)].)

Misdemeanor battery does not necessarily cause or threaten to cause serious bodily harm, nor is it likely to do so. Misdemeanor battery is defined as "any willful and unlawful use of force or violence upon the person of another." (§ 242.) When that battery is committed against a

correctional officer, it is likewise a misdemeanor under section 243, subdivision (b), subject to the same "force or violence" requirement. (*In re David S.* (2005) 133 Cal.App.4th 1160, 1165 [noting that proof of a battery against any specific class of victim set forth in section 243 "requires proof of section 242: willful and unlawful use of force or violence upon the person of another"].)

Unlike the United States Supreme Court's common-sense understanding of "force or violence" under factor (b) in *Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976, the term "force or violence" under section 242 (and by extension, section 243) "has a special legal meaning of a harmful or offensive touching." (*People v. Page* (2004) 123 Cal.App.4th 1466, 1474, fn. 1.) It means nothing more than "the least touching," which "need not be violent or severe." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4.) It need not cause pain or serious bodily harm; it need not even be "[]likely to cause harm" or pain. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 423; accord, *People v. Rocha* (1971) 3 Cal.3d 893, 899-900, fn. 12.)

Thus, as this Court has implicitly recognized, the meaning of the term "force or violence" for battery under section 242 (and by extension, section 243) is not synonymous with the meaning of that term under factor (b). (*People v. Davis*, *supra*, 10 Cal.4th at pp. 541-542 [on the facts it was not reasonably likely that jurors erroneously applied the special definition of force or violence in battery context to substitute for the common-sense definition of the same term under factor (b)]); see also *People v. Collins* (1992) 10 Cal.App.4th 690, followed in *People v. Anzalone* (1999) 19 Cal.4th 1074, 1082-1083 [ordinary meaning of "force" and "violence" is different than the special legal meaning of "force or violence" in the battery

context; ordinary meaning of violence "carries the connotation of more than a simple touching required for a battery"].) Given the technical, legal meaning of "force or violence" in the battery context, misdemeanor battery in the abstract does not necessarily involve a level of force or violence that is dangerous.

The same is true when a misdemeanor battery is committed with bodily fluids against a correctional officer, where no injury results. At the time of appellant's trial, no statute specifically addressed this conduct, and the assault on Sonoma County jail personnel was therefore a misdemeanor battery under section 243, subdivision (b), at the time it was committed in 1996. While it is true that section 243.1 also provided (and still provides) felony punishment for *any* batteries on custodial officers engaged in their law enforcement duties, this Court explained that this statute remains in effect even though section 243 prescribes lesser punishment for a non-injurious battery because the Legislature intended the former as a charging option "for more serious cases" of non-injurious battery on an officer. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 834.)

The Legislature recently, however, has indicated that an assault with bodily fluids is not, without more, a "more serious" form of battery on an officer, as evidenced by newer statutes that address such conduct and punish it as either a misdemeanor or felony (otherwise known as a "wobbler"). Specifically, in 1997 and 2000, the Legislature enacted the "gassing" statutes, which punish as a wobbler an inmate's assault by gassing on a correctional officer with human excrement or other bodily fluids or combination thereof. (§ 243.9 [county jail personnel]; § 4501.1[state prison personnel].) Thus, the statute contemplates that some assaults with excrement will be akin to a simple misdemeanor battery (i.e., a

touching that causes no bodily harm or risk of harm), while others will be more serious (i.e., a touching that results in injury or risk of injury), elevating the battery to a felony. The type of injury that concerned the Legislature was apparently the risk of a life-threatening infection; subdivision (c) of both statutes allows for involuntary medical testing of violators for hepatitis and tuberculosis. (§ 243.9, subd. (c); § 4501.1, subd (c).)

Although the gassing statutes were not in effect during appellant's trial, they are nonetheless instructive on the issue of when, if ever, a gassing battery is more serious than a technical battery, or in other words, is a battery that involves force or violence as those terms are commonly understood. Given the provision in the statutes allowing for medical testing of inmates who violate the statute, the more serious gassing batteries are presumably those that carry the risk of infection. On the other hand, gassing batteries that result in no infection or risk of infection, are more akin to a technical violation of the statute – a misdemeanor that does not involve "force or violence" as those terms are commonly understood. Indeed, the gassing statutes contemplated as much when they allowed for misdemeanor treatment of assaults with excrement and other bodily fluids. Thus, just as with sections 242 and 243, a misdemeanor violation of section 243.9, subdivision (a), in the abstract does not involve the level of force or violence that is dangerous within the meaning of factor (b).

But this Court does not decide in the abstract whether criminal activity that technically violates a criminal statute qualifies under factor (b). Rather, the question "can only be determined by looking to the facts of the particular case." (*People v. Mason*, *supra*, 52 Cal.3d at p. 955; accord, *People v. Dunkle*, *supra*, 36 Cal.4th at p. 922 ["Whether such a burglary

'involves' force or violence, and thus qualifies as an aggravating factor under factor (b), depends on the circumstances of its commission"]; *People v. Raley* (1992) 2 Cal.4th 870, 908 [lewd act on child only qualifies as crime involving "force or violence" under factor (b) if it involved force or violence under circumstances of its commission].)

Given that the purpose of factor (b) is to help the jury decide whether the defendant's propensity for violence makes him the type of person who deserves to die, a battery should be admissible as other-crimes evidence only when the circumstances of its commission causes, threatens to cause, or is likely to cause serious bodily harm. On the other hand, when the conduct that constitutes a battery is simply a technical violation of the least adjudicated elements of the offense (i.e., "the least touching" (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214, fn. 4)), that does not cause, and is not likely to cause, serious bodily harm, it should not be admissible as other-crimes evidence. This Court's prior decisions are consonant with this reading of factor (b). This Court has held that acts amounting to a battery qualify under factor (b) when they cause, threaten to cause, or are likely to cause serious bodily harm, but it never has held that a mere, technical battery satisfying only the least adjudicated elements of the statute *alone* is sufficient to influence the choice between life and death under factor (b).

For example, in *People v. Davis*, *supra*, 10 Cal.4th 463, the defendant argued that it was reasonably likely that the jurors erroneously considered mere technical batteries under factor (b) by substituting the specialized definition of "force or violence" in the battery context, with which they were instructed, for the common meaning of "force or violence" under factor (b), on which they were not instructed and which required a greater degree of force or violence than battery. (*Id.* at p. 541.) This Court

implicitly acknowledged the validity of the underlying legal premise that the special meaning of "force or violence" in the battery context conflicts with the common-sense meaning of the same term under factor (b) and that, if the jurors misapplied the lesser battery standard to factor (b), this would be error. (*Id.* at pp. 541-542.) However, the Court rejected the defendant's argument for two reasons. The first turned on the language of the particular instructions, which is not applicable here. (*Id.* at p. 542.) Second, the Court emphasized that the incidents of battery in that case went beyond mere technical violations of the least adjudicated elements of section 242 and "indisputably involved the use of 'force,' and 'violence,' and 'threats' of violence under their common connotations: . . . defendant kicked the victim and repeatedly lunged at him with [a] sword; . . . defendant slashed at the victim, cutting his jacket with a knife; . . . defendant struck, choked and pushed the victim." (*Ibid.*) In this way, *Davis* impliedly recognized that mere technical batteries without more – evidence that they caused, threatened to cause, or were likely to cause serious bodily harm – do not qualify under factor (b).

More specific to the conduct at issue here, in *People v. Pinholster* (1992) 1 Cal.4th 865, the defendant argued that a series of in-custody assaults and batteries were not crimes involving force or violence under factor (b). Those acts included physical assaults on inmates and jail deputies in which he threw urine at deputies, punched one person in the head, struck another in the groin, kicked several police officers, and threatened to kill deputies. (*Id.* at pp. 910, 961.) This Court held that the acts of striking and kicking – acts that certainly caused pain and posed a danger of serious bodily harm – amounted to assaults and batteries involving "force or violence" under factor (b) and, therefore, were properly

admitted. (*Id.* at p. 961.) As to throwing urine, this Court observed that it was a technical battery. (*Ibid.*) However, this Court did *not* hold that the act was admissible under factor (b) for this reason. Instead, this Court emphasized the series of acts causing pain and posing a danger of serious bodily harm, during which the urine throwing also occurred. (*Ibid.*) Therefore, that act was properly admitted under the general rule that "'all crimes committed during a continuous course of criminal activity which includes the use of force or violence may be considered in aggravation *even if some portions thereof* [i.e., the technical battery] *may not be violent*.' [Citation.]" (*Ibid.*, italics added.)

Similarly, in *People v. Burgener* (2003) 29 Cal.4th 833, the Court held that a series of acts in which the defendant threw a mixture of scouring powder and chlorine bleach, as well as water and urine, at jail guards amounted to batteries *and* involved force or violence under factor (b). (*Id.* at p. 868.) Again, as in *Pinholster*, the non-dangerous, non-violent act of throwing urine and water was part of a series of acts that were violent and did present a danger of serious bodily harm, since chlorine bleach is a toxic substance which poses a risk of serious injury if it comes into contact with a person's skin or eyes.

Finally, in *People v. Hamilton* (2009) 45 Cal.4th 863, this Court held that the defendant's conduct was admissible under factor (b) where he refused to accompany deputies to court by raising his fists in a fighting stance, "struggl[ing] as mightily as he could," and spitting on a deputy. (*Id.* at pp. 933-934.) Again, although the court concluded that the jury could have found that the spitting was a battery (*Id.* at p. 934, citing *People v. Pinholster*, *supra*, 1 Cal.4th at p. 961), the court focused on the defendant's fighting stance and violent struggle to conclude that jurors could have

reasonably found that the defendant "attempted, and had the present ability, to inflict a violent injury on the deputies." (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 934.) As with *Pinholster and Burgener*, *supra*, the Court acknowledged that the battery with bodily fluids was a technical battery, but never characterized that battery, *in and of itself*, as involving the kind of force or violence contemplated in factor (b).

As such, the sentencing jury in appellant's case should not have heard about or considered the gassing battery, because it was neither dangerous in the abstract, nor dangerous under the circumstances of its commission. The urine, thrown through the small opening of a food port, caused no serious bodily harm, threatened no serious bodily harm and was not likely to cause serious bodily harm to the correctional officers. The officers reported no injuries, and the prosecutor offered no evidence that appellant's urine carried any disease or infection that had the potential to cause any injury. Further, the battery was not accompanied by any violent or dangerous acts as in *Pinholster*, *Burgener*, and *Hamilton*.

The most that can be said about appellant's technical battery is that it was repugnant, but it was by no means violent. Plainly put, the gassing battery did not have the requisite degree of gravity to justify its use as an aggravating factor to influence the jury's decision to put appellant to death. As a matter of statutory construction, appellant's conduct did not satisfy the "force or violence" requirement of section 190.3, factor (b), and the trial court abused its discretion by admitting it.

D. The Evidence Was More Prejudicial Than Probative

Under section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b)

create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Whether the admission of evidence in violation of section 352 has the additional legal consequence of violating state and federal due process rights is a question of law (or a mixed question of law and fact), to be reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894, 900 [questions of law are reviewed de novo, and mixed questions of law and fact are likewise subject to independent review where the inquiry involves "application of an objective, constitutionally based legal test to the historical facts"]; see *People v. Partida* (2005) 37 Cal.4th 428, 435 [inherent in alleged 352 error is the question of whether the error had "legal consequence" of violating due process].) A section 352 error violates due process when it renders the trial "fundamentally unfair." (*People v. Partida*, *supra*, 37 Cal.4th at p. 432.)

While the trial court does not have discretion to exclude "'*all* evidence of a capital defendant's commission or attempted commission of a prior violent felony,'" nothing in section 190.3, factor (b) "deprives the trial court of its traditional discretion to exclude 'particular items of evidence' by which the prosecution seeks to demonstrate . . . violent criminal activity [], in a 'manner' that is misleading, cumulative, or unduly inflammatory." (*People v. Box* (2000) 23 Cal.4th 1153, 1201, quoting *People v. Karis* (1988) 46 Cal.3d 612, 641–642, fn. 21.)

Here, even if the battery was somehow admissible as violent conduct, the court should have granted defense counsel's request to exclude evidence that the battery was committed with urine. Given that no injury resulted from the liquid thrown onto the deputies, the nature of that liquid was irrelevant; the fact that it caused an unwanted touching was all that was relevant. Evidence that the liquid was urine was unduly inflammatory

because jurors were undoubtedly repulsed by such evidence, which had nothing to do with appellant's propensity for violence. The introduction of evidence that painted appellant in a revolting light rendered the penalty trial fundamentally unfair, denying him due process of law, a fair trial, and a reliable death verdict. (U.S. Const., 5th, 8th &14th Amends; Cal. Const., art I, §§ 1, 7, 17.)

E. Under Any Standard of Prejudice, Reversal is Required

Because the errors in this case rendered the trial fundamentally unfair and deprived appellant of due process and a reliable death verdict, the burden is on the prosecution to show that the errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The prosecution cannot meet this burden because the inadmissible evidence undoubtedly caused the jury to feel revulsion toward appellant, thereby unfairly tipping the scale toward death. Thus, even under the state standard of prejudice, reversal is required, because it is "reasonably probable" that in the error's absence, appellant would not have been sentenced to death. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13.)

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THE TRIAL COURT ERRED IN ALLOWING THE JURY TO HEAR EVIDENCE IN AGGRAVATION THAT APPELLANT POSSESSED HACKSAW BLADES

The court erroneously admitted evidence at the penalty phase regarding appellant's possession of hacksaw blades while in prison. The prosecution claimed that the possession of the hacksaw blades violated section 4502, and was a crime of force or violence within the meaning of section 190.3, factor (b) (hereinafter "factor (b)"). The court agreed, finding that the evidence was admissible because appellant's possession of the blades amounted to the possession of a weapon. The evidence presented, however, was insufficient to establish a violation of section 4502, because hacksaw blades are not weapons, and their possession does not amount to an implied use of force or violence. The error was prejudicial because the prosecutor argued that appellant's possession of the hacksaw blades rendered him an escape risk. Accordingly, the error violated appellant's state statutory rights and his rights under both state and federal Constitutions to due process, a fair trial and a reliable penalty verdict. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 5th, 6th, 8th, and 14th Amends.)

A. Procedural and Factual Background

The defense filed a motion requesting an Evidence Code section 402 hearing on the aggravating factors alleged by the prosecution, and sought exclusion of several items, including appellant's possession of hacksaw blades while in prison (item 13 of the People's Notice of Evidence in Aggravation [6a SuppCT2d:11964]). (24CT:5032-5059.) The motion sought a hearing on whether the prosecution had substantial evidence that

among other things, appellant possessed the hacksaw blades and that such possession "involved violence or the threat of force, such that it should be presented at the penalty phase." (24CT:5039.) During arguments on the motion, before addressing any specific item of evidence, defense counsel reminded the court of its duty to (1) decide whether any of the acts in question were violent acts, and (2) determine whether the prosecution had presented substantial evidence of each act to permit the acts to go to the jury. (115RT:18477.) Defense counsel then argued among other things that a hearing was required on the alleged possession of hacksaw blades because that charge was dismissed at preliminary hearing, which raised doubt as to whether substantial evidence of that offense existed. (115RT:18480.) Counsel also argued that the court needed to decide whether "the actual physical items constitutes a dangerous weapon." (115RT:18480.)

On a later date, the prosecutor told the court that if called to testify, Officer Franklin Despain would say that he was the correctional officer who discovered appellant in possession of hacksaw blades. The court responded that the evidence "would fall squarely within the parameters of an inmate . . . in possession of weapons in a custodial setting that would otherwise be admissible for the jury to determine whether the People have proved this beyond a reasonable doubt." (119RT:18886.) Defense counsel disagreed. (119RT:18888.)

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After conducting a *Phillips* hearing[133] where Despain testified that appellant possessed hacksaw blades in his rectum while in custody on May 5, 1984 (119RT:18944-18947), the court ruled that Despain could testify about the hacksaw blades. (119RT:19003.)

Evidence of hacksaw blade possession presented to the jury

Despain testified in front of the jury that on May 5, 1984, he was a correctional officer at San Quentin State Prison. That day, after he and another officer moved appellant to the adjustment center, Despain placed a metal detector by appellant's rectum, and when the detector sounded an alarm, appellant voluntarily removed from his rectum three hacksaw blades wrapped in plastic. (119RT:19005-19007.) The blades were about a half-inch wide, and a little over four inches long. (119RT:19008-19009.)

Prosecutor's argument related to hacksaw blade possession

The prosecutor spent a significant portion of his penalty phase argument on appellant's prior criminal conduct. After discussing an incident where correctional officers found a weapon in appellant's cell, which occurred on the same day as the hacksaw blade possession, the prosecutor added:

> That same day they find on him three hacksaw blades, in his rectum. This is somebody that is obviously planning. This is somebody who is intent on doing something with an item like that if you're going to go to that extent, ladies and gentlemen. And we know, of course, that . . . a little over a year later ...

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[133] In *People v. Phillips* (1985) 41 Cal.3d 29, this Court explained that "in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element" of other violent crimes the prosecution intends to introduce in aggravation under factor (b). (*Id.* at p. 72, fn. 25.)

> while in the adjustment center . . .we know that on the 19th of May,[134] no bar is going to stop Mr. Scully from doing what he wants to do. There are no bars because he saws himself out of the cell that he's in . . . . Now, how he did it, I guess, is anyone's guess. But he saws himself - I don't know how long it might have taken . . . . Somehow he gets the equipment to saw himself out of the bar, leaves the sawed-off portion there on his bunk where it was found. What does he do? He's not going to stay. He knows that much. He has a purpose for doing it. His purpose again is his path of violence.

(128RT:19901-02.)

The prosecutor then went on to discuss the assault that appellant committed after leaving his cell on May 19, 1995, as well as the rest of the factor (b) evidence.

Related Jury Instructions

The jury was instructed that under factor (b) it could consider in aggravation any criminal acts that involved force or violence or implied force or violence. (26CT:5305.) Also, jurors were instructed that before they could consider an aggravating factor, they must find beyond a reasonable doubt that the criminal acts took place. (26CT:5306.) Among the acts listed was "May 1, 1984, Possession of Sharp Instrument by Prisoner." (26CT:5309.) Also, the jury was instructed in the elements of possession of a sharp instrument, a violation of Penal Code section 4502, subdivision (a), but a sharp instrument was not defined. (26CT:5321.)

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[134] The prosecutor is referring to an incident on May 19, 1985, where, after a portion of his cell bar was removed, appellant left his cell and assaulted an inmate. (See 120RT:19104-19106, 19124-19125.)

B. There Was Insufficient Evidence That the Hacksaw Blades Were Sharp Instruments under section 4502

Evidence of criminal activity under factor (b) must be limited to conduct that violates a penal statute. (*People v. Phillips*, *supra*, 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808.) The prosecution must establish each element of the offense beyond a reasonable doubt. (See *People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) Here the court concluded that the hacksaw blade evidence qualified as weapons possession by an inmate, and the jury was instructed on the elements of section 4502, in connection with this incident. However, because hacksaw blades are not sharp instruments within the meaning of section 4502, appellant's possession of them did not violate the statute.

Section 4502, subdivision (a), punishes an inmate's possession of "any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon." Here, the prosecutor's theory was that the hacksaw qualified as a sharp instrument and was therefore a crime of violence, but that theory was wrong.

Although this Court has not defined what a "sharp instrument" is under section 4502, the Court of Appeal in *People v. Hayes* (2009) 171 Cal.App.4th 549 described a sharp instrument as an instrument that is (1) "sharp" as that term is commonly used, (2) something that can be used to inflict injury, and (3) something that an inmate is not required to possess. (*Id.* at pp. 557-560 & fn. 5 [applying statute to sharpened piece of hard plastic].) The dictionary defines "sharp" as "adapted to cutting or

piercing," as in "having a thin keen edge," or "tapering to a fine point." (Webster's 3d New Internat. Dict. (2002) p. 2088, col. 1-2.) An item is "keen" when it has "a fine edge or point." (*Id.* at p. 1235, col. 1.)[135] Under the plain language of section 4502 and the meaning of the word "sharp" as commonly used, a hacksaw blade is not a sharp instrument. A hacksaw blade has no "thin keen edge" but rather is a "fine tooth saw" used for cutting metal or other hard materials. (*Id.* at p. 1018, col. 3.) Thus, unlike razor blades, which have a thin, keen edge, and could readily cut and seriously injure human flesh, hacksaw blades, when mounted, become saws with small teeth, which require a back and forth sawing motion to cut through something. As one court has noted, "a hacksaw blade is . . . manufactured and designed to cut metal or other hard materials, not human flesh." (*Commonwealth v. Jordan* (Pa. 1993) 632 A.2d 325, 327.) As such, it is not a sharp instrument as contemplated in section 4502.

C. The Possession of Hacksaw Blades Is Not An Act Of Implied Force or Violence

This Court has held that an inmate's possession of a potentially dangerous weapon while in custody is admissible under factor (b). (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 589 [inmate's possession of razor blades that had been removed from the razor handle and possession of intact razors in excess of the single razor allowed, was admissible under factor (b)].) Such conduct by an inmate involves the implied use of force or violence even though the inmate commits no assault with the weapon and does not

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[135] "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.)

brandish it in a threatening manner. (*Ibid.*) Here, however, the prosecution failed to establish that a hacksaw blade is a potentially dangerous weapon that is admissible under factor (b).

While no California cases have decided whether hacksaw blades are weapons under section 4502, other states interpreting similar statutes have determined that they are *not* weapons. For example, the Illinois appellate court determined that hacksaws are not dangerous weapons in the custodial setting, per se. (*People v. Morissette* (Ill.App.Ct. 1992) 589 N.E.2d 144.) There, the Illinois statute prohibited an inmate's possession of "[a]ny knife, dagger, dirk, billy, razor, stiletto, broken bottle, or other piece of glass which could be used as a dangerous weapon . . . *or any other dangerous weapon or instrument of like character*." (*Id.* at p.147, citing Ill. Rev. Stat. 1989, ch. 38, par. 31A-1.1(c)(2)(v), emphasis added.) In holding that an indictment alleging an inmate's possession of a hacksaw failed to state an offense, the *Morissette* Court found that hacksaw blades did not fall within the category of "any other dangerous weapon" under the statute. (*Ibid.*) The court explained that dangerous weapons are divided into two categories: "weapons [that] are dangerous per se and [weapons that] become dangerous because of the way they are used." (*Ibid.*) The court affirmed the trial court's decision that "a hacksaw blade, which is a common tool, [was not] dangerous per se, and in the absence of allegations of use which would make it a dangerous weapon, there was no criminal offense stated." (*Ibid.*)

The court concluded, "A hacksaw blade is not dangerous per se, and the unlawful weapons statute is not intended to make the possession of every tool, implement, or sporting device which has the potential to inflict

serious bodily harm an unlawful weapon." (*People v. Morissette*, *supra*, 589 N.E.2d at p. 148, citation and internal quotes omitted.)

The Pennsylvania appellate court has likewise held that hacksaw blades are not weapons within the meaning of its 'inmate in possession' statute.[136] (*Commonwealth v. Jordan*, *supra*, 632 A.2d at p. 327.) The court explained,

> No testimony was presented on this prosecution to support a reasonable conclusion that the broken pieces of the hacksaw blade were "readily capable of lethal use" nor are we prepared to so conclude. Moreover, we can only understand the legislature to have been referring to the cutting or stabbing of human flesh in its reference to "other cutting or stabbing implement or club." While a hacksaw blade is, in fact, a cutting instrument, it is manufactured and designed to cut metal or other hard materials, not human flesh. Without any testimony or other evidence on this record to support a conclusion that the unmounted, five-inch pieces of hacksaw blade could readily have been used to kill some person, we will not assume that the contraband presented here qualifies, without more, as a weapon.

(*Ibid.*)

Likewise here, absent any allegation that appellant used the hacksaw blades as weapons, or that he altered them to make them weapons, the evidence was insufficient to show a violation of section 4502 or any crime of implied force or violence under factor (b). (See e.g., *People v. Collins*

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[136] The Pennsylvania statute prohibits an inmate's possession of a weapon, which is defined as "any implement readily capable of lethal use and shall include any firearm, ammunition, knife, dagger, razor, other cutting or stabbing implement or club, including any item which has been modified or adopted so that it can be used as a firearm, ammunition, knife, dagger, razor, other cutting or stabbing implement, or club." (18 Pa.C.S.A. § 5122.)

(N.Y. 2009) 63 A.D.3d 1609 [non-inmates possession of hacksaw and steak knife supported guilty finding on weapons possession where defendant *actually threatened* victim with both hacksaw and knife].) Nor did the prosecutor ever argue that the hacksaw blades were weapons, as he focused his argument on appellant's potential for escape, not assault, with the blades. (128RT:19901-19902.) In sum, the evidence was insufficient to show that appellant's hacksaw blade possession equaled possession of a potentially dangerous weapon (see *Jackson v. Virginia* (1979) 443 U.S. 307), and it should not have been presented to the jury.

Besides violating state statutory and state constitutional law, the admission of evidence of this incident violated federal constitutional law as well. The erroneous admission of aggravating evidence violates the requirements of heightened reliability and relevance of evidence for determination of penalty in a capital trial under the Eighth Amendment's prohibition against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584.) Furthermore, California's state evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be deprived of his life or liberty in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation under the Fourteenth Amendment. (*Ibid.*) Admitting evidence of the hacksaw blade possession at appellant's penalty trial was therefore a violation of his right to due process. Appellant's sentence of death must therefore be reversed.

D. The Error was Prejudicial

Evidence of unadjudicated acts of violence are admissible at a penalty trial because they tend "to show defendant's propensity for violence." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) The purpose of

the statutory exclusion of non-violent unadjudicated conduct is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)

Specifically, a jury should not base its decision to execute on concerns that the defendant could escape from prison. Indeed, the "erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty." (*People v. Gallego* (1990) 52 Cal.3d 115, 196.) Here, during closing arguments, the prosecutor described in detail most of the prior acts of violence that were introduced against appellant, and then immediately followed this discussion with insinuations that appellant was an escape risk. (128RT:19894-19901.) The prosecutor reminded the jury that correctional officers had discovered hacksaw blades in appellant's rectum, and argued, "This is somebody that is obviously planning. This is somebody who is intent on doing something with an item like that if you're going to go to that extent, ladies and gentlemen." (128RT:19901.) The prosecutor then immediately connected that incident with one that occurred on May 19 of the following year, when appellant removed bars from his cell and committed an assault; the prosecutor preyed on jurors' fears of escape by arguing that "no bar is going to stop Mr. Scully from doing what he wants to do. There are no bars because he saws himself out of the cell that he's in." (128RT:19901.) Jurors were then implicitly reminded of the hacksaw blade possession with the statement, "Somehow he gets the equipment to saw himself out of the bar . . . ." (128RT:19902.) Given that the prosecutor discussed this incident immediately after mentioning the hacksaw blade possession, jurors were invited to conclude that the hacksaw blades must have been an escape tool. The prosecutor never argued they

were weapons. Thus, jurors were encouraged to consider the hacksaw blade possession as an escape risk. Moreover, evidence of the manner in which the hacksaw blades were stored tended to de-humanize appellant.

Because escape evidence "may weigh heavily in the jury's determination of penalty" (*Gallego*, *supra* 52 Cal.3d at p.196), a reasonable possibility exists that had the jury not heard this evidence, it would have returned a life verdict instead of death. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Also, under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, the prosecution cannot show beyond a reasonable doubt that the federal constitutional errors did not contribute to the verdict. The death sentence therefore must be reversed.

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THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY ADMITTED FIVE PHOTOGRAPHS AT THE PENALTY PHASE OF APPELLANT'S TRIAL

Over appellant's objections, the trial court erroneously permitted the prosecution to introduce five photographs during the penalty phase of appellant's trial, one of which was wholly irrelevant and four of which were more prejudicial than probative. The admission of these photographs was prejudicial error and violated appellant's state statutory and constitutional rights as well as his federal constitutional rights. (Evid. Code §§ 350, 352; Cal. Const., art. I, §§ 7, 15, 17, 24; U.S. Const., 5th, 6th, 8th & 14th Amends.)

A. The Proceedings Below

The five contested photographs were erroneously admitted during testimony regarding two incidents of prior acts of violence that the prosecution presented as evidence in aggravation. The facts presented concerned the November 30, 1978 rape of Diane Keogh, and a May 19, 1985 assault of inmate Louis Moody while appellant was an inmate at San Quentin State Prison.[137]

One of the admitted photographs (People's Exh. No. 32) was of Louis Moody, a fellow prison inmate of appellant, who was the victim of a May 19, 1985 assault at the prison, for which appellant was later convicted. The prosecutor wanted to show the jury the injuries that Moody sustained

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[137] Appellant was convicted of both of these offenses. The prosecution introduced the convictions under section 190.3, factor (c) and subsequently argued to the jury that the evidence of the convictions and the facts of the offense be considered under both factors (b) and (c) of section 190.3. (128RT:19893-19894.)

from the assault. (116RT:18639.) The photograph depicted Moody lying on a metal slab on what appeared to be an examination table at a medical facility, and in which he looked, if not like a corpse, certainly close to death. It was a near full-body photograph in which Moody, naked and with his eyes closed, looked ashen and cadaverous. Appellant argued it was more prejudicial than probative, was "morgue-like" in its appearance and given that he was not objecting in general to the act itself or the allegation surrounding it, using such a highly inflammatory photograph would only prejudice the jury without providing probative value. (120RT:19090.)

The court agreed with appellant that the photograph appeared morgue-like, stating that Moody looked "kind of dead lying here." The prosecution did not intend to call Moody, and stated it would stipulate that Moody's injuries were not life-threatening and that he was in fact not dead. (120RT:19091, 19093.) The court admitted the photograph stating that the jury had already seen much worse anyway. (120RT:19092.)

The state presented testimony from three witnesses who were correctional officers at San Quentin at the time of the assault, two of whom witnessed it and the third saw Moody's injuries at the hospital. Ronald Wolf testified that he saw Moody, who had been handcuffed, and appellant wrestling on the ground in the area of the showers and that appellant had a knife-like weapon which he was using to cut Moody. Wolf saw a lot of blood. (120RT:19104-19110.) Kent Armbright testified that he saw appellant stabbing Moody, who was handcuffed, at which point Armbright subdued and handcuffed appellant. He too testified that there was a lot of blood. (120RT:19110-19117.) Thomas Arzate testified that on May 19, 1985, he saw inmate Moody lying on a gurney and being taken from the adjustment center and later being treated at the hospital. Moody's wounds

included a puncture wound on his right shoulder, lacerations on his neck and one on his ear. (120RT:19125-19126.) Arzate identified People's Exhibit No. 32 as showing Moody's injuries about which he testified. (120RT:19125-19126.) It was stipulated that inmate Moody's injuries were not life-threatening and that he was currently an inmate in the California Department of Corrections. (120RT:19129.)

The trial court also admitted four photographs regarding the 1978 sexual assault. Three of the photographs were of the victim, Diane Keogh (People's Exh. Nos. 25, 26 and 27), and one was of appellant as he appeared around the time of the crime (People's Exh. No. 28). The photographs of Keogh depicted close-up views of her face, showing bruises on her forehead, neck and eye, and a swollen lip. The court found them not "horribly ghastly, gruesome or so terribly inflammatory" that they would "shock the normal juror," noting that the photographs the jury had already seen were far worse. (116RT:18640.) The court agreed they were "prejudicial," stating that was "why they're being offered," but they were more probative than prejudicial. (116RT:18640-18641.)

The prosecutor also wanted to show the jury a photograph of appellant as he appeared in 1978, around the time of the crime. (116RT:18641-18642.) Appellant offered to stipulate to identification stating that the photograph would then be of no significance to the jury. (116RT:18642.) Although the prosecutor could offer no authority for admitting a photograph of the defendant to show how he appeared at the time of a crime offered as penalty phase aggravation, when not necessary to prove identification, the court nonetheless found the photo admissible as a circumstance of that crime. (116RT:18642-18643.) The court stated that "being assaulted by a person who looks like this," may be a factor for the

jury to consider (116RT:18643) in determining whether to sentence someone to life or to death. Appellant objected contending it would deny him due process and a fair hearing. (116RT:18644.) Appellant argued that there was nothing in the record to suggest that there was anything about appellant's appearance that was a relevant circumstance of the crime or that made it more aggravated. (116RT:18644-18645.) The court agreed with appellant that its reasoning suggested that a victim who may be more affected by, for example, a Black, or bald-headed perpetrator, could have that fact introduced by the prosecutor, and argued in aggravation (116RT:18643-18644), but nonetheless admitted the photo (People's Exh. No. 28), noting it was not gruesome, that appellant was not horribly scarred, it was just the way he looked at the time and did not "fall outside the pale of evidence." (116RT:18644-18645.)

The four photographs were introduced during Diane Keogh's testimony. She testified in detail as to what occurred on October 4, 1978, when a man broke into her apartment and sexually assaulted her. (119RT:18900-18916; 18919.) When she first saw the man, later identified as appellant, she tried to get away, but he was between the door and her. He hit her on the right side of her face with a closed fist. He hit her near her right eye and on her cheek. (119RT:18914.) He put his hands around her throat, but she could breathe and kept screaming. (119RT:18915.) He hit her again, on her jaw. (119RT:18915-18916.) He put both his hands around her throat again, this time close to her jaw. (119RT:18916.) Her lips were cut and bleeding. (119RT:18917.) She testified that the photographs (People's Exh. Nos. 25, 26 and 27) showed the injuries (119RT:18916-18917) and were taken after the assailant accompanied her to get medical treatment, after which she went to the police.

(119RT:18922-18924, 18928.) Keogh identified People's Exhibit No. 28 as a photograph of the person who assaulted her and then accompanied her to get medical treatment for her injuries and agreed that it depicted the way that she recalled he looked. (119RT:18924.) It was stipulated that Keogh could identify appellant as the assailant.[138] (119RT:18937.)

B. The Trial Court Prejudicially Erred in Admitting the Challenged Photographs

The trial court erred in admitting People's Exhibit Nos. 25 through 28 and No. 32. The court's error violated appellant's state statutory and constitutional rights as well as his federal constitutional rights. (Evid. Code §§ 350, 352; Cal. Const., art. I, §§ 7, 15, 17; U.S. Const., 5th, 6th, 8th and 14th Amends.)

The photographs of Moody's and Keogh's injuries were more prejudicial than probative. As a general rule, evidence should be excluded when "its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

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[138] Appellant wrote an apology to Keogh not long after the crime, before he pled guilty to the offense and before the preliminary hearing in that case. Keogh kept the letter for many years, informing the prosecution that she had thrown it away only a year before the prosecution contacted her to testify at appellant's capital trial. (119RT:18934-18935.) This information was not presented to the jury.

In *People v. Box* (2000) 23 Cal.4th 1153, this Court reiterated that the trial court retains its inherent discretion to exclude otherwise admissible evidence at the penalty phase when the particular piece of challenged evidence is unduly inflammatory. (*Id.*, at p. 1200, citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1206 and *People v. Karis*, *supra*, 46 Cal.3d at pp. 641-642.) This is so despite that emotional evidence that could provide a jury with a reason to sentence someone to death is permissible, because the jury nonetheless must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) The jury's decision to impose death must be the result of a reasoned moral response. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.) Given that the jury assesses the moral weight of aggravating factors for purposes of sentencing, unduly prejudicial evidence offered in support of the aggravating factor must be excluded if its prejudicial impact could unfairly and unconstitutionally persuade jurors to sentence the defendant to death. (See *People v. Edwards* (1991) 54 Cal.3d 787, 836 [trial court must strike a careful balance between the probative and the prejudicial in assessing admissibility of emotional, inflammatory evidence].)

The prejudicial impact of the unduly gruesome photograph of Moody outweighed its probative value. As this Court stated in *People v. Allen* (1986) 42 Cal.3d 1222, 1257, "[a]lthough photographic evidence may properly be admitted even if largely cumulative [citations], the necessity of admitting such evidence is a relevant factor in assessing its probative value

[citations]." Correctional officers testified about the Moody assault and described the wounds that he sustained. Additional proof offered by the gruesome photograph did no more than corroborate the testimony of three correctional officers, whose testimony was unchallenged. Their testimony rendered the probative value of the inflammatory photograph minimal. Against the backdrop of its nominal probative value was the prejudicial impact of a disturbing photograph showing Moody's naked body lying on a metal slab, looking like a cadaver, in a facility that looked as much like a morgue as a clinic. The photograph was unduly gruesome and inflammatory and it was error to admit it.

Similarly, in light of Keogh's testimony detailing her injuries, the probative value of the photographs was diminished. As stated above, if a trial court is inclined to admit photographs that are cumulative to other evidence, their necessity, or lack thereof, is a relevant factor in assessing probative value. (*People v. Allen*, *supra*, 42 Cal.3d at p. 1257.) Indeed, as this Court has stated, "[i]f evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1137, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 318.)

The trial court itself found the photographs of Keogh prejudicial. (116RT:18640-18641.) Keogh's detailed testimony about the assault and her injuries negated any need to show the jury the pictures. At best, the photographs were cumulative to her testimony, with the result that their prejudicial impact clearly outweighed any remaining probative value.

The court also erred in admitting People's Exhibit No. 28, the photo in which the court found that the way that appellant looked 20 years ago, at the time of the crime against Keogh, was probative of the issue of whether

appellant should live or die. Appellant's appearance was wholly irrelevant. It served no proper evidentiary purpose. There was no need to establish identity, as there was a stipulation to that fact. (Compare *People v. Elliot* (2012) 53 Cal.4th 535, 577 [where identity of perpetrator was in issue, photo corroborating testimony of defendant's appearance around time of the crime properly admitted].) The court admitted the photo on the theory that it could be a circumstance of the crime because appellant's looks may have had an impact on Keogh. (116RT:18643-18644.) The photo was also not relevant for this supposed purpose. As counsel argued at trial, there was nothing to suggest that the crime was more aggravated because of the way that appellant looked.

More importantly, evidence of one's appearance should not be used as evidence to support a factor in aggravation upon which a jury may rely, in any way whatsoever, to impose a death sentence. "The statutory factors give the jury broad latitude to consider amorphous human factors, in effect, to weigh the worth of one's life against his culpability." (*Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044.) In making this judgment, one's physical appearance, whether it be race, disability, or a societal expression of good-looking or unattractive, cannot fairly be a factor upon which one's worth is judged or one of the human factors considered in weighing whether an individual lives or dies. A factor over which one can exercise no control, such as one's innate appearance, cannot of itself be deemed an aggravating factor or evidence in support of an aggravating factor. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 788 [mere chronological age, a factor over which one can exercise no control, should not of itself be deemed an aggravating factor].) It was error to admit this

irrelevant photograph and error to admit the three photographs of Keogh's injuries.

In addition to being error under state law, the trial court's erroneous rulings admitting the photos at issue here deprived appellant of his federal constitutional rights to due process and to a fair and reliable penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; see also *Spears v. Mullin* (10th Cir. 2003) 343 F.3d 1215, 1225-1230 [unduly gruesome crime-scene photos introduced at penalty phase deprived defendants of a fundamentally fair sentencing proceeding as guaranteed by the Eighth and Fourteenth Amendments]; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545, 548 [admission of inflammatory photos that did not illuminate any issue in the case could render trial fundamentally unfair where only conceivable reason for their admission was to inflame the jury against the defendant].) To the extent the error in admitting these photos was solely one of state law, it nevertheless violated appellant's right to due process by depriving him of a state-created liberty interest. (*Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.

Under either the federal standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24) or the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836), the erroneous admission of the photographs was prejudicial and when considered in conjunction with the other errors in this case, resulted in an unreliable death penalty verdict. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [state law errors that may not amount to deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair].) Appellant's death judgment must be reversed.

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING AT THE PENALTY PHASE INADMISSABLE VICTIM IMPACT EVIDENCE AND BY REFUSING TO GIVE A CAUTIONARY INSTRUCTION AS TO ITS USE

At the penalty phase, over defense objection, the prosecution called five members of Deputy Trejo's family to testify about the effect on them of his death. Also over objection, the prosecution presented multiple photographs of Deputy Trejo with his family.

Under the circumstances in this case, even assuming that some of the victim impact evidence offered minimal probative value, the number of members of Deputy Trejo's family permitted by the trial court to testify exceeded any legitimate function the evidence may have had and denied appellant a fair and reliable penalty hearing. The evidence was excessive, inflammatory and cumulative. Any doubts the jury may have had about the appropriateness of a death sentence would have been overwhelmed by the heart-wrenching testimony of multiple family members.

The erroneous admission of victim impact testimony from multiple family members, exacerbated by the trial court's refusal to limit its prejudice with a cautionary instruction, was not harmless and denied appellant his right to a fair and reliable determination of penalty under both the state and federal Constitutions. (U.S. Const., 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15, & 17; *Payne v. Tennessee* (1991) 501 U.S. 808, 825 (hereinafter, "*Payne*"); *Gardner v. Florida* (1977) 430 U.S. 349, 358 [decision to impose the death sentence must be "based on reason rather than caprice or emotion"].) Appellant is entitled to reversal of the death judgment and a new penalty trial. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

A. Over Appellant's Objection the Trial Court Allowed Five Family Members to Testify About the Impact of Deputy Trejo's Death and Admitted Multiple Victim Impact Photographs

Prior to the start of the penalty phase, appellant filed a motion challenging the admission of victim impact evidence. (24CT:5008-5029.) Appellant argued that, notwithstanding the decision in *Payne*, the admission of victim impact evidence in this case would violate the Eighth and Fourteenth Amendments' guarantees of reliable capital sentencing and due process. (24CT:5008-5029; 115RT:18423-18443; 121RT:19139-19142, 19150-19159.) Appellant's arguments cited *Payne*, 501 U.S. 808, *Gardner v. Florida*, *supra*, 430 U.S. at p. 358, this Court's decision in *People v. Edwards* (1991) 54 Cal.3d 787, numerous other decisions from this Court, as well as the federal and state Constitutions. (24CT:5008-5029.) Appellant also had objected that under Evidence Code section 352, the evidence was more prejudicial than probative. (24CT:5026-5027.)

Relying on the prosecutor's proffer as to what he intended to introduce, the court ruled that the intended aggravating evidence was admissible and refused to limit the number of Deputy Trejo's immediate family members who might testify as victim impact witnesses.[139] (115RT:18441-18442; 121RT:19152-19159.) In allowing five family victim impact witnesses, the court stated that "you take your victim as you find" him, noting that each witness is an individual and has a relationship separate from any other witness who may testify and thus testimony from multiple family members was not cumulative. (121RT:19152.) The trial

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[139] Despite its ruling, the trial court itself noted that the prosecution was presenting "quite a few" victim impact witnesses. (121RT:19159.)

court also admitted over objection, five photographs of Deputy Trejo and his family.[140] (121RT:19143-19149.)

Appellant requested that the trial court give a cautionary instruction proposed by defense counsel regarding the jury's consideration of the victim impact aggravating evidence. (25CT:5148; 123RT:19391-19393.) The request was denied. (124RT:19393.)

B. The Testimony of Deputy Frank Trejo's Five Family Members

Five members of Deputy Trejo's family testified about the effect of their loss. All four of Deputy Trejo's children testified. Debra Trejo testified that her father, Frank Trejo, was her friend, biggest supporter and a surrogate father to her two daughters. (121RT:19176.) The father of Debra Trejo's children left when her children were young and her father, Frank Trejo, stepped in and helped her raise them. Debra had more problems with her daughters after her father's death. Her daughters, Amanda, who was three at the time of her grandfather's death, and Haley, who was two, were afraid to let Debra out of their sight. (121RT19177, 19181.) Debra had to seek counseling for Amanda. (121RT:19177.) Holidays were different since her father's death; there was not the "laughter and the good times;" there was an emptiness. She missed her father's practical jokes. She described the daily routine she shared with her father. (121RT:19178-

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[140] Appellant made clear that he was objecting "vociferously" to all of the photographs offered by the prosecution (121RT:19147), and that he made an "accommodation" to two of the proffered photographs (People's Exh. Nos. 54 and 55) only because of the breadth of victim impact evidence the court indicated it would permit. One of these photographs was of Deputy Trejo (People's Exh. No. 55), and the other was of him with his wife and a child (People's Exh. No. 54). (121RT:19143-19144.)

19179.) People's Exhibit No. 51 was a photograph of her father, her daughter Haley and Debra's sister at a family barbeque at her parents' home. (121RT:19180.) She testified that her father was very good with her children. There was a lot of love between her father and her children; he was a friend to them and they felt secure and safe with him. (121RT:19180.) Debra identified a second photograph of her father (People's Exh. No. 55), one taken close in time before his death. (121RT:19181.)

Frank Trejo's daughter, Dominique Trejo, testified that shortly before her father's death she had learned that she was pregnant with her first child. She had not shared the news with her father before his death. (121RT:19181-19184.) Since her father's death, every holiday had been difficult because his absence was so strongly felt. "There was a major part of the family that was no longer there, so just this void was there with the family when the holidays came around." (121RT:19185.) Christmas had been particularly hard because Dominique especially loved watching her father with his grandchildren. Since her father's death, she viewed her personal safety differently. She was hesitant to go places that before she "didn't think twice" about going to and she panicked if her son was out of her sight for too long. Before her father's death, she had never had that kind of panic. (121RT:19185-19186.)

Michael Trejo, Frank Trejo's only son, testified that he saw his father before he went to work on the night that he was killed. He was living with his parents and his duty was to wake his father every evening at 7:30 p.m. so that his father could get ready to go to his late night shift. (121RT:19188-19189.) He had a good relationship with his father and they shared many things, including collecting guns and watching football.

(121RT:19189.) Michael was 22 years old when his father was killed, and since his father's death, he had become the man of the house. He had to grow up a lot and step into his father's role. (121RT:19189.) Shortly after his father died, he became a father for the first time. He missed not having his father there to guide him through doing things right for his newly born daughter. (121RT:19190.) Michael identified yet another photograph of Deputy Trejo's family (People's Exh. No. 53), which included his father, his mother, his sister Deanna, his nieces–Amanda, Haley and Priscilla, himself and his ex-wife. (121RT 19191.)

Frank Trejo's youngest child, Deanna Trejo, also testified. (121RT:19192.) She was a teenager when her father died. She lived at home with her parents and was the mother of one daughter, Priscilla. Her daughter and her father were best friends. She described her father as also being like Priscilla's father, as he often took care of her. Within months of her father's death, Deanna could no longer work. She quit her job because it was too hard for her emotionally and because without her father available to take care of her daughter, it became difficult to find a babysitter. (121RT:19193-19194.) She no longer took part in the pastimes she used to share with her father. (121RT:19194.) About a year after her father's death, she gave birth to another child. (121RT:19194.) Deanna told the jury that People's Exhibit No. 53 was a photograph of her father and mother, her brother Michael, her nieces and her own daughter, Priscilla, taken at her high school graduation. (121RT:19195.) Deanna also identified another photograph (People's Exh. No. 52), depicting her parents, her sister Debra and her Aunt Billie. (121RT:19195.) Like her brother and sisters, Deanna expressed the difficulties that she had faced around holidays

since her father's death. Deanna sought counseling to help deal with her loss. (121RT:19196.)

Lastly, the prosecution called Frank Trejo's wife, Barbara. She testified about her marriage, telling the jury that had her husband lived to June 6th of the year that he died, they would have celebrated their 40th wedding anniversary. She was 13 years old when she met Frank Trejo and he was 17. They met in Lompoc, California, in 1953. Frank had been born and raised in Lompoc. She married Frank when she was 15. From Lompoc, they moved to Northern California, where her husband became a police officer in Tiburon, California. They later moved to Santa Rosa. (121RT:19197-19198.)

Barbara Trejo described their marriage as a relationship in which they were "one." "You're not two people." (121RT:19198.) She described their shared routines, including how they spent his payday, every two weeks, going to breakfast, seeing their children and grandchildren and going shopping. She described her routines without her husband, testifying that now "there's a piece missing."[141] (121RT:19198-19199.) She had difficulties financially given her diminished income and had returned to work. Moreover, she had increased responsibilities caring for her children and grandchildren now that she had to do so on her own. She described the emotional difficulty in facing holidays alone and told the jury that the first Father's Day, shortly after her husband's death, was particularly difficult because her grandchildren asked where their grandfather was.

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[141] The record indicates that Barbara Trejo was crying as she described her routine now that her husband was deceased. (121RT:19199 [court asked if a tissue was available for the witness after Mrs. Trejo stopped testifying mid-sentence and shortly thereafter apologized].)

(121RT:19199.) Since her husband's death, when her children or grandchildren leave the house, she must know where they are at all times. When she herself leaves, she calls home two or three times to ensure that they are home safe. (121RT:19199-19200.)

Mrs. Trejo told the jury that her husband had planned to retire from being a deputy sheriff in 1996, that is, one year from the day he was shot and killed. She testified about their hopes and dreams when he was retired, which included finally doing the kinds of things that they had not been able to do for the prior 40 years. They planned "to travel and enjoy each other." (121RT:19200.) Mrs. Trejo had not sought counseling because she was "not really ready to sit down and talk. I don't want to pay someone to listen to me cry." (121RT:19201.) She identified the last photograph the prosecution introduced, People's Exhibit No. 54. It was a photograph of herself and her husband with their granddaughter Amanda. It was taken in May of 1994, on her birthday, by their daughter, Dominique. Dominique had said to her parents that the family had no photographs of them together with their father in his uniform. She wanted a photograph of her father in his uniform. (121RT:19201.)

C. The Applicable Legal Principles

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.) "It is a hallmark of a fair and civilized justice system that verdicts be based on reason, not emotion, revenge, or even sympathy." (*Le v. Mullin* (10th Cir. 2002) 311 F.3d 1002, 1015.) Evidence that improperly encourages the jury to impose a sentence of death based on considerations of sympathy for the victims may violate due process. (*Ibid.*)

In *Payne*, 501 U.S. 808, the United States Supreme Court upheld admission of evidence describing the impact of a state defendant's capital crimes on a three-year-old boy who witnessed his mother and sister being killed, and was seriously wounded himself. The Court held that the Eighth Amendment did not preclude admission of, and argument on, such evidence (*id.* at p. 827), thereby overruling in part the ban on victim impact evidence and argument imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805. The Court did not hold that victim impact evidence must, or even should, be admitted in a capital case, but instead held that if a state decides to permit consideration of this evidence, "the Eighth Amendment erects no *per se* bar." (*Payne*, at p. 827; see also *id.* at p. 831 (conc. opn. of O'Connor, J.).)

Following *Payne*, this Court decided in *People v. Edwards*, *supra,* 54 Cal.3d at pp. 833, 835, that section 190.3, factor (a), allows victim impact evidence and argument on the specific harm caused by the defendant, including the impact of the death on the victim's family. This Court, like the court in *Payne*, did not conclude that victim impact evidence is admissible in every capital case, stating that such evidence "only encompasses evidence that logically shows the harm caused by the defendant." (*Id.* at p. 835.)

D. The Victim Impact Evidence Admitted at Appellant's Trial Violated His Right to a Fair and Reliable Sentencing Hearing

Aggravating evidence offered by the prosecution, to be potentially admissible, must first be relevant to one of the statutory factors in California's death penalty scheme. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) This Court has found victim impact evidence admissible on the

theory it is relevant to section 190.3, factor (a), which permits consideration of the "circumstances of the crime." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 833, 835.) To be relevant to the circumstances of the offense, the evidence must show the circumstances that "materially, morally, or logically" surround the crime. (*Id.* at p. 833.) For purposes of victim impact evidence, this Court has interpreted this requirement to include evidence concerning "the immediate injurious impact of a capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935), evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital homicide and the facts of the homicide that were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. and dis. opn. of Kennard, J.).)

These requirements, or limitations, are consistent with *Payne*, 501 U.S. 808. Indeed, a significant feature of the victim impact evidence in *Payne* and *Edwards*, is that the evidence was limited and narrowly drawn. In *Payne*, one family witness testified, briefly, and the testimony concerned the impact of the crime on the witness's grandson, who was present when his mother and sister were killed and who himself had been assaulted during the crime. (*Payne*, *supra*, at pp. 812-815; see also *id.* at pp. 831-832 (conc. opn. of O'Connor, J.).) As Justice O'Connor stated in her concurring opinion, the Eighth Amendment does not bar the state from presenting "a quick glimpse" of the victim's life to remind the jurors that the victim was a unique human being. (*Id.* at pp. 822; 830-831.) In *People v. Edwards*, *supra*, 54 Cal.3d 787, this Court stated that victim impact evidence is not without limit, explaining that "emotion may not reign over reason" and aggravating evidence which "invites an irrational, purely subjective

response should be curtailed" (citation omitted). (*Id.* at p. 836.) To be consistent with the holdings in *Payne* and *Edwards* and to ensure a fair and reliable sentencing hearing, the evidence must therefore be attended by appropriate safeguards to minimize the prejudicial effect of such evocative evidence and to confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision.

The limited and narrowly-drawn testimony admitted in *Payne* illustrates two such safeguards: allowing only that evidence of grief that would have been known to the defendant (the effect of the crime on the deceased victim's family member who was present at the scene of the crime), and permitting only one witness to provide that information, given the emotional nature of testimony about grief, sorrow and loss. The trial court failed to apply these safeguards in appellant's case. None of the testifying family members in appellant's case were present either during or immediately after the homicide, and the evidence to which they testified was not evidence about which appellant knew or that was reasonably apparent to appellant at the time of the crime.

Appellant is aware that this Court has rejected the need for these safeguards and found that to be relevant to the circumstances of the crime, victim impact evidence does not have to include evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital homicide, and can include aspects of the decedent's life that had nothing at all to do with the circumstances of what occurred at or even near the time of the homicide. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180-1183; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 364; *People v. Prince* (2007) 40 Cal.4th 1179, 1287, fn. 28. [victim impact evidence is not limited to evidence of the victim's

characteristics that were known to the defendant at the time of the crime]; *People v. Carrington* (2009) 47 Cal.4th 145, 196-197 [same]). Indeed, permissible victim impact evidence admissible under factor (a) has been found to include people who may not even have known the victim. (*People v. Ervine* (2009) 47 Cal.4th 745, 792-793 [effects of murder on victim's community, including coworkers and coworkers' families]; *People v. Taylor* (2010) 48 Cal.4th 574, 645-646 [director of after-school program where victim had volunteered testified about effect of victim's death on school's "community"].) This Court has found every aspect of the profound sadness that accompanies the loss of a loved one to be fair game to present to a jury when the state is asking the jury to execute the person who caused the loss. This is so despite the fact that such wrenching emotions are attendant to most such losses, particularly those from a sudden and unexpected death.[142]

"The punishment phase of a criminal trial is not a memorial service for the victim." (*Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 335-336.)[143] "What may be entirely appropriate eulogies to celebrate the

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[142] In *Payne and Suffering–A Personal Reflection and a Victim-Centered Critique* (1992) 20 Fla. St. U. L.Rev 21, 58-59, author Vivian Berger contends that the courtroom cannot function as a therapeutic environment for the victims of the gravest offenses, and that the system is not equipped to nurture those who have suffered the loss of a loved one, although with the advent of *Payne*, the state in its quest for death "encourages the prosecution to urge mourning family and friends to present their grief in a forum ill-suited to respond to it, yet holding out a seductive (if illusory) capacity to do so."

[143] *Salazar v. State*, *supra*, 90 S.W.3d 330 was a non-capital case, but the court applied the principles that govern the admission of victim impact testimony in capital cases. (*Id.* at p. 335, fn. 5.)

life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Id.* at p. 336.) Memorial services are emotional events. In contrast, a capital case sentencing proceeding, which potentially results in a decision in which the government prematurely ends the natural life of the convicted defendant, is one in which reason, and not unbridled emotion, is to reign. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.) The powerful, emotional and evocative victim impact evidence that is akin to what is presented at a memorial service permits a life or death decision to be based on unbridled emotion.

In *Payne*, as in *Edwards*, it was acknowledged that the use of victim impact evidence was not without limit. The high court in *Payne* held that the Eighth Amendment erected no per se bar to the admission of victim impact evidence, but further held that the Due Process Clause of the Fourteenth Amendment provided a mechanism for relief when evidence was introduced that was so unduly prejudicial that it rendered the trial fundamentally unfair. (*Payne*, *supra*, 501 U.S. at p. 825.) Similarly, regarding limits on such emotional evidence, this Court held in *Edwards* that "factor (a) [does not] necessarily include[] all forms of victim impact evidence and argument allowed by *Payne*" and that its holding did not mean that there were no limits on emotional evidence. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 835-836). This Court commented that it was not then "explor[ing] the outer reaches of evidence admissible as a circumstance of the crime." (*Id.* at p. 835.)

Since its opinion in *Edwards*, this Court has not only "explored" the reaches of victim impact evidence, but has done so in a manner that has unconstitutionally expanded the relevance and fairness limitations imposed by *Payne* in permitting ever-expanding and unduly emotional aggravating

evidence as a circumstance of the crime, under section 190.3, factor (a). Indeed, in *People v. Hartsch* (2010) 49 Cal.4th 472, this Court stated that *Payne* was not a case of limits, but was one of breadth, stating that the sentencing authority is free "to consider a wide range of relevant material." (*Id.* at p. 509, quoting *Payne*, *supra*, 501 U.S. at pp. 820-821.) The effect of this interpretation of *Payne* could be to give prosecutors carte blanche in presenting and arguing every aspect of what might somehow be connected to the victim and the loss to others from the victim's death. "Arguably, as a practical matter, humanity's essential interconnectedness militates against any limit being placed on who can testify. As famously observed by John Donne, '[n]o man is an island, entire of itself; every man is a piece of the continent, a part of the man . . .[a]ny man's death diminishes me because I am involved in mankind. . . .'" (Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials* (1999) 41 Ariz. L. Rev. 143, 155, fn. 81.) In the end, the result has been that neither the Eighth Amendment nor, as *Payne* envisioned, the Fourteenth Amendment have protected a defendant against victim impact evidence that rendered a trial fundamentally unfair. (*Payne*, *supra*, 501 U.S. at p. 825.)

As stated above, there were factors present in *Payne* that, in theory, limited the potential for prejudicial harm from victim impact evidence, and thus acted as a safeguard against constitutionally infirm sentencing hearings. Among those factors was the limited number of witnesses who testified about the impact of the crime upon the victims' loved ones. Here, Deputy Trejo's wife and his four children testified to much of the same heart-felt information, providing the jury with compelling sorrowful information, over and over again. Each described their day-to-day life with

Deputy Trejo, described him as the backbone of the family who helped them emotionally and financially, and all but one spoke specifically about the profound impact of their loss during the holidays, now spent without their beloved father, and as to Barbara Trejo, without her husband.

This Court has suggested that having multiple family members testify about one victim can be unfairly excessive. (See, e.g., *People v. Booker* (2011) 51 Cal.4th 141, 194 [testimony from six family members not excessive as to three victims because there was only "an average of two witnesses per victim"]; cf. *People v. Taylor*, *supra*, 48 Cal.4th at p. 646 [six family members testifying about victim permissible where their testimony offered the personal perspectives of four different generations and none was cumulative of another].) Prior to the death penalty being abolished in New Jersey,[144] that state's high court had limited victim impact evidence to one witness per victim. In *State v. Muhammad* (N.J. 1996) 678 A.2d 164,180, the court stated victim impact testimony of one survivor was adequate to provide the jury with a glimpse of the victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness and not offend the due process clause. "The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." (*Ibid.*)

The trial court permitted five members of Deputy Trejo's family to testify to aggravating evidence, which was not only cumulative, but excessive, particularly when coupled with the other factors present in this

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[144] See N.J.S.A. 2C:11-3.

case. This was error. With each additional family member the heartfelt testimony of their loss tended only to support facts already known to the jury. The evidence did not differ in kind or purpose from the family member who testified before or after each family witness. Each additional family member's testimony was thus of limited probative value, and was unduly inflammatory given the heart-rending nature of victim impact evidence. (See *People v. Pollock*, *supra*, 32 Cal.4th at p. 1180 [victim impact evidence that elicits from the jury an emotional response untethered to the case facts is inadmissible]; *Kelly v. California* (2008) 555 U.S. 1020, 129 S.Ct. at 564, 568 (Breyer, J., dissenting from denial of cert. [due process implicated when victim impact evidence has minimal probity coupled with purely emotional impact].) Indeed, as the trial court noted when ruling on appellant's motion to modify the death verdict, Deputy Trejo's family's testimony was not only "compelling," but was "agonizing." (129RT:20112.) A system that permits multiple family members to testify seriatim about the void created by the loss of their loved one and to testify in detail about the excruciating pain they felt from their loss, as was done here, is a system that permits a jury to impose the ultimate sanction based on an unbridled emotional response to heart-wrenching evidence, rather than a reasoned decision based on the convicted defendant's culpability.

The trial court also erroneously admitted over objection numerous photographs of Deputy Trejo. Appellant is aware that this Court has routinely permitted photographs of the victim and his family when the state seeks death. (See *People v. Bramit* (2009) 46 Cal.4th 1221, 1241 [family photographs "humanized" the victim]; *People v. Verdugo* (2010) 50 Cal.4th 263, 298 [photographs of family events relevant to humanize the victim]; *People v. Edwards*, *supra*, 54 Cal.3d at p. 836 [a photograph may suggest

the "preciousness" of one's life and is thus relevant to determine the punishment for taking the life].) Nonetheless, appellant submits that the photographs admitted in this case, in which Deputy Trejo's humanity and his uniqueness as an individual human being suffused the trial, and simultaneously where the contempt for appellant was palpable, was error.

The admitted photographs, which depicted Deputy Trejo with his children and grandchildren, and which showed him in full uniform, offered nothing more than prejudicial, emotional, evocative evidence to, as trial counsel stated, "make the jury hate Mr. Scully. Hate him. Kill him. .... [L]et's not pretend this is anything but exactly that." (121RT:19147.) Even the trial court found that three of the originally proffered photographs "went beyond the pale," and excluded them. (121RT:19148.) Nonetheless, the trial court admitted five photographs (People's Exhibit Nos. 51 through 55), none of which were probative of the impact of his death on his family or were necessary to "humanize" Deputy Trejo. The photographs encouraged the jury to return a sentence of death based on the raw emotion that a photograph can elicit. It is reason, not caprice or emotion upon which the decision to sentence someone to death must be based. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The victim impact evidence was not justified in appellant's case. At the heart of the decision in *Payne* was a perceived imbalance between the defendant's right to present humanizing, mitigating evidence and the state's inability to present comparable evidence about the victim. *Booth v. Maryland*, *supra*, 482 U.S. 496, had barred the admission of all victim impact evidence. Writing for the majority in *Payne*, Chief Justice Rehnquist said that *Booth* "unfairly weighted the scales in a capital trial," against the state. (*Payne*, *supra*, 501 U.S. at p. 822.) *Payne* stated that the

state has an interest in counteracting the mitigating evidence the defendant may present "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]" (*Id.* at p. 825.) The high court wanted states to be able to counterbalance the mitigating evidence convicted defendants might introduce at the penalty phase, believing such was necessary to avoid the victim becoming a "'faceless stranger at the penalty phase of a capital trial.'" (*Ibid.*, quoting *South Carolina v. Gathers*, *supra*, 490 U.S. at p. 821 (dis. opn. of O'Connor, J.).)

This Court also has found that victim impact evidence is admissible to counterbalance the defendant's mitigating evidence. (See, e.g., *People v. Pollock*, *supra*, 32 Cal.4th at p. 1182, citing *Payne*, *supra*, 501 U.S. at p. 826; see also *People v. Kelly* (2007) 42 Cal.4th 763, 797 [purpose of victim impact evidence is to "humanize" the victim]; *People v. Brown* (2004) 33 Cal.4th 382, 398 ["just as the defendant is entitled to be humanized, so too is the victim"]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1056 [prosecution has an interest in counteracting a defendant's mitigating evidence].)

Any perceived imbalance that may be present in some capital cases was not present here. First, before the prosecution presented any victim impact evidence, the jury had a clear sense that Deputy Trejo had been a unique human being. Indeed, many of his colleagues from the Sonoma County Deputy Sheriff's Office testified for the state during the guilt phase of the trial, including the years of service that Deputy Trejo had given to the community. Moreover, Deputy Trejo's former colleagues provided the security in the courtroom throughout the trial, and the bailiffs in whose

charge the jury was left were likewise from the Sonoma County Sheriff's Department.[145] In any event, there was no question that Deputy Trejo's uniqueness and the sense of loss from his death was clear to the jury after one and certainly after two of his family members testified.

Moreover, the jurors were predisposed to identify with Deputy Trejo, not appellant. Appellant was the inveterate, dispossessed outsider released from prison only days earlier, who intruded upon the pastoral county of the victims and jurors and who felled not just one of their own, but one of their protectors, a long-time and much beloved deputy sheriff. Further separating appellant from the jurors was the evidence of prior and other misconduct admitted at both phases of appellant's trial. A substantial part of the guilt phase was devoted to the testimony of witnesses who described prior acts of misconduct by appellant, as well as to evidence of crimes committed against seven victims that followed the homicide. At the penalty phase, the prosecution presented additional prior acts of misconduct. The prosecutor brought its full force to dehumanize appellant. Indeed, victim impact evidence itself can dehumanize a defendant. (See, e.g., Bandes, *Empathy, Narrative, and Victim Impact Statements* (1996) 63 U. Chi. L. Rev. 361, 410 [victim impact evidence casts the defendant from the human community].) Nonetheless, despite numerous witnesses, lengthy testimony and hundreds of exhibits that the prosecution presented against appellant throughout both phases of the trial, the trial court permitted the prosecutor to present highly-charged victim impact evidence that was unnecessary to

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[145] As Justice Souter pointed out in his concurring opinion in *Payne*, certain aspects of victim impact evidence are usually already revealed to the jury during the guilt phase of the trial, such as the identity or certain attributes of the victim. (*Payne*, *supra*, 501 U.S. at p. 840.)

either humanize Deputy Trejo[146] or to balance any perceived or potential imbalance between the state's efforts to obtain a death sentence and the defendant's to live the rest of his life in prison. Indeed, the evidence presented by the defense at the penalty phase was evidence that, for all intents and purposes, had been presented, and rejected, at the guilt phase. The apparent main theme of the penalty phase, like the guilt phase, was that appellant's lengthy incarceration in isolation and inhospitable, inhumane living conditions explained the circumstances that led to the charges, as well as those applicable to whether appellant should live or die.

The alleged justification for permitting the traumatic and profoundly heart-felt reactions suffered by victim impact witnesses–balancing the scales during the penalty trial in case the murder had become an abstraction and the deceased victim faceless, and to remind jurors that any mitigation case yet to come is balanced by a grievous crime, was not present here. Thus, the evidence not only exceeded a "quick glimpse" of Deputy Trejo's life to "remind the jury that [the deputy] ... was a unique human being" (*Payne*, *supra*, 501 U.S. at pp. 830-831 (conc. opn. of O'Connor, J.)), but for that purpose it was unnecessary in this case. There was no unfair balance against the state that called for remedy through victim impact aggravating evidence. The trial court's erroneous decision to permit this aggravating victim impact evidence played on the emotions of the jury in making its "'moral assessment of . . . whether [appellant] should be put to death.'" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 834, quoting *People v.*

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[146] Indeed, Justice Souter in his concurring opinion in *Payne* stated that all but an incompetent defendant knows that the victim whose life was taken was a unique human being and was not a valueless fungible person. (*Payne*, 501 U.S. at p. 838 (conc. opn. of Souter, J.).)

Haskett (1982) 30 Cal.3d 841, 863-864.) The victim impact evidence prevented the jury from reaching a penalty verdict in a reliable and non-arbitrary way, and denied appellant a fair and reliable penalty hearing. (*Payne*, 501 U.S. at p. 825; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358; U.S. Const., 8th & 14th Amend.; Cal. Const., art. I, §§ 7, 15, 17.)

E. The Victim Impact Evidence Was More Prejudicial than Probative

In any event, the admitted victim impact evidence was far more prejudicial than probative. First, the victim impact evidence here was, at best, minimally probative as it did not describe a harm that distinguished appellant's case from other homicides, thus making it aggravated. "The purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 788.) In short, evidence in aggravation is presented for the prosecutor to ask for death, after showing that in the state's view, the defendant is especially deserving of death. But with victim impact evidence, the profound emotional reactions by loved-ones to any traumatic death, and in particularly sudden deaths, is attendant with most, if not all, deaths. (See, e.g., *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1056 [family members' testimony about how they missed their loved ones was the kind of evidence "loved ones commonly express in capital cases"]; *Payne*, 501 U.S. at p. 838 (conc. opn. of Souter, J.) [that there will be victims left behind who will be hurt by the victim's death is such a foreseeable consequence of taking a life as to be virtually inevitable].)

Second, the compelling testimony from multiple family members, and the emotionally-moving photographs, as was presented here, was the

type of evocative evidence likely to inflame the jurors' emotions. This Court in *Edwards* did not retreat from the cautions noted in *People v. Haskett*, *supra*, 30 Cal.3d at p. 864, that trial courts must maintain limits on emotional evidence and argument and must "'strike a careful balance between the probative and the prejudicial . . . [and exclude evidence] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response. . . .' [Citation.]" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) Moreover, even if this Court finds the victim impact evidence more than minimally probative, the testimony of multiple members of Deputy Trejo's family, as detailed above, was both excessive and unduly cumulative. Thus, whatever minimal relevance the victim impact evidence may have had, it was outweighed by its prejudicial effect.

F. Section 190.3, Factor (a) as Applied is Unconstitutionally Vague and Overbroad

This Court's decisions regarding victim impact aggravating evidence have resulted in yet another constitutional infirmity. Based on this Court's opinions as to what constitutes victim impact evidence that is admissible as a "circumstance of the crime," under section 190.3, factor (a), is unconstitutionally vague and overbroad. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.) Aggravating evidence is only admissible when it is relevant to one of the statutory factors (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 775-776), and as stated above, victim impact evidence is admitted on the theory that it is relevant to factor (a) of section 190.3, as a "circumstance of the crime." (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 833, 835).

"[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (opn. of Stewart, Powell, and Stevens, JJ.).) "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 333.) A sentencing factor which permits victim impact evidence must therefore provide the jurors with "clear and objective standards" providing the "specific and detailed guidance" required by the Eighth and Fourteenth Amendments (*Lewis v. Jeffers* (1990) 497 U.S. 764, 774), and must likewise comport with Article I, sections 7, 15 and 17 of the California Constitution.

In *Tuilaepa v. California* (1994) 512 U.S. 967, 976, the Supreme Court held, in a context other than victim impact evidence, that factor (a) was not vague on its face. (See also *id.* at p. 981 (conc. opn. of Souter, J.) [the term "circumstances of the crime" had a "common-sense core of meaning" that jurors could easily understand and apply].) In the years following *Payne* and *Edwards*, however, this Court's broad interpretation of permissible victim impact evidence admitted under factor (a) has resulted in evidence presented to a jury unfettered and undirected by adequate instructions from the trial court such that factor (a) has become unconstitutionally overbroad and vague. To be constitutional, a state's law authorizing capital punishment must "tailor and 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; see also *Tuilaepa v. California*, *supra*, 512 U.S. at p. 986 [because a "vague aggravator creates the risk of an arbitrary thumb on death's side of the scale," it must be analyzed for "clarity, objectivity, and principled guidance"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242 (conc. opn. of Douglas, J.) ["What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions."].)

At trial, defense counsel argued that an expansive interpretation of victim impact evidence that would permit the admission of the evidence in this case would render section 190.3, factor (a) unconstitutionally vague and overbroad. (24CT:5019-5023.) Appellant is aware that this Court has consistently held that its interpretation of section 190.3, factor (a), to include victim impact evidence, does not render the statute unconstitutionally vague or overbroad. (*People v. McKinnon* (2011) 52 Cal.4th 610, 690; *People v. Carrington*, *supra*, 47 Cal.4th at p. 197.) This Court has also held that section 190.3, factor (a) has not become unconstitutionally overbroad or vague given its broad interpretation of admissible victim impact testimony. (*People v. Hamilton*, *supra*, 45 Cal.4th at p. 931; *People v. Boyette* (2002) 29 Cal.4th 381, 445 fn.12 [rejecting defendant's challenge that the broad array of victim impact evidence that the Court has permitted under the guise of factor (a) circumstances of the crime renders it unconstitutionally vague].) Consistent with this Court's direction in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant has not presented a full argument on the issue, given the Court's consistency of its position and presents the claim to preserve it for possible federal court review.

G. The Trial Court Erroneously Refused to Instruct the Jury on the Appropriate Use of Victim Impact Evidence

Prior to the start of the penalty phase, the court and parties discussed instructions, including one proposed by the defense to instruct the jury on the appropriate use of victim impact evidence and cautioning against an improper use. (123RT:19391-19393.) The prosecution objected and the court denied appellant's proposed instruction. (123RT:19393.)

Appellant's proposed instruction was a cautionary one, recognizing that victim impact evidence can be so emotional that it can divert the jury's attention from its goal, taint the jury's decision and lead to a sentence based on unbridled emotion, rather than reason. The defense requested that the following proposed language be added to CALJIC No. 8.85:

> Evidence has been introduced in this case that may arouse in you a natural sympathy for a victim or a victim's family. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(25CT:5148.)

The trial court's refusal to give the cautionary instruction was error. Having admitted evidence that was emotionally-charged, heart-wrenching, cumulative and unnecessary to either humanize Deputy Trejo or balance the state's case against appellant's mitigation, the court's refusal to provide jurors with guidance and to caution against using the victim impact evidence to make their life or death decision based on emotion, rather than reason, was prejudicial error. The proposed instruction did not "demean the

evidence" as the trial court stated, or tell the jurors that they could not consider emotion. (123RT:19393.)

The language in appellant's proposed modification to CALJIC No. 8.85 appropriately conveyed to the jurors both how the evidence can properly be considered, as well as admonished them that the emotional impact of evidence regarding the victim's family should not divert their attention such that their decision is one based on an irrational, purely subjective response to the prosecution's emotionally-laden evidence and argument. This Court long ago recognized that in every capital case "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett*, *supra*, 30 Cal.3d at p. 864.) Without a proper cautionary instruction, which appellant requested but was denied, there was an unconstitutional risk that the victim impact evidence tainted the jury's sentencing decision and resulted in the unfair, arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the federal Constitution, and its counterparts in the California Constitution.

Appellant is aware that this Court has repeatedly rejected claims that juries should be instructed on the proper use of victim impact evidence. This is so even when the instruction, as it did here, does no more than inform juries that when choosing between life or death for the defendant, the decision must be based on reason, and not on an emotional reaction to emotional evidence.

In *People v. Zamudio*, *supra*, 43 Cal.4th at pp. 368-370, the defendant proposed an instruction similar to the one appellant requested. This Court acknowledged that the substance of the requested instruction correctly stated the law, but found it was not error for the trial court to

refuse to give it finding, among other reasons, that it would have mislead the jury by suggesting that emotions may not play any part in a juror's decision whether the defendant should live or die. (*Ibid.*) However, the instruction in *Zamudio*, which had the same language regarding emotional evidence presented during trial as the proposed instruction in appellant's case, did not, as this Court stated, tell the jury that emotions may not play any part in its decision. Instead, the proposed instruction correctly stated the law: the emotional evidence and sympathy for the victim's family may not "divert your attention from your proper role of deciding" the penalty, and you may not sentence the person before you to death as a result of an "irrational, purely subjective response to emotional evidence." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 368.) Indeed, nowhere in the instruction in *Zamudio*, or in appellant's requested instruction, did it tell the jury that emotions may play "no part in a juror's decision." (*Ibid.*)

In appellant's case, no other jury instruction adequately guided the jury on the use of the emotionally-laden victim impact evidence or admonished the jury against its misuse. Appellant maintains that without a cautionary instruction, like the one requested at his trial, there was nothing to stop raw emotion and other improper considerations from tainting the jury's decision, in violation of his right to a decision by a rational and properly instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const. 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, & 17.)

Despite this Court's cases rejecting proposed instructions that are both correct on the law and are cautions to preclude jurors from sentencing a human being to death based on raw, unbridled emotion, appellant respectfully requests the Court reconsider its prior decisions. (*People v.*

MiKinnon, *supra*, 52 Cal.4th at pp. 691-692; *People v. Carey* (2007) 41 Cal.4th 109, 134; *People v. Harris* (2005) 37 Cal.4th 310, 358-359; *People v. Ochoa* (2001) 26 Cal.4th 398, 455.)

H. The Admission of Impermissible and Inflammatory Victim Impact Evidence and Denial of the Cautionary Instruction Require Reversal of Appellant's Death Sentence

The erroneous admission of the irrelevant, highly prejudicial and cumulative victim impact aggravating evidence violated appellant's state and federal constitutional rights to a fair and reliable penalty determination. The harm from the erroneous admission of the evidence was exacerbated by the trial court's refusal to give the defense requested cautionary instruction, as well as by the court's error in admitting victim impact testimony from the victims of the non-capital crimes. (See Argument 17, *post*.)

Whether the evidentiary and instructional errors are reviewed individually or collectively, reversal of the penalty is required under either the harmless error standard for a federal constitutional violation (*Chapman v. California*, *supra*, 386 U.S. at p. 24) or the standard for state-law error at the penalty phase (*People v. Brown*, *supra*, 46 Cal.3d at p. 447-448). Reversal is required under the state standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 [could a "reasonable juror" have been affected by the error]); *People v. Brown*, *supra*, 46 Cal.3d at p. 472, fn. 1 (conc. & dis. opn. of Broussard, J.) [inquiry is only whether it is reasonably possible that a single juror might have changed his or her vote in the absence of error].)

There were two explanations presented to the jury as to what occurred outside the R&S bar, and although the jury found against appellant

at the guilt phase, there may well have been jurors who found sufficient lingering doubt to sentence appellant to a life sentence, rather than death. The prosecution's theory that appellant committed a first degree murder was based on significantly divergent testimony by a handful of witnesses, most of whom were in varying degrees of intoxication, and some of whom had significant reasons to curry favor with the prosecution.

The other explanation was that offered by appellant about the events that led to the tragic death of Deputy Trejo. When appellant testified, he immediately acknowledged that he alone was to blame for the shooting and responsible for Deputy Trejo's death. (95RT:15028.) He explained that it was not intentional and the gun discharged when he tripped and fell. Evidence about the position of Deputy Trejo, which supported appellant's testimony, was corroborated by expert testimony. (95RT:15918-15825.) In other words, while the guilt phase verdict demonstrates that the jury rejected appellant's explanation at the guilt phase, any lingering doubt that may have inured to appellant was lost when the trial court permitted the prosecution to present its powerful and emotionally-laden victim impact evidence in asking the jury to sentence appellant to death.

Additionally, the defense mitigation evidence was not only essentially a repeat of what the jury had heard, and rejected, at the guilt phase, but there was little presented about appellant's upbringing and minimal evidence that humanized appellant for the jury. Despite, or because of the mitigation evidence, appellant could not fairly counter the highly emotional effects that the victim impact evidence undoubtedly had on appellant's jury and its penalty determination, effects which were skillfully exploited by the prosecutor in his penalty phase closing argument.

The prosecutor's carefully crafted argument urged the jury to tell appellant that he deserved to die for what he had left in his wake – which included Deputy Trejo's bereft family members, who lost their loved one upon whom many of them, including his children and grandchildren, were dependent, and whose sudden loss meant that they could not even say goodbye to him. (128RT:19891, 19917.)

In advocating for death, the prosecutor implored the jury to stop from happening in this case what he argued can happen at many trials, that is, to have the true victim, here Deputy Frank Trejo, cease to exist as an identifiable figure (128RT:19883), and to think of appellant as the victim. (128RT:19883-19884, 19913-19915.) The prosecutor argued that the convicted defendant can usurp the passion due to the victim and thereby steal both the victim's life and the victim's moral constituency. (128RT:19884.) The prosecutor's argument was calculated to arouse passion and prejudice during penalty phase argument. The hurt, loss and sorrow from Deputy Trejo's death was palpable throughout trial. Indeed, the very presence of his coworkers as the bailiffs during the trial and in whose charge the jury was left were daily reminders of who Deputy Trejo was and of his loss to the law enforcement community.[147] Moreover, Deputy Trejo's widow, Barbara, was present in the courtroom nearly every day of the trial. (See, e.g., 4RT:483-484; 30RT:3943; 45RT:6782;

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[147] Appellant moved, unsuccessfully, to recuse the Sonoma County Sheriff's Department, that is, Deputy Trejo's department, from acting as bailiffs for the courtroom (19RT:2806-2815; 13CT:2615-2625; see also 103RT:16279-16281), and repeatedly objected to the unnecessary and unduly prejudicial effect of the excessive number of deputy sheriffs assigned to the courtroom. (19RT:2815-2821; 38RT:5262; 49RT:7398, 7455-7457).

82RT:12583-12584 [trial court admonished prosecutor to direct Mrs. Trejo and her family members not to confer with the prosecutor or have direct communication with him in the courtroom in front of the jury, finding it improper, especially as to the deputy's widow].)

The victim impact aggravating evidence changed the jury's weighing calculus and unfairly skewed the balance in favor of death. (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.) [Eighth Amendment dictates that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion." (original italics)].) The evidence diverted the jury from a "reasoned *moral* response to the defendant's background, character and crime" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *California v. Brown*, *supra*, 479 U.S. at p. 545 (conc. opn. of O'Connor, J. (original italics)), and it was not reigned in by any instruction informing the jury as to its proper use. (See *People v. Edwards*, *supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett*, *supra*, 30 Cal.3d at p. 864 [victim impact evidence can be prejudicial if it diverts "the jury's attention from its proper role [and] invites an irrational, purely subjective response."]; *Kelly v. California*, *supra*, 129 S.Ct. at p. 567 (statement of Stevens, J., respecting the denial of cert.) [primary, if not sole effect of the victim impact evidence "was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants . . . [it] added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment"].)

The violations of appellant's federal constitutional rights require reversal unless the prosecution can show that they were harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The

violations of appellant's rights under state law require reversal if there is any reasonable possibility that they affected the jury's penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.) Given the circumstances in this case, the state cannot prove that the errors were harmless. The trial court's errors and the unique circumstances of this case include the presentation of inflammatory and cumulative victim impact evidence, the utter lack of need to "balance" the case to ensure that Deputy Trejo was humanized for the jury, the lack of evidence humanizing appellant for the jury, the admission of victim impact testimony from the non-capital crimes (see Argument 17, *post*) and the trial court's refusal to instruct the jury to follow its duty and not be diverted by the emotionally-laden evidence such that it overcomes their reason, and to follow its duty in sentencing appellant. The errors violated appellant's right to a fair and reliable capital sentencing hearing and denied appellant due process by rendering the penalty trial fundamentally unfair. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17; *Payne*, 501 U.S. 808.) Appellant is entitled to reversal of the death judgment and a new penalty trial.

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING AT THE PENALTY PHASE INADMISSIBLE VICTIM IMPACT TESTIMONY FROM KAREN KING AND FRANK COOPER

A. Introduction

In his motion to exclude victim impact evidence regarding Deputy Trejo's family members (see Argument 16), appellant also moved to exclude victim impact evidence as to the non-capital crimes against the Cooper and King family. Appellant argued, inter alia, that the admission of victim impact evidence in this case would violate the Eighth and Fourteenth Amendments' guarantees of reliable capital sentencing and due process. (24CT:5008-5029.) Other authority upon which appellant relied was *Payne v. Tennessee* (1991) 501 U.S. 808, *Gardner v. Florida* (1977) 430 U.S. 349, 358, this Court's decision in *People v. Edwards* (1991) 54 Cal.3d 787, and the state Constitution. (See 24CT:5008-5029.)

The court also heard argument on appellant's objections to the proposed testimony from Karen King and Frank Cooper regarding the effect on them of the crimes of burglary and false imprisonment, and assault with a firearm as to Cooper. Appellant argued, inter alia, that victim impact evidence from the victims of the noncapital crimes was not within the purview of the circumstances of the homicide and thus inadmissible under section 190.3, factor (a). Counsel also argued that in any event, the evidence was inadmissible under Evidence Code section 352. (115RT:18442-18444; 121RT:19160-19164.) The court overruled appellant's objections. (121RT:19161.)

Appellant also moved that the prosecution be precluded from eliciting evidence from either Frank Cooper or Karen King about the effect

on them of having a crime committed against them by a person of appellant's race. Counsel stated that there was nothing about the crimes at the Cooper/King residence indicating that it was racially motivated, that to permit such testimony would improperly inject the issue of race into the sentencing decision and that allowing it would permit "emotional racist testimony." (121RT:19162-19164.) The trial court denied appellant's motion to preclude the prosecutor from presenting evidence regarding the deleterious impact on the victim from the crime having been committed by a person of appellant's race. (121RT:19163-19165.) In denying appellant's motion to prevent race from entering the penalty decision, the trial court stated "it is one of those you take your victim as you find them situation." (121RT:19163.) The trial court stated that appellant "happened to break into a house occupied by African-Americans, and they have a different reaction, possibly, apparently Karen King does, than a white family might have had, so I don't think that she should be limited from testifying to that reaction." (121RT:19163.)

The court's rulings were erroneous.

B. Summary of the Penalty Phase Victim Impact Testimony from the Victims of the Noncapital Crimes

The first two victim impact witnesses to testify at the penalty phase were the victims of the noncapital crimes. Frank Cooper was almost 69 years old when he testified at the penalty phase. (121RT:19167.) Since appellant committed the crime against him his health had deteriorated, he was more tired than he was before the crime, and he did not feel like doing much of anything. (121RT:19167-19168.) Before the crime he had worked, but now was unable to. (121RT:19167-19168.) He was now

"afraid . . . to get out and roam around." (121RT:19168.) He and his family now suffered financial hardships. (121RT:19167-19168.)

He had not slept as well as he had before the crime, now had a "nervous condition" that caused him to wake from any kind of noise, and when he did so, checked his house to ensure it was secure. (121RT:19169-19170.) Cooper testified that there were many months now where his monthly income, which had been roughly $6700 a month, was "bad." He further testified that Yolanda King, his fiancé, with whom he lived both currently and at the time of the crime, had also been unable to work since the crime, resulting in another $12,000 to $15,000 loss to their family. (121RT:19168.) He had to take a new medication since the crime. (121RT:19169.) He changed the way he lived. (121RT:19169.)

Karen King testified about the impact the crime had on her physical and mental well-being. She testified that she could no longer sleep well and suffered from stress. She took sleeping medication but still could not sleep through the night. (121RT:19170-19171.) She placed furniture in front of her door, and when she woke in the middle of the night she checked the windows and doors. (121RT:19171-19172.) King no longer lived in the house where the crime occurred and was unable to return to it because of her fear of the area and the house. (121RT:19172.) She testified that the crime against her had resulted in her becoming distant from her mother, Yolanda King, although before the crime they were close and had lived in the same house. Since the crime, King's son no longer listened to her. She could no longer care for her daughter due to the stress from which she suffered and for the most part, her daughter now stayed with her mother. (121RT:19172.)

Karen King testified that she smoked more than she did before the crime. She did not drink before the crime occurred, but she now drank a lot to calm her nerves and ease her stress. Since the crime King rarely left her house and was afraid to meet new people. King was particularly afraid of white people; before this crime, she was not afraid of white people. (121RT:19173.) King's fears, stress, drinking, increased smoking, inability to sleep, inability to venture from her home and her fear of white people all developed after appellant broke into her house, and despite the fact that neither she nor her children suffered any physical injury during the crime. (121RT:19172-19175.)

C. The Applicable Legal Principles

As discussed fully in Argument 16, *ante*, in *Payne v. Tennessee*, *supra*, 501 U.S. 808, the United States Supreme Court held that the Eighth Amendment did not preclude admission of victim impact evidence (*id.* at p. 827), thereby overruling the broad exclusion on victim impact evidence imposed by its earlier decisions in *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805.

Following *Payne v. Tennessee*, *supra*, 501 U.S. 808, this Court decided that factor (a) of section 190.3 allows victim impact evidence and argument on the specific harm caused by the defendant, including the impact of the homicide victim's death on the victim's family. (*People v. Edwards*, *supra*, 54 Cal.3d at pp. 833, 835.) For purposes of victim impact evidence, this Court has interpreted this requirement to include evidence concerning "the immediate injurious impact of the *capital murder*" (*People v. Montiel* (1993) 5 Cal.4th 877, 935 (italics added)), evidence of the *homicide* victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital homicide, and the facts

of the *homicide* that were disclosed by the evidence properly received during the guilt phase (*People v. Fierro* (1991) 1 Cal.4th 173, 264 (conc. and dis. opn. of Kennard, J.)).

D. It Was Error to Admit Victim Impact Testimony From Frank Cooper and Karen King

The trial court erred in permitting victim impact testimony from Karen King and Frank Cooper. The victim impact testimony from these witnesses was prejudicial on its own and exacerbated the harm from the trial court's erroneous admission of victim impact testimony from five members of Deputy Trejo's family and multiple victim impact photographs, and the court's refusal to limit the prejudice from this evidence with a cautionary instruction. In Argument 16, *ante*, appellant argued that the court committed prejudicial error in allowing the prosecutor's victim impact evidence as to the circumstances of the capital homicide and, once admitted, by refusing to give appellant's cautionary instruction as to its use. The court's error here, allowing the victims of the noncapital crimes that were joined in the present proceeding, to testify about the impact from those crimes, was separate error. The error was not harmless and denied appellant his right to a fair and reliable penalty determination under both the state and federal Constitutions. (U.S. Const., 8th & 14th Amends; Cal. Const., art. I, §§ 7, 15, & 17; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Appellant acknowledges that this Court has extended the permissible bounds of victim impact evidence beyond the impact from the capital homicide tried in the present proceeding. This has included evidence of the continuing impact on the victim of a defendant's criminal activity, other than the capital homicide, including crimes for which appellant was tried

and convicted in the present proceeding, as well as the continuing impact on the victim of a defendant's prior criminal activity admitted under section 190.3, factor (b). In both instances, this Court has concluded the evidence was admissible under section 190.3, factor (b).

As to prior criminal activity admitted under factor (b), that is, prior criminal activity for which appellant was not tried in the present proceeding, this Court in *People v. Bramit* (2009) 46 Cal.4th 1221 held that aggravating evidence admissible under section 190.3, factor (b), included the "circumstances of" the criminal conduct admitted under factor (b), which included the continuing impact on the victim from that conduct. (*Id.* at p. 1241; see also *People v. Brady* (2010) 50 Cal.4th 547, 581-582.)

Regarding criminal activity for which appellant was tried and convicted in the present capital proceeding, this Court held, in *People v. Martinez* (2010) 47 Cal.4th 911, 961, that the continuing impact on the victim of a defendant's criminal activity tried jointly with the capital homicide, although not relevant to the circumstances of the *capital crime* under factor (a), was relevant and admissible as evidence of the emotional effect of defendant's other violent criminal acts under section 190.3, factor (b).

Appellant maintains that testimony at the penalty phase from the non-homicide crime victims, Karen King and Frank Cooper, violated appellant's state and federal constitutional rights to due process and a fair and reliable penalty determination. Permitting highly emotional victim impact evidence at the penalty phase from non-homicide crime victims takes the sentencing proceeding yet another step closer to sentencing the defendant based on highly charged emotional evidence, and a step away from a sentence based on reason. (U.S. Const., 8th & 14th Amends; Cal.

Const., art. I, §§ 7, 15, & 17; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; *Gardner v. Florida*, *supra*, 430 U.S. at p. 358 [decision to impose the death sentence must be "based on reason rather than caprice or emotion"].)

Appellant respectfully asks this Court to reconsider its prior rulings and that victim impact evidence be limited to victims of the capital crime. Consistent with this Court's direction in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, appellant has not presented a full argument on this issue given the Court's current position, and presents the claim to preserve it for possible federal court review.

1. Victim Impact Evidence from Frank Cooper and Karen King Was Not Admissible under Section 190.3, Factor (a)

The testimony of Frank Cooper and Karen King as to the impact the crimes against them had on their lives was inadmissible as aggravating evidence under section 190.3, factor (a), yet it was under this factor that the evidence was erroneously admitted. The Cooper/King crimes were not related directly to the circumstances of the capital crime. The crimes occurred hours after, and miles away from, the shooting. (71RT:10816-10817; 76RT:11492; 82RT:12614.) The mere fact these two separate incidents were joined for trial does not make the facts surrounding the Cooper/King crimes, including the victim impact evidence, a circumstance of the shooting of Deputy Trejo, and their penalty phase testimony should not have been admitted or considered by the jury under factor (a).

Evidence of the impact of a defendant's conduct toward victims other than the murder victim is relevant under factor (a) if it is related *directly* to the circumstances of the capital offense. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1062-1063; see *People v. Clark* (1990) 50 Cal.3d

583, 629.) For example, in *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1062-1063, the defendant shot a jewelry store employee just before killing the store owner. The surviving employee's testimony about the long-term effects of the shooting were held admissible as a circumstance of the crime. Similarly, in *People v. Haskett* (1982) 30 Cal.3d 841, 863-864, defendant was tried for both the attempted murder of a mother and the capital crimes of murdering her children at the same time. Evidence of the mother's suffering was considered proper factor (a) evidence. (*Ibid.*)

However, the simple fact that a noncapital crime is joined with a capital crime for trial does not mean that it is directly related to the capital crime within the meaning of factor (a). In *People v. Martinez*, *supra*, 47 Cal.4th 911, the defendant was charged with a capital crime and two assaults – one assault occurred a week before the capital crime and one a week after. Despite being tried together, this Court acknowledged that the assaults were not relevant to the circumstances of the capital crime. (*Id.* at p. 961.)

This Court's decision in *People v. Miranda* (1987) 44 Cal.3d 57, 105-106, has generated some confusion regarding how noncapital crimes joined with capital crimes can be considered as aggravation in a penalty phase trial. In *Miranda* the Court recognized the possibility that jurors could be confused by the language of section 190.3, factors (b) and (c), and erroneously double-count evidence of the charged crimes under factors (a) and under factor (b) and/or (c). The Court recommended that to avoid such confusion, trial courts "should expressly instruct that subdivisions (b) and (c) refer to crimes other than those underlying the guilt determination." (*People v. Miranda, supra*, 44 Cal.3d at p. 106, fn. 28.)

CALJIC No. 8.85 was subsequently modified to comport with the Court's recommendation in *Miranda*, and that instruction as modified was given in this case. Specifically, the jury was instructed as to factor (b) in relevant part as follows: "The presence or absence of criminal activity by the defendant, *other than the crime for which the defendant has been tried in the present proceedings*, which involve the use or attempted use of force or violence. . . ." (128RT:19856; 26CT:5305-5307, emphasis added.) *Miranda*, however, involved noncapital crimes that were committed at the same time as the capital crime and therefore clearly related to it. (*People v. Miranda*, *supra*, 44 Cal.3d at pp. 71-72.) In *People v. Prince* (2007) 40 Cal.4th 1179, 1292, this Court explained that *Miranda* did not decide whether convictions in the same proceeding as the capital case which were "unrelated to the capital crimes could be considered under factor (b)." The Court went on to conclude there was no logical reason evidence of such unrelated crimes that "would be admissible under factor (b) would become inadmissible because of a joinder with capital offenses." (*Ibid.*)

While it appears therefore that evidence of the Cooper/King crimes were theoretically admissible as aggravating evidence under factor (b) in the present case, that evidence was erroneously admitted under factor (a), and the jurors were instructed in such a manner that they could not have considered the evidence under factor (b). Besides receiving CALJIC No. 8.85, the jury was specifically instructed as to those purported incidents of violence it could consider under factor (b). (128RT:19861-19862; 26CT:5309-5310.) The Cooper/King crimes were not among them. Moreover, the prosecutor told the jury during argument that the victim impact evidence as to Cooper and King was a factor in aggravation to be considered under factor (a). (128RT:19890.) Therefore there was no way

for the jury to consider the Cooper/King evidence as aggravation under any factor other than factor (a).

Appellant submits that consideration of the impact from these crimes in deciding between life and death was error and that the error was prejudicial. In *People v. Martinez*, *supra*, 47 Cal.4th at p. 961, despite recognizing that the noncapital crimes there were not relevant to the circumstances of the capital crime, this Court noted that the victim impact evidence of the noncapital offenses was relevant as evidence of other violent acts committed by the defendant under factor (b). Implicit in this statement is the assumption that whether such information is admitted under factor (a) or factor (b) makes no difference. Appellant respectfully disagrees. At the penalty phase the question that the jury decides turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. (*People v. Haskett*, *supra*, 30 Cal.3d at pp. 863-64. Factors (a) and (b) are mutually exclusive as factors in aggravation. (See *People v. Melton* (1988) 44 Cal.3d 713, 763.) Furthermore, they serve different purposes in our capital sentencing scheme, and a juror's understanding of evidence in the context of those factors would likely affect the weight that juror would give to that evidence in making the moral assessment of a defendant's culpability.

Criminal activity involving force or violence under factor (b) is limited to conduct "other than the immediate circumstances for which the death penalty is being contemplated." (*People v. Melton*, *supra*, 44 Cal.3d at p. 763; see *People v. Webster* (1991) 54 Cal.3d 411, 452-453.) This Court has concluded that the purpose of factor (b) evidence is to show the defendant's propensity for violence. (*People v. Balderas* (1985) 41 Cal. 3d 144, 202.) The Court has also held that the victims of crimes introduced

under factor (b) may testify to the effect the crime has had on them. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1276; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1241.) This is so simply because such evidence is relevant to the nature of the violent act committed by the defendant. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 39.)

Thus, where a piece of evidence offered under factor (a) is inadmissible, but would have been admissible under factor (b), its admission under factor (a) is nevertheless erroneous, and that admission cannot be regarded as inherently non-prejudicial. This Court should reconsider the language in *Martinez* that suggests otherwise.

Applied to the present case, the error cannot be considered non-prejudicial. There was, in fact, abundant evidence admitted under factor (b) apart from the Cooper/King crimes that a reasonable juror could deem credible to conclude that appellant had a propensity for violence. Such a juror could conclude that the Cooper/King crimes therefore add little in the way of aggravation in determining the appropriate sentence for the unrelated capital murder. The same juror however, believing that the Cooper/King crimes were a circumstance of the offense for which he or she was choosing the appropriate punishment, could deem those crimes to be so significantly aggravating as to be the difference between a sentence of life and death. Stated otherwise, the shooting of Deputy Trejo was the central event on which the jury should have been making its sentencing decision, in balance with the other aggravating and mitigating evidence. Instead, the jury was told that the central event on which it was to determine whether appellant lived or died was the shooting of Deputy Trejo plus the crimes that occurred at the Cooper/King home and the continuing impact upon them. Even the trial court considered the circumstances of the Cooper/King

crime to be extremely significant, stating that it found the homicide and the crimes against Frank Cooper and the Kings equally inflammatory, and that a jury could find the charges involving them "as offensive as murdering" Deputy Trejo. (20CT:4055 [order denying severance of counts].) Accordingly, there is a reasonable possibility that but for these errors, the jury would have reached a verdict more favorable to appellant. The death judgment must therefore be reversed.

2. Victim Impact Evidence from Frank Cooper and Karen King Was Not Admissible under Section 190.3, Factor (b)

Evidence of the Cooper/King crimes and the testimony of Frank Cooper and Karen King as to the impact those crimes had on their lives was inadmissible as aggravating evidence under section 190.3, factor (b) because it involved criminal activity for which appellant was tried in the present proceeding and the jury was so instructed. As stated above, appellant's jury was specifically instructed that in deciding between life and death they may consider, under factor (b), "[t]he presence or absence of criminal activity by the defendant, *other than the crime for which the defendant has been tried in the present proceedings*, which involve the use or attempted use of force or violence. . . ." (128RT:19856; 26CT:5305-5307, emphasis added.) Appellant was tried for the crimes against Cooper and King in the present proceeding.

Moreover, factor (b), unlike factor (a), makes no mention of the "circumstances" of the criminal activity. Factor (a) of section 190.3, speaks of "the circumstances of the crime of which the defendant was convicted in the present proceeding." In contract, factor (b) speaks only of "the presence or absence" of criminal activity involving force or violence. There

is no mention of the "circumstances" of the criminal activity, and likewise no mention of its "impact" or "effects."

Additionally, expanding victim impact evidence under factor (b) to include as "circumstances" of the noncapital crime, the impact and effects from that crime, renders this aggravating factor unconstitutionally vague and permits death sentences to be imposed arbitrarily. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, and 17; *Tuilaepa v. California* (1994) 512 U.S. 967, 975; *Stringer v. Black* (1992) 503 U.S. 222, 237.) Other jurisdictions have concluded that, although evidence of the defendant's *commission* of a noncapital crime is admissible, evidence of the *impact* on the victims of noncapital crimes is not. (See, e.g., *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 745 [evidence regarding the impact of a capital defendant's prior crimes on the victims of those crimes is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the *homicide* for which he is being sentenced]; *Rhodes v. State* (Fla. 1989) 547 So.2d 1201, 1204-1205 [testimony of prior felony conviction admissible at penalty phase of capital trial, but error to admit evidence of victim's physical and emotional trauma and suffering of the collateral crime]; *Cantu v. State* (Tex.Crim.App. 1997) 939 S.W.2d 627, 635-637 [victim impact evidence regarding one other than *the victim for whose death the defendant has been tried* is not relevant to the issue as contemplated by *Payne*].)

3. Victim Impact Evidence From Frank Cooper and Karen King Resulted in the Risk that the Jury Sentenced Appellant to Death to Punish Him for his Noncapital Crimes

Yet another reason that the victim impact evidence from Cooper and King was inadmissible was the risk that such emotionally-laden evidence as

the impact of the crimes on the nonhomicide victims led the jury to sentence appellant to death not because of his culpability for the homicide for which he was on trial, but because the jury would believe that he would not be punished enough for his other transgressions. Given that the victim impact evidence from Cooper and King was presented during the sentencing phase, there was the impermissible risk that the jury would feel the need to punish appellant for these noncapital crimes within their sentencing options of life or death. (See, e.g., *State v. Bigbee* (Tenn. 1994) 885 S.W.2d 797, 812 [prosecutor's argument improper by implying that imposition of the death penalty would be an appropriate way to further punish the defendant for prior crime]; cf., *Rogers v. Lynaugh* (5th Cir. 1988) 848 F.2d 606, 611 [prosecutor's argument that jury's sentence should include punishment for prior felony convictions was constitutional error].) This was necessarily a risk in appellant's case because the crimes were tried in the present proceeding and the challenged victim impact testimony was presented during the sentencing proceeding for the capital crime. There was no reason for the jury to believe anything other than that they are to punish appellant for the crimes from the guilt phase, like the capital homicide, for which he had not yet been punished or sentenced. The jury would conclude that they must account for appellant's punishment and that their choice for the crimes of which appellant was convicted in this proceeding was one between life and death. This was error.

The victim impact evidence was erroneously admitted and its admission violated appellant's state and federal constitutional rights to due process and a fair and reliable penalty determination.

E. The Victim Impact Evidence Was More Prejudicial than Probative

In any event, Frank Cooper's and Karen King's impact evidence was far more prejudicial than probative. This Court in *Edwards* did not retreat from the cautions noted in *People v. Haskett*, *supra*, 30 Cal.3d at p. 864, that trial courts must maintain limits on emotional evidence and argument and must "'strike a careful balance between the probative and the prejudicial . . . [and exclude evidence] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response. . . .' [Citation.]" (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836.) To be probative, such evidence at the penalty phase must describe a harm that would distinguish the defendant's case from other capital crimes, thus making it aggravated and the defendant especially deserving of death. (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 788 ["the purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character"].)

Assuming, without conceding, that Cooper's and King's victim impact testimony was probative for this purpose, its probative value was outweighed by its prejudicial impact. First, as stated above and in Argument 16, *ante*, the very nature of victim impact testimony – an emotional appeal to sentence the defendant to the ultimate sanction – inflames jurors' emotions and risks the arbitrary imposition of a death verdict. Moreover, their testimony was cumulative to their guilt phase testimony. Appellant had argued below that the victim impact evidence was not only unduly prejudicial on its own, but that the prejudicial weight, as compared to the probative value, was particularly acute because the jurors had heard from the victim witnesses about the crimes during the guilt phase.

(121RT:19160-19161.) As this Court stated in *People v. Davis* (2009) 46 Cal.4th 539, 618, evidence of prior crimes themselves can demonstrate the impact of those crimes on the victims. (See Catherine Bendor, *Defendants' Wrongs and Victims' Rights: Payne v. Tennessee* (1992) 27 Harv. C.R.-C.L. L.Rev. 219, 237 [when victim impact evidence is before the jury at both the guilt and the sentencing phases, repetition of such emotional facts further inflames jurors' reactions and promotes arbitrary decision making].) The victims' opportunity to testify again at the penalty phase, about crimes other than the capital homicide increased the risk of, and resulted in, a death verdict based on emotion and revenge, rather than one of reason. (See *Gardner v. Florida*, *supra*, 430 U.S. at p. 358.) In sum, the probative value the victim impact evidence may have had on the decision the jury had to make – whether appellant would live or die – was far outweighed by its prejudicial effect.

F. The Trial Court Erred by Admitting Testimony that Appealed to Racial Prejudice

Over appellant's objection, the court permitted the prosecutor to present inflammatory race-based testimony from Karen King. During King's testimony, in response to the prosecutor's question whether her ability to be out in public had changed since the crimes, King testified that it had, that she stayed in the house a lot and that she was afraid to meet new people. (121RT:19173.) The prosecutor followed up with whether there were any particular people that she was afraid of – to which she responded "Caucasians." (121RT:19173.) The prosecutor continued, asking if she was afraid of Caucasians before March 30, 1995, to which King responded "no." (121RT:19173.)

In *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1241-1242, the prosecution presented testimony from victims of uncharged bank robberies. In addition to testimony about the facts of the prior misconduct, admitted pursuant to section 190.3, factor (b), the trial court in *Bramit* permitted the witnesses to testify to the continuing impact of the crime upon their life. One witness testified that since the crime, she felt differently toward people of defendant's race, had less confidence in them and moved away from them when she saw them. Another testified that she got nervous and uptight when she saw people of defendant's race.

On appeal, the defendant in *Bramit* argued that the racially biased testimony demonstrated that the prosecutor was appealing to racial prejudice in seeking death. This Court stated that the defendant's contention that the prosecutor committed misconduct was forfeited because he had failed to object at trial, or to request an admonition, which this Court believed would have cured any prejudice. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1241-1242.) The Court stated that in any event, it did not appear that the prosecutor intended to elicit racial remarks, or to appeal to racial prejudice, noting that the witness's statements about the defendant's race likely came as a surprise to the prosecutor given that the witness testified that she had not realized until that moment that she felt that way. (*Id.* at p. 1242.) The Court also found that the testimony did not violate the defendant's Eighth Amendment rights, given that the record did not indicate that the prosecutor had capitalized on the witness's remarks. (*Ibid.*)

The situation for appellant was quite different. The prosecutor was not at all surprised by King's testimony about appellant's race. Indeed, the prosecutor fought to be able to present it. Appellant below had moved before the penalty phase began to preclude the anticipated testimony. The

court denied appellant's objection. (121RT:19163-19165.) While King ultimately gave the prosecutor the answers he sought, he had to prod and lead her to state that since the crime she had been afraid of people of appellant's race. (121RT:19172-19173.)

The harm from Karen King's testimony concerning her fear of people of appellant's race was that it implied to appellant's jury that appellant's race was a factor that they could consider in deciding whether to sentence appellant to life or to death. This they could not properly do. (See, e.g., *McFarland v. Smith* (2nd Cir. 1979) 611 F.2d 414, 417 ["to raise the issue of race is to draw the jury's attention to a characteristic that the Constitution generally commands us to ignore"]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [race of defendant is not a constitutionally permissible factor in capital sentencing]; *McClesky v. Kemp* (1987) 481 U.S. 279 [race of the victim is not a constitutionally permissible factor in capital sentencing].)

Allowing racially-charged testimony to come in at the sentencing phase of a capital case under the guise of victim impact evidence violated appellant's right to a fair and reliable sentencing hearing. (See *Turner v. Murray* (1986) 476 U.S. 28, 35 ["because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for race prejudice to operate but remain undetected"].)

No court should permit the prosecution to use evidence of race or other constitutionally protected classifications in seeking a death sentence. (See *Dawson v. Delaware* (1992) 503 U.S. 159, 165-168 [admission of defendant's membership in White racist prison gang was constitutional error requiring reversal of death sentence where that evidence was not relevant to any issue being decided at the punishment phase].) The

prosecutor here brought the issue of race into the sentencing decision by arguing for admission of, and then presenting evidence that, King feared people of appellant's race since he committed the crime against her. While that may be one of the continuing effects of the crime against her, the court's decision to permit the evidence resulted in appellant's race becoming a consideration for the jury in deciding appellant's sentence. Indeed, the jury was instructed that they "shall consider, take into account and be guided by" such factors. (CALJIC No. 8.85.) The court's decision injected the issue of race into the sentencing. This prejudicial evidence implicated appellant's right to due process and to a reliable penalty determination under the Eighth and Fourteenth Amendments. (See *Furman v. Georgia* (1972) 408 U.S. 238, 242 (conc. opn. of Douglas, J.) [death penalty unconstitutional if it discriminates by reason of race or is "imposed under a procedure that gives room for the play of such prejudices"].)

G. The Admission of Victim Impact Evidence from the Noncapital Crime Victims and Denial of the Cautionary Instruction Require Reversal of Appellant's Death Sentence

The erroneous admission of the highly prejudicial, cumulative and racially based victim impact aggravating evidence violated appellant's state and federal constitutional rights to a fair and reliable penalty determination. The errors were exacerbated by the trial court's refusal to give the defense requested cautionary instruction regarding the jury's consideration of the victim impact aggravating evidence. (See Argument 16, § H., *ante*.)

Whether the evidentiary and instructional errors are reviewed individually or collectively, reversal of the penalty verdict is required under either the harmless error standard for a federal constitutional violation (*Chapman v. California* (1967) 386 U.S. 18, 24) or the standard for state-

law error at the penalty phase (*People v. Brown* (1988) 46 Cal.3d 432, 447-448). Reversal is required under the state standard if there is a reasonable possibility that even a single juror *might* have reached a different decision absent the error. (*People v. Ashmus* (1991) 54 Cal.3d 932, 983-984 [could a "reasonable juror" have been affected by the error]); *People v. Brown*, *supra*, 46 Cal.3d at p. 472, fn. 1 (conc. & dis. opn. of Broussard, J.).)

In advocating for death, the prosecutor emphasized the victim impact from the crimes against Frank Cooper and the King family. His argument referred to the impact upon them when appellant refused to release the children, but permitted some of the adults in the residence to leave, the impact on Yolanda King, who could no longer work, and the emotional and mental impact upon Karen King. (128RT:19890-19891.) Indeed, apparently not obtaining what he fully wanted from one of the non-homicide victim impact witnesses, the prosecutor offered his own words for that of his witness and argued in his effort to have appellant sentenced to death that Frank Cooper "would [not] admit it, but I think that this has shaken him up pretty much." (128RT:19891.)

The victim impact aggravating evidence changed the jury's weighing calculus and unfairly skewed the balance in favor of death. (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.) [Eighth Amendment dictates that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion" (original italics)].) The evidence diverted the jury from a "reasoned *moral* response to the defendant's background, character and crime" (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328, quoting *California v. Brown*, *supra*, 479 U.S. at p. 545 (conc. opn. of O'Connor, J. (original italics)), and it was not reigned in by

any instruction directing the jury as to its proper use. (See also *People v. Edwards*, *supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett*, *supra*, 30 Cal.3d at p. 864 [victim impact evidence can be prejudicial if it diverts "the jury's attention from its proper role [and] invites an irrational, purely subjective response"].)

As argued fully in Argument 16, *ante*, the harm from the court's error in permitting victim impact testimony, including the testimony from the noncapital crime victims, violated appellant's right to a fair and reliable capital sentencing hearing and denied appellant due process by rendering the penalty trial fundamentally unfair. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17; *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; see also *id.* at pp. 836-837 (conc. opn. of Souter, J.).) Appellant is entitled to reversal of the death judgment and a new penalty trial.

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THE TRIAL COURT ERRONEOUSLY REFUSED TO GIVE LEGALLY ACCURATE INSTRUCTIONS REQUESTED BY APPELLANT REGARDING THE SCOPE OF AGGRAVATING AND MITIGATING EVIDENCE, THE NATURE OF THE JURORS' SENTENCING DISCRETION, AND THAT MERCY COULD BE CONSIDERED AS A BASIS FOR SENTENCING APPELLANT TO LIFE

The defense requested a number of special and pinpoint penalty phase instructions that accurately reflected the law. Specifically, the defense requested instructions clarifying, defining and providing the scope of mitigating circumstances (25CT:5163, 5167, 5169, 5171, 5173, 5175, 5177, 5180-5183, 5191), the limitations on aggravating circumstances (25CT:5172, 5178, 5180-5183, 5191), the nature and scope of the jury's sentencing discretion and of the weighing process (25CT:5137, 5139, 5144, 5161, 5162, 5183), and that the jury could exercise mercy in deciding the sentence to impose (25CT:5185). These were all denied.

The trial court's refusal to give these instructions violated state law as well as appellant's Eighth and Fourteenth Amendment rights to a fair penalty trial and reliable penalty determination. A "defendant is entitled to instructions which direct attention to evidence or amplify legal principles from which the jury may conclude that his guilt has not been established." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 257, citing *People v. Sears* (1970) 2 Cal.3d 180, 190.) If the instruction correctly states applicable law and does not otherwise excessively duplicate an instruction or confuse the jury, it should be given. (See *People v. Kane* (1946) 27 Cal.2d 693, 698 [error to refuse proposed instruction which was correct and simple statement of the law, pertinent and material to defendant's theory and supported by evidence].) The right to such instructions applies at the

penalty phase of a capital trial as well. A defendant has a right to clear instructions which do not preclude consideration of mitigating factors and which also guide and focus the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. (*People v. Gordon* (1990) 50 Cal.3d 1223,1277; see also *People v. Davenport* (1985) 41 Cal.3d 247, 283 [appellant denied right to a fair and reliable sentencing determination if jury not provided with proper instructions as to how to weigh admitted mitigating evidence].) Under section 1093, subdivision (f), the trial court must instruct the jury "on any points of law pertinent to the issue, if requested by either party."

While a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative, or if it might confuse the jury (*People v. Gurule* (2002) 28 Cal. 4th 557, 659), none of these reasons applied to the instructions proffered by the defense in this case. To the contrary, each of the requested instructions discussed below was an accurate statement of the law that would have ensured a fair and reliable sentencing determination as required by the Eighth and Fourteenth Amendments to the U.S. Constitution. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [Eighth Amendment "gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case"], citing *Gardner v. Florida* (1977) 430 U.S. 349, 363-364 (conc. opn. of White, J.) and *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The trial court's refusal to give the defense requested instructions discussed below violated appellant's right to a fair trial and a reliable, nonarbitrary and individualized penalty determination under the Eighth and Fourteenth Amendments to the U.S. Constitution. (See *Penry v. Lynaugh*

(1989) 492 U.S. 302, 318-323; *Clemons v. Mississippi* (1990) 494 U.S. 738.)

A. The Trial Court Erred by Refusing to Give Legally Accurate Instructions Clarifying the Scope of "Mitigating" Circumstances

1. Appellant's Requested Special Instructions

The defense requested numerous special instructions clarifying and defining the scope of mitigating circumstances. Many of the proffered instructions were offered alternatively, that is, if the court were to deny an initial proffered instruction, the defense offered an alternative to the rejected one. Initially, the defense requested an overall alternative to CALJIC No. 8.88 (25CT:5180-5183), in light of research demonstrating that many instructions as given do not provide adequate guidance, in large part because they are not well understood. (126RT:19708-19709.) The requested instruction included a section defining mitigating factors, which read as follows:

> Now I will explain to you what the legal term "mitigating factors" means in a case like this. Mitigating factors are the opposite of aggravating factors. That is, in a criminal case such as this one a "mitigating factor" is any evidence regarding the defendant's character, background or history or the circumstances of the crime that, in your judgment, makes a sentence of LWOP more appropriate for this defendant than a sentence of death.
>
> To decide that something is a mitigating factor which would lessen the penalty, you do NOT have to believe that it excuses or justifies the crime itself.
>
> The law permits each juror to decide for himself or herself whether mitigating factors exist. Although the jury as a whole can of course discuss these matters, the decision about what counts as a mitigating factor in this case is one which the law

> leaves to the individual juror. Because of this, the jury does NOT need to reach a unanimous decision about what counts as a mitigating factor.

(25CT:5182, emphasis in original.) The court denied the proffered instruction, despite noting that the language was easy to understand, which was helpful, that they may be correct statements of the law, and that CALJIC is not a "model of clarity." (126RT:19709.)

The relevant portion of the instruction given to the jury, from CALJIC No. 8.88, stated as follows: "A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (26CT:5337; 128RT:19875.) In support of the proposed instructions, the defense provided evidence demonstrating that instructions jurors receive in capital cases do not provide adequate guidance. Appellant submitted an article that included research showing that capital jury instructions, despite their legal accuracy, were confusing, lacked clarity and thus failed to provide constitutionally requisite guidance to the jury, resulting in unreliable jury verdicts. (25CT:5211-5219, Diamond & Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions* (1996) 79 Judicature 224-232.) Appellant also provided a draft of a proposed statute in Illinois (before that state abolished the death penalty) that was prepared based on research demonstrating the infirmities in most state's statutes, and was drafted to provide the constitutionally requisite guidance in clear, explanatory language. (25CT:5220-5229, Diamond, Levi and Bradford, *Draft of Illinois Capital Jury Instructions*.)

Research has continued to support the premise that CALJIC instructions, like the ones given in appellant's case, are not readily understood by lay people, in part due to the archaic nature of the vocabulary. In one study, 48% of college student subjects did not understand what the term "mitigating" meant and 82% did not understand the term "extenuating" in context of the instruction, whereas only 29% either could not define or gave an incorrect definition of "aggravating," a more commonly used term; 28% misclassified the factor (k) catchall as aggravating. (Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law and Human Behavior 575, 579, 581.)[148] In February 2012, The American Bar Association (ABA) House of Delegates adopted a Resolution that state courts adopt jury instructions "which are in language understandable by jurors untrained in law and legal terms, in the penalty phase of trials in which the death penalty may be imposed." (ABA Resolution 101G (February 6, 2012).) The ABA Resolution included a report citing research that found that a significant percentage of capital jurors, including in California, did not understand their sentencing

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[148] Appellant acknowledges that this Court has previously rejected challenges to CALJIC No. 8.88 based on such studies, reasoning that "[t]he presumption that the jurors in this case understood and followed the mitigation instruction supplied to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination." (*People v. Welch* (1999) 20 Cal. 4th 701, 773; accord *People v. Lee* (2011) 51 Cal. 4th 620, 652.) First, appellant submitted research with his requested instructions. (25CT:5211-5219.) These studies, at a minimum, should be grounds for this Court reconsidering its unsupported assumption that "the terms 'aggravating' and 'mitigating' are commonly understood and do not require further elaboration." (*People v. Lee*, *supra*, 51 Cal.4th at p. 652.)

instructions, including the meaning of mitigation and its legally prescribed role in their sentencing decision. (ABA Criminal Justice Section, Report accompanying Resolution 101G, p. 3.) Alarmingly, the study further found that not only do capital jurors not understand the sentencing instructions, but that the word "mitigation" was foreign to most jurors and a number of them confused it with "aggravation." (*Id.* at p. 4.)

The requested instruction was an accurate statement of the law. It stated in plain, simple language that to find something mitigating, the juror did not have to believe it excused the crime, or justified the crime, but was simply a factor or circumstance that may make life without parole, rather than death, the more appropriate sentence. It also avoided the word "extenuating" which, as noted above, studies have shown is not well understood. By contrast, the instruction given, in explaining a mitigating factor, focused solely on considering such a possible factor as extenuating the appropriateness of the death penalty. The likelihood that jurors would misunderstand the meaning of "extenuating" was sufficient reason for giving appellant's proffered instruction. California law recognizes that "[t]o perform their job properly and fairly, jurors must *understand* the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means. The mere recitation of technically correct but arcane legal precepts does precious little to insure that jurors can apply the law to a given set of facts." (*People v. Thompkins, supra*, 195 Cal.App.3d at p. 250, emphasis in original.) The proffered instruction clarified terms essential for the jury to give effect to mitigating evidence as required by the Eighth Amendment, and the court's failure to so instruct was error.

Once the court denied the instruction that had been offered as an alternative to all of CALJIC No. 8.88, appellant requested as an alternative an instruction that would be added to CALJIC No. 8.88, to clarify the definition of mitigating factors. It read as follows:

> Mitigating factors are the opposite of aggravating factors. That is, in a criminal case such as this one a mitigating factor is any evidence regarding the defendant's character or the circumstances of the crime that in your judgment makes a sentence of life imprisonment without the possibility of parole more appropriate for this defendant than a sentence of death. In order to decide that something is a mitigating factor which would lessen the penalty you do not have to believe that it excuses or justifies the crime itself.
>
> The law says that you can decide something is a mitigating factor even if the instructions do not mention it specifically and even if it is not similar to any of the specific mitigating factors mentioned in these instructions or in the arguments of counsel.

(25CT:5191.) The court denied the proposed instruction, finding it duplicative of CALJIC No. 8.88. (126RT:19709; 19729.) For the reasons stated above, the trial court erred in denying appellant's proposed instruction that would have clarified terms, in understandable language, essential for the jury to have the guidance needed to give effect to appellant's mitigating evidence.

Another defense instruction which the court denied was one that would have told the jury that, given that permissible aggravating factors are limited to those listed, evidence presented "regarding the defendant's background, character and personal history may only be considered by you as mitigating evidence." (25CT:5163.) In denying the requested instruction, the court stated that it agreed in principle that the case law supported appellant's instruction, but its first sentence duplicated an

instruction the court intended to give. (126RT:19684-19685.) Appellant's instruction read as follows:

> The permissible aggravating factors are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented regarding the defendant's background, character and personal history may only be considered by you as mitigating evidence.

(25CT:5163.) CALJIC No. 8.85, as given at appellant's trial, included the following language:

> The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

(26CT:5306-5307; 128RT:19860.) Appellant asked that alternatively the first sentence be removed from his proffered instruction and that the remaining instruction be given, as it was not duplicative of any given instruction, and as noted by the court, was a correct statement of the law. (126RT:19684.) This too was denied. (126RT:19685.)

It was error to deny appellant's proffered instruction. First, to the extent that the first sentence was duplicative, appellant agreed to deleting that sentence, which addressed the court's only concern about what it agreed was an otherwise accurate statement of the law. Excessively duplicative language can always be stricken from a proffered instruction to which a defendant is otherwise entitled. (*People v. Thompkins*, *supra*, 195 Cal.App.3d at p. 257.) Second, as the trial court itself stated, it was an accurate statement of the law. Evidence of a capital defendant's background can be only a mitigating factor because the permissible aggravating factors are limited to those listed in section 190.3. (See *People*

v. Hardy (1992) 2 Cal.4th 86, 207.) Nonetheless, the court denied appellant's request finding that the instruction still duplicated the one the court intended to give, that is, that only the enumerated aggravating factors could be considered. (126RT:19685.) This was error.

Telling the jurors that appellant's background could not be considered as a reason to impose the death penalty would not have duplicated the instruction that informed them that only the enumerated factors listed by the court could be considered as aggravating factors, that is, evidence that fell within the purview of factors (a), (b) and (c). Exacerbating the harm from the trial court's refusal was the prosecutor's argument. In support of his closing argument urging the jury to impose death, the prosecutor referred to evidence of appellant's background that had been presented as mitigation. Although the prosecutor stated that the factors, other than (a), (b) and (c) can only be considered as mitigating (128RT:19909), in asking the jury to return a verdict of death, the prosecutor nevertheless argued that appellant's history and background warranted death (128RT:19907). In referring to the mental impairments that appellant suffered from extended housing in California prisons' Security Housing Units (SHU), evidence that was presented at the guilt and penalty phases of the trial, the prosecutor argued for death. The prosecutor argued that sentencing appellant to life would be nothing more than ending his "two year sabbatical" from the SHU given that evidence of institutionalization only showed that he can adapt to his conditions (128RT:19907, 19909) and that the mental impairments from which he suffered (the SHU syndrome) do not warrant being considered as mitigation (128RT:19911). The prosecutor also argued that any other evidence

appellant presented under factor (k), referring to testimony from appellant's family members, warranted death. (128RT:19913-19916.)

This Court has held generally that it is not necessary for the instructions to identify the various aggravating and mitigating evidence. (See e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Medina* (1990) 51 Cal.3d 870, 909.) The Court has not, however, determined whether the trial court can refuse a defense requested instruction that informs the jury that evidence of a defendant's background, other than evidence that falls within one of the aggravating factors, (a), (b) or (c), can only be mitigating. In both *People v. Hardy*, *supra*, 2 Cal.4th at p. 207 and *People v. Martinez* (2003) 31 Cal.4th 673, 701, the Court stated that even if it were assumed it was error to fail to instruct that evidence of the defendant's background could be considered as mitigating evidence only, there was no reasonable possibility of prejudice, in part because in neither case had the prosecutor argued that evidence of appellant's background was aggravating. Not so here. The prosecutor's argument not only told the jury that appellant's background was not mitigating, but he used that very evidence to urge the jury to choose death. Although the prosecutor did not argue that the profoundly deleterious effects of the SHU and that testimony from appellant's family members about his parents' alcoholism and the repeated abandonment he experienced fell within the purview of factors (a), (b) and (c) and were therefore "aggravating," by arguing that appellant's mitigating evidence warranted death, his argument was the equivalent. The argument exacerbated the trial court's error in denying appellant's instruction, causing prejudicial harm to appellant.

Other special defense instructions proffered by the defense and denied by the court provided necessary guidance that would have allowed

the jury to give effect to appellant's mitigating evidence. They addressed factors (d) and (h) of CALJIC No. 8.85. They were accurate statements of the law and did not duplicate any instructions given. The following two instructions were offered as supplements to CALJIC No. 8.85, regarding factor (d). One of the instructions would have informed the jurors that the mental or emotional disturbance referred to in factor (d) was

> not limited to evidence which excuses the crime or reduces defendant's culpability, but includes any degree of mental or emotional disturbance which a juror determines is of a nature that death should not be imposed. Even if a juror concluded that such evidence was not sufficient to reduce the degree of guilt, the evidence may still be sufficient for consideration as a mitigating factor in deciding on the appropriate penalty.

(25CT:5169). The court refused to give the instruction, finding it duplicated what the court was going to give regarding CALJIC No. 8.85, factor (k). (126RT:19698-19699.)

The other denied special instruction regarding factor (d) would have told the jury that "a mental or emotional disturbance may be considered as a factor in mitigation even if it did not actually impair the defendant's mental capacity at the time of the offense." (25CT:5171.) Appellant asked, alternatively, that it be given in reference to factor (k). (126RT:19699-19701.) Even though the prosecution conceded that the instruction was an accurate statement of law under factor (k) (126RT:19699), the court, appearing to be impatient with the length of time the jury instruction discussion was taking, stated it wanted to "move on" and did not "want to wait anymore" (126RT:19702), and refused to give the instruction. The court stated that it did not have to tell them again about psychological impairment in light of the other instructions. (126RT:19702.) The instruction that the court believed made appellant's instruction unnecessary

(126RT:19702) was the following modification to CALJIC No. 8.85, regarding factors to consider in determining which penalty to impose:

> Whether the defendant committed the offense while under the influence of a mental or emotional disturbance, which disturbance need not be extreme nor amount to legal insanity or an inability to form a specific intent. [¶] The defendant's history of alcohol, drug and/or narcotic addiction.

(128RT:19859; 26CT:5306.)

Appellant also proffered a special instruction to be given with CALJIC No. 8.85, regarding factor (h). CALJIC No. 8.85, factor (h), as it was given to the jury, read as follows:

> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(128RT:19858; 26CT:5305.) Appellant's requested modification would have added the following:

> A mental disease or mental defect may be considered as a factor in mitigation even if it did not actually impair the defendant's mental capacity at the time of the offense.

(25CT:5177.) This instruction paralleled the one requested regarding factor (d), above. The court refused to give the instruction under factor (h) claiming it was duplicative. (126RT:19702, 19707.) This was error.

Neither this instruction regarding factor (h), or the "parallel" instructions that appellant requested to be given in conjunction with factor (d), or alternatively, factor (k) duplicated the instructions given. Instead, they explained the breadth of mitigation by stating that appellant's evidence of a mental disease or defect and/or of the effect of intoxication can be considered as mitigating even if it did not rise to a level that impaired his mental capacity at the time of the offense.

Appellant's mitigating evidence included the mental impairments from which he suffered as a result of his many years housed in the brutal and inhumane environment of the Security Housing Unit. Appellant also presented evidence of his intoxication. There was evidence that his mental impairments from these factors were present at the time of the confrontation with Deputy Trejo. While the jury may have concluded that they did not rise to the level of an extreme mental disturbance or that they impaired appellant's mental capacity at the time of the offense, the instructions as given failed to inform the jury that they may nonetheless consider the evidence as within the scope of mitigation and in making their decision between life and death. They were legally accurate statements of the law that augmented, not duplicated, the given instructions. The requested special instructions regarding factors (d), (h) and alternatively, factor (k) would have guided the jury in making its decision and imposing its judgment and it was error to deny them. The court's errors violated appellant's right to a fair penalty trial and to a reliable, nonarbitrary and individualized penalty determination under the Eighth and Fourteenth Amendments to the U.S. Constitution.

2. Appellant's Requested Pinpoint Instructions

The court also denied a pinpoint instruction offered as an addition to CALJIC No. 8.85, regarding factor (d). The proffered instruction would have told the jury that "mental or emotional disturbance may result from any cause or may exist without apparent cause," and would have informed the jurors that "in deciding whether the defendant suffered from a mental or emotional disturbance you should consider all of the relevant circumstances in which the defendant found himself . . . includ[ing] but not limited to the

impact of chemical addictions and long-term incarceration in maximum security prisons." (25CT:5167.)

Appellant proffered two other pinpoint instructions, both as adjuncts to CALJIC No. 8.85, regarding factor (h). One of these proffered instructions would have informed the jury that:

> In deciding whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired by mental disease, mental defect or intoxication you should consider all of the relevant circumstances in which the defendant found himself. These circumstances include but are not limited to the impact of chemical addictions and long-term incarceration in maximum security prisons.

(25CT:5173.) The other, also in support of appellant's theory regarding the evidence of intoxication, as well as informing the jurors of the scope and meaning of mitigation, read as follows:

> The mental defect, mental disease or intoxication referred to in this instruction is not limited to evidence which excuses the crime or reduces defendant's culpability, but includes any degree of mental defect, disease or intoxication which a juror determines is of a nature that death should not be imposed. Even if a juror concluded that such evidence was not sufficient to reduce the degree of guilt, the evidence may still be sufficient for consideration as a mitigating factor in deciding on the appropriate penalty.

(25CT:5175.)

As stated above, a defendant is entitled to an instruction that correctly states applicable law if it directs attention to evidence or amplifies legal principles. (*People v. Thompkins*, *supra*, 195 Cal.App.3d at pp. 256-257, citing *People v. Sears*, *supra*, 2 Cal.3d at pp. 180, 190.) In *People v. Kane*, *supra*, 27 Cal.2d at p. 700, this Court recognized that when the importance of a fact or principle that a jury is to consider is so critical that

its emphasis cannot be stated enough, it is error to deny the defendant's pinpoint instruction. The trial court in *Kane* had given correct instructions defining robbery and reasonable doubt, but its refusal to give the pinpoint instruction directing the jury to acquit if the victim had given the defendant permission to take the property was prejudicial error. (*Id.* at p. 698.) "'It is true that the instruction given stated the law correctly; but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.'" (*Id.* at p. 700, quoting *People v. Cook* (1905) 148 Cal. 334, 347; see also *People v. Mayo* (1961) 194 Cal.App.2d 527, 536-537 [error to refuse specific instructions pinpointing theory of defense even though instructions regarding elements of offense were generally correct and adequate]; *People v. Sears, supra,* 2 Cal.3d at p. 190 [citing *Kane* and *Mayo* with approval in recognizing that defendant is entitled to instruction pinpointing theory of defense even if instruction given is generally adequate]; § 1093, subd. (f) [trial court must instruct jury "on any points of law pertinent to the issue if requested by either party"].) The ultimate question in the penalty phase of a capital case is whether to impose life or death. It can hardly be said enough that a more critical decision cannot be made in a trial, than that between life and death. In capital cases, fact-finding procedures must aspire to a heightened standard of reliability, "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411.)

Appellant's pinpoint instructions regarding factors (d) and (h) would have provided the jury with correct statements of the law on critical principles that they were to consider in deciding between life and death,

principles so critical that their emphasis cannot be stated enough. (See *People v. Kane*, *supra*, 27 Cal.2d at p. 700.) The pinpoint instructions directly supported the theory of appellant's penalty case. Defense counsel argued that the confluence of circumstances that contributed to Deputy Trejo's death, including appellant's intoxication at the time of the crime and the impact at the time of the crime from his long-term incarceration in maximum security prison and from his chemical addictions, provided evidence of a lingering doubt that appellant's intent at the time of the crimes supported a first degree murder, even if they did not accept that appellant was under the influence of an "extreme mental disturbance." At a minimum, it was mitigating. As counsel argued, it "lightened, in effect, the weight of the aggravating factor." (128RT:19933-19935.) While the jury may have concluded that appellant's impairments did not rise to the level of an "extreme" mental or emotional disturbance or that they impaired appellant's mental capacity at the time of the offense, the instructions as given failed to inform the jurors that they may nonetheless consider the evidence as within the scope of mitigation and in making their decision between life and death. The court's failure to instruct the jury with appellant's instructions that pinpointed his defense theory violated appellant's right to a fair penalty trial and to a reliable, nonarbitrary and individualized penalty determination under the Eighth and Fourteenth Amendments to the U.S. Constitution.

B. The Trial Court Erred by Refusing to Give Legally Accurate Instructions Concerning the Limitations on Aggravating Circumstances

As stated above, appellant proffered an instruction as an alternative to CALJIC No. 8.88 (25CT:5180-5183), which the trial court denied. That instruction included a section that explained in plain language the meaning

of and limited scope of aggravating factors. As noted above, appellant had included research with his request that supported the need for the proffered instruction. The court denied the special instruction, despite noting that the language in appellant's proffered instruction was easy to understand and indicating that it was helpful, that it appeared to be correct statements of the law and that CALJIC is not a "model of clarity." (126RT:19709.)

Appellant then asked, alternatively, for an addition to CALJIC No. 8.88 that defined an aggravating factor in plain language. That instruction read in relevant part:

> In a criminal case such as this one an aggravating factor is any fact or condition or circumstance above and beyond the elements of the crime itself that, in your judgment, makes a sentence of death more appropriate for this defendant than a sentence of life in prison without the possibility of parole.

(25CT:5191.) The court claimed this instruction duplicated a section of CALJIC No. 8.88 that the court was giving. (126RT:19708-19709; 19729.) The relevant portion of CALJIC No. 8.88 read as follows:

> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.

(128RT:19875; 25CT:5337.) Contrary to the court's finding, the proffered instruction, offered in addition to CALJIC No. 8.88, did not duplicate the explanation of an aggravating factor in No. 8.88, nor was there any other instruction that explained clearly what may constitute an aggravating factor. The requested instruction explained, as the court itself noted, a correct statement of the law in understandable language. Appellant acknowledges that this Court has held that the word "aggravating" is a commonly understood term that a court does not need to define for the jury deciding

whether appellant should live or die (see *People v. Sanders* (1995) 11 Cal.4th 475, 561), but asks the Court to reconsider, particularly in light of studies that demonstrate that critically important mitigating factors presented under factor (k) are frequently misidentified as aggravating factors. (See Haney & Lynch, *supra*, 21 Law and Human Behavior at p. 581.)

Instructions that clearly and accurately instructed the jury on the definition of an aggravating factor, as well as mitigating factors, as argued above, would have provided the jury with the guidance needed to perform their task fairly and reliably and thereby ensured a fair and reliable sentencing determination as required by the Eighth and Fourteenth Amendments to the United States Constitution. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 584 [in a capital case Eighth Amendment requires special need for reliability in determination whether death is the appropriate punishment].)

Appellant also requested instructions that his emotional and mental disturbances may not be considered as aggravating factors (25CT:5172) and an instruction that evidence of mental defects, diseases or intoxication may not be considered as an aggravating factor (25CT:5178). Such evidence is not among the enumerated factors that may be considered in aggravation (See CALJIC No. 8.85), and for a juror to consider a defendant's mental disabilities and impairments as an aggravating factor violates due process. (See *Zant v. Stevens* (1983) 462 U.S. 862, 885 [a defendant's mental illness militates in favor of a lesser sentence]; cf. *People v. Poggi* (1988) 45 Cal.3d 306, 344-345 [prosecutor's argument linking defendant's violence and mental illness was troubling, but instructions as a whole pass constitutional

muster as they would not have led a juror to believe that emotional or mental disturbance could be considered as aggravating].)

The instructions appellant requested concerning aggravating circumstances were legally correct. The trial court's error in denying appellant's instructions concerning limitations on aggravating circumstances denied him a fair penalty trial and a reliable, nonarbitrary and individualized penalty determination under the Eighth and Fourteenth Amendments to the U.S. Constitution.

C. The Trial Court Erred by Refusing to Give Legally Accurate Instructions Concerning the Scope of the Jury's Discretion and of the Weighing Process

The jury instruction noted above that was proffered as an alternative to CALJIC No. 8.88 included a section on weighing aggravating and mitigating factors. (25CT:5183.) As noted, the court denied the instruction. (126RT:19709.) The court also denied other defense proffered instructions concerning the scope of the jury's discretion and the weighing process.

One of these instructions would have told the jury that the finding of a felony-murder special circumstance is not entitled to greater weight than the finding of any other special circumstance. (25CT:5162.) Appellant argued below that the instruction was required to ensure appellant a reliable, nonarbitrary, reasoned and moral sentencing determination, noting that California, unlike many other states, permits death for a felony murder. This, appellant argued, violated his right to due process, equal protection and to be free from cruel and unusual punishment. (126RT:19683-19684; 25CT:5162.) The court stated that it did not understand the basis for the instruction given that a fact-finder might go in "the other direction," implying that the felony-murder special circumstance might be given less

weight than other special circumstances. The court declined to give the instruction, although it stated that had felony murder been the only theory upon which appellant was found to be death-eligible, it would have considered giving it. (126RT:19684.) The court did not disagree with the language of appellant's instruction, did not find that it duplicated any other instruction or was contrary to the law. Indeed, the court stated that it would have considered giving it had it been the only special circumstance found true, but had it been, the instruction would not have been needed to inform the jurors that it should not be given greater weight in deciding appellant's penalty than any other special circumstance the jury had found true. To the extent that the trial court denied the instruction on the theory that appellant may be better off without it, it was error to do so given that appellant requested it.

Appellant's instruction did no more than assist in the weighing process and attempt to prevent the jury from imposing death based on giving undue weight to a fact or circumstance that some jurisdictions do not even permit as a reason to render an individual death-eligible, let alone as a reason to impose death. Appellant acknowledges that this Court has rejected the foundation upon which appellant based his argument. Appellant contended that the jury, after having found appellant guilty of a robbery, of murder, and having found true the special circumstance of felony murder, may be more inclined to give undue weight to the felony-murder special circumstance in choosing appellant's sentence. For this premise, appellant cited *People v. Gates* (1987) 43 Cal.3d 1168. In *Gates*, this Court rejected the defendant's argument that use of the same robbery as the basis for the felony-murder rule, as a special circumstance, and as an aggravating circumstance in the penalty phase violated the Eighth

Amendment. (*Id.* at pp. 1188-1189.) Rejecting the defendant's argument in *Gates*, the Court stated that under the California statutory scheme, the jury must weigh the factors in aggravation and mitigation to determine penalty and that given that circumstances of the crime is an aggravating factor as to all defendants who reach the penalty phase, a felony-murder special circumstance does not subject a defendant to any greater chance of receiving the death penalty than any other defendant against whom a special circumstance finding has been made. (*Ibid.*)

Given that appellant was convicted of a robbery, of murder, and that the felony-murder special circumstance was found true, there was a risk that, because of these three facts, appellant would be subject to a greater chance of being sentenced to death unless the jury was told that the felony-murder special circumstance carried no greater weight as an aggravating factor than the other special circumstances found to be true. In *People v. Holt* (1997) 15 Cal.4th 619, the defendant argued that given that one of the special circumstances found true in his case was the felony-murder special circumstance, the jury would be able to consider as separate aggravating factors robbery as a circumstance of the crime and robbery as a felony-murder special circumstance, rendering that factor of the statute unconstitutional. (*Id.* at p. 699.) This Court rejected appellant's challenge, but stated that in such situations, a defendant may request a clarifying instruction admonishing the jury not to double-count the circumstances of the crime and the special circumstances it found true as more than one aggravating factor. (*Ibid.*, citing *People v. Ashmus* (1991) 54 Cal.3d 932, 997.) Appellant's instruction would have likewise provided guidance and clarification to the jury to avoid greater weight being given to the felony-murder special circumstance and it was error to deny the instructions.

Appellant also requested a special instruction that the jury be informed that death is a more severe punishment than life in prison without possibility of parole. The instruction read as follows:

> Some of you expressed the view during jury selection that the punishment of life in prison without the possibility of parole was actually worse than the death penalty.
>
> You are instructed that death is qualitatively different from all other punishments and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to impose the penalty of death with a view that you were thereby imposing the less severe of the two available penalties.

(25CT:5137.)

The instruction that death was the more severe punishment was of particular importance in appellant's case because a number of prospective jurors had indicated that life without parole seemed the harsher sentence and also because evidence introduced at trial demonstrated the harsh conditions at Pelican Bay State Prison. The court denied the instruction, stating that it was concerned about giving an instruction that might appear as if the court was singling out an individual juror for something that he or she may have said during voir dire, and did not want to re-read the juror questionnaires to determine if any of the jurors deciding penalty may have said that life without parole was a worse sentence than death. Further, the court believed it had sufficiently covered the issue during voir dire to render the instruction unnecessary. (123RT:19371-19372.)

It was error to deny appellant's proffered instruction. It was an accurate statement of the law, was not argumentative and did not duplicate any other instruction. (See, e.g., *People v. Gurule*, *supra*, 28 Cal.4th at p.

659 [a court may refuse an instruction that is an incorrect statement of the law, is argumentative or is duplicative].) Moreover, the trial court's reliance upon information that some prospective jurors may have been told during voir dire that death was the more severe penalty, does not diminish the need for an *instruction* that informs the jury of the accurate state of the law. (See, e.g., *People v. Vann* (1974) 12 Cal.3d 220, 226, 227, fn. 6 [error to fail to give instruction in the final charge to the jury, even though critical aspects of the instruction were given during jury selection, where significant time had elapsed between jury selection and final instructions, and despite counsel during argument mentioning the pith of the instruction]; *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1222-1223 [instruction at the conclusion of trial, even if given before trial, should be repeated in final charge if lapse of time or intervening events may cause jury confusion and given that prospective jurors may not give an instruction the same focused attention as jurors impaneled and sworn]; see also *Taylor v. Kentucky* (1978) 436 U.S. 480, 488-489 [arguments of counsel cannot substitute for proper jury instructions].) The jury in appellant's case was never instructed that death was the more severe penalty. This was error.

Appellant also requested an instruction that would have informed the jurors that parole rules of older cases, those in which the media informs the public that notorious defendants are eligible for parole, do not apply to appellant and have no significance in relation to their sentencing decision because the sentencing laws under which those defendants had been sentenced had been replaced with that of life without possibility of parole. (25CT:5139.) In support of its proffered instruction, appellant cited research studies demonstrating that a significant number of death-qualified

jurors erroneously believe that a defendant sentenced to life without parole will nonetheless be eventually released. (25CT:5139.)

The court denied the instruction. In so doing, the court reminded appellant that it had told the prospective jurors, even before they prepared hardship questionnaires, that the current law was different than that in place at the time that Sirhan Sirhan and Charles Manson were sentenced, making them eligible for parole, and that the court was giving an instruction that the jurors should assume that the sentence that they impose will be carried out. (123RT:19374.) The court did not find appellant's instruction to be an incorrect statement of the law. Indeed, the court informed the prospective jurors on their first day of jury duty that appellant's case was under a different law than the law in place previously which permits notorious inmates to be considered for parole. Appellant argued that it bore repeating given the many months that had passed between the prospective jurors' first day and the charge to the jury deciding appellant's fate, but the court did not reconsider its ruling. As stated above, an instruction delivered to the jury before trial, let alone general information the court dispenses to the jury outside the context of its instructions, does not render unnecessary the need to instruct the jury during the court's final charge to the jury. (*People v. Elguera*, *supra*, 8 Cal.App.4th at p. 1223.)

The trial court had also suggested that the requested instruction was unnecessary given that the jury would be instructed that their sentence will be carried out. The two instructions, however, were not a duplication of each other. The instruction the jurors were given told them to "assume that the sentence that you impose will be carried out." (RT128:19857; 26CT:5304.) It did not instruct them to disregard cases from the past in which notorious killers were eligible for parole. The proffered instruction

would have told them that the notorious cases in which convicted defendants were given parole hearings had "no significance in relation to [their] penalty decision in this case" and that if they were "aware of any such old cases, [they] are instructed to disregard them and to remember that [their] penalty decision in this case as to this defendant is governed by the law existing today." (25CT:5139.) Appellant's instruction was an accurate statement of the law, was not argumentative and did not duplicate any given instructions. It was error to deny appellant's proffered instruction.

All the above proposed instructions would have clarified for the jury the nature of the process of moral weighing in which they were to engage during their deliberative process. Instructions that assist the jury in this life and death determination help eliminate the possibility that the jury will "misapprehend[] the nature of the penalty determination process or the scope of their discretion to determine [the appropriate punishment] through the weighing process . . . ." (*People v. Sanders*, *supra*, 11 Cal.4th at p. 557; see also *People v. Moon* (2005) 37 Cal.4th 1, 40-41 [jury's sentencing task is a "moral endeavor" in which jury may "exercise unbridled discretion" once defendant has been found death-eligible, citing *California v. Ramos* (1983) 463 U.S. 992, 1009, fn. 22].)

The trial court's error in denying appellant's proffered instructions that accurately stated the law regarding the scope of the jury's discretion and of the weighing process denied appellant his right to a fair and reliable penalty determination, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

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D. The Trial Court Erred by Refusing to Instruct the Jury that it Could Consider Mercy as a Basis for Returning a Verdict of Life Without the Possibility of Parole

The defense requested the following jury instruction: "In determining whether in light of all the relevant circumstances a sentence of death is appropriate, you may decide to exercise mercy on behalf of the defendant." (25CT:5185.) Once again, the trial court refused to instruct the jury with this legally accurate statement of the law, stating that mercy is a "God-like thing . . . which is not . . . what I should be telling them to do." (126RT:19675.) The failure of the trial court to instruct the jury with appellant's proffered instruction was error.

1. Consideration of Mercy Is a Constitutionally Valid Response to Mitigating Evidence and a Guide for Juror Discretion in Determining Penalty

It is well-established that mercy is a proper consideration for the penalty determination in a capital case. The United States Supreme Court's death penalty jurisprudence recognizes that guided discretion includes a determination of those cases fit for mercy. "[T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." (*Gregg v. Georgia* (1976) 428 U.S. 153, 203.) Indeed, the Eighth Amendment requires that capital sentencing "'reflect a reasoned moral response to the defendant's background, character, and crime.'" (*Roper v. Simmons* (2005) 543 U.S. 551, 603, quoting *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) The life and death determination "is not simply a finding of facts which resolves the penalty decision," but instead a "moral assessment of those facts as they reflect on whether defendant should be put

to death." (*People v. Brown* (1985) 40 Cal.3d 512, 540, internal citations and quotation marks omitted.) In exercising this task, the jurors "may apply their own moral standards to the . . . evidence" and "may reject death if persuaded to do so on the basis of *any* constitutionally relevant evidence or observation." (*People v. Allen* (1986) 42 Cal.3d 1222, 1287, internal citations and quotation marks omitted, emphasis in original; see also *People v. Rodriguez* (1986) 42 Cal.3d 730, 779 ["the sentencing function is inherently moral and normative, not factual"].) Mercy offers a means for the jurors to deliver a life verdict even if they find that the aggravating factors outweigh the mitigating factors, or fail to find any mitigating factors. (See *People v. Duncan* (1991) 53 Cal. 3d 955, 979 [a juror may determine that the evidence is insufficient to warrant death even in the absence of mitigating circumstances].)

Moreover, this Court has acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. In *People v. Haskett* (1982) 30 Cal. 3d. 841, 864, this Court stated that trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." This statement recognizes that although mercy is not itself a listed, statutory factor in mitigation, it is a critical and legitimate "reasoned moral response" to mitigating evidence permitting imposition of a penalty less than death. (See *Penry v. Lynaugh*, *supra*, 492 U.S. at p. 327, citing *Gregg v. Georgia*, *supra*, 428 U.S. at p. 222 (conc. opn., White, J.); *Zant v. Stephens*, *supra*, 462 U.S. at pp. 875-876, fn. 13; see also *People v. Lanphear* (1984) 36 Cal.3d 163, 169 [trial counsel's plea for mercy and compassion relevant to whether death was an appropriate penalty for the

defendant notwithstanding his culpability in the commission of the murder].)

The Eighth and Fourteenth Amendments to the United States Constitution mandate that a capital case jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) These cases guarantee the right of a capital defendant to offer any mitigating evidence and require appropriate instructions to the jury that "give effect to the mitigating evidence." (*Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 319, 323; see also *Brewer v. Quarterman* (2007) 550 U.S. 286, 289, 294-295.) The unfettered mitigation inquiry preserves the defendant's right to mercy, and the jury's prerogative to give mercy, but without an instruction informing the jury, it is no more than an empty, hollow right.

2. Appellant was Entitled to a Jury Instruction Informing the Jurors That They May Exercise Mercy on Behalf of the Defendant

The critical role that mercy may play in a juror's "reasoned moral response" to mitigation evidence and to the determination of the appropriate penalty is lost when the trial court fails to instruct the jury that it is within their purview to show mercy on behalf of the defendant, and thereby sentence him to a life verdict. This is particularly so where, as here, the concept of mercy was implicated by the evidence as well as the arguments of counsel.

Much of appellant's mitigating evidence was designed to elicit mercy as a "reasoned moral response" from the jury. Appellant accepted responsibility and expressed remorse for those who suffered. In an opening

statement (54RT:8303-8304), when he testified at the guilt phase (95RT:15028) and when he gave a statement during closing argument at the penalty phase, appellant stated that he was responsible for Deputy Trejo's death, that he was to blame for the tragedy and would not "shirk any responsibility." (128RT:19920.) During a closing statement at the penalty phase he told the jury he accepted "total responsibility for this whole terrible tragedy," and expressed sorrow "about all that happened and those who suffered from it." (128RT:19920.) To provide the jurors with a whole picture of the person who they were sentencing, appellant presented evidence of childhood troubles, addiction problems and the mental health impairments and effects from years in security housing units. Appellant's family members expressed their love for him and asked that his life be spared. (See, e.g., 122RT:19236 [appellant's father]; 124RT:19448; 19464, 19465-19466; 126RT:19659, 19692 [appellant's sisters]; 124RT:19449 [appellant's mother].)

During argument, counsel asked that appellant be spared because he was more than what the prosecution had painted him (128RT:19923-19925), and urged the jurors that in making their moral judgment to go back to the child who was abandoned, whose brain was damaged, who self-medicated, who became institutionalized at a young age in an atmosphere of violence and who had been emotionally and mentally debilitated by the severe and extreme conditions of prison security housing. (128RT:19927, 19937-19938, 19953-19954, 19958.) In asking the jury to spare appellant's life, to give mercy, counsel argued that the mitigating evidence showed appellant's humanity. (128RT:19972.)

Without adequate instructional guidance, there is a substantial likelihood that a jury may exclude any consideration of mercy, or believe

that it is out of their reach, even though the concept is implicated by the evidence as well as the arguments of counsel. (See *Brewer v. Quarterman*, *supra*, 550 U.S. at pp. 294-296; *California v. Brown*, *supra*, 479 U.S. at p. 546 (conc. opn. of O'Connor, J.).)

The court's decision to refuse appellant's proposed instruction resulted in the jury being both uninformed and indeed, misinformed, about its ability and appellant's right that it consider constitutionally relevant evidence, especially if it did not fit neatly into any statutory mitigating factor, including factor (k), or other mitigating circumstances the court listed in its instructions. (CALJIC No. 8.85; 26CT:5305-5307; 128RT:19858-19860 [§ 190.3, factors (d)-(k) and its modifications].) Without an instruction about the relationship of mercy to the jury's sentencing decision, there is a substantial likelihood the jury believed it was precluded from considering relevant mitigating evidence.

The absence of such an instruction would have reasonably lead the jury to believe that mercy was an improper consideration in its ultimate decision and would have created a false limitation on its right and ability to exercise mercy. The failure to so instruct also would have led a reasonable juror to believe that his or her options were restricted in some fashion when considering the appropriate punishment. Had the trial court granted appellant's requested instruction the jury may have reasonably decided that mercy was warranted and sentenced him to life imprisonment.

The prosecutor capitalized on this absent instruction. During his closing argument the prosecutor argued derisively about mercy, including stating that he knew that appellant's attorney would ask for mercy. (128RT:19913, 19915-19916.) Of course, he also knew that the court would not instruct the jury that they could exercise mercy. He warned the

jurors in no uncertain terms to beware of such a request by appellant's attorney because it was not deserved. (128RT:19913, 19915-19916.)

"[T]he jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence" in mitigation intended to inspire mercy, "in rendering its sentencing decision" (*Penry v. Lynaugh*, *supra*, 492 U.S. at p. 328), leaving them an inadequate means of effecting a moral response to evidence falling outside the enumerated factors. The court's error unconstitutionally precluded appellant's jury "from giving effect to . . . relevant mitigating evidence." (*Buchanan v. Angelone* (1998) 522 U.S. 269, 276, citations omitted; accord, *Tennard v. Dretke* (2004) 542 U.S. 274, 285; see also § 1127 [trial court should charge the jury on points of law that are both correct and pertinent to the issues before the jury].) The jury was left without a means to give effect to a merciful response to the evidence and to appellant.

3. This Court Should Reconsider Its Prior Decisions That Defendants Are Not Entitled to a "Mercy" Instruction

This Court has repeatedly held that it is not error to deny a request for a "mercy" instruction where the court has instructed the jury pursuant to CALJIC No. 8.85, that it may consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (See *People v. Gonzales* (2011) 52 Cal.4th 254, 326-327; *People v. Ervine* (2009) 47 Cal.4th 745, 801-803.) This Court has held that when a jury is told it may *sympathetically consider* all mitigating evidence, it need not also be instructed that it may exercise "mercy." (*People v. Gonzales*, *supra*, 52

Cal.4th at pp. 326-327.) The trial court instructed the jury with CALJIC No. 8.85, in reference to factor (k), that stated in relevant part that they shall consider "any sympathetic, compassionate or other aspect of the defendant's background . . . that the defendant offers as a basis for a sentence less than death." (128RT:19857-19859; 26CT:5306.)

Based on the Court's assumption that the terms "mercy," "compassion" and "sympathy," are synonymous, it has concluded that a capital sentencing jury is sufficiently instructed if told it may consider "sympathetic" or "compassionate" aspects of a defendant's life in deciding between life and death, and need not also be told that it may exercise mercy. Indeed, in *People v. Ervine*, *supra*, 47 Cal.4th at p. 802, this Court said as much when it suggested that the terms are interchangeable and that within the context of CALJIC No. 8.85, "mercy" and "compassion" are synonymous.[149] First, appellant maintains that the terms are not synonymous. Mercy can be defined as "compassion or forbearance shown especially to an offender," whereas both sympathy and compassion as "an inclination to think or feel alike," "the act or capacity of entering into or sharing the feelings or interests of another" and as "sympathetic consciousness of others' distress together with a desire to alleviate " (Merriam-Webster Dictionary, <http://www.merriam-webster.com>.)

Moreover, the Court's view that the terms are basically the same thing does not then comport with its cases that hold that it is not error to

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[149] In rejecting the defendant's request for an instruction on mercy, this Court cited the *Oxford English Dictionary* to support its conclusion that "mercy" and "compassion" were synonymous within the context of CALJIC No. 8.85. (*People v. Ervine*, *supra*, 47 Cal.4th at p. 802.)

deny a mercy instruction because "the unadorned use of the word 'mercy' implies an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1195.) Under this Court's reasoning in *McPeters*, appellant's instruction that mercy could be considered and exercised in its sentencing decision would not have implied, or resulted in an arbitrary or capricious exercise of power given that appellant's mitigating evidence implicated and suggested mercy. If, as this Court held in *Ervine*, the terms mercy, compassion and sympathy, within the context of CALJIC No. 8.85, are synonymous, then there is no risk that instructing the jury regarding "mercy" could result in an arbitrary or capricious exercise of power rather than reasoned discretion based on particular facts and circumstances. As stated above, a jury's decision "to afford mercy does not render unconstitutional death sentences imposed" under a system with safeguards against arbitrariness. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 203.)

Appellant requests this Court to reconsider its prior decisions finding no error in refusal to instruct on mercy.

E. The Judgment of Death Must Be Vacated

Appellant maintains that each of the requested instructions should have been given, and the failure to give any one of the instructions discussed above constitutes reversible error. However, even if the denial of each instruction individually would not be considered to be reversible error, the cumulative effect of the trial court's failure to give all of the instructions denied appellant a fair penalty trial and to an individualized and reliable penalty determination in violation of the Eighth and Fourteenth Amendments.

Each instruction was designed to address the considerations that the jurors could bring to bear in making the determination between life and death. The proffered instructions were correct statements of the law. The principles embraced by the instructions have been endorsed by this Court. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (see *Boyde v. California* (1990) 494 U.S. 370, 380), to uphold the instructions as given and find no prejudicial error in the court's denial of appellant's proffered instructions would "risk that the death penalty [was] imposed in spite of factors which [called] for a less severe penalty." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 605.) "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Ibid.*) The trial court's errors resulted in a penalty trial that did not have sufficient indicia of trustworthiness to guarantee an individualized and reliable penalty determination. Appellant's death judgment must be vacated.

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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 consistently has rejected cogent 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 to urge their 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. Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 19 special circumstances, one of which, murder while engaged in felony under subdivision (a)(17), contained 11 qualifying felonies. Appellant objected to the felony murder special circumstance, and its breadth, as unconstitutional under the Eighth Amendment of the United States Constitution. (23CT:4739-4741.)

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. Appellant objected to this statutory scheme that fails to perform a constitutionally mandated narrowing function. (23CT:4742.) This Court has routinely rejected 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 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

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 26CT:5305-5307; 128RT:19857.) 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. In this case, for instance, the prosecutor argued that the circumstances of the murder were aggravating because of the manner in which the homicide occurred (128RT:19888-19889 [takes victim by surprise]), the time it occurred (128RT:19889 [crime occurred at 11:30 at night]), the location (128RT:19889 [dark parking lot]), the method (128RT:19889 [gun]) and the loss to and pain endured by the victim's family (128:19890-19891 [victim impact evidence].)

This Court never has 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." Thus, 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 this 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) 33 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because it Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 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. (CALJIC No. 8.88; 128RT:19874-19876.) Indeed, during penalty phase closing argument, the prosecutor emphasized that the state had no burden of proof and that, unlike at the guilt phase, did not have to prove beyond a reasonable doubt that appellant should, as the prosecutor argued, be sentenced to die for his crime. (128RT:19886.)

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; 26CT:5337; 128RT:19874-19876.) 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*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *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 the claim that either the Fourteenth Amendment 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 therefore appellant is 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. Appellant specifically requested that the court instruct the jury that the state bore the burden of persuasion as to penalty and that the burden of proof was one of beyond a reasonable doubt as to whether death was the appropriate punishment. (116RT:18602-18603.) The court denied the request. (116RT:18603.)

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CALJIC Nos. 8.85 and 8.88, the instructions given here (26CT:5305-5306; 5337-5338: 128RT:19857-19860; 19875-19876),[150] failed to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court also has 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 this 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 fact 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

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[150] The modifications to CALJIC Nos. 8.85 and 8.87, with which appellant's jury was instructed, did not concern the burden of proof. (See 128RT:19857-19860; 19874-19876.)

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. 280, 305.) Nonetheless, this Court has "held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) Appellant requested an instruction requiring jury unanimity as to the existence of factors in aggravation (see 25CT:5278 [evidence introduced pursuant to factors (b) and (c)]), a request the trial court denied (CALJIC No. 8.87; CT26:5309-5310; 128RT:19860-19862). The prosecutor repeatedly reminded the jurors that unanimity was not required. (128RT:19898, 19909.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s 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., § 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. Y1st* (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 alleged acts of 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; 26CT:5309-5310; 128RT:19860-19862.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in 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*, *supra*, 25 Cal.4th at pp. 584-585.) Here, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant and argued that such activity supported a sentence of death. (See, e.g., 128RT:19882, 19898-19904).

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.) Appellant 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 sentence appellant to death hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 26CT:5337-5338; 128RT:19876.) 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*, *supra*, 486 U.S. at p. 362.) Appellant objected to its use, which the court overruled, as well as proffered a modification, which the court denied. (126RT:19718-19722.)

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.) Appellant asks this Court to 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. (26CT:5337; 128RT:19876.) 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.

Appellant requested alternatives and modifications to CALJIC No. 8.88 that would have instructed the jurors they must decide whether death or life imprisonment without the possibility of parole was the "appropriate"

sentence, rather than that their decision rests on whether the death penalty is warranted. (25CT:5180-5183.) The trial court denied the proffered instructions. (126RT:19709.)

This 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

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. (26CT:5337; 128RT:19874-19876.) By failing to conform to the mandate of 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 a life-without-parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof 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 appellant bore some particular burden in proving facts in mitigation. Appellant requested that the court instruct the jury that a mitigating factor does not have to be proved beyond a reasonable doubt. (25CT:5196.) That request was denied. (126RT:19731.)

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* (1993) 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, California's death penalty law is remarkably deficient in the protections needed to insure the

consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellants'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(d) and (g); Pen. Code, § 190.3, factors (d) and (g); 128RT:19858; 26CT:5305), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) Appellant's objection to the inclusion of these restrictive adjectives (124RT:19472; 25CT:5152), was overruled (124RT:19472-19473). Because the offending restrictive adjectives remained in the instructions under factors (d) and (g), the error

that occurred and harm that resulted was not remedied by the trial court's modification of CALJIC No. 8.85 to include, in factor (k), that an aspect the jury may consider was "whether the defendant committed the offense while under the influence of a mental or emotional disturbance, which disturbance need not be extreme." (26CT:5306; 128RT:19858-19859.)

Appellant is aware that this Court has rejected the argument that the use of restrictive adjectives are barriers to the consideration of mitigation in violation of the federal Constitution (*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 (e), (f), (g), (i), and (j); 123RT:19383-19385.) Appellant requested that these inapplicable sentencing factors be deleted from the jury instructions. (123RT:19382-19386, 127RT:19768-19772; see also 25CT:5145 [proffered instruction to disregard inapplicable factors].) The trial court denied appellant's request and proffered modification to CALJIC No. 8.85 (127RT:19772), and did not omit the inapplicable factors from the jury instructions. (26CT:5305-5306; 128RT:19858.) The trial court's failure to omit the designated factors likely confused the jurors and prevented them from making a reliable determination of the appropriate penalty, in violation of appellant'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. (26CT:5305-5306; 128RT:19857-19860.) 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 proffered a modification to CALJIC No. 8.85, which would have instructed the jurors that certain factors are mitigating only (25CT:5156), which the trial court denied (126RT:19677-19678). Appellant also objected to the "whether or not" language in the instruction (25CT:5153; 124RT:19473-19474), which was overruled (124RT:19474; 127RT:19772). Appellant's jury was therefore 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 nonexistent 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.) 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 Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates the Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and noncapital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a noncapital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, and aggravating and mitigating factors must be established by a preponderance of the evidence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) 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 asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

Appellant moved pretrial that the prosecution be prohibited from seeking the death penalty. Appellant argued that the United States was unique, given its status in the international community and as an industrialized nation, in that it still uses the arbitrary and capricious sentence of death as a means to punish its citizens. (19CT:3856-3877; 24RT:3220-3224.) The trial court denied appellant's motion, stating that the legislature has found death to be an appropriate penalty and that appellant's argument should be directed to the legislature, rather than the judicial branch of government. (24RT:3225.) This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.)

In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's 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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REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that this Court concludes that none of the errors in this case was by itself sufficiently prejudicial to require reversal of appellant's convictions and death sentence, the cumulative effect of the many errors that occurred nevertheless requires reversal of both appellant's convictions and sentences. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may so infect the trial with unfairness as to violate due process and require reversal. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Parle v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928 [principle that cumulative errors may violate due process is "clearly established" by Supreme Court precedent].)

As this Court stated in *People v. Hill* (1998) 17 Cal.4th 800, "the aggregate prejudicial effect" of a series of errors may be "greater than the sum of the prejudice of each error standing alone." (*Id.* at p. 845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; see also *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

Appellant could not be fairly tried in the venue in which he was forced to proceed. The extensive and pernicious publicity about appellant and the media's repeated rendition of the prosecution's theory of the case, presented as established facts, impaired the jury's ability to analyze the evidence fairly and objectively and interfered with appellant's right to a fair

trial. (Argument 1, *ante*.) The trial court then erroneously allowed the prosecutor to present evidence of other crimes that was tethered to weak charges for which no substantial evidence ever existed. (Argument 2, *ante*.) Indeed, the magistrate had refused to hold appellant on either charge, but the trial court erroneously denied appellant's section 995 motion when the counts were charged in the Information. (Argument 3, *ante*.) Appellant was not convicted of either count. The prosecutor nonetheless was victorious because he successfully used these two unsubstantiated counts to present to the jury evidence of appellant's prior robberies, despite their dissimilarities to the weak counts. This painted appellant as a violent person of bad character, which predisposed the jury to reject appellant's defense that he took Deputy Trejo's gun simply to disarm him, and that the shooting was an accident and unintentional. The trial court's errors were exacerbated when the court refused appellant's requested instruction that would have told the jury that if they believed the shooting was accidental they could return, at most, a second degree murder verdict and could not find true the felony-murder special circumstance allegation. (Argument 6, *ante*.)

The trial court also allowed the prosecution to introduce unduly prejudicial evidence, including emotionally-laden photographs (Argument 5, *ante*), and appellant's decision not to participate in a lineup, despite the fact that identification was not an issue in the case (Argument 4, *ante*). Compounding the court's errors throughout the trial was its refusal to give numerous instructions that appellant requested and to give other instructions over appellant's objection. (Arguments 7-11, *ante*.) The harm from these instructional errors included enabling the jury to convict appellant on a

lesser standard than is constitutionally required, leaving the jury without proper direction and distorting the factfinding process.

The trial court's errors, forcing appellant to face a jury in a community saturated with negative publicity, and permitting the prosecution to introduce evidence at the guilt phase that tended to inflame the jurors' fears that appellant was a dangerous, habitual criminal, made it likely that the jury would resolve against appellant any doubts about the circumstances surrounding the shooting and Deputy Trejo's death. The combined effect of these errors, along with the other errors raised in this brief, was to render appellant's trial fundamentally unfair. His convictions must therefore be reversed.

The death judgment must also be evaluated in light of the cumulative error. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244.) That evaluation includes errors that occurred at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) This is so because under California law, the penalty determination takes into account evidence presented in the guilt phase of a capital trial, including the "circumstances of the crime" and "the existence of any special circumstances found to be true." (§ 190.3, subd. (a).) Moreover, evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.) Here, the trial court erroneously excluded a prospective juror who was willing to impose a death sentence if warranted, although she personally disfavored such a sentence. (Argument 12, *ante*.) Other errors committed at the penalty phase included admission of unduly prejudicial evidence, some of which was outright inadmissible (Arguments 13-17, *ante*), and instructional errors that skewed the balancing process toward a

death verdict (Argument 18, *ante*). These errors, combined with the guilt-innocence phase errors discussed above, and the other errors raised in this brief, violated appellant's state and federal constitutional rights to a fair penalty trial and reliable penalty verdict and requires that his death sentence be vacated. (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *Mak v. Blodgett* (1992) 970 F.2d 614, 622-625 [cumulative effect of penalty phase errors violated federal due process].)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, true findings of the special circumstances and death sentence.

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THE COURT IMPERMISSIBLY SENTENCED APPELLANT TO TWO ENHANCEMENTS ON A SINGLE PRIOR CONVICTION

The jury found true that on April 12, 1982, appellant suffered five robbery convictions within the meaning of section 667, subdivision (a). (24CT:5076; 25CT:5080-5082.) The court sentenced appellant to a five-year enhancement on each of the prior robbery convictions, pursuant to section 667, subdivision (a). (129RT:20138.) The jury also found true that on April 12, 1982, appellant was sentenced to prison for those robberies, and did not remain free from custody or a criminal conviction for 10 years, within the meaning of section 667.5, subdivision (a). (24CT:5076; 25CT:5082; 117RT:18754.) Although the court had intended to follow the probation report's recommendation that this enhancement be stayed, the prosecution argued that the enhancement should be "consecutive" and the court ultimately imposed a three-year enhancement under section 667.5, subdivision (a), as well. (117RT: 20136.)

The imposition of both enhancements was error. "[S]ection 667, subdivision (a) five-year enhancements must be imposed and thus may not also be the subject of prior prison term enhancements resulting from the same convictions." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562, citing *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153.) Here, appellant was sentenced to a five year enhancement on each of the prior robberies, and was also sentenced to a three-year prison prior based on those same robberies. The court should have declined to impose the three-year enhancement. Accordingly, this Court should reverse the enhancement.

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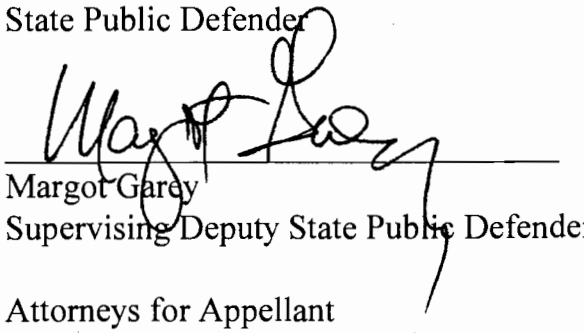
CONCLUSION

For the foregoing reasons, appellants convictions and sentence of death must be reversed.

DATED: August 30, 2012

Respectfully submitted,
MICHAEL J. HERSEK
State Public Defender



Margot Garey
Supervising Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630)

I am the Supervising Deputy State Public Defender assigned to represent appellant, Robert Scully, in this automatic appeal. On April 6, 2012, this Court granted my motion to file appellant's opening brief in excess of the 102,000-word limit specified in Rule 8.630, subd. (b)(1)(A) of the California Rules of Court, up to 175,000 words. I 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, excluding tables and certificates is 172,891 words in length.

Dated: August 30, 2012.

Margot Garey
Supervising Deputy State Public Defender

DECLARATION OF SERVICE

Re: *People v. Robert Walter Scully*

Supreme Court No. S062259
Superior Court No. SCR22969

I, Tamara Reus, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, Suite 1000, Oakland, CA 94607. On this day, I served true copies of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Office of the Attorney General
Attn: Pamela Critchfield, D.A.G.
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Robert Walter Scully
(Appellant)
(To be Personally Served September 12, 2012)

Clerk of the Court
Sonoma County Superior Court
600 Administration Drive
Santa Rosa CA 95403

Each said envelope was then, on August 30, 2012, sealed and deposited in the United States Mail at Oakland, Alameda County, 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 August 30, 2012, at Oakland, California.

Tamara Reus
Declarant