No. S065233

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FLOYD DANIEL SMITH, Defendant and Appellant.	(San Bernardino County Sup. Ct. No. FWV08607)

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the
County of San Bernardino

HONORABLE JOHN W. KENNEDY, JUDGE

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

CONSTITUTIONS

COURT RULES

TABLE OF AUTHORITIES

Pages

STATUTES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

Pages

TEXTS AND OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S065233
v.	)	(San Bernardino County Superior Ct. No. FWV08607/ FWV10531)
FLOYD DANIEL SMITH,	)	
Defendant and Appellant	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment imposing a verdict of death. (Pen. Code, § 1239, subd. (b); Cal. Rules of Court, rule 8.204(a)(2)(B).)

STATEMENT OF THE CASE

On December 12, 1994, a felony complaint was filed accusing appellant of the November 27, 1994, murder of Joshua Rexford and the first degree residential burglary of Michael Honess. (CT 1:1-3; SCT 1:126.[1])

[1] The Clerk's Transcript is referred to as "CT;" the initial one volume Supplemental Clerk's Transcript is referred to as "SCT;" the subsequent six-volume Supplemental Clerk's Transcript is referred to by citing the particular volume number, e.g., " 3 SCT;" the Reporter's Transcript is designated "RT," and is referred to by citing the appropriate volume and page number.

An amended complaint was filed on February 21, 1995 (CT 1:6-8, 9) and a grand jury indictment was filed on October 26, 1995. (CT 1:15; CT 2:1-5, 7-10) Then, on November 28, 1996 – almost two years after the initial felony complaint – the prosecution elected to pursue the death penalty. (CT 2:74-79.) The final amended indictment – the one upon which appellant was tried – was filed on February 28, 1997. In addition to the Rexford homicide and the Honess burglary, appellant was charged with the attempted murder of Maikolo ("Walter") Pupua and Ndibu ("Freddy") Badibanga; the first degree burglary of Pupua's apartment (the scene of the Rexford homicide); and assault with a handgun, false imprisonment and dissuading a witness by force or threat vis-a-vis Honess. The indictment also alleged the special circumstances of lying-in-wait and prior murder, as well as alleging sentencing enhancements for use of a handgun, felon in possession of a handgun, and commission of a violent felony. (CT 3:310-317.)

On February 7, 1997, the prosecution filed its notice of aggravating evidence: the circumstances of the capital crime, an expunged 1984 murder conviction that occurred while appellant was a juvenile, and an unadjudicated 1984 charge of kidnapping, attempted robbery, and forced oral copulation. (CT 3:305-306.) On February 19, 1997, appellant filed a motion to strike the prior murder special circumstance because the underlying expunged conviction occurred while appellant was a juvenile.

(CT 3: 321-325.) The trial court denied the motion.[2] (CT 3:336; RT 4:787-796.)

There were two guilt trials; the first began on March 17, 1997. (CT 3:361-363.) On March 31, 1997, the trial court declared a mistrial arising from the prosecutor's use of "motive" evidence that had not previously been disclosed to the defense. (CT 3:371, 381-389; RT 6:1627-1845.)

Jury selection for the second guilt trial began on April 28, 1997. The prosecutor dismissed Black panelists with three of his first five peremptory challenges, and appellant raised a *Wheeler/Batson*[3] objection. (RT 8:2578-2591, 2606.) The trial court found that a prima facie case had been made, but ultimately denied appellant's motion. (RT 8:2593, 2607, 2620-2621.) Appellant made a second *Wheeler/Batson* motion after the prosecutor excused another Black panelist. (RT 9:2696.) The trial court again found that a prima facie case had been made, but again denied appellant's motion. (RT 9:2719-2720, 2772.) The jury was empaneled over appellant's objections on May 14, 1997; the second guilt trial began the same day. (CT 3:410–412.) During trial, appellant moved to exclude the involuntary testimony and prior statements of prosecution witness Troy Holloway. (RT 10:3186, 3282.) Although the trial court disapproved of the police conduct, it denied appellant's motion. (RT 11:3296.)

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[2] On March 14, 1997, appellant petitioned the Fourth District Court of Appeal for a review of the trial court's ruling. On March 17, 1997, the Court of Appeal summarily denied appellant's petition. (3 SCT 1:291-356, 358.)

[3] *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1979) 22 Cal.3d 258.

The court instructed the jury on July 9, 1997; it did not include any instructions on lesser included offenses of first degree murder. The deliberations began at 4:15 p.m on that day; the verdicts were announced at 10:38 a.m. on July 16, 1997. Appellant was found guilty of all charges, except the charge of dissuading a witness by force or threat. He was also acquitted of the attempted murders of Mr. Badibanga and Mr. Pupua, and found guilty only of attempted manslaughter regarding both of them. The special circumstances and sentencing enhancements were found true. (CT 3:463-481, 484-485.)

Appellant's penalty trial began on July 22, 1997. (CT 3:487-489.) Immediately before the defense closing argument, appellant made a *Faretta*[4] motion and asked the court to allow him to argue the case for his life. The motion was denied. (RT 18:6040-6045.) The jury began its penalty deliberations at 1:58 p.m. on July 28, 1997. The death verdict was announced at 11:16 a.m. the next day. (CT 3:498-500.)

On October 14, 1997, the trial court *sua sponte* held a Penal Code section 190.4 hearing before it sentenced appellant. After a cursory argument by defense counsel, the court denied its own section 190.4 motion, announced the sentence, and signed the death warrant. (CT 3:521-530.)

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[4] *Faretta v. California* (1975) 422 U.S. 806, 834-835.

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Background Events

a. Walter Pupua's Background

The November 27, 1994, shooting at issue occurred in the apartment of Maikolo Walter Pupua; an apartment described as a "party" location. The apartment had a lot of visitors, and Joshua Rexford and Ndibu Frederick Badibanga frequently spent the night there. The neighbor directly above Mr. Pupua's apartment testified that throughout October and November there were parties in, and loud noise coming from, the apartment late into the evenings. (RT 9:2824-2825; RT 10:3073-3075, 3166; RT 13:4006-4007.)

Mr. Pupua was involved in two fights in the approximately 30 hours before the shooting. Mr. Pupua, Mr. Badibanga and Mr. Rexford were involved in a 15-to-20-person fight at a high school football game, where Mr. Rexford fought against Mexicans, Blacks and whites.[5] (RT 9:2915-2917, 2952-2953, 2960.) Additionally, several hours before the shooting, there was a violent fight in Mr. Pupua's apartment; Mr. Pupua was so enraged he slammed his fist through his glass patio door. (RT 9:2914-2919, 2951.) His neighbors described this fight as more angry and violent than the other drunken brawls that Mr. Pupua routinely hosted.[6] (See RT

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[5] Mr. Pupua and Mr. Badibanga agreed that Mr. Rexford was involved in the fight. Mr. Pupua testified that he was involved, but Mr. Badibanga was not; Mr. Badibanga testified to the reverse. (RT 9:2915-2917, 2952-2953, 2960; RT10:3075-3080.)

[6] One of the neighbors saw a female "lookout" from Mr. Pupua's apartment watching for the police; she ran back into the apartment when (continued...)

9:2917-2920; 10:3083-3084, 3218; 13:4009, 4012, 4055, 4087-4088, 4106, 4113-4117, 4122.)

b. Joshua Rexford's Background

Mr. Rexford's mother, Dawn Hall, told the police that he was short-tempered and easily upset. (RT 13:4254-4255.) Mr. Rexford's girlfriend, Lucina Valenzuela, said that he had a lot of enemies. (RT 14:4462-4463.) According to Ms. Valenzuela, Ms. Hall frequently told Mr. Rexford that he needed to stop "kicking people's ass [because] people are going to come back for you and hurt you," and that he had "to calm down because one of these days someone is going to come up to you with a gun and you're not going to know what to do." (RT 14:4471-4472.) There were two incidents in the weeks before his death where Mr. Rexford's life had been threatened by persons unconnected to appellant. (RT 13:4195.) Ms. Valenzuela also said Mr. Rexford threw some young Mexican "Cholos" (Mexican street gang members) out of a party hosted by one of Ms. Valenzuela's friends. (RT 13:4205, 4238-4240.)

Approximately two months before Mr. Rexford was killed, he confronted an unknown man who had pulled his car to the curb in an attempt to pick up Ms. Valenzuela. The confrontation resulted in the man firing shots at Mr. Rexford. The man was never identified, and the incident never resolved. (RT 13:4212-4214; RT 14:4473-4475.)

Mark Rexford, Josh Rexford's older brother, testified about an incident at a mall that occurred shortly before the football game fight. While the Rexford brothers and Mr. Pupua were in the mall parking lot,

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[6](...continued)
they arrived. This was typical behavior for Mr. Pupua's apartment. (RT 13:4103-4104.)

they passed two young Mexican males, who had a short verbal exchange with Joshua Rexford. Then one of the Mexican males – who appeared to be a "cholo" – cursed and threatened to shoot and kill Joshua Rexford. The Mexican male yelled something related to South Ontario and/or Ontario, and said that he would go back to his car and get his "gauge," i.e., a 12-gauge shotgun. Mark Rexford was upset that his brother did not avoid the confrontation. (RT 14:4391-4397, 4415-4421.)

Mark Rexford also recalled a fight at Mr. Pupua's between Joshua Rexford and a slender Mexican male that occurred on the Wednesday or Thursday night before the shooting. Joshua Rexford was upset because the Mexican male had disrespected Mr. Pupua's home by throwing up in the bathroom. The other people at the party had to separate the two of them. (RT 14:4377-4386, 4410-4411.)

c. Appellant's Background

Appellant testified during the guilt phase, and provided some limited information about his background. As a teenager, appellant was an Amateur Athletic Union (A.A.U.) registered amateur boxer.[7] (RT 16:5055-5057.) He earned a living through several part-time jobs, including work as a recruiter/youth activities director/performer for a church youth program (New Life Ministries), a performer at school district special events and anti-drug rallies, and a disc jockey and entertainer at private events. (RT 15:4789; RT 16:5061-5062, 5066.) During 1994, appellant founded a youth services organization, Networking Strategies for Youth Development Efficacy. (RT 15:4831, 4840-4841; RT 12:3795.)

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[7] Boxing trophies and record books were found during the search of appellant's apartment. (RT 16:5055-5057.)

d. Events of Saturday, November 26, 1994

Appellant testified that on Saturday evening, November 26, 1994, he went to Mr. Pupua's apartment complex to look for his friend Rock; he wanted Rock to help him open a teen center in Fontana. It was dark when appellant went to the complex, but otherwise he was unsure of the times various things occurred. He drove there by himself in a green 1994 Ford Thunderbird that had been loaned to him by his father figure–Carroll Green. It was cold and raining; appellant had a cold and had taken cough syrup that made him tired. When appellant was leaving the complex after he was unable to find Rock, he put the key in the driver's door, and a Mexican male with a gun in his hand approached him from behind. Appellant thought it was a carjacking. The person asked for the car keys; appellant gave him the key, but not the security starter chip. A large white male came from behind the car, hit appellant on the head and pushed him on his shoulder to force appellant into the car. The Mexican male got in the driver's seat, and the white male got in the back with appellant. (RT 15:4789-4792.)

When the Mexican male could not start the car, the white male stuck a gun in appellant's face and made him hand over the security chip. The Mexican male then demanded to know how to get to appellant's apartment, and appellant told him. (RT 15:4793-4795.) The three of them went to appellant's apartment and the two men searched it. One of them made one or two phone calls, saying either "do I ask for Walter?" or "may I talk to Walter?" Appellant thought that the while male dialed the phone and handed the receiver to the Mexican male. (RT 15:4796.) When the Mexican male was talking on the phone, appellant overheard something about a fight over a football game. (RT 15:4799-4800.) Appellant testified

that he heard the white male refer to the Mexican male as "Carlos." (RT 16:5054.)

While the men made the phone calls, the Mexican male saw a photograph of appellant and his young son that was taped to the phone, next to directions to the home where appellant's wife and son were staying. The Mexican male said, "I don't have to say anything else, do I?" and took the address and directions. (RT 15:4805-4806.)

At some point, another white male arrived at the apartment. Appellant spent the night on the floor and eventually passed out from the cold medication and his exhaustion. It was "purple" when he woke up, and all three of the intruders were still in his apartment. (RT 15:4797.)

e. Events at the Civic Center Drive Apartment Complex During the Morning of Sunday, November 27, 1994

Appellant testified that he and the three men left his apartment Sunday morning in the Thunderbird, with the Mexican male driving. When they left appellant's apartment, the Mexican male had an aluminum colored, small caliber weapon, and the white male who was one of his original abductors had a 12-inch long black nine millimeter gun. Someone in a dirty white American-made truck followed them. (RT 15:4799-4803.)

When they got out of the Thunderbird at Mr. Pupua's apartment complex, one of the white males separated from the group and walked into the complex alone. Appellant and the other two men walked to the back wall of the complex, and appellant and the Mexican male sat on the wall. (RT 15:4807-4808.)

Michael Honess, who lived on the third floor of Mr. Pupua's apartment building within the complex, left his apartment and walked to the

back of the complex at approximately 9:15 a.m. (RT 10:2975-2979.) He saw two unfamiliar people sitting on a wall behind his building. One of them was appellant, who asked for cigarettes. At first Mr. Honess thought the other person was white, but he "found out later[8]" that he was "Hispanic."[9] Mr. Honess gave appellant two cigarettes and walked back to his apartment. (RT 10:2979-2983.)

Sebrina Smith, a teenager who lived in a second floor apartment above Mr. Pupua's apartment, saw appellant at approximately 9:00 a.m. when she used the back stairs to go to the newspaper vending area. Appellant was coming up the stairs from the first floor; he asked her to tell him if she saw his mother's white car, and told her it was too cold for her to be outside with bare feet. (RT 10:3254-3256.) She saw appellant again minutes later when she returned from her newspaper run; he was sitting on the front stairs landing between the second and third floors, in front of her apartment door, smoking a cigarette. She told him she did not see his mother's car and he thanked her. He was alone both times she saw him (RT 10:3258-3260), but he appeared nervous. (RT 13:4037-4039.) Ms. Smith thought appellant was talking to someone she could not see, but who was standing on the third-floor landing. (RT 13:4040-4041.)

Appellant testified that he saw Sebrina Smith when he sat on the steps in front of the Smiths' apartment. The Mexican male was sitting directly below appellant, still on the wall. The white male was standing on the steps, where appellant's legs could be seen. When appellant spoke to

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[8] Detective Brooke Wagner told him this. (RT 10:3035.)

[9] Mr. Honess told the investigating detective that appellant was accompanied by two white men. (RT B:52; RT 10:3034.)

Ms. Smith about her bare feet and his mother's car, he was trying to draw attention to himself and talk through "subliminal messages" because his abductors were still there. (RT 15:4811-4812.)

Between 10:00 and 10:15 a.m., Sebrina's mother, Nancy Smith, saw appellant standing on the front stair landing close to her apartment door. He was by himself, looking at one of the complex's stray cats. He commented that they had a lot of cats, even though there was only one cat there. (RT 12:3826-3830.) Later, she saw two sets of legs walking down the back stairs from the third floor to the second floor. (RT 12:3833-3834.)

Appellant spoke to several people while he was in the back wall area; he tried to talk to everyone he saw and to make eye contact; that was all he could do because the Mexican male was sitting with him. (RT 15:4809.) In addition to asking Mr. Honess for a cigarette, he spoke to an older Black man and woman wearing jogging suits. He acted as if he was trying to stay out of the cold, and asked them to come back and tell him if they saw his mother's white car. (RT 15:4810.)

2. Events Related to the Commission of the Alleged Crimes

a. Mr. Pupua's Apartment

Mr. Pupua testified that Mr. Rexford and Mr. Badibanga accompanied him to a house party on the Saturday night before the shooting. They returned to his apartment around 1:30 to 2:00 a.m., and went to bed, except for Mr. Rexford, who walked back to the party. (RT 9:2848-2850.)

Mr. Rexford called Mr. Pupua at approximately 5:00 or 6:00 a.m. to ask for a ride; Mr. Pupua and Mr. Badibanga left at about 6:30 a.m. and picked Mr. Rexford up near the party. (RT 9:2851-2852.) At some point

after picking up Mr. Rexford, the three drove to the home of Mr. Rexford's mother, Dawn Hall, stayed there for "about an hour," and returned to Mr. Pupua's apartment–arriving at approximately 9:30 a.m. (RT 9:2852-2853, 2859.)[10]

After arriving back at Mr. Pupua's apartment, the three of them sat in the living room eating and playing a video game. According to Mr. Pupua, they were facing the television with Mr. Rexford seated in the middle, with Mr. Pupua on his left and Mr. Badibanga on his right. (RT 9:2869-2870.) Mr. Badibanga testified that he was sitting in the middle. (RT 10:3105.)

b. Michael Honess's Apartment

Using the back stairs, Mr. Honess walked his girlfriend to her car around 9:30 a.m. When he returned, he saw appellant sitting on the third-floor stairs adjacent to his apartment. Appellant complained about the lack of pay phones in the complex, and said that he needed to call his mother. Mr. Honess invited him to enter his apartment to use his phone. (RT 10:2983-2986.)

Appellant was in the apartment two or three minutes, and told Mr. Honess that his name was "Jerry." He called information to obtain the

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[10] There seem to be significant time gaps in Mr. Pupua's version of events. He testified that the house party was two to three miles from his apartment, and that Dawn Hall's apartment was four to five miles from that location. (RT 9:2850, 2852.) This is a total maximum driving distance of approximately 16 miles. He also testified that he and Mr. Badibanga left the apartment at about 6:30 a.m. and picked Mr. Rexford up on a street near the party. (RT 9:2851-2852.) They then drove straight to Ms. Hall's home, where they stayed for about an hour (RT 9:2852-2853), before returning to Mr. Pupua's apartment at approximately 9:30 a.m. (RT 9:2859.) Unless it took Mr. Pupua and Mr. Badibanga approximately two hours to drive approximately 16 miles, there is a great deal of time unaccounted for.

number for a church, and wrote the number on a piece of paper that he left behind. (RT 10:2986-2989.) After calling information, appellant called Elder Perry of Solid Rock Ministries. A woman answered, and he asked to speak to "Uncle Perry." Perry did not come to the phone, and appellant did not leave a message. (RT 15:4813.) Appellant did not call the police regarding his abduction because he did not think they would accept the word of a Black ex-felon whom they found in a white stranger's apartment. (RT 15:4815.)

Mr. Honess testified that shortly after appellant left, there was a knock at his door. Mr. Honess saw appellant by himself, and assumed he again wanted to use the phone. He opened the door and turned to walk back into his apartment, and felt appellant's hand on his shoulder pushing him to his hands and knees. Appellant told him to get down. Appellant had a dark gray or black automatic pistol in his hand, and told Mr. Honess that he would not be hurt.[11] Mr. Honess could not see what appellant was doing with the pistol because he had his back to appellant. Two other people came into the apartment after appellant – the "Hispanic" Mr. Honess previously saw sitting on the wall, and a "heavyset" white male. (RT 10:2990-2995.) The white man carried a sawed-off shotgun the entire time he was in Mr. Honess's apartment. (RT 10:3013.)

Appellant testified that when he walked out of the Honess apartment, the Mexican male and the white man had already come up the top flight of stairs and were on the third floor landing. Appellant snatched Mr. Honess

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[11] When Mr. Honess was interviewed by the police on the day of the shooting, he did not say that appellant had a gun. (RT 10:2991; RT 14:4506, 4511.) The police "misplaced" the audiotape of Mr. Honess's subsequent interview with Detective Franks. (RT 14:4662.)

out of the way because the white man was carrying a sawed-off shotgun. Appellant thought that the men would start shooting because he was not sitting on the stairs where he was supposed to be. When appellant grabbed Mr. Honess, the two men entered the apartment and the white man pumped a round into the shotgun chamber and pointed the gun. Appellant fell on top of Mr. Honess, with his back to the gun. Appellant thought the man was going to fire. (RT 15:4816-4819.) Appellant did not have a gun. (RT 15:5140.)

The white man and the Hispanic male looked through the blinds covering Mr. Honess's living room sliding glass door, which faced the front of the apartment building. Appellant never looked out. (RT 10:2995-3000.)

The Hispanic man found Mr. Honess's wallet in the bedroom, brought it into the living room, and put it on a table. Appellant took Mr. Honess's driver's license from the wallet, looked at it, and said, "I know who you are." Appellant said this in a normal, non-threatening voice. Mr. Honess "maybe briefly" felt threatened by the statement, "but [he] let it pass." (RT 10:3017.) There was no money in the wallet. The Hispanic man put his hands into Mr. Honess's pants pocket and pulled out some money. Appellant told him to put the money back. (RT 10:3001-3005.)

The men were in Mr. Honess's apartment 15 to 20 minutes. (RT 10:3018.) The Mexican male made the decision to leave. (RT 15:4808.) Appellant was the last of the three to walk out. Mr. Honess walked out behind him, and stopped at the top of the stairs to smoke a cigarette. (RT 10:3018-3020.) Appellant told Mr. Honess that he could "watch the fireworks" if he wanted, and to be sure to tell the police everything that had happened. Appellant felt that, if something happened to him, Mr. Honess

could identify him. Appellant felt ill. Appellant and the Mexican male walked down the front stairs, and the white man went down the back stairs. (RT 15:4819, 4932; see also RT 10:3016-3017.) According to Mr. Honess, appellant did not have a pistol in his hand when he walked down the stairs. (RT 10:3026.)

Mr. Honess could not see appellant or the Hispanic man after they passed the second floor. He heard someone knock two or three times on a door on the bottom level. Within five seconds of the knocks, he heard five gunshots. (RT 10:3024-3026.)

c. Entry into Mr. Pupua's Apartment

Mr. Pupua and Mr. Badibanga were expecting their friend, Sean Garcia, to stop by that morning to watch football. (RT 9:2872-2873; RT 10:3109, 3121, 3159-3160.) They heard three knocks on the door and Mr. Badibanga said "come in." When the door opened, Mr. Pupua saw–from a distance of approximately 20 feet–a Black man with a gun in his right hand. (RT 9:2874, 2876, 2879.) This person took one step into the apartment and stopped. (RT 9:2875.) At trial, Mr. Pupua and Mr. Badibanga identified appellant as that man.[12] (RT 9:2881; RT 10:3121-3123.)

When Mr. Pupua called 911, however, he told the operator that two Black men entered his apartment and began shooting; later, he told a police

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[12] Mr. Pupua testified that he first saw appellant's photograph three days after the shooting when the police presented it to him as part of a photographic line-up, and that he had not previously seen a flyer with appellant's picture. (RT 9:2909.) Then, after being confronted with the transcript of his first trial testimony, he admitted that he previously testified that he saw the flyer one week after the shooting and before he saw the line-up photos, but that the flyer picture did not look like appellant. (RT 9:2910-2912.) Next, he claimed that he did not remember saying the words in the transcript. (RT 9:2913-2914.)

officer that there had been three Black men. (RT 14:4498, 4622-4623; see also RT 9:2950 [he only saw appellant but felt there could be another person].) He admitted that he only saw "a little bit of [the shooter's]" face (RT 9:2922), and he closed his eyes and dropped to the floor as soon as the shooting started. (RT 9:2882, 2900.)

Mr. Badibanga also saw a person behind and to the right side of appellant. Mr. Badibanga could only see a portion of that person's body; it could possibly have been a light-skinned Caucasian. (RT 10:3125-3126.) Mr. Badibanga only saw the gunman for approximately two seconds, "but it was just a glance actually." He did not see the second person's face. (RT 10:3162.) Mr. Badibanga was not looking at the gunman when he dropped to the floor. (RT 10:3163.)

Because Mr. Pupua's living room was so poorly lit, even though they were there during the mid-afternoon, the police forensic team needed to use a flash attachment when they photographed the crime scene. (RT 12:3717.)

d. Descriptions of the Shooting Itself

Appellant testified that when he and the Mexican male left Mr. Honess's apartment, they went directly downstairs to Mr. Pupua's apartment. (RT 15:4820.) Appellant did not know that the Mexican male planned to shoot anyone, but it felt " dangerous." (RT 16:5052.) The Mexican male knocked on the door, and when someone inside said "come in," the Mexican male opened the door and started shooting with a silver .25 caliber pistol in one hand and a black nine millimeter pistol in the other. Appellant did not know how long the shooting lasted or how many shots were fired. As soon as the Mexican male started shooting, appellant tried to run out of the apartment. However, the door swung back too fast and

appellant became stuck between the door and the wall and could not get out. (RT 15:4820.)

Neither Mr. Pupua nor Mr. Badibanga testified that a gun was aimed directly at Mr. Rexford. Mr. Pupua testified that, as soon as the door opened, the Black man pointed the black gun toward "us," not Mr. Rexford specifically. (RT 9:2874, 2876, 2879.) Mr. Badibanga testified that appellant's gun was pointed "upwards," but he did not say that the gun was pointed at anyone in particular. (See RT 9: 3123-3124.)

Although Mr. Pupua testified that he saw the intruders for three to five seconds (RT 9:2900), he also testified that appellant started shooting as soon as he opened the door. Mr. Pupua dove into the corner of the living room holding his stereo speaker; 15 or 16 shots were fired, lasting 30 to 45 seconds (RT 9:2882), and there were three to four bullet holes in the corner area where he lay. (RT 9:2883.) He did not see what Mr. Rexford and Mr. Badibanga did after the shooting began, nor did he see the gunmen leave the apartment. (RT 9:2882-2883.)

Mr. Badibanga heard between seven and eleven shots. (RT 10:3123-3125.) From the pace of the gunfire, he believed the weapon was semiautomatic. (RT 10:3146.) Mr. Badibanga went forward to the floor and could not stand back up because his knee and ankle gave out. He fell to his knees and crawled around the right wall into Mr. Pupua's bedroom. (RT 10:3127-3128.) When he returned to the living room, he saw six or seven bullet holes in the wall behind where he had been sitting. (RT 10:3151.)

e. Departures from the Scene

Mr. Badibanga punched Mr. Pupua's bedroom window out with his hands and jumped through. He landed to the left of Mr. Pupua's patio and

front door. (RT 10:3129-3130; see also RT 10:3261-3268, 3841-3842.) While there, he heard more than one person running from Mr. Pupua's door. Mr. Badibanga ran towards the sidewalk in the direction of the Civic Center Drive entrance to the apartments. He saw appellant again, jogging out of the visitor's parking area with a lighter-complected person. Mr. Badibanga could see both of appellant's hands and he was not holding a gun. A third person – "a lot lighter complexion, possibly Caucasian, Hispanic" – was standing near a car. The three got into a car parked on Civic Center Drive, and turned right onto Haven Avenue. Mr. Badibanga claimed that appellant was the driver. (RT 10:3135-3144.)

Esau Boche, a resident of the apartment complex, testified that he walked to his car at approximately 10:15 that morning. When he reached his car, he saw and spoke to a white male who was walking to a car parked farther up the street. At approximately the same time that the man got in the car on the driver's side, Mr. Boche saw two men quickly jogging from the west side of the complex. Appellant was one of the runners, and he had a gun. The other man was light-skinned. Appellant raised the gun and told Mr. Boche, "don't look at us." Appellant and the other man got into the car in which the white man was waiting. Mr. Boche saw appellant get into the car on the passenger side. The car quickly pulled away. (RT 10:3225-3237, 3242.)

Appellant testified that, after he was able to get out from behind Mr. Pupua's front door, he started to run. The Mexican male was running directly behind him. Appellant dropped his wallet when they reached the parking lot and stopped to pick it up. The Mexican male was still right with him. (RT 15:4823.) Appellant testified he did not have a gun, consequently

he did not point a gun at anyone when he ran through the parking lot. (RT 15:4816, 4824.)

Appellant got into the back seat of the Thunderbird on the passenger side. The Mexican male drove them to a park in Jurupa Hills. The white truck that appellant saw on the way to the apartment complex pulled up behind the Thunderbird. The Mexican male and the two white men got out of the Thunderbird, left appellant in the back seat, and stood by the car. After a while they told him that he could leave. He jumped into the driver's seat, drove to a 7-Eleven to use the telephone, and then drove to his apartment in Rialto. (RT 15:4824-4826.)

3. Events Immediately after the Shooting

a. Mr. Rexford, Mr. Badibanga and Mr. Pupua

After Mr. Pupua got up from the floor, he saw Mr. Rexford standing in the living room; Mr. Rexford was severely wounded and his stomach contents were exposed. Mr. Rexford told Mr. Pupua to call 911, and walked out of the living room toward the bedroom area, calling for Mr. Badibanga. (RT 9:2883-2884.) Mr. Badibanga came into the apartment through the front door approximately one minute after the shooting ended; he had a large cut on his hand. (RT 9:2884.) Mr. Rexford collapsed in the back bedroom, but was able to talk to the police when they arrived five to ten minutes after Mr. Pupua called 911; he was still talking when the medical personnel took him to the hospital. (RT 9:2888-2889; see also RT 10:3147-3151.) Mr. Rexford died at Loma Linda hospital at approximately 3:00 p.m. (RT 12:3882-3883.) The cause of death was multiple gunshot wounds to the chest and abdomen. (RT 10:3202.)

b. Michael Honess

After hearing the shots, Mr. Honess walked back into his apartment, stayed inside for approximately ten minutes, walked past the police and emergency personnel who had responded to the scene and – without reporting anything to the police – left as planned to meet his girlfriend for brunch. (RT 10:3027-3028, 3042, 3046-3048.) Detective Wagner testified that he found Mr. Honess's account to be "bizarre" – e.g., he claimed that, after having intruders in his apartment and hearing gunfire seconds after they left, he smoked a cigarette, changed clothes, walked past the investigating police officers and paramedics to take his girlfriend to brunch, and showed up at a police station several hours later. (RT 10:3042-3043.)

c. Allen Smith

Allen Smith testified that, after the shooting, there was a group of people milling around in front of Mr. Pupua's apartment. From upstairs, he heard someone downstairs say, "I couldn't get to my gun in time," but he could not identify the speaker.[13] (RT 13:4010.)

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[13] Mr. Pupua testified that there were no guns in his apartment at the time of the shooting, and testified that he was not aware of any guns or ammunition ever being in his apartment prior to the shooting. (RT 9:2880, 2954.) He initially testified that he had only shot a pistol once at an arcade (RT 9:2880) but later said he had "seen a couple of [his] friends' nine millimeters, and that "a lot of times" he and his boxing manager went to a shooting range where they shot the manager's .45. (RT 9:2892-2893.) He further testified that, after the shooting, he stood outside of his apartment with three women and another man. (RT 14:4631.)

4. The Law Enforcement and Private Citizen Investigations

a. Law Enforcement Investigation and Witness Statements

Officer Carlos Quezada of the San Bernardino Sheriff's Department was sent to the crime scene at approximately 10:20 a.m. (RT 12:3867.) When he arrived, Mr. Pupua and Mr. Badibanga were both outside of the apartment and hysterical. Officer Quezada saw numerous shell casings on the living room carpet, blood on the walls, and Mr. Rexford curled in a fetal position on a bedroom floor. Mr. Rexford was semi-conscious and identified himself. Officer Quezada called for an ambulance, but he could not secure the crime scene. Mr. Pupua was too hysterical to provide any information about the suspects. Mr. Pupua was throwing furniture, and both men ran in and out of the living room kicking bullets and shell casings. (RT 10:3147-3149; RT 12:3868-3871; RT 14:4623, 4628.) Deputy Sheriff Quezada admitted that he was unable to contain the scene to preserve the evidence due to Mr. Pupua's and Mr. Badibanga's disruptive behavior. (RT 12:3871.)

Mr. Badibanga was taken to the police station approximately one hour after the police arrived. He prepared a composite sketch of the shooter. (RT 10:3152-3154.) He was "reluctant" to do the composition. (RT 12:3713.) On the day after the shooting, Mr. Pupua constructed a composite sketch. Three or four days after the shooting, he identified appellant through a photographic line-up. (RT 9:2949, 2957-2958.) Although Mr. Pupua testified at the first trial that he had seen flyers with appellant's picture before he had seen the photo line-up (RT 9:2912), he now claimed to have picked appellant's photograph before he saw any flyer depicting the Rexford shooting suspect. (RT 9:2949-2950.) Both Mr.

Pupua and Mr. Badibanga identified appellant in exactly the same manner. (RT 14:4644-4648.) Before their testimony, Mr. Pupua and Mr. Badibanga "talk[ed] about everything" they remembered. (RT 9:2903-2905.)

On the day of the shooting, Michael Honess was interviewed at least twice by the police. Detective Robert Hards testified that he interviewed Mr. Honess after being dispatched to the crime scene at approximately 10:45 a.m. (RT 14:4516, 4520.) Mr. Honess testified that he did not recall talking to Detective Hards that morning. (RT 10:3036-3038.)

The sheriff's forensic team found six bullet holes in Mr. Pupua's apartment, one unfired .25 cartridge inside the apartment, six fired nine millimeter cartridges and one fired .25 caliber cartridge inside and outside of the apartment, and three bullets (two nine millimeter and one undetermined caliber) in the apartment. (RT 12:3679, 3693-3702.)

Three bullets of undetermined caliber were removed from Mr. Rexford's body during the autopsy. (RT 12:3703.) The medical examiner testified that all three bullets were "large caliber." One bullet was preserved; it measured approximately nine millimeters in diameter at the base. The other two bullets had been "deformed" as they passed through Mr. Rexford's body. (RT 10:3197.) The medical examiner did not testify, however, that the preserved bullet necessarily came from a nine millimeter gun or even that the bullet was a nine millimeter. Forensic Specialist Karen Rice, who had worked at over 2500 crime scenes (RT 12:3681), could not determine the caliber of the three bullets taken from Mr. Rexford, including the one bullet that was preserved (RT 12:3703).

The sheriff's forensic team went to Mr. Honess's apartment at approximately 8:00 p.m. on the day of the shooting, and lifted a latent

fingerprint from the telephone. (RT 12:3705, 3707.) The fingerprint was matched to appellant. (RT 12:3740-3744.)

b. Facts Pertaining to the Prosecution's Motive Theory

i. The Death of Manuel Farias

Manuel Farias was killed on October 30, 1994. (RT 11:3427.) He had been missing for a time before his body was located and identified; he was buried on or about November 23, 1994. (RT 11:3432, 3434.) Appellant knew Manuel through a mutual friend (RT 15:4828); he attended Manuel's funeral and the reception at Manuel's grandmother's home afterwards. (RT 11:3428; RT 15:4828.)

Linda Farias (Manuel's sister) testified that, during the reception, she overheard a conversation between appellant, Jake Carroll, Sean Flores, and another man; they were discussing a "Josh." She heard them say that "Josh" was Brian's cousin, that Brian was responsible for Manuel's death, and that they could find Brian through "Josh." (RT 11:3431, 3433, 3456.) Detective Franks testified that Linda Farias told him that appellant was purportedly overheard discussing a "Josh," but never specifically said "Josh Rexford."[14] (RT 14:4706, 4725.) The police received this information from Ms. Farias after Detective Franks told her that appellant may have been responsible for Manuel's death, and after she received a phone call from Dawn Hall, Mr. Rexford's mother. (RT 11:3436-3440; RT 14:4665.)

Christina Hogue also attended the post-funeral reception. She overheard Jake Carroll and Victor and Carnout Ledbetter discussing Brian's possible involvement in Manuel's death, but was not sure if appellant

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[14] Josh Rexford's mother testified that he had a step-cousin named Brian who lived in nearby Ontario. (RT 12:3878.)

participated in that conversation. (RT 12:3566-3568.) Sean Flores testified that he and appellant did not talk about anyone named Brian, or about Mr. Rexford or a "Josh," after Manuel Farias's funeral, and he did not hear anyone discuss retaliating for Farias's killing. (RT 14:4359-4360, 4368.)

Raymond Farias, Manuel's and Linda's younger brother, had cerebral palsy; he was approximately 17 years old when interviewed by Detective Franks in 1995. (RT 11:3423.) He told Franks repeatedly that he did not have any information about Mr. Rexford's death. (RT 11:3410, 3414-3415.) Franks questioned Raymond for four hours at his home, and then, over the objections of Raymond's adult relatives, took him to the sheriff's station for further questioning. (RT 11:3415-3417, RT 14:4656-4657.) Franks told Raymond that appellant had killed Mr. Rexford, and that Raymond would be arrested by order of the trial judge because the police believed that he was involved. Franks said this despite the fact that he had not spoken to the judge. (RT 11:3410-3411; RT 14:4659, 4662.) After another two or three hours of interrogation, Raymond told Franks that appellant told him that appellant shot Mr. Rexford. (RT 11:3417, 3422.) Raymond testified that appellant did not tell him why he shot Mr. Rexford. (RT 11:3408.)[15]

Christina Hogue testified that she drove Raymond to pick up newspapers containing a story about Mr. Rexford's death, and Raymond brought them to the home of Jake Carroll.[16] (RT 12:3573-3575.) When

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[15] Detective Franks testified that Raymond told him that appellant said he killed Mr. Rexford in retaliation for Raymond's brother, Manuel. (RT 15:4712.)

[16] Jake Carroll was a friend of appellant's, and also knew Manuel (continued...)

Raymond got to Carroll's house, appellant was there. (RT 12:3573-3576.) Raymond told Christina Hogue that "we got Brian back." (RT 12:3582-3583.)

Appellant testified that Manuel Farias was an acquaintance, not a personal friend. Appellant attended Farias's funeral, and the reception afterwards, but he did not talk about retaliating for his death. (RT 15:4828.)

ii. Troy Holloway and Patrick Wiley

Troy Holloway was first interviewed by Detective Frank Gonzales on March 8, 1995. (RT 15:4741-4742.) Holloway told Gonzales that, on the day after Mr. Rexford was killed, he paid a friend (Steve Blackshire) $70 for a nine millimeter gun because he feared for his life. Three days later, he threw the gun into a ditch and tossed the bullets into a field. (3 SCT 3:1139-1165; 4 SCT 4:1139; see also 4 SCT 4:1144.)

Approximately two years later, on March 21, 1997, Detective Franks questioned Holloway via telephone. (RT 12:3952, 15:4695.) Holloway was stationed on a Navy ship in Virginia; military officers were present during the phone call. (RT 11:3529-3530, 3 SCT 3:801, 820.)

Franks testified that he had received no orders from the trial court regarding Holloway. (RT 14:4668; see also RT 12:4178.) Yet, Franks

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[16](...continued)
Farias, Troy Holloway and Sean Flores. (RT 13:3989; RT 14:4365.) During the investigation, Carroll was arrested, but released. (RT 14:4649-4651.) Detective Franks testified that Michael Honess viewed a live line-up and identified Jake Carroll as the white man who entered his apartment. Esau Boche was shown the line-up and identified a different white male. (RT 14:4654-4655; RT 15:4713-4716.)

threatened Holloway with criminal *and* military custody if he did not change his story to implicate appellant. (See, e.g., 3 SCT 3:804-805.)

Holloway initially re-affirmed the truth of his statements to Gonzales, and told Franks that he disposed of the gun not because he believed it had been used during the Rexford shooting, but because he was afraid of his mother discovering that he had brought a gun into her home. (3 SCT 3:807-810.) After additional threats from Franks, and after Franks spelled out the prosecution's Farias-revenge motive theory for him (3 SCT 3:813-817, 821-822), Holloway changed his story to match the prosecution's theories. He told Franks that (1) word on the street was that Josh Rexford was involved in Manuel Farias's murder and appellant killed him because of this (3 SCT 3:823, 330); (2) that at an unspecified time before the shooting, appellant asked him questions about Josh Rexford, and said that he "just wanted to talk to Josh" (3 SCT 3:825, 830-833, 839-841); (3) that at an unspecified time before the shooting, Holloway asked appellant to get him a gun; (4) that after the shooting, appellant gave him a nine millimeter gun; (5) that he gave it back to appellant two days later because he was afraid of his mother (3 SCT 3:836-838); and (6) that Patrick Wiley had a .25 caliber weapon (3 SCT 3:834, 844).

At trial, Holloway testified that he was at appellant's apartment some three to five days before Mr. Rexford was shot. Holloway claimed that a small, "weird looking" gun was on appellant's couch, and appellant was wearing a nine millimeter pistol. While at the apartment, appellant asked Holloway questions about Mr. Rexford. Holloway gave appellant general information about Mr. Rexford – e.g., that he was "cool" – but did not tell appellant where he could find Mr. Rexford. (RT 11:3445-3446, 3468.)

Holloway learned of Mr. Rexford's death from Mark Rexford at approximately 10:00 p.m. on the day of the shooting. (RT 11:3449.) Thereafter, some friends gathered at his home to mourn. (RT 11:3459.) Appellant gave Patrick Wiley a ride to Holloway's house. (RT 12:3633-3634.) Holloway testified that appellant openly handed him a nine millimeter automatic pistol.[17] After showing the gun to friends and firing it twice, four to five days after he received the nine millimeter from appellant, Holloway gave the gun to Patrick Wiley. Holloway was afraid that his mother would find it. (RT 11:3470-3473; RT 12:3595-3597, 3618, 3624-3625.)

Patrick Wiley testified that, while they were talking in Holloway's bedroom, appellant removed an unwrapped black nine millimeter from his coat and handed it to Holloway. Wiley confirmed that Holloway had asked him to get a gun for him, but claimed that he had not told appellant that Holloway was looking for a gun. (RT 12:3636-3639.) Three or four days later, appellant called him and asked him to retrieve the gun from Holloway; Wiley did so, and gave the gun back to appellant.[18] (RT 12:3641-3643.)

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[17] Two of Holloway's friends testified that they saw one of the three Black males who stopped by hand Holloway a tightly rolled up paper bag. (RT 12:3615-3617, 3770-3772.) Bennett Brown did not see a brown paper sack in the car or at Holloway's house, or see anyone give anyone anything while at the house. (RT 11:3390-3392, 3401.) Patrick Wiley testified that he did not see an exchange of a brown bag. (RT 12:3665.)

[18] Wiley claimed to have previously seen that gun on the kitchen counter in appellant's apartment. (RT 12:3640-3641.) He also claimed to have seen a gun in appellant's room at Dr. Green's house, and in a suitcase appellant had while he was riding with Dr. Green in Green's car. (RT 12:3670-3671, 3676.)

Appellant testified that he knew Troy Holloway in November 1994, but not well. He knew Holloway as one of Patrick Wiley's friends, and had met him two or three times. Appellant testified that he did not give Holloway a gun, nor did he give a gun to Patrick Wiley to give to Holloway. (RT 15:4827.) Nor did he ever ask Holloway where Mr. Rexford could be found. (RT 15:4828.)

c. Dawn Hall's Involvement with the Law Enforcement Investigation and the Government's Witnesses

Mr. Rexford's mother, Dawn Hall, testified that she distributed two different flyers with appellant's picture, and interviewed witnesses regarding her son's killing. (RT 13:4246, 4249-4250.) Ms. Hall began her investigation in mid-December 1994; she connected a two-way recorder to her phone to record incoming and outgoing calls. (RT 13:4261, 4263.) She continued "investigating" until summer 1995. (RT 14:4345.)

Mr. Badibanga extensively discussed the case with Ms. Hall – "I have talked to her basically on and off throughout this whole time. And she's asked, you know, basically went over everything." (RT 10:3171, 3177.) Dawn Hall confirmed that she had talked to Mr. Badibanga "hundreds of times." (RT 13:4256.)

Esau Boche knew Mr. Rexford from high school. (RT 10:3224.) He talked to Dawn Hall about the case at least three times; the first time, Ms. Hall called him. (RT 10:3245.) Mr. Boche met Ms. Hall after she introduced himself; she already knew who he was. He did not recall giving her his phone number. (RT 10:3246-3247; RT 13:4247, 4265.) Mr. Boche called her in May 1997 to wish her a happy Mother's Day. (RT 13:4248.)

In approximately May 1995, Dawn Hall was the first person to tell Christina Hogue about Mr. Rexford's death. (RT 12:3576, 3581.) They

met while Ms. Hall was distributing flyers at a Wal-Mart. (RT 12:3578-3579.)

After she talked to Christina Hogue, Ms. Hall wrote a series of letters to Raymond Farias asking him to talk to her. (RT 13:4252-4253.) Linda Farias called Ms. Hall to find out why Raymond was receiving these letters. They had two conversations; during the second conversation Ms. Farias mentioned Sean Flores's name.[19] During both conversations, Ms. Hall told Ms. Farias to call Detective Franks, an investigating detective on both the Farias and Rexford homicides. (RT 13:4251-4253; RT 12:3498-3499.) After the second conversation, Ms. Hall called Detective Franks. Franks then re-interviewed Linda Farias. (RT 11:3438; RT 12:4252-4253; RT 15:4725-4732.)

According to Franks, he first interviewed Ms. Farias on April 2, 1997, about her brother's death, and she did not mention anything about appellant's purported comments at Manuel's funeral.[20] (RT 14:4665-4666; 15:4692-4693.) However, when Franks questioned Ms. Farias on April 17, 1997 – after she talked to Dawn Hall – she told him that appellant was present during the conversation and was doing most of the talking. (RT 15:4706-4707, 4725-4730, 4733.)

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[19] Sean Flores testified at appellant's trial. He denied participating in or overhearing any conversation about retaliating for Manuel Farias's death at Manuel's funeral. (RT 13:4358-4359.)

[20] Although Linda Farias testified that she told Franks about the conversation at the funeral reception when he first interviewed her, she acknowledged that no such statement was on the audiotape of their conversation. She claimed that Franks only recorded part of their conversation, and that she told Franks about the revenge conversation after he turned off the tape recorder. (RT 11:3438-3440.)

On direct examination, Linda Farias denied that she was biased against appellant, and testified that she did not believe he had any involvement in her brother's murder. (RT 11:3436-3437.) However, Franks testified that Ms. Farias twice told him that she believed appellant was in some way responsible for Manuel's death. (RT 15:4734.)

Lucinda Valenzuela, Mr. Rexford's girlfriend, spoke to Ms. Hall on the night before her testimony. Even though Ms. Valenzuela's brother was scheduled to testify on the same day as Ms. Valenzuela, she wanted to ride to court with Ms. Hall. (RT 13:4197-4199.)

Dawn Hall testified that, prior to Mr. Rexford's death, Patrick Wiley had been to her house with Troy Holloway approximately three times. (RT 12:3880.)

Sebrina Smith testified that she became friends with Ms. Hall after Mr. Rexford's death. (RT 13:4036.) Ms. Smith claimed to have discussed the case with Ms. Hall once or twice. However, after concluding her testimony during the first guilt phase trial, Ms. Smith returned to the courtroom to observe the rest of the trial "to support Dawn because she can not be in here."[21] (RT 13:4076-4078.) Nancy Smith also testified that she had become friends with Ms. Hall. (RT 13:4087.)

5. Appellant's Pre-arrest Statements and Surrender to Law Enforcement

On December 11, 1994, the Sheriff's Department searched appellant's apartment. (RT 12:3914.) They found .25 caliber and shotgun shells at his apartment, but not nine millimeter bullets. (RT 12:3947.) During trial, the parties stipulated that the .25 caliber bullets found in

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[21] Ms. Hall had not yet testified. (RT 13:4078.)

appellant's apartment were made by Winchester, and the .25 caliber casings found at Mr. Pupua's apartment were made by Remington. (RT 14:4641.)

Appellant paged Detective Franks at approximately 5:25 p.m. on December 11, 1994. (RT 12:3921.) He admitted being present at a shooting, if it involved a "white guy that got into some sort of an altercation at a football game." (RT 12:3922.) Franks and appellant scheduled a meeting for that evening. Appellant did not attend. (RT 12:3923, 3925-3927.)

Appellant called Franks again at approximately 5:00 p.m. on the next day. (RT 12:3927-3928, 3933-3934.) Appellant told Franks that he first learned that a death had resulted from the shooting on December 11, 1994 when Carroll Green told him.[22]

During January 1995, appellant made three copies of an audiotaped statement – one for Carroll Green, one for Patrick Wiley, and one for himself. (RT 16:5044-5045; see also RT 11:3331-3332.) The tape ultimately reached Robert Monroe, a reporter with the Inland Valley Daily Bulletin who had previously written about one of appellant's youth service projects. Mr. Monroe forwarded the cassette to the police. (RT 10:3114-3115, 3118.)

Patrick Wiley testified that appellant called him and told him about the tape, and that he wanted his "peers" and "the community" – along with Holloway's, Wiley's, and Mr. Rexford's mothers – to listen to the tape. (RT 11:3465, 3477.) An edited copy of the tape was played for the jury. (RT 12:3975; RT 13:3982.) Among other things, appellant said on this tape

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[22] However, appellant testified that he learned from a newspaper that one of the apartment occupants had died. (RT 16:5048.)

that, when the Mexican male spoke to "Walter" on the phone from appellant's apartment the night before the shooting, he asked "Walter" about both a fight at a football game as well as the start time of an upcoming professional football game, and who would be watching the game. (3 SCT 3:855.) Additionally, appellant stated that, at Manuel Farias's funeral, "some of the family was asking questions about . . . some white guy named Josh an[d] Mexican guy named Anthony and a short Puerto Rican guy. I didn't know what that stuff meant[.]" (3 SCT 3:871.) Appellant also speculated that Farias's death arose from a situation in which Farias brought a stranger to a dealer's house; Farias brought a stranger to the home of a Mexican gangster named Brian or Ryan against the gangster's orders. (3 SCT 3:871-872, 876.) Appellant also believed that Brian/Ryan knew "Josh" and that the Josh in question[23] owned a red Chevy Blazer. (3 SCT Vol 3:872.)

On February 13, 1995, Carroll Green drove appellant to the Fontana police department, where he turned himself in. (RT 11:3364-3365; RT 12:3794-3796.) Appellant told the arresting officer that he did not murder anyone but knew who the shooter was, and that he knew who was responsible for Manuel Farias's death. (RT 12:3797.) He said that he could not have surrendered earlier because he did not trust his wife to protect his son. Appellant intended to move his wife and son to Germany to stay with her aunt at a military base; he surrendered in February 1995 because it took time for his wife's letter to reach her aunt in Germany. (RT 15:4929.)

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[23] Appellant testified that he knew this Josh was white because they had played basketball together. (RT 15:4995; RT 16:5048.)

After his arrest, appellant declined to participate in a live line-up held by the Sheriff's Department. He told the officer in charge of the line-up that, because his photograph had already been published in the newspaper,[24] he did not believe that the line-up could be fair. (RT 12:3812-3815.)

B. Trial of the Prior Murder Special Circumstance

To prove that appellant had a prior murder conviction, the prosecution introduced into evidence a January 17, 1985, fingerprint card containing the comparison fingerprint used by the forensic team on the Rexford homicide to identify appellant from the fingerprint lifted from Michael Honess's apartment (RT 12:3739-3742); a Riverside County Superior Court minute order showing that, when Floyd Daniel Smith, Jr., was 16 years old, he pled guilty to murder and was sentenced to incarceration by the California Youth Authority; and a certified copy of Floyd Daniel Smith, Jr.'s California Youth Authority discharge package . (RT 17:5566; 3 SCT 3:788, 790-791; Exhs. 23 & 24.) Appellant did not present any evidence. After one half hour of deliberations, the jury found the special circumstance to be true. (RT 17:5574-5575.)

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[24] Defense counsel asked Dawn Hall to bring to court all newspaper articles about her son's death. She did so, and testified that the first photograph of appellant appeared in the Sun on December 13, 1994. A composite sketch of appellant was published in the Daily Bulletin on December 1, 1994. The Daily Bulletin published photographs of appellant with articles published on January 4 and January 18, 1995. The only photograph of Mr. Rexford was published with his obituary on December 2, 1994. (RT 13:4270-4274.)

C. Penalty Phase Evidence

1. Evidence Presented by Appellant

Appellant presented his case for life first. (RT 14:4290-4291; RT 17:5563.)

Dr. David Glaser, a forensic psychiatrist,[25] provided the jury with a short summary of appellant's mitigating background:

Appellant was born on July 20, 1967, to 26-year-old Gertrude Stewart, an alleged prostitute who had been impregnated by her pimp. Appellant never met his father. (RT 17:5603; 3 SCT 3:785.) While pregnant with appellant, Gertrude had significant medical and psychiatric problems. She used drugs, drank alcohol, and smoked cigarettes. She suffered from a rapidly growing cyst that could not be removed until after appellant was born. She was prescribed an anti-psychopathic and antidepressant medication, Triavil, during her sixth or seventh month of pregnancy. She suffered a severe dystonic reaction to the Triavil, becoming stiff and falling from a piano bench. The fall caused physical trauma to her uterus. Triavil is a combination of Elavil, an antidepressant, and Perphenazine, an antipsychopathic, and is prescribed for a person who is delusional, believes things that are patently absurd, or is experiencing auditory or visual hallucinations. Gertrude also took a "strong anti-

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[25] Dr. Glaser prepared for his testimony by interviewing appellant for six hours; reading the capital trial transcripts and appellant's arrest records; listening to appellant's two audiotaped statements and the tape of Bridgette Harris's interview with the defense investigator; and reviewing prior evaluations of appellant prepared by several California Youth Authority psychiatrists, psychologists, physicians, and social workers, as well as reports prepared by appellant's probation officers and foster home administrators. (RT 17:5598-5600; RT 18:5867-5876.)

inflammatory." All of these drugs could be dangerous to a growing fetus. Physical trauma to the uterus during pregnancy, as well as toxicity in utero, can have an adverse effect on the child's brain development and cause long term implications into the child's adulthood. (RT 17:5603-5606, 5687, 5695.)

Gertrude physically abused appellant throughout his childhood. She beat him for wetting his bed, which, to Dr. Glaser, was like yelling at a person in a wheelchair for not being able to walk. She hit appellant in the head with a purse containing a gun. The blow opened a gash in appellant's head and rendered him unconscious. Appellant's mother beat him on the head with a soup ladle when he was eight, whipped him with extension cords, and routinely told his older brother George to beat him. On one occasion when appellant had been knocked out, his mother thought he was faking and threatened to stick him with a barbeque fork to resolve the issue. Appellant fled from home a couple of times before he was 10. According to Dr. Glaser, this was not an unreasonable response to appellant's toxic home environment. There was "no doubt in [Dr. Glaser's] mind as a child psychologist that Floyd Smith was subjected to both an abusive and neglectful and a physically abusive relationship by his mother." (RT 17:5607-5613.)

By neglecting her parental duties, appellant's mother abandoned him to the "supervision" of his older brother, George, who physically and sexually abused him. George was able to emotionally blackmail appellant because he was so terrified of George's temper. (RT 17:5617.) Appellant's sister Bridgette witnessed an incident where George bound appellant, hung him upside down from a door, and burned appellant's penis with a metal implement George heated on the stove. (RT 17:5620.) George regularly

forced appellant into his bedroom, locked the door, and forced appellant to fellate him. During the 1980's, George was imprisoned on rape and cocaine charges. (RT 17:5623-5624.)

When appellant was 13, his mother had him arrested and made a ward of the juvenile court. He did not have a relationship with his mother thereafter, beyond occasional negative encounters. Between the ages of 13 and 17, appellant lived in six foster placements. (RT 17:5617-5618.)

In Dr. Glaser's opinion, appellant's childhood was full of neglect, physical abuse, sexual abuse, abandonment and trauma, and lacked age-appropriate supervision. The ongoing abuse and neglect, as well as being painted as the family black sheep, had a long-term effect on appellant. Dr. Glaser opined that appellant's poor adjustments to his foster placements can be directly traced to serious and profound parental deficits, an absent father, a neglectful, sporadic mother, and physical and sexual abuse by his older brother. (RT 17:5625-5627.)

Appellant's younger brother, Willis Holman, testified that he had a close relationship with his mother and frequently spoke to her on the phone. During their conversations, she did not inquire about appellant's welfare. (RT 18:5811, 5815.)

Ruthie Justice, a junior high school teacher and church worker, testified that she and appellant worked together on behalf of New Life Ministries. In 1991 and 1992, appellant assisted in efforts to establish a new community-based church with a focus on keeping youth involved in church activities. Appellant recruited youth during the week, and drove them to church on Sundays; he was also part of the church's motivational team. In this context, he told the youth about his background, advising them not to make the same mistakes he did. Appellant had an office at the

church, and also provided telephone counseling and organized youth activities. Appellant also was a musician who did local performances and in 1993 produced an audio tape of positive, uplifting message music. (RT 18:5891-5900.)

Appellant's older sister, Bridgette Harris, testified that she and four of her siblings shared the same father, while appellant and Willis were the offspring of two different men. Ms. Harris knew nothing of appellant's father. (RT 18:5923-5925.) Ms. Harris corroborated the data underlying Dr. Glaser's testimony and opinions. She testified that appellant and his mother had a bad relationship and that he was the family black sheep. She confirmed that appellant was mentally and physically abused by both his mother and George, and sexually abused by George. Ms. Harris and her siblings received a lot of beatings with extension cords; appellant was beaten three to four times per week. Gertrude also wrapped extension cords around appellant's neck while she held him pinned against a wall, sometimes applying a great deal of pressure to keep him down. Ms. Harris described an incident where her mother pinned appellant against their washer/dryer and was going to stick him in the chest with a barbeque fork. She also remembered the incident where her mother hit appellant on the head with a loaded purse. It occurred at their babysitter's home; sometimes Gertrude left her children with the woman for three weeks at a time. Appellant was slammed in the head because he had failed to come into the house for dinner; his mother also cursed at him. Gertrude saw the blood flowing from appellant's head, but left the house to go to her planned destination without seeking medical treatment for him. The babysitter was scared, but she got ice and a cold towel and attended to appellant. (RT 18:5925-5932.)

According to Ms. Harris, her older brother George also was physically abusive to appellant. George beat appellant with his fists whenever George felt like it. These were not standard issue brother-on-brother scuffles – appellant did not have to do anything for George to come up and "sock him real good." George also was physically abusive to his other siblings, but not with the intensity he applied to appellant. Ms. Harris witnessed George's sexual assault on appellant. George was 11 or 12, and appellant was four or five. George tied a rope around appellant's ankles and dragged him to the door of the boys' bedroom. He used a rope to hoist appellant up the door, hung him upside down and bound, and tied a sock around his mouth. He then got a butter knife and stuck it in a stove flame, unzipped appellant's pants and put the hot butter knife on the tip of appellant's penis. Approximately once per week, Ms. Harris also personally observed George grabbing appellant by the back of the neck to make him go into the bedroom. From behind the closed door, she could hear appellant saying, "no, stop, no," and George sometimes saying, "do it, open it, do it" or "suck it." Ms. Harris did not do anything or tell their mother – George beat his siblings if they told on him, and she knew her mother would still leave them alone with him for days at a time regardless of what they said. Ms. Harris recalled Gertrude having appellant removed from the home. In 1979, Gertrude sent Ms. Harris and her sisters, Angela and Johanna, away to live with their father. She was tired of them. (RT 18:5935-5943.)

Finally, appellant's toddler son, Reylon, testified that he enjoyed spending time with his father. (RT 18:5970-5973.)

2. Evidence Presented by the Prosecution

The prosecution presented the testimony of Felton Manuel, who alleged that, on January 27, 1984, appellant approached him as he was walking across a field. Appellant pointed a gun at his head, asked for money, and told Manuel to take him to Mr. Manuel's house. While there, appellant forced Mr. Manuel to fellate him, then walked him back to the field and made him strip naked. Appellant tossed Mr. Manuel's clothes over a fence, and took his wallet. (RT 17:5658-5664.)

One evening when appellant was 16, he was hanging out with three acquaintances (one female, two males) in their early 20s. (RT 18:5751, 5789.) They were drinking from big bottles of wine, and had just finished all of the alcohol right before the crime occurred. The female told the men standing around her to rob an acquaintance, Virgil Fowler, who was walking toward them. Appellant pulled out a gun and told Fowler to lie on the ground. Fowler went down, but got up and tried to run away; appellant shot him. (RT 18:5777-5783.) On the orders of one of the older men, appellant and the other members of the group initially told the police that Fowler had been shot in a drive-by shooting. (RT 18:5784, 5790.) Additionally, Dawn Hall testified that, on July 10, 1997, appellant pointed his finger at her as if he were holding a gun and called her a "fucking bitch" as she and her supporters left the courtroom. (RT 18:5799-5802.)

ARGUMENT

I

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN DENYING HIS *BATSON/WHEELER* MOTIONS

A. Introduction

Four eligible Black venirepersons[26] were seated in the jury box as prospective jurors for this case, which involved a white murder victim and a Black defendant. The prosecutor used peremptory challenges to remove all four of the Black prospective jurors from the jury. No Black jurors served on appellant's jury.

Appellant twice objected to the prosecutor's discriminatory actions and moved for a new jury selection process in accord with *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1979) 22 Cal.3d 258. However, after hearing the prosecutor's purported justifications for removing the Black prospective jurors, the trial court erroneously denied appellant's motions.

Consequently, appellant's convictions and death sentence must be reversed because they were obtained in violation of his rights to a fundamentally fair trial by an impartial jury drawn from a representative cross-section of the community, due process of law, equal protection and reliable guilt and penalty verdicts, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1,

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[26] Another Black prospective juror, Daniel Coates, was seated in the jury box. (RT 9:2719.) However, the parties excused Mr. Coates by stipulation because he had a hearing problem. (RT 9:2726-2729.) The jury was empaneled before two Black prospective jurors remaining in the venire were called to the jury box. (RT 9:2709.)

sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Miller-El v. Dretke* (2005) 545 U.S. 231, 239-241; *Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.)

B. Factual Background

1. Appellant's First *Batson/Wheeler* Motion

a. The Prima Facie Case

Two Black panelists, Sandra Davis and Regina Sam, were in the first group of twelve seated in the jury box before the parties began to exercise their peremptory challenges. Without asking her any questions, the prosecutor used his first peremptory strike to excuse Sandra Davis.[27] (RT 8:2555.) After excusing two non-Black panelists,[28] the prosecutor used his fourth and fifth peremptory excusals to dismiss two more Black jurors, Ms. Sam and Huey Dredd.[29] (RT 8:2578, 2590.)

Defense counsel made a *Batson/Wheeler* motion immediately after Mr. Dredd was excused. (RT 8:2591, 2606.) The trial court found "a prima facie showing based just on . . . the statistics . . . that 60 percent of the peremptories have been regarding black jurors, and that 6 percent of the jurors are black." (RT 8:2593; see also *id.* at p. 2607.)

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[27] An individual who served as a juror replaced Ms. Davis in the box; the juror number was not included in the appellate record. (RT 8:2555.)

[28] Charles Shore (RT 8:2561) and Michael Fowler (RT 8:2570).

[29] When the prosecutor dismissed Regina Sam without asking her any questions, Huey Dredd replaced her in the jury box. (RT 8:2578.)

b. The Prosecutor's Stated Grounds for Removal

Sandra Davis: The prosecutor told the court that he had earlier tried to remove Ms. Davis for cause because she was sympathetic to O.J. Simpson and had "scrambled" and "undefined" opinions about the death penalty. (RT 8:2591, 2594.) However, the prosecutor's characterization of Ms. Davis's answers, given during the prior week's *Hovey*[30] death qualification questioning,[31] was extremely misleading. In response to the prosecutor's question regarding her feelings about being a capital juror, Ms. Davis initially replied that she did not want to sentence someone to death – "[i]t's like I'm killing someone." (RT 8:2336.) But, when asked if she could impose death after listening to the evidence and law, Ms. Davis unequivocally said that she could – "I wouldn't want to – but I would do it." (RT 8:2337; see also *id.* at p. 2338.) She also confirmed that her "no" response to question 158 on the juror questionnaire meant that she could consider both death and life without parole as appropriate penalties, and that she could vote for the death penalty. (RT 8:2338-2339; 7 SCT 15:4344.)

Most importantly, contrary to the prosecutor's representation to the court, when given the chance to challenge Ms. Davis for cause during *Hovey* voir dire, he said, "I'm not going to make a motion." (RT 8:2341.)

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[30] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

[31] Both parties gave the court a list of prospective jurors that they believed needed *Hovey* questioning based upon the jurors' questionnaire responses. The prosecutor included Ms. Davis on his list, but not Ms. Sam, Mr. Dredd or Ms. Elizabeth Kimbrough, a Black juror later struck by the prosecution. (RT 8:2249-2255.)

After looking at Ms. Davis's questionnaire as an afterthought, the prosecutor also argued that she said that she did not want the responsibility of deciding a death penalty case; she was divorced; she had only approximately one year of college; she had only lived at her current address for five months; and she had three previous addresses in the Imperial Valley region. This purportedly caused the prosecutor to "have some difficulty concerning her stability in the community." (RT 8:2598; 7 SCT 15:4303-4304, 4328.)

The prosecutor also provided the court with cherry-picked quotes from Ms. Davis's responses to questions 66(a),[32] 76,[33] 77[34] and 79:[35] "I really don't want to judge someone. What if I am wrong or what if we are

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[32] "Do you want to serve as a juror in this case? If yes, please explain why you want to serve as a juror." (7 SCT 17:4970.)

[33] "Are your feelings about the death penalty such that, if a juror in a murder case, you would never be able to vote for the penalty of death of a defendant?" (7 SCT 17:4973.)

[34] "Are your feelings about the death penalty such that, as a juror in a murder case, you would be always able to vote for the penalty of death of a defendant?" (7 SCT 17:4973.)

[35] "There are no circumstances under which a jury is instructed by the court that it must return a verdict of death. No matter what the evidence, the jury is always given the option in the penalty phase of choosing either life without the possibility of parole or the death penalty. Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole? Why? . . . [Or] rejecting life imprisonment without the possibility of parole and choosing the death penalty? Why? Are your feelings about the death penalty such that you would refuse to find the defendant guilty of first degree murder and/or special circumstances true, solely to avoid having to make a decision on the death penalty? Why?" (7 SCT 17:4974.)

wrong? I wouldn't want to vote for anyone to die, but if they killed someone, I think they deserved to die. I wouldn't want to have to vote for the penalty of death. I just don't want to be the reason why someone died. I don't want to have to make that decision on anyone." (RT 8:2601; see 7 SCT 15:4325, 4328-4329.) The prosecutor also noted that Ms. Davis checked the "no" box when asked if she could consider imposing the death penalty as a realistic and practical possibility (question 83), and wrote, "I would feel like I killed them. It would bother me." (RT 8:2602; 7 SCT 15:4330.) In response to whether she would be reluctant to personally vote for a death sentence (question 105), she wrote, "yes, yes. It would be hard for myself to be the reason why someone would die." (RT 8:2602; 7 SCT 15:4334.)

As a final afterthought, the prosecutor stated that he excused Ms. Davis because he "did not see the type of community leadership that I would hope for in a leader of group dynamics of the thing. I labeled her as a probably follower within the group . . . that I'm trying to form in this particular instance, and I felt that though she was probably somewhat below average, I still felt that she was the average realm. . . . In this particular group, she was eliminated on that process." (RT 8:2602.)

Defense counsel argued that, viewed in its entirety, Ms. Davis's questionnaire indicated that she was not biased against the death penalty. In response to questions 76 and 77, Ms. Davis wrote that she believed that if someone killed someone else, the killer deserved to die, and the death penalty was appropriate for intentional murders. Although Ms. Davis did not want to make this ultimate decision, in response to question 78 she wrote that she could make that decision if called upon to do so. (7 SCT 15:4328; RT 8:2607.) In response to questions 50 and 53, Ms. Davis wrote

that she felt that criminals were treated too leniently. (7 SCT:4321-4322; RT 8:2607-2608.)

Additionally, defense counsel noted that Ms. Davis had two sisters who were correctional officers and that Ms. Davis was employed full-time with a permanent residence. (7 SCT 15:4304, 4306-4307; RT 8:2608.) Indeed, when Ms. Davis first entered the jury box, the trial court described her as the parent of an eight-year-old daughter and a seven-year Kaiser Permanente employee. (RT 8:2543.)

Regina Sam: The prosecutor did not seek *Hovey* questioning for Ms. Sam (RT 8:2249-2255), nor did he ask her any questions before removing her from the jury. (RT 8:2545-2578.) He initially claimed that he excused her because she had a brother who was a "juvenile delinquent;" she wore casual clothes (a t-shirt with writing,[36] open-toed shoes and "modified sweat pants") to court; she had very little college education; and she had unstable work and housing histories. (RT 8:2593-2594.) Defense counsel replied that none of this related to Ms. Sam's "ability to [understand] issues, to sit on the jury as a fair or impartial juror, or to consider and follow the court's instructions on evidence." (RT 8:2596-2597.)

Although he did not mention these factors in his initial volley of justifications, after quickly scanning his notes the prosecutor stated as an afterthought that Ms. Sam's questionnaire indicated that she felt that race played a role in the criminal justice system; she had four previous addresses in the region; and she had an A.A. degree and, although "quite frankly [he]

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[36] The prosecutor recalled that the t-shirt had "some type of commercial for some type of product," not a political or religious message. It is unclear whether by "commercial" the prosecutor meant an actual advertisement, or a simple brand logo, e.g., Gap or Old Navy. (RT 8:2596.)

didn't see this," a B.S.M. from Pepperdine University. (RT 8:2598; see also *id.* at p. 2602.)

The hearing on the excusals of Ms. Davis, Ms. Sam and Mr. Dredd was then continued until after lunch. After the recess, the prosecutor added a claim that he believed Ms. Sam was anti-death penalty based upon his interpretation of her responses to questions 79[37] and 116:[38] "If we can prove without a doubt that the crime was committed. We must be very careful to listen," and "maybe it has been randomly imposed and some criminals get harsher charges than others. It seemed to depend on the situation, the person, the crime." (RT 8:2603.)

However, the prosecutor undercut his implied assertion on the previous day that Ms. Sam was likely to be anti-prosecution because of her brother's juvenile history. First, he admitted that Ms. Sam said on her questionnaire that she agreed with her brother's community service sentence because he was young and had been accused only of misdemeanors. Ms. Sam also wrote that her brother never claimed to have been treated unfairly by the police or the juvenile court, and that she thought lenient sentences for juveniles was one of the most important

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[37] Interestingly, Ms. Sam's response to question 79 actually *favored* the prosecution. When asked, "Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty?" Ms. Sam checked, "yes," and wrote, "if it can be proven without a doubt by evidence the crime was committed. We must be very careful to listen." (7 SCT 17:4974.)

[38] "Do you feel the death penalty is used too often? Too seldom? Randomly? Please explain." (7 SCT 17:4981.)

causes of crime because "they're getting more dangerous than the adults because they get off." (RT 8:2603-2604; 7 SCT 17:4986.)

Defense counsel cut through the pretext of the prosecutor's purported grounds, arguing that Ms. Sam's questionnaire showed that she was a stable community member. Ms. Sam had a bachelor's degree in science and management, held a job as a data entry representative for five years, and had been married to an electrical engineer for eleven years. On questions 74, 75, 79 and 84, Ms. Sam wrote that she was for the death penalty, would vote to keep it in effect, could apply it in an appropriate case, and thought it should be applied, depending on the circumstances. Further, in response to question 58, Ms. Sam said that she did not judge others by race and that everyone deserved a fair trial. (7 SCT 4964, 4968, 4973-4974, 4975-4976; RT 8:2608-2609.)

As stated by defense counsel, "[t]here [was] nothing to . . . suggest in Ms. Sam's background, either about her personal background, her conviction, or moral or religious values concerning the death penalty, that she could not be fair or impartial" with regard to the guilt and penalty evidence. Nor was there anything to indicate that she would not vote for death if that was called for by the evidence. (RT 8:2609; see also *id.* at p. 2618.)

Huey Dredd: The prosecutor did not seek *Hovey* voir dire for Mr. Dredd. (RT 8:2249-2255.) When Mr. Dredd entered the jury box immediately after Ms. Sam was excused, defense counsel – not the prosecutor – suggested to the trial court that the parties question Mr. Dredd in private because he wrote on his questionnaire that he had health concerns, and that he did not know why he was being questioned on the death penalty. (RT 8:2579.)

At the bench, Mr. Dredd said that he was on medication for hypertension, but that his health was "fine." He also said that he understood why he was asked about the death penalty, and that he thought the death penalty "has it's place. I think I support it if the proof is conclusive that this is what is necessary." (RT 8:2580-2581.)

When Mr Dredd returned to the jury box, the prosecutor asked him if he understood that "the burden of proof in a criminal case is proof beyond a reasonable doubt[?]" Mr. Dredd answered affirmatively, and confirmed that he would not hold the prosecution to a "no doubt" standard of proof. (RT 8:2582.) The prosecutor "pass[ed] for cause." (RT 8:2583.)

Despite this record, in defense of the peremptory excusal, the prosecutor claimed that he dismissed Mr. Dredd because he was 70 years old; his responses indicated he "was extremely confused as to his opinions;" he was "very weak" regarding the death penalty and the status of crime in the community; and he emphasized that "he felt the standard of proof on the death penalty should be no doubt." (RT 8:2595.) The prosecutor acknowledged that Mr. Dredd had an M.A. degree, but he was "extremely" pro-O.J. Simpson and anti-prosecution, weak on law enforcement, and had some reservations about the application of the death penalty. (RT 8:2599.)

Despite saying earlier in the day that Mr. Dredd's opinions were "confused," after having a lunch break to read Mr. Dredd's questionnaire the prosecutor claimed that his real problem was that Mr. Dredd did not have any opinions about crime and the criminal justice system. (RT 8:2604.) Mr. Dredd wrote that he did not have any strong opinions about any of the region's recent high profile criminal trials, including the Simpson case (he was not upset with this verdict because he thought there was doubt), and that every story has two sides. He also wrote that he could "not

think of a better way to solve serious problems" in the criminal justice system, and that he had no suggestions on how to improve it. (RT 8:2604-2605; see 7 SCT 10:2772.)

The prosecutor also cited as an afterthought Mr. Dredd's response to question 74:[39] "care should be used in sentencing someone to death. There should be no doubt." It also purportedly bothered the prosecutor that Mr. Dredd offered a comment in response to question 76, "Are your feelings about the death penalty such that if a juror in a murder case you would never be able to vote for the penalty of death for the defendant?" Mr. Dredd replied, "I really have problems as to how this question is asked."[40] (7 SCT 10:2779; RT 8:2604-2605.) However, in response to a different question, Mr. Dredd wrote, "I feel the death penalty should be used in extreme cases where there is no doubt." (7 SCT 10:2782; RT 8:2605.)

Defense counsel argued that Mr. Dredd stated that he actively supported the Briggs Initiative to reinstate the death penalty because he hoped that it would deter crime. Counsel further argued that Mr. Dredd's opinions about the Simpson case were not relevant to a determination of whether he had a bias regarding appellant's guilt or penalty. (7 SCT 10:2782; RT 8:2609.)

c. The Trial Court's Ruling

Defense counsel argued that *Batson* and *Wheeler* set forth two criteria for determining purposeful discrimination by a prosecutor in selecting a jury: first, whether "the prosecution has used its peremptory

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[39] "What are your general feelings about the death penalty?" (7 SCT 10:2778.)

[40] Mr. Dredd was a school district administrator and former elementary school teacher. (7 SCT 10:2756-2757.)

challenges in a disproportionate way, as to a particular group" of prospective jurors, and second, "the burden shifts to the prosecution to give mutual [sic] justification for the dismissal, and the justification must be relevant to the particular case. [¶] It can't be factors that are not relevant in establishing that that particular prospective juror has biases and prejudices in general, but that they somehow impact his ability to be fair in this particular case." (RT 8:2606.) The trial court made it clear that appellant had satisfied the first step prima facie requirement. (RT 8:2707.)

Before issuing its ruling on the second step, the trial court queried defense counsel on whether the standard of review was objective or subjective: "[D]o you believe it's necessary that I find that the district attorney has a racially-motivated intent, or is it sufficient if I show that the effect of what he does is to produce a systemic exclusion of blacks? . . . [¶] If the question is what is the [e]ffect of it, then obviously your case is stronger than if the question is what is his intent. Because, if his intent is the issue, then I really have to listen to his explanation and not conclude whether that was a wise way to use a peremptory, but rather conclude whether or not I believe that that was his thought process." (RT 8:2611.) Defense counsel replied that the court's focus should be on the discriminatory effect: "the court does not ask or delve into whether or not they have an intent," and "if the prosecution does not have any [race] neutral basis for removing the prospective jurors, then it's established." (RT 8:2612.)

The court 's response indicated its concerns about its ruling:

> I really don't believe that Mr. McDowell's subjective motivation was racially based. . . . [O]n the other hand, I am concerned about the net effect to your client. . . . I think there's an additional factor that I really have to be sensitive to

in this case, and that is, also, the fact that both of your client's attorneys are African-American.

(RT 8:2613.)

The court continued to struggle with the appropriate standard of review, and stated its belief that *Batson* required a showing of "purposeful discrimination," "purposeful intent." Defense counsel responded that a disproportionate use of peremptory strikes "would indicate purposeful discrimination;" the court agreed. (RT 8:2614.)

Regarding Ms. Davis, the court did not "have any problem at all with accepting Mr. McDowell's statement that he saw this as a close statement on whether she should be excused for cause," and – without asking the clerk or reporter to check the record – it mistakenly determined it may have previously denied a prosecution challenge of Ms. Davis for cause. This misunderstanding of the record caused it to feel "there was no problem with the non-racial basis for exercising the peremptory." (RT 8:2613.)

The court saw a "much closer question" with respect to the prosecutor's removal of Ms. Sam and Mr. Dredd, but without explanation it "accept[ed] the truth of his statement that he was concerned about those jurors' statements about [their] sense of the degree of proof required that exceeds proof beyond a reasonable doubt." (RT 8:2613-2614.)

However, the court failed to consider the prosecutor's other purported grounds for striking Ms. Davis, Ms. Sam and Mr. Dredd, including but not limited to Ms. Davis's supposed unstable work and housing histories, Ms. Sam's clothing choices and her feelings about her "juvenile delinquent" brother, or Mr. Dredd's age and supposed lack of opinions. The court's incomplete review is hard to understand, because it

was reminded of its duty by the prosecutor:[41] "On the two jurors you just named, those weren't the only reasons that I gave to the Court, and they certainly weren't the only reasons that I excused those people from this jury." (RT 8:2615.)

Still, the court was uncomfortable with its ruling:

> Although, I'm not precluding further discussion on that subject, but I am concerned about the net effect of all this. If you're sitting here, as Mr. Smith, who cares . . . what's going on in the D.A.'s mind, if the fact of it is that there are only seven African-Americans in the panel, and they're all getting kicked off, the net effect is the same as to whether or not the D.A. has some net effect.

(RT 8:2614; see also *id.* at p. 2615 [" I am concerned, however, about the net effect to Mr. Smith. [¶] I mean who cares what's in your mind if the net

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[41] The prosecutor cited *Purkett v. Elam* (1995) 514 U.S. 765, as being on point regarding the standard of review. Presumably the prosecutor was referring to this passage: "Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York* [(1991) 500 U.S. 352, 358-359] (O'Connor, J., concurring in judgment); *Batson*, supra, at 96-98, 106 S.Ct., at 1722-1723. The second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.' *Hernandez*, 500 U.S., at 360, 111 S.Ct., at 1866 (plurality opinion); *id.*, at 374, 111 S.Ct., at 1874 (O'Connor, J., concurring in judgment)." (*Purkett v. Elam*, *supra*, 514 U.S. at pp. 767-768.)

effect is to systematically result in the exclusion of African-Americans? That's a legitimate concern."].)

The court further commented that, if it were trying the case, it would not have shared the prosecutor's concerns about Ms. Sam or Mr. Dredd. The court recalled that San Bernardino County demographic statistics showed that only approximately 12 percent of the county's population had college degrees, while it was 20 percent for the average California community, and it noted that Mr. Dredd had been a high school principal. (RT 8:2615-2616.)

The prosecutor reminded the court that it was not familiar with the demographics of this venire panel, and explained his general approach to jury selection: "I'm picking from people from this panel that will form a well working, cohesive group, not the – I'll repeat this again, not individual people. Are these leaders? Are they followers? Will this conflict with a leader? Will these be people working a[s] a group? Do they have background in doing so. Do they have any experiences working with leaders and as followers or working as a group." (RT 8:2616.) He repeated his purported concerns that Mr. Dredd was not actively involved in the community, was devoid of opinions and was confused due to his age – "why take that risk when there are other people whom I've evaluated who are a better fit within the total group?"[42] (RT 8:2615-2617.)

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[42] Defense counsel countered that Mr. Dredd's questionnaire stated that he was a member of the South Area Bay Club, a Parents and Teachers Association, and the Omega Psi Phi fraternity. Further, Mr. Dredd had a bachelor of science degree, and a master's degree from U.C.L.A. (RT 8:2618-2619.)

The court replied: "I will accept the truthfulness of your statement. . . I do not have to accept it just because you say it. I accept it because I believe it to be true." (RT 8:2617.) The court was not sure if it was proper for it to also consider its prior knowledge of the prosecutor's jury selection practices or personal integrity, and admitted that it did not "know what I can properly consider." (*Ibid.*) The prosecutor was not sure if it was a proper factor.[43] (RT 8:2618.) Defense counsel again stated that the prosecutor had not stated any grounds concerning these three jurors' backgrounds or views that would prevent them from being fair and impartial jurors. (RT 8:2617-2618.)

The prosecutor offered his final defense of his dismissal of the three Black prospective jurors: "In terms of jury group dynamics you look for one leader. At the most, you look for one leader and some lieutenants. . . . [¶] [Regina Sam's] contact with the community is extremely limited and, again, I'm going by the standard formed by the group of jurors here. We have many, many people who are involved in particular community group efforts, that are charitable in nature or involving children. That's the type of person that I want involved in this case, quite frankly." (RT 8:2620.)

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[43] It is – see *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281. Nevertheless, the prosecutor made reference to his personal point of view at the conclusion of this *Batson/Wheeler* hearing: "I should also put on the record something that I don't think was done last time. Is that [sic], yes, defense counsel is black, the Defendant is black. But two of the victims in this case are also black, and many of the witnesses in this case are also black. As the Court probably recognizes, just from the Court's own experience in this courtroom, perhaps the prosecution is also very concerned with that." (RT 8:2621.) Mr. Badibanga is presumably of African descent. The prosecutor must have been referring to Mr. Pupua as the other Black victim; however, Mr. Pupua is Tongan. (RT 9:2946.)

The court ended the discussion in this equivocal manner:

> Well, anyway I'll deny the motion. That's not to say that I would have exercised the peremptories the same as you, but it's your case not mine. And I think the ultimate question whether there's purposeful discrimination, I don't believe that your motivation has been a racial motivation. I am concerned about the statistical effect of, however, exercising peremptories, three out of five peremptories being African-American.

(RT 8:2620-2621.)

2. Appellant's Second *Batson/Wheeler* Motion

Elizabeth Kimbrough was the next Black panelist to be questioned after Mr. Dredd's dismissal. According to defense counsel, when Ms. Kimbrough entered the jury box, only one other unidentified Black prospective juror remained among the jurors who could be called to the box before the parties exhausted their peremptory challenges.[44] Noting that the prosecutor could "only get one," defense counsel predicted that, because the prosecutor questioned Ms. Kimbrough for an unusually long time when she first entered the box, he would strike her. (RT 8:2592.) Counsel was correct.

When Ms. Kimbrough took her seat in the jury box, the prosecutor pounced on the fact that her husband was a former professional football player who had been on the Buffalo Bills with O.J. Simpson for one season. However, Ms. Kimbrough stated that she had no strong feelings about the Simpson case, that she and her husband had not followed the case, and that since the year in Buffalo her husband had no contact with Simpson or

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[44] Another Black prospective juror, Daniel Coates, was seated in the box after Mr. Dredd's dismissal. However, Mr. Coates had a hearing problem and was excused by stipulation. (RT 9:2718-2719, 2726-2729.)

anyone associated with Simpson. (RT 8:2586.) In connection with this line of questioning, for some reason the prosecutor also asked Ms. Kimbrough if she would be disappointed if appellant's trial was boring and not up to "movie standard." She said "no." (RT 8:2585-2587.)

In response to the prosecutor's other questions, Ms. Kimbrough said that she understood that the prosecution had the burden of proving its case without the defendant's testimony and that, if on appellant's jury, she could work around any time conflicts arising from her work responsibilities. (RT 8:2588-2590.) The prosecutor passed Ms. Kimbrough for cause, and then excused Mr. Dredd. (RT 8:2590.)

Later, before striking Ms. Kimbrough, the prosecutor thrice approved the jury (RT 8:2638, 2672, 2674), and removed five non-Black jurors (RT 8:2632, 2649, 2660, 2677, 2686). When defense counsel announced for the first time that appellant accepted the jury, the prosecutor asked to approach the bench, and informed the court and defense counsel that he intended to use a peremptory strike against Ms. Kimbrough. Defense counsel responded that she would make a *Wheeler* motion if he did. The trial court invited counsel to its chambers. (RT 9:2696.)

a. The Prima Facie Case

In chambers, the trial court observed "that she's the only African-American juror who is now in the box. And there are certainly *Wheeler* issues." (RT 9:2697.) Later, before issuing its ruling on the Kimbrough excusal, the court declared that "the objective fact is that there have been four blacks seated and this would be the excusal of the fourth. So I think that's plenty evidence that a prima facie case has been made." (RT 9:2711.)

b. Prosecutor's Grounds for Removal

The prosecutor began his defense of the Kimbrough excusal by claiming that "the character of the overall panel ha[d] changed dramatically" since he thrice approved the jury: "I compliment the [defense] jury selector on knocking out my leaders . . . to the point, now, that Mrs. Kimbrough, I believe, in all likelihood if she remains on the jury, along with the people who are likely to follow her, will become the jury foreperson." (RT 9:2697.) He claimed that her questionnaire responses were biased against the death penalty and that, because she was an "executive with a corporation,"[45] there were no other individuals left on the jury who could:

> [C]ounter her position or to interact with her or reason with her on the level of sophistication that she has in her capacity or likely capacity as the foreperson or the foreperson in actual practice. [¶] I believe that the weakest persons on the panel would follow her lead, and I think she would take them down to her level of feeling concerning the death penalty. . . . [¶] I believe what has happened here is that the only reason why I wasn't going to remove her in my last use of peremptory challenge was, quite frankly, there was a chilling affect [sic] by the Court's previous statements. Even though right now she is the – has the lowest opinion on the death penalty of any person on the panel right now, and think the defense counsel used a very good tactical use of this particular motion to try to save her on the panel.

(RT 9:2697-2698.)

The prosecutor explained that he used a grading system on all potential jurors that rated how he felt the juror would " interact with the other members of the panel, whether or not they have experience in doing

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[45] Ms. Kimbrough was a regional personnel manager for Target. (7 SCT 20:5725.)

so, and whether or not they are lone wolves or capable of working within a group type of exercise. And, if they are, then what position they would likely be to take within that group." (RT 9:2698.) He liked Ms. Kimbrough's "group ability" despite her "weakness" on the death penalty, and conceded that she could not have been excused for cause. He supposedly assigned her a grade of C- based solely on her answers to the questionnaire questions on the death penalty.[46] (RT 9:2698-2699.)

The prosecutor also claimed that he disbelieved Ms. Kimbrough's questionnaire response that she had not thought about how the criminal justice system could be improved because she had not had much interaction with it. (7 SCT 20:5740.) The prosecutor claimed that, as a member of the board of directors of a shelter for abused women,[47] Ms. Kimbrough had to be "interactive in that major area in criminal law . . . [which] was a major factor in, for instance the O.J. Simpson case." The prosecutor also, without explanation, r efused to accept her testimony that neither she nor her husband closely followed the Simpson trial. (RT 9:2700; see RT 8:2585-2587.)

However, the prosecutor undercut himself when he delved into Ms. Kimbrough's feelings about the death penalty. He claimed to have in part based his excusal of Ms. Kimbrough on her response to question 77, where she "indicated that she would be open to voting for the death penalty, but

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[46] The prosecutor also claimed that he gave Ms. Kimbrough's questionnaire to another supervising prosecutor with capital trial experience, "Mr. Kochis," who used a similar grading process. Mr. Kochis allegedly gave Ms. Kimbrough the same grade. (RT 9:2699.)

[47] Ms. Kimbrough wrote on her questionnaire that she was a former member of the board for a women's shelter in Minneapolis, Minnesota. (7 SCT 20:5728.)

wouldn't necessarily always vote for it." He also complained that she wrote "yes" or "no" in response to questions on the death penalty, even though the questions were worded to elicit "yes" or "no" answers. (7 SCT 20:5747; RT 9:2701-2702.) Additionally, the prosecutor claimed that Ms. Kimbrough was purportedly biased against the death penalty because when asked if she believed in "an eye [f]or an eye" (question 87), she wrote that "two wrongs don't make a right," and she responded to question 88[48] about the death penalty by writing, "I don't think positively or negatively about it. I see it more as a part of our society's system that we unfortunately have to deal with periodically." (7 SCT 20:5750; RT 9:2702.)

Moreover, the prosecutor desperately interpreted Ms. Kimbrough's responses to questions 91 and 92 – that there are people who should be imprisoned for life and that life imprisonment could be an appropriate punishment for intentional murder depending on the "fact-specific case" – to mean that she had a strong tendency to lean toward life without possibility of parole over death. (7 SCT 20:5751; RT 9:2703-2704.) Also, he disbelieved that she lacked an opinion about the death penalty and, when she wrote in response to question 99[49] that she thought the questionnaire included questions about the death penalty so that the court could "determine if I could have difficulty making the decision if/when the time comes," the prosecutor claimed that she was sending an undefined "message." (7 SCT 20:5750; RT 9:2704-2705.)

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[48] "Do you have positive or negative feelings about the death penalty?" (7 SCT 20:5750.)

[49] "Why do you think we are asking all these questions about the death penalty?" (7 SCT 20:5752.)

The transparency of the prosecutor's purported non-discriminatory justifications for striking Ms. Kimbrough is particularly exemplified by this statement:

> [referring to questionnaire page 32, "Will you be reluctant to personally vote for a sentence of death?"] The response is "I would need to listen to the testimony in the penalty phase and then decide. I wouldn't automatically vote for a death sentence." Now, in that particular thing she seems like a rather insightful person, who's willing to follow the letter of the law . . . . [¶] Again, does she have a hidden agenda there? And I cannot again help, but feel – strongly feel that she would lean more towards life imprisonment without the possibility of parole than the death penalty, but she has a bias there, not a for-cause bias, but I believe there is a bias that would make her a weaker juror on that particular issue in this panel.

(7 SCT 20:5753; RT 9:2705-2706.)

The prosecutor also found objectionable Ms. Kimbrough's response to question 107, "Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence on a person convicted of murder with special circumstances?" She wrote, "I don't see a benefit in sentencing anyone to death. I just don't think of it in those terms." The prosecutor felt that this was "the ultimate capper in placing her in the negative side of the death penalty issue." (7 SCT 20:5753; RT 9:2706.) He concluded his statement of justifications by criticizing Ms. Kimbrough's answers to questions 108 and 109 as "equivocal."[50] (RT 2706-2707.)

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[50] To the contrary, Ms. Kimbrough was very direct. When asked what she thought of the "benefit" of imposing a sentence of life without possibility of parole, Ms. Kimbrough wrote that she did not "think of

(continued...)

Defense counsel argued that it was obvious that the prosecutor had exercised his peremptory challenges in a discriminatory manner against a protected class within the jury panel because he dismissed all four Black jurors who reached the jury box "solely on the basis of race without any reasonable and rational basis for doing so." (RT 9:2708.) Counsel pointed out that there were four Blacks remaining on the venire panel,[51] but the defense would exhaust its peremptory challenges before any of them could be seated in the jury box. (RT 9:2709.) She also argued that Ms. Kimbrough's questionnaire responses indicated that she was neutral on the death penalty and not biased against the prosecution. (RT 9:2710-2711.)

c. The Trial Court's Ruling

After hearing defense counsel's argument, the court told the prosecutor that he did not need to speak, because "on this one, I'm not as troubled as with some of the other jurors." (RT 9:2711.) After finding that there was "plenty evidence that a prima facie case has been made," the court analyzed the situation before it:

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[50](...continued)
imposing sentences in those terms." When asked if she could grant mercy to a person she believed was guilty of intentional murder, she replied, "If by 'mercy,' you mean grant a less harsh sentence, I could, if there were circumstances to warrant it." (RT 9:2706-2707.)

[51] Defense counsel identified juror number 43 (Kenneth Hancock), juror 89 (Robert Hoffman), juror 91 (Ardel Hurst) and juror 92 (Delores Jones). (RT 9:2709.) On their questionnaires, Mr. Hoffman and Ms. Hurst identify themselves as Black. (See 7 SCT 19:5656; 7 SCT 16:4582.) However, neither Ms. Jones nor Mr. Hancock provided any racial identification on their questionnaires or on the record. (See 7 SCT 3:474-516; 7 SCT 3:690-732.) Consequently, appellant did not include jurors 43 or 92 in the statistical calculations presented in the subsequent subsections of this argument.

> And it shifts, then, to the D.A. to identify . . . [a] nonracial basis for the excusal. And it tells the judge that it quote, "if these general assertions," that is statements by the prosecutor, "are accepted as rebutting a defendant's prima facie case, the Equal Protection Clause would be a vain and illusory requirement."[52] So I do realize it's my responsibility to really examine and say, "what's really going on here?" [¶] And on this one, I really don't have any trouble accepting Mr. McDowell's comments, and the reason that I don't have any trouble accepting it is as he said, that if it was just based on racial issues, I assume he would have tried to excuse her sooner. And because he passed a number of times, had you chosen to pass, she would have been left on the jury, and he would have been stuck with her. So I really believe that if it was just a racial issue. We would have heard the proposed challenge much sooner. [¶] And I do accept that, to me, that the logic of his evaluation is her stand on death penalty issues. [¶] Again, I think it's not my place to constitute my sense of whether I would exercise a peremptory. Although I think . . . the general tenor of her answers indicate a – if you tried to put her on some spectrum of people who support the death penalty. She probably supports it less than most people seem [to]. . . . I think what he says about her obviously potential, given what he perceives to be a predisposition against the death penalty, suggests, to my mind, at least, that he's pretty clearly established a nonracial basis for the exercise of the peremptory.

(RT 9:2711-2712.)

Defense counsel disagreed:

> I would say that the contrary logic applied, that if he felt that she was acceptable before, and did not choose to exercise the peremptory, the fact that the defense, at this time has . . . expressed that it will accept the jury panel as constituted, and there is a real danger that at this time if the jury panel is accepted as constituted, at this moment with Kimbrough still

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[52] The court later stated that it was quoting from "*Johnson*." (RT 9:2719; see *People v. Johnson*, *supra*, 47 Cal.3d at p. 1216.)

> sitting on the panel, that he's in danger of having a jury panel that consists of at least one black. . . . [¶] And it's obvious that he was prepared, and anticipated that the defense . . . would accept the jury as constituted, [and] came ready here with full barrels with Kimbrough's questionnaire, ready to make grounds, in the event that happened so that he could see to it that he could attempt to unseat her, even in the face of a *Wheeler* motion.

(RT 9:2712-2713.)

Defense counsel further argued Ms. Kimbrough's questionnaire responses were neutral and did not indicate that she would refuse to vote for the death penalty in appropriate circumstances. In response, the court offered his interpretation of the prosecutor's argument:

> What I think I'm hearing him say he has perceived her as being extremely reluctant to the death penalty. [¶] With her having a nonleadership role on the jury, I think I'm hearing him say that he believe's she's an intelligent woman, she's generally open-minded, and that she could be talked out of her position by other leadership. But if you put her on a jury in the absence of other leadership, and she is the juror, I think I'm hearing him say that he perceives that her reluctance to impose the death penalty wouldn't be disputed by anybody, and I think he could rationally conclude that she's reluctant to impose the death penalty from the following: [¶] [o]n page 25, I'm reading just part, I grant you. I'm being selective. I'm reading part of her answer to question 74 . . . "In general, I don't think people should decide who gets to live and who has to die. However, I recognize that there may be times that this difficult choice has to be made. It should not be made lightly." [¶] Certainly as he believes, there is no reason to excuse her for cause. But I think . . . that answer would cause a reasonable prosecutor to believe that she has a significant reluctance to the death penalty.

(RT 9:2714-2715; see also RT 9:2715-2716.)

For some reason, both the trial court and the prosecutor perceived Ms. Kimbrough as the probable jury foreperson.[53] Recalling his experience trying death penalty cases during the 1960s, "when 50 percent of the public was adamantly opposed to the imposition of the death penalty," the court remarked that "if you ever got an answer like this, you were getting somebody clear over on the right end of the political spectrum. [¶] And now I think it's not unreasonable for the prosecution to assume that somebody with answers like this is certainly left of center." (RT 9:2717.)

The court ended the discussion with this summary: "we'll show that a *Wheeler* has been made. For the record, I do find [that] a prima facie showing has been made. I do find for the record that pursuant to the language of the *Johnson* case, that I'm satisfied that Mr. McDowell has a reason . . . that is based on his perception of her bias as it relates to the death penalty, not a bias sufficient to excuse her for cause, but as a predisposition not to follow it. I find that that is an independent reason for his excusal, having nothing to do with her race." (RT 9:2719-2720.) Immediately thereafter, the prosecutor excused Ms. Kimbrough, and jury selection proceeded. (RT 9:2720.) After the alternate jurors were selected, appellant renewed his *Wheeler* motion and it was denied without comment. (RT 9:2772.)

No Black jurors served on appellant's jury.

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[53] Appellant does not have the foreperson's juror identification/questionnaire number. Thus, appellant cannot compare Ms. Kimbrough's qualifications, or questionnaire and voir dire responses, with the foreperson's. (See RT 16:5186.)

C. Applicable Legal Standards

Under the Fourteenth Amendment's Equal Protection Clause and the California Constitution, prospective jurors must not be peremptorily challenged because of their race. (*Batson v. Kentucky*, *supra*, 476 U.S. 79, 98-99; *People v. Wheeler*, *supra*, 22 Cal.3d 258, 276.) A prosecutor commits reversible error by basing even a single peremptory challenge upon a prospective juror's race. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

To prevail on a *Batson/Wheeler* motion, a defendant must first show that the prosecutor has peremptorily challenged one or more members of a cognizable group, and the totality of the relevant circumstances must raise an inference the challenges were racially motivated. If the defendant makes this prima facie showing, the prosecutor must then articulate legitimate, race-neutral reasons for the challenges. Finally, the trial court must determine, in light of the defendant's prima facie case and the prosecutor's proffered reasons, whether the defendant has proved purposeful discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 168; *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-98; *People v. Johnson*, *supra*, 47 Cal.3d at p. 1218; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277, 280-282.)

The third step requires that the trial court determine whether the prosecutor's justifications are credible, i.e., the court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .'" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1216, quoting *People v. Hall* (1983) 35 Cal.3d 161, 167-168.) At this stage, the trial court

must assess the credibility of the prosecutor's grounds for excusing the jurors, and implausible justifications should be found to be pretexts for purposeful discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768.) In particular:

> Circumstantial evidence of invidious intent may include proof of disproportionate impact. . . . We have observed that under some circumstances proof of discriminatory impact "may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."

(*Batson v. Kentucky*, *supra*, 476 U.S. at p. 93, quoting *Washington v. Davis* (1976) 426 U.S. 229, 242.)

This Court reviews the ruling below for substantial evidence to determine if the trial court made "'a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered[.]'" (*People v. Avila* (2006) 38 Cal.4th 491, 541, quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864.) On the other hand, a reviewing court gives no deference to a trial court's ruling that a particular reason is genuine if the proffered reason is contradicted by the record or implausible. (*People v. Reynoso* (2003) 31 Cal.4th 903, 923, 929.) Moreover, "[a] reviewing court's level of suspicion may. . . be raised by a series of very weak explanations for a prosecutor's peremptory challenges. The whole may be greater than the sum of its parts." (*Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651.)

A prosecutor's motives may be considered pretextual when his proffered explanations were also applicable to one or more jurors of another race whom the prosecutor did not see fit to challenge. (*Caldwell v. Maloney*, *supra*, 159 F.3d at p. 651.) Consequently, comparative analysis of struck and seated jurors is "a well-established tool for exploring the

possibility that facially race-neutral reasons are a pretext for discrimination." (*Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1251.) When reviewing a *Batson* claim raised on federal habeas corpus, the United States Supreme Court stated that, "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step. [citation omitted]." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241.)

For many years, this Court approved the use of comparative analysis. (See, e.g., *People v. Trevino* (1985) 39 Cal.3d 667, 690-691; *People v. Hall*, *supra*, 35 Cal.3d 161, 168.) However, in *People v. Johnson* (2003) 30 Cal.4th 1302, this Court held that a reviewing court should not attempt its own comparative juror analysis for the first time on appeal. (*Id.* at pp. 1324-1325.)

Appellant submits that this holding in *Johnson* is directly at odds with the United States Supreme Court's decision in *Miller-El v. Dretke*, and urges this Court to reconsider this issue and explicitly re-approve the use of comparative analysis by California reviewing courts. Although it deferred the question of whether a comparison of seated and improperly challenged jurors' complete voir dire answers (i.e., in-court and questionnaire responses[54]) similar to that approved in *Miller-El v. Dretke* must be undertaken in *Batson/Wheeler* challenges raised on direct appeal, this Court has employed comparative juror analysis in a capital case presenting *Batson/Wheeler* issues similar to those presented here. (See *People v. Zambrano* (2007) 41 Cal.4th 1082, 1109.)

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[54] See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 241, fn. 2.

Further, without comparative analysis, even a seemingly neutral explanation may serve as a pretext for racial discrimination. For example, in *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, the prosecutor claimed it challenged two Hispanics based on responses they had given during voir dire. The reviewing court found that the reasons advanced by the prosecutor would normally be adequately "neutral" explanations, but after the court compared them to the responses given by white jurors, they did not hold up. (*Id.* at pp. 698-699; see also *People v. Hall*, *supra*, 35 Cal.3d at p. 168 [disparate treatment given jurors "is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor was exercising peremptory challenges for impermissible reasons"]; *Garrett v. Morris* (8th Cir. 1987) 815 F.2d 509, 514 [court rejected the prosecutor's explanation after comparing answers given by the excluded Black persons to those given by white persons permitted to serve].)

The proffer of faulty reasons, and only one or two otherwise adequate reasons, may undermine the prosecutor's credibility to such an extent that a *Batson/Wheeler* challenge should be sustained. (See *Lewis v. Lewis* (9th Cir. 2003) 321 F.3d 824, 831.) "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 325.)

Moreover, because a biased prosecutor can simply add traits to a shopping list to achieve a combination that no white juror possesses, some courts have viewed shopping-list claims with disfavor. (See, e.g., *United States v. Stewart* (11th Cir. 1995) 65 F.3d 918, 926; *United States v. Alvarado* (2d Cir. 1991) 951 F.2d 22, 25; *United States v. Chinchilla*, *supra*,

874 F.2d at pp. 698-699.) One court has held that giving one false reason makes all other reasons irrelevant. (*United States v. Chinchilla*, *supra*, 874 F.2d at p. 699.)

D. The Statistical Evidence Alone Demonstrates That the Prosecutor Was Acting In a Purposely Discriminatory Fashion When He Excused the Four Black Prospective Jurors

Although it is not dispositive,[55] in appellant's case "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 342; see also *McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 ["severely disproportionate exclusion of blacks from the jury venire is powerful evidence of intentional race discrimination"].)

Further, "if a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination." (*Hernandez v. New York* (1991) 500 U.S. 352, 363.) This Court has agreed that statistical evidence is relevant to show purposeful discrimination in the use of peremptory challenges: "For illustration, however, we mention certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of

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[55] See, e.g., *United States v. Changco* (9th Cir. 1993) 1 F.3d 837, 840 ["Whether a particular reason for striking jurors has a disproportionate effect on minorities is relevant to figuring out whether intentional discrimination has occurred; but disparate impact does not, by itself, a *Batson* violation make."].)

the identified group from the venire, or has used a disproportionate number of his peremptories against the group." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.)

That showing can be made here. The trial court twice found that appellant established a prima facie case that the prosecutor used his peremptory challenges in a racially discriminatory manner. (RT 8:2593, 2607; RT 9:2711.) The court acknowledged statistical evidence of a disparate impact on the racial composition of the jury, yet it denied appellant's motions. (See RT 8:2593, 2607, 2614, 2615, 2620-2621 ["I am concerned about the statistical effect of, however, exercising peremptories, three out of five peremptories being African-American."].)

There were 107 panelists in the venire when the parties began to exercise their peremptory challenges. (RT 8:2529-2537.) Only seven of these individuals were identified as Black – the four prospective jurors struck by the prosecutor (Ms. Davis, Ms. Sam, Mr. Dredd, and Ms. Kimbrough), the prospective juror who was excused by stipulation because of his hearing problem (Mr. Coates), and the two venirepersons who were not called to the jury box before the parties accepted the jury (Mr. Huffman and Ms. Hurst). (RT 8:2591; RT 9:2709, 2726-2729.)

In its *Miller-El* statistical calculations, the United States Supreme Court only included Black prospective jurors "eligible to serve on the jury," i.e., those who were not "excused for cause or by agreement of the parties." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at pp. 326, 331.) As described above, excluding Mr. Coates, there were only six eligible Black prospective jurors among the 107-person venire panel; they represented only 5.6 percent of the venire. The prosecutor excluded all four of the prospective Black jurors who were called to the jury box. Thus, the prosecutor used

peremptory challenges to exclude 100 percent of the eligible Black prospective jurors who sat in the jury box.. (*Id.* at p. 331, 342 [10 of 11, or "91% of the eligible black jurors were removed by peremptory strikes."].)

During the exercise of peremptory challenges, a total of 36 eligible prospective jurors entered the jury box – i.e., the 12 seated jurors, the 11 prospective jurors excused by the prosecutor,[56] and the 13 prospective jurors excused by appellant.[57] The four Black prospective jurors represented only 11.1 percent of the 36 jurors called to the jury box, yet the prosecutor devoted 36.4 percent of his peremptory challenges (4 of 11) to excluding them. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 342 ["In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans."]

Even more appalling is the fact that, while the prosecutor struck only 23.3 percent (7 of 30) of non-Black prospective jurors, he excluded 100 percent of the Black prospective jurors. This means that the prosecutor struck Blacks at almost four times the rate that he struck non-Blacks. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 331 ["In contrast the prosecutors used their peremptory strikes against just 13% (4 out of 31) of the eligible nonblack prospective jurors qualified to serve on petitioner's jury."].) In sum, as stated by United States Supreme Court, "happenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 342.)

Manifesting the untoward belief that Black jurors would favor a Black defendant represented by Black lawyers, especially because the

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[56] See RT 8:2555, 2561, 2570, 2578, 2583, 2632, 2649; RT 9:2660, 2677, 2686, 2720.

[57] See RT 8:2559, 2565, 2573, 2583, 2629, 2635, 2638; RT 9:2651, 2666, 2672, 2675, 2682, 2724.

homicide victim was white, the prosecutor made clear from the beginning his intention to eliminate all Blacks from appellant's jury. (*People v Reynoso*, *supra*, 31 Cal.4th 903, 926, fn. 7 [recognizing "suspected untoward belief on the prosecutor's part that Hispanic jurors would tend to be biased in favor of, and thereby be more inclined to vote to acquit, the Hispanic defendants"]; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1326 [highly relevant to prima facie case that Black defendant was charged with killing white girlfriend's child]; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281 [that alleged victim was member of group to which majority of remaining jurors belonged was evidence of prima facie case].)

The prosecutor demonstrated this intent by using his first peremptory challenge to strike a Black juror, Sandra Davis, of whom he did not ask a single question. (RT 8:2555; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 281 [evidence of discriminatory intent that prosecutor failed to engage prospective juror in more than desultory voir dire, or to ask her any questions at all].) Again wasting no time, the prosecutor used his fourth and fifth peremptory challenges to strike Regina Sam and Huey Dredd, both Black. (RT 8:2578, 2590.) Thus, by the time appellant made his first *Batson/Wheeler* motion, the prosecutor had struck all of the eligible Black prospective jurors that he could (Elizabeth Kimbrough had just been seated and was available to strike, but the prosecutor chose Mr. Dredd as his third strike instead), while using 60 percent (three of five) of his peremptory challenges to do so. (RT 8:2555, 2578, 2590.) Accordingly, the trial court readily found a prima facie case of purposeful race discrimination. (RT 8:2593.)

The prosecutor did not strike the only other possible Black, Ms. Kimbrough, until his eleventh peremptory challenge. (RT 8:2632, 2649,

2660, 2677, 2686.) As the prosecutor candidly admitted, however, he would have used his tenth peremptory challenge against Ms. Kimbrough but for the "chilling" effect caused by the trial court's previous statements, presumably the court's finding of a prima facie case and its concern that the prosecutor was systematically excluding African-Americans. (RT 8:2615.) Accepting that the prosecutor used his eleventh and not his tenth peremptory challenge to remove Ms. Kimbrough means that he used four of eleven strikes, or 36 percent, to eliminate all the Blacks possible. The trial court found "plenty of evidence that a prima facie case ha[d] been made." (RT 9:2711.)

In *Miller-El*, the high court emphasized that evidence of purposeful discrimination included the facts that supported the prima facie case. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 340.) There, the prosecutor used 10 out of his 14 peremptory challenges to strike 11 of the 12 eligible Black prospective jurors. The Court found that happenstance was unlikely to produce such a disparity. (*Id.* at p. 342.)

Although it is not crystal clear to which "disparity" *Miller-El* was referring, this Court has concluded that *Miller-El* was concerned with "the statistical disparity of peremptory challenges of African-Americans (10 of 11 were challenged) compared to others (four of 31 were challenged)." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1327; cf. *State v. McFadden* (Mo. 2006) 191 S.W.3d 648, 657, fn. 27 ["As the United States Supreme Court noted in *Miller-El*, happenstance was unlikely to explain the disparity of the prosecutor's use of its peremptory strikes to exclude 91% of the eligible African-American venire members"].)

Here, by the time of the first *Batson/Wheeler* motion, the prosecutor had used three peremptory challenges against three Blacks, but had used

merely two peremptory challenges against 16 non-Blacks. (RT 8:2555-2590.) In other words, the prosecutor had struck 100 percent of the Blacks compared to 12.5 percent of the non-Blacks. By the time of the second motion, the prosecutor was beginning to look better, but only because of the chilling effect of the court's prior prima facie finding; he had used four peremptory challenges to excuse all four Blacks and seven peremptory challenges against 30 non-Blacks, or 100 percent against Blacks and 23 percent against non-Blacks. (RT 8:2621-9:2697.)

In *Johnson*, this Court found that in comparison to *Miller-El's* 10 of 14 strikes, the number of strikes there was smaller, three of 12, "and thus perhaps more explainable by happenstance." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1327.) But this Court also acknowledged that in one respect, the percentages were "even worse" and "indeed troubling" because the Johnson prosecutor challenged all three (100 percent) of the eligible African-Americans. (*Id.* at p. 1328.)

In this case, although the number of strikes was also smaller than *Miller-El's*, it was not for lack of effort on the prosecutor's part. After all, he struck every Black that he possibly could, suggesting that if more Blacks were on the panel, he would have struck them, too. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280 [to establish a prima facie case, "the party may show that his opponent has struck most or all of the members of the identified group from the venire"].) At least the *Miller-El* prosecutor left one Black on the jury. (See *Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107 [finding a prima facie case where the prosecutor used three of four peremptory challenges to excuse Blacks]; *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1091 [prima facie case where prosecutor used five of six peremptory challenges to strike African-Americans]; *Fernandez v. Roe*

(9th Cir. 2002) 286 F.3d 1073, 1077-1080 [prima facie showing where four of seven Hispanics and two African-Americans were excused by prosecutor]; *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 812 [prima facie finding where prosecutor struck five of nine African-Americans].)

In *Wheeler*, this Court ruled that to establish a prima facie case a party may show that his opponent "has used a disproportionate number of his peremptories against the group." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) The Second Circuit has defined "disproportionate" in the *Batson* context as follows: "a rate of minority challenges significantly higher than the minority percentage of the venire." (*United States v. Alvarado* (2d Cir. 1991) 923 F.2d 253, 255 [finding a prima facie case where the prosecution challenged 50 percent of minority venirepersons, who represented only 29 percent of the pool].) To decide whether such an inference is raised, the prosecutor's actual strikes must be compared with the number of strikes that would have been expected had there been no discrimination at all. The rate of strikes actually used against members of a protected group should mirror its proportion in the available venire. But if the rate of strikes against the protected group is significantly higher than the expected rate, an inference of discrimination may be drawn. (*Ibid.*) The Ninth Circuit utilizes the same reasoning. (*Fernandez v. Roe*, *supra*, 286 F.3d at p. 1078 [prosecutor removed 57 percent of available Hispanic jurors using 21 percent of his peremptory challenges when only 12 percent of the venire was Hispanic]; *Turner v. Marshall*, *supra*, 63 F.3d at pp. 812-813 [prosecutor struck 56 percent of available Black jurors using 56 percent of his peremptory challenges when only 30 percent of the venire was Black].)

Here, as the trial court found, Blacks made up six percent of the venire, that is, seven of 106. (RT 8:2593.) But the prosecutor struck four

of seven Blacks, or 57 percent; thus, the prosecutor eliminated Blacks at a significantly higher rate than expected, making a potent case of purposeful discrimination.

Thus, five different statistics – the percentage of Blacks struck that the prosecutor had an opportunity to strike (100 percent), the percentage of non-Blacks challenged by the prosecutor (12.5 percent when the first motion was made and 23 percent by the time of the second motion), the percentage of the prosecutor's peremptory challenges against Blacks (60 percent when the first motion was made and 36 percent by the time of the second motion), the percentage of all Blacks in the venire excused by the prosecutor (57 percent), and the percentage of the venire made up by Blacks (six percent) – provide ample support for the conclusion that "the seriously disproportionate exclusion of blacks from the jury venire is powerful evidence of intentional race discrimination." (*McClain v. Prunty* (9th Cir. 2000) 217 F.3d 1209, 1223 [prosecutor used three of his 10 peremptory challenges to remove 100 percent of the eligible Black prospective jurors].)

E. The Prosecutor Peremptorily Struck Black Prospective Jurors For Providing Answers Similar To Those Of Non-Black Jurors He Did Not Strike

The prosecutor advanced a total of 13 reasons for striking the four Black jurors at issue.[58] However, a review of the questionnaires and voir

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[58] Three of these justifications – that Regina Sam wore casual clothes and open-toed shoes to court (RT 8:2593-2594), that Elizabeth Kimbrough was not disclosing her true opinions about the O.J. Simpson trial (RT 9:2700), and that Ms. Kimbrough would likely have been selected as jury foreperson (RT 9:2697) – cannot be addressed by comparative analysis of other jurors' questionnaires and voir dire responses. However, the blatant use of pretextual justifications in this case undermines the prosecutor's

(continued...)

dire responses of the seated jurors,[59] as well as those of the panelists passed by the prosecutor when he could have used a peremptory challenge against them, discloses that the prosecutor ignored similar or virtually identical responses by non-Black members of the jury panel.[60]

1. Age/Health (Mr. Dredd)

a. Age[61]

The prosecutor claimed that he struck Mr. Dredd in part because he was 70 years old. (RT 8:2595.) There was no apparent benefit to the prosecution to be gained by excluding Mr. Dredd, or any senior citizen, from appellant's jury. Appellant is not a senior citizen and, other than ethnicity, shared nothing in common with Mr. Dredd. It is hard to imagine how Mr. Dredd's age could cause him to hold a specific bias in appellant's favor. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276 [peremptory challenges must be based on specific bias].) In contrast, Mr. Dredd had

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[58](...continued)
credibility with regard to *all* of his peremptory challenges. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831 [proffer of faulty reasons combined with only one or two otherwise adequate reasons may undermine the prosecutor's credibility to such an extent that *Batson* challenge should be sustained]; accord, *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 369.)

[59] None of the seated jurors were selected for *Hovey* voir dire.

[60] See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 247, fn. 6 ["None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."].

[61] There were no jurors or alternates who were over 65 years old.

something in common with one of the victims in this case – Michael Honess was also a senior citizen. (See RT 9:2790; RT 15:4905.)

b. Health

During voir dire, Mr. Dredd was questioned at the bench regarding his questionnaire statement that he had health concerns; he declared that his health was "fine." (RT 8:2579-2580.) Even assuming that the prosecutor's purported age-based justification for striking Mr. Dredd arose in part from a concern about whether Mr. Dredd could handle the physical demands of jury service, the prosecutor ignored this issue when he approved a non-Black juror. Juror 36/37B[62] had diabetes and high blood pressure, and marked "yes" when asked if she had a physical condition that would make it difficult for her to serve as a juror. (SCT 22:6440.)

2. Divorced (Ms. Davis)

The prosecutor claimed that he struck Ms. Davis in part because she was divorced. (RT 8:2598.) Juror 392 was divorced. (SCT 24:7138.)

3. Housing and Employment History (Ms. Davis, Ms. Sam)

The prosecutor claimed that he struck Ms. Davis in part because she had only lived at her current address for five months and had three previous Imperial Valley addresses; he was purportedly concerned about her "stability in the community." (RT 8:2598.) He claimed that he struck Ms. Sam in part because she had unstable work and housing histories. (RT 9:2593-2594, 2602.)

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[62] The index to the supplemental clerk's transcript labels her as juror number 36; she wrote on her questionnaire that she was juror number 37B.

However, Juror 119 had only lived at her current address for one year, provided no prior address history, and was unemployed. (SCT 23:6665, 6667.) Juror 36/37B also was unemployed. (SCT 22:6411.)

4. No or Minimal College Education (Ms. Sam)

The prosecutor claimed that he struck Ms. Sam in part because she had very little college education. (RT 8:2594.) However, Juror 119 did not graduate from high school. (SCT 23:6665-6666.) Neither Jurors 192, 380, 392, nor alternate jurors 197, 389 or 392, attended college or professional school. (SCT 22:6837; SCT 23:6881; SCT 24:7053, 7140.)

Additionally, there were numerous prosecution-approved jurors who had very little, if any, college education. Juror 77 only took two classes (English and "supervisory") after graduating from high school. (SCT 22:6496.) Juror 36/37B attended only one semester at Chaffey Junior College. (SCT 22:6410.) Juror 46/47B[63] had only one year at Chaffey. (SCT 22:6453; RT 8:2571.) Alternate juror 153 attended only one summer semester at Riverside Community College. (SCT 23:6795.) Juror 370 had one year of "general" study at Fullerton Junior College. (SCT 24:7010.)

The prosecutor also initially passed on several almost-jurors with minimal educational credentials. Joseph Vargas (juror 136) spent perhaps one year at a city college. (7 SCT 7:2068.) Susan Hitt and Rodrigo Ibanez (numbers 185 and 290) attended no college, university or professional school. (7 SCT 10:2928; 7 SCT 16:4606.) Mr. Ibanez also said that he did not want to be a juror because English was his second language and he had trouble understanding difficult words. (7 SCT 16:4626.)

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[63] The index to the supplemental clerk's transcript labels her as juror number 46, however she wrote on her questionnaire that she was juror number 47B.

5. Family Member with Criminal History (Ms. Sam)

The prosecutor claimed that he struck Ms. Sam in part because she had a brother who had a juvenile criminal record. (RT 8:2593, 2603-2604.) However, the prosecutor forgave this purported liability when he approved two alternate jurors.

Alternate juror 197 had a close relative who had been arrested. His brother-in-law was arrested for a fishing license violation, and juror 197 was critical of how the case was handled, feeling that his relative had been treated "poorly" by the criminal justice system – "he was jailed for over 12 hours on a violation that was over five years old that he thought he had already . . . paid." (SCT 23:6917.)

Alternate juror 389 had a child who had been convicted of a crime. Her daughter was convicted of possession of an illegal substance, and served jail time as part of her sentence. Like Ms. Sam, juror 389 believed that her relative deserved her punishment – "no one wants their child to be in jail, but she knew the consequences of her actions . . . she didn't do what the court said so they had to follow through on their ruling" – and she thought the criminal justice system had treated her daughter fairly. (SCT 24:7133.)

The prosecutor also ignored this issue when he initially failed to strike prospective juror Susan Hitt (juror 185). Ms. Hitt's brother previously committed a theft and served time in the California Youth Authority. Like Ms. Sam, Ms. Hitt thought the criminal justice system had treated her brother fairly: "he did an injustice and paid for it." (7 SCT 10:2964.)

6. Lack of Opinion About Criminal Justice System/Death Penalty (Mr. Dredd, Ms. Kimbrough)

The prosecutor claimed that he struck Mr. Dredd in part because he did not have any strong opinions about crime or the criminal justice system and was "very weak" on the death penalty. (RT 8:2595, 2604.) He claimed to have struck Ms. Kimbrough primarily because her questionnaire responses indicated that she was biased against the death penalty. (RT 9:2701-2707.)

However, these supposed disqualifying faults were ignored when the prosecutor approved non-Black jurors. Juror 36/37B had no opinion regarding what problems existed within the criminal justice system or how it could be improved, or the crime problem – "I really am not very knowledgeable with our criminal justice system." (SCT 22:6426; see also question 54 at SCT 22:6427.) Juror 380 also expressed no opinions regarding the criminal justice system's problems or the most important causes of crime. (SCT 24:7069, 7090.) Juror 192 gave a non-responsive answer to the question regarding the justice system's problems – "all evidence should be entered." (SCT 22:6854.)

Juror 87 did not answer the question asking her general feelings about the death penalty, and claimed not to have negative or positive feelings about it. (SCT 22:6603, 6607.) She also failed to answer any of the questions on a full page of the questionnaire's section on the death penalty. (SCT 22:6608.)

7. Opinion on Race and the Criminal Justice System (Ms. Sam)

The prosecutor claimed that he struck Ms. Sam in part because she felt that race played a role in the criminal justice system. (RT 8:2598.)

However, Jurors 317 and 353 also stated on their questionnaires that they did not believe that Blacks were treated as fairly by the judicial system as other persons. (SCT 24:6961, 7004.) Additionally, the prosecutor passed on prospective juror Gilbert Kelly (juror 85) three times, even though on his questionnaire he admitted that he felt that Hispanics were more likely to commit crimes than other persons. (7 SCT 5:1268.)

The prosecutor twice failed to exercise a peremptory challenge against prospective juror 131, Deborah Toler-Guell, even though she did not feel that Hispanics or Blacks are treated as fairly by the judicial system as other persons (7 SCT 2000, 2019), and wrote that "their [sic] is still obvious racial prejudices" in how persons accused of violent crimes are generally treated (7 SCT 7:1998).

8. Did Not Want Responsibility of Death Judgment (Ms. Davis)

The prosecutor claimed that he struck Ms. Davis in part because she would be reluctant to personally impose the death penalty. (RT 8:2602.) However, in response to question 88 ("do you have positive or negative feelings about the death penalty?"), juror 36/37B wrote, "I don't want anyone to die." (SCT 22:6436; see also her response to question 140 at SCT 22:6445.) She also wrote that she was unsure whether she could set aside her personal feelings and follow the law set forth by the trial court. (SCT 22:6438, 6442.)

Alternate juror 197 also did not want to serve on this case; he previously served as an alternate juror on a murder trial – "it is an awesome responsibility I think one should have only once." (SCT 23:6901.)

9. "Weak" on the Death Penalty (Ms. Davis, Ms. Sam, Mr. Dredd, Ms. Kimbrough)

The prosecutor claimed that he struck all four of the Black prospective jurors in part due to their sympathetic or undefined opinions regarding the death penalty. (RT 8:2591, 2594-2595, 2601-2603; RT 9:2701-2707.) Although the prosecutor claimed that he gave low grades to all prospective jurors who seemed hesitant to vote to impose the death penalty, "[a] number of venire members not struck by the State, including some seated on the jury, offered some version of the uncontroversial, and responsible, view that imposition of the death penalty ought to depend on the circumstances." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 251, fn. 10.)

Juror 46/47B wrote that she wanted to be "absolutely sure" of guilt before considering the death penalty. (SCT 22:6475.) In her response to question 79, juror 119 indicated disfavor for the death penalty. She marked that she could see herself rejecting death and choosing a life sentence, but could not see rejecting life and choosing death, because "giving him imprisonment is just like taking his life away." (SCT 23:6690.) In her response to question 105, she stated that she would be reluctant to personally vote for a death sentence. (SCT 23:6695.) Juror 370 also demonstrated a reluctance about the death penalty, marking "no" when asked if his feelings about the death penalty would prevent him from always being able to vote for the penalty of death. (SCT 24:7033.) He also marked that he could not see himself, in an appropriate case, rejecting life imprisonment and choosing the death penalty. (SCT 24:7034.)

Alternate juror 389 said that she would not always be able to vote for a death verdict. (SCT 24:7120.) Although alternate juror 91 believed that the death penalty should be carried out when it is imposed (SCT 23:6646),

on questions 79, 83, and 89 his answers indicated that he would be hesitant to vote in favor of death. (SCT 23:6647-6648, 6649, 6650.) He also stated that he would be unable to put aside his personal opinions regarding what the law ought to be and follow the court's instructions. (SCT 23:6652.)

10. Criticized Juror Questionnaire (Mr. Dredd, Ms. Kimbrough)

The prosecutor claimed that he struck Mr. Dredd and Ms. Kimbrough in part because they criticized the wording of some questions on the juror questionnaire. (RT 8:2604-2605; RT 9:2702, 2706.) However, several non-Black jurors also wrote unsolicited critiques on their questionnaires. Juror 86 wrote that "much of this questionnair[e] was ambiguous and poorly stated." (SCT 22:6577.) Alternate juror 140 commented on how the questionnaire was written, as indicated by his "not a yes/no question" comment at question 94. (SCT 23:6779.) Alternate juror 389 also criticized the questionnaire: "on some of these questions you wanted a blanket opinion and in many cases there is no pat answers without hearing the specifics." (SCT 24:7136.)

Moreover, during voir dire, several panelists criticized the wording and size of the questionnaire, or were not sure of how to answer one or more questions. (See, e.g., RT 8:2358 ["by the time I got to the end of that questionnaire. I wasn't sure what I was thinking. Believe me"; RT 8:2358 ["explain what is the question actually asking. I thought it was sort of repeating itself towards the end, and so I said didn't they ask this before"]; RT 8:2467 ["maybe I just misunderstood [the question] the way I was reading it, because there was so many questions that I thought one would coincide with another. It could have been I was a little confused on that one"]; RT 8:2470 ["At that time, I was not entirely sure where I stood . . . I

was going to give it serious consideration between the time I filled out the answers and the time I have now"].)

11. Misunderstanding of Prosecution's Burden of Proof (Ms. Sam, Mr. Dredd)

The trial court accepted the truth of the prosecutor's claims that he struck Mr. Dredd and Ms. Sam in part because their questionnaire responses indicated that they would hold the prosecution to an excessively high standard of proof because this was a capital case. (RT 8:2595, 2603, 2613-2614.) However, juror 47B stated on her questionnaire that she "must be *absolutely* sure of guilt to even consider [the death penalty]." (SCT 22:6475.)

Where, as here, the prosecution employed a double standard against members of the excluded group in favor of persons permitted to serve as jurors, it is strongly suggestive of group bias and can in itself warrant the conclusion that the prosecutor used peremptories for pretextual reasons. (See *Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 343; *United States v. Chinchilla*, *supra*, 874 F.2d at p. 695.) This Court should reach that conclusion here.[64]

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[64] The inconsistency between the prosecutor's approaches toward the Black jurors and the rest of the panel is particularly noticeable when one considers his treatment of Hector Quezada (prospective juror 103). Although he later excused him (RT 9:2677), the prosecutor twice approved Hector Quezada to sit as a deliberating juror. (RT 8:2638; RT 9:2672.) Mr. Quezada had no college, university, or professional school attendance. (7 SCT 6:1552.) He he did not want to serve as a juror on this case because it would take too long. (7 SCT 6:1572.) He wrote that he could not set aside his personal feelings about what the law should be and follow the court's instructions. (7 SCT 6:1580.) Mr. Quezada barely answered the question asking for his general feelings about the death penalty: "do not like." (7

(continued...)

F. Proper Evaluation of the Prosecutor's Reasons For Excusing Each of the Black Prospective Jurors Reveals That the Prosecutor Utilized His Peremptory Challenges in a Racially Biased Manner

"[P]eremptory challenges 'are [only] permissible so long as they are based on specific bias.'" (*People v. Williams*, *supra*, 16 Cal.4th at p. 188, quoting *People v. Johnson*, *supra*, 47 Cal.3d at p. 1216.) Specific bias is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 274, 276.) The trial court had an obligation to make a "sincere and reasoned" effort to evaluate the genuineness and sufficiency of the prosecutor's reasons as to each individual juror challenged and to clearly express its findings. (*People v.*

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[64](...continued)
SCT 6:1574.) He marked that he could not consider imposing the death penalty as a realistic and practical possibility. (7 SCT 6:1577.) He was not sure if he had positive or negative feelings about the death penalty, and had no general thoughts about the benefit of imposing life imprisonment or death sentences. (7 SCT 6:1578, 1581-1582.) He had no feelings about life sentences. (7 SCT 6:1579.) When asked how he felt about being called to sit in judgment of another person, Mr. Quezada wrote "not good" (7 SCT 6:1587), and later wrote that he did not like to pass judgment (7 SCT 6:1590). He admitted that he would refuse to find a defendant guilty of first degree murder and/or special circumstances to avoid having to make a decision on the penalty. (7 SCT 6:1576.) He also stated that having to answer questions about the death penalty made him think that appellant was guilty, and made it more likely that he would vote for death. (7 SCT 6:1580.) He said that he would be reluctant to personally vote for death and then face the defendant to deliver the verdict. (7 SCT 6:1581.) Mr. Quezada failed to answer seven questions pertaining to his opinions on the criminal justice system's problems and needed improvements, the Simpson verdict, how alleged violent criminals, property crime offenders and sexual offenders are treated, whether crime has increased in recent years, and what should be done about crime. (7 SCT 6:1568-1569.) He failed to answer the entire last page of the questionnaire, or to sign it. (7 SCT 6:1591.)

Silva, *supra*, 38 Cal.4th at pp. 385-386 [reversing death judgment because of numerous discrepancies between the prosecutor's reasons and the responses of the challenged jurors in the record, and trial court's failure to honor "its obligation to make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation' and to clearly express its findings"]; *People v. Fuentes* (1991) 54 Cal.3d 715, 720-721; *People v. Turner* (1986) 42 Cal.3d 711, 728; *McClain v. Prunty, supra* 217 F.3d 1209, 1220 ["trial court has a duty to determine the credibility of the prosecutor's proffered explanations"].)

In appellant's case, the trial court made its rulings without reviewing the daily transcripts to refresh its recollection of the *Hovey* and general voir dire, and the questionnaire responses of the challenged Black prospective jurors, to verify that the prosecutor's descriptions of those statements were accurate. As a result, the trial court's evaluation of the prosecutor's justifications for excusing the Black prospective jurors was unreliable and inadequate. The court was not equipped to distinguish bonafide reasons from sham excuses as to each of the challenged jurors, and it simply accepted the prosecutor's reasons at face value without regard to the trial record. The court admitted that it was taking the prosecutor at his word, as evidenced by its blind acceptance of the prosecutor's misrepresentation that he had challenged Ms. Davis for cause during *Hovey* voir dire. (RT 8:2613; see also RT 9:2711-2712.)

Had the trial court in this case engaged in a reasoned, informed evaluation of each of the prosecutor's various "race-neutral" reasons for striking each of the Black prospective jurors, it would have concluded that the prosecutor failed to establish that his challenges against each of the jurors were exercised for motives other than group bias. The trial court

missed many indicators showing that the prosecutor's justifications were pretextual. First, the prosecutor developed most of his purported race-neutral justifications after he read the Black prospective jurors' questionnaires after he had to defend his peremptory challenges. (See RT 8:2598-2599, 2602-2604.) The trial court did not consider this before making its rulings, even though "[i]t would be difficult to credit the State's new explanation[s], which reek[ed] of afterthought." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.) Here, as in *Miller-El*, there was "no good reason to doubt that the State's afterthought about" the Black prospective jurors' questionnaire responses "was anything but makeweight." (*Ibid.*)

The trial court also failed to recognize that the prosecutor did not question the Black prospective jurors regarding the above-listed issues that purportedly concerned him. In particular, he did not question them regarding the three key matters that purportedly made him strike all four – their alleged hesitancy to impose the death penalty, misunderstanding of the burden of proof, and inability to function within a group. In fact, the prosecutor did not question Ms. Davis or Ms. Sam at all before striking them from the jury. He chose to eliminate them without giving Ms. Davis the opportunity to follow-up on her questionnaire and *Hovey* responses regarding her ability to impose the death penalty, or Ms. Sam the chance to explain her feelings about her choice of attire or her brother's criminal past. Nor did the prosecutor allow either woman to address her supposed lack of education and community stability or involvement. The prosecutor also failed to follow-up on his purported concerns regarding Mr. Dredd's and Ms. Kimbrough's supposed lack of (or hidden) opinions regarding the criminal justice system and the death penalty, and their inability to work as group members or followers.

The prosecutor's failure to follow-up on the matters that he allegedly was concerned about is evidence suggesting that his explanations are shams and pretexts for discrimination. This Court has said that the prosecutor's omissions are relevant for the purpose of showing purposeful discrimination in the use of peremptory challenges. (*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) The United States Supreme Court agrees that a prosecutor without a hidden discriminatory agenda would ask follow-up questions on issues that supposedly matter to him. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 244, 246.)

The trial court missed another plainly obvious factor that in and of itself discredits many of the prosecutor's purported race-neutral reasons for excluding the Black prospective jurors. This Court has made it clear that a peremptory challenge must be based on a prospective juror's specific bias, and specific bias is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276; see *People v. Williams*, *supra*, 16 Cal.4th at p. 188; *People v. Fuentes*, *supra*, 54 Cal.3d 707, 720 [prosecutor did not explain how prospective juror's work and education related to jury service in that case].)

Thus, unless Ms. Sam was wearing a "Free Floyd Smith" t-shirt, it is inconceivable how her t-shirt with writing and casual clothing could demonstrate a bias related to the case on trial. For example, in *People v. Allen* (2004) 115 Cal.App.4th 542, the prosecutor struck a prospective juror in part because of "her demeanor, and not only dress but how she took her seat;" he claimed that it indicated that she would tend to "disregard [her] duty as a juror and kind of have more of an independent thinking." (*Id.* at p. 546.) The appellate court found the prosecutor's reasons "incomprehensible," without anything "in the record to give them content"

for the trial judge to review, and "hardly sufficient" to demonstrate specific bias. (*Id.* at p. 551.)

Similarly, here the prosecutor was never asked by the trial court to explain how an alleged lack of college education or community involvement, or a purported unstable employment or housing history, would make Ms. Davis or Ms. Sam biased for or against a party to the trial. What bias would a divorced person (Ms. Davis) supposedly possess? Why would a 70 year old (Mr. Dredd) be biased against this prosecution or prosecutor? Why wouldn't Ms. Sam be able to isolate her brother's experiences with the criminal justice system from appellant's? How could Ms. Kimbrough's purportedly hidden feelings about the Simpson trial cause her to be biased here? What specific bias was apparent from Mr. Dredd's and Ms. Kimbrough's criticism of the juror questionnaire? These and similar questions were left unasked by the trial court and unanswered by the prosecutor.

Further, the prosecutor declared that he excused Ms. Sam in part because she felt that race played a part in the criminal justice system. (RT 8:2598.) However, the trial court failed to see that this reason is inherently not race-neutral. Indeed, both the prosecutor and the trial court apparently forgot that the prosecutor expressed a deep concern over the racial factors involved in appellant's case:

> I should also put on the record something that I don't think was done last time. Is that [sic], yes, defense counsel is black, the Defendant is black. But two of the victims in this case are also black, and many of the witnesses in this case are also black. As the Court probably recognizes, just from the Court's own experience in this courtroom, perhaps the prosecution is also very concerned with that.

(RT 8:2621.)

Remarkably, the trial court forgot that it, too, was concerned about race:

> "I think there's an additional factor that I really have to be sensitive to in this case, and that is, also, the fact that both of your client's attorneys are African-American. So I think that's an additional reason why the court needs to be especially concerned because if we end up with a selection of a jury of people with whom you do not share a racial characteristic – I guess that's the best way I can put it – that's something that would trouble me."

(RT 8:2613.[65])

In fact, the court was so concerned about the racial dynamics of this case that, at the conclusion of the hearing on Ms. Kimbrough's excusal, the court "considered moving the other African-American up in the sequence to seat her now, and have rejected that idea, for the reason that I'll be engaged in tinkering that I shouldn't do." (RT 9:2818.)

Ms. Sam did not say anything that has not been addressed in our constitutional jurisprudence:

> In a series of decisions beginning almost four decades ago the United States Supreme Court has held that an essential prerequisite to an impartial jury is that it be drawn from a representative cross-section of the community. The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or

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[65] See also the trial court's remarks at RT 8:2597, noting that "*Wheeler* requires the court to focus upon the exclusion of members of protected classes," and that "the Court is required to be attentive to the exclusion . . . of Black jurors, especially when . . . the Defendant in the case is black, and especially when both his counsel are black. I think that's something I need to pay careful attention to."

> national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.

(*People v. Wheeler*, *supra*, 22 Cal.3d at pp. 266-267; see also *Id.* at pp. 280-281; *Batson v. Kentucky*, *supra*, 476 U.S. at p. 85; *People v. Johnson*, *supra*, 30 Cal.4th at p. 1326; *People v Reynoso*, *supra*, 31 Cal.4th 903, 926, fn. 7.)

Batson and *Wheeler* are about nothing if not the recognition that racial differences play a part in the workings of the criminal justice system. This trial involved a Black defendant, represented by Black counsel, with a predominantly white jury venire, who was accused of killing a young white victim. However, without thinking critically about the reasoning, or lack thereof, behind the prosecutor's assertion – or remembering that it too was concerned about the racial dynamics of appellant's trial – the trial court blithely allowed the prosecutor to exclude Ms. Sam on the basis of race.

In addition, the trial court failed to see the pretextual nature of the prosecutor's claim that, without further inquiry, he was justified in excusing Ms. Sam due to her brother's juvenile offense. The Supreme Court's opinion in *Miller-El II* is instructive on this point:

> [T]he court's readiness to accept the State's substitute reason ignores not only its pretextual timing but the other reasons rendering it implausible. [The Black prospective juror] Fields's testimony indicated he was not close to his brother, App. 190 ('I don't really know too much about it'), and the prosecution asked nothing further about the influence his

> brother's history might have had on Fields, as it probably would have done if the family history had actually mattered. See, e.g., *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000) ('[T]he State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination'). There is no good reason to doubt that the State's afterthought about Fields's brother was anything but makeweight.

(*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 246.)

Here, the prosecutor never questioned Ms. Sam about her questionnaire responses regarding her brother's juvenile history, and he approved of two non-Black alternate jurors[66] who had close relatives with criminal histories. (See *Miller-El v. Dretke*, *supra*, 545 U.S. at p. 250, fn. 8 [with respect to the criminal history of another Black prospective juror's relative, the *Miller-El* prosecutor "never questioned Warren about his errant relative at all; as with Field's brother, the failure to ask undermines the persuasiveness of the claimed concern. And Warren's brother's criminal history was comparable to those of relatives of other panel members not struck by the prosecutor"].)

When the prosecutor offered his final defense of his dismissal of the first three Black prospective jurors, he said: "In terms of jury group dynamics you look for one leader. At the most, you look for one leader and some lieutenants. . . . [¶] [Regina Sam's] contact with the community is extremely limited and, again, I'm going by the standard formed by the group of jurors here. We have many, many people who are involved in particular community group efforts, that are charitable in nature or involving children. That's the type of person that I want involved in this

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[66] See SCT 23:6717; SCT 24:7133.

case, quite frankly." (RT 8:2620.) But, what about the other cast-off Black jurors? As noted above, Ms. Davis was a Girl Scout troop leader and was about to open a day care center. Mr. Dredd was a former elementary school teacher and a school administrator. Ms. Kimbrough served on the board of a battered women's shelter; presumably many of these battered women had children with them at the shelter, and the board supervised the provision of services to these children. The trial court missed this.

The prosecutor made much of his "group dynamics" approach to selecting appellant's jury, i.e, scoring jurors based upon their likelihood of being leaders, lieutenants, followers, etc. He claimed to have struck Ms. Kimbrough because she was an "executive with a corporation," and there were no other individuals left on the jury who could "counter her position or to interact with her or reason with her on the level of sophistication that she has in her capacity or likely capacity as the foreperson." (RT 9:2697.) However, he never articulated why, under the specific circumstances of appellant's case and trial, he believed that any of the discarded Black jurors (particularly Ms. Kimbrough) would not be appropriate leaders or lieutenants, or why he felt that any of the four would be unable to effectively work as group members or be followers. Indeed, the pretext of this justification would have been obvious had the trial court realized that the prosecutor claimed to have excused Ms. Sam because she was a follower, but he shunned Ms. Kimbrough because she was a leader. Apparently the prosecutor believed that Black jurors were not appropriate for any role on appellant's jury.

The prosecutor claimed that, in choosing the jury, his focus was on "[w]ill these be people working a[s] a group? Do they have background in doing so. Do they have any experiences working with leaders and as

followers or working as a group." (RT 8:2616.) Yet, all of the discarded Black jurors had educational, employment and/or community service backgrounds that demonstrated their ability to successfully work with others as followers and leaders. Ms. Davis took college-level classes, and was a seven-year Kaiser Permanente employee and Girl Scout troop leader who was licensed to open a day care center. (7 SCT 15:4305-4306, 4309, 4338.) Ms. Sam had associate's and bachelor's degrees, had worked for a total of sixteen years, and sold real estate and insurance. (7 SCT 17:4949, 4951, 4983.) Mr. Dredd had undergraduate and graduate degrees, was a member of a national fraternity, and had over twenty years experience as an educator and manager. (7 SCT 10:2756-2757.) Ms. Kimbrough had a bachelor's degree, worked as a human resources manager, and had served on the board of a community organization. (7 SCT 20:5722-5725, 5728.) The trial court missed this, too.

When one looks at the actual questionnaire and voir dire responses, it is obvious that the prosecutor's purported race neutral justifications for peremptorily excusing the Black jurors were implausible and suggestive of racial bias. The justifications, therefore, "demanded further inquiry on the part of the trial court." (*People v. Hall*, *supra*, 35 Cal.3d at p.169.) The trial court's failure to competently investigate the legitimacy of each of the prosecutor's reasons as to each of the challenged Black prospective jurors at issue undermines its fact-finding and its ultimate denial of appellant's *Batson/Wheeler* motion. (See, e.g., *People v. Silva*, *supra*, 25 Cal.4th at pp. 385-386; *Lewis v. Lewis*, *supra*, 321 F.3d at p. 830; *United States v. Chinchilla*, *supra*, 874 F.2d at pp. 698-699.)

G. The Trial Court's Conclusions Regarding the Purported Biases of the Black Prospective Jurors Are Not Supported by the Record

The trial court stated that it denied appellant's *Batson/Wheeler* motions because it agreed with the prosecutor that Ms. Sam and Mr. Dredd would likely hold the prosecution to an excessively high burden of proof, and that Ms. Davis and Ms. Kimbrough were biased against the death penalty (though not sufficiently biased to be excused for cause). (See RT 8:2613-2614; RT 9:2714-2715, 2719-2720.) The record on appeal does not support the trial court's conclusions. Moreover, even if this Court were to somehow find that one or more valid, race-neutral reasons supported the prosecutor's decisions – i.e., that the prosecutor had mixed motives – in excusing one or more of the Black prospective jurors, the overwhelming number of pretextual reasons is strong evidence that the reasons given as a whole were insufficient and lacked credibility. (See *Lewis v. Lewis*, *supra*, 321 F.3d at p. 831.) The question of mixed motives in the *Batson* context was addressed in *Robinson v. United States* (D.C. 2005) 878 A.2d 1273, where the court held:

> To prove a *Batson* violation, a defendant need not show that a prosecutor's strikes were motivated solely by racial or gender bias, to the exclusion of all other considerations. Such a requirement would render *Batson* a virtual nullity and divorce it from the real world of jury selection, for the motivations behind peremptory challenges are seldom so crystallized and singular. Mixed motives are the norm. However, even if the prosecutor acted from mixed motives, some of which were non-discriminatory, his actions deny equal protection and violate *Batson* if race and gender influenced his decision.

(*Id.* at p. 1284.)

1. The Trial Court's Conclusions Regarding the Purported Biases of the Black Prospective Jurors Are Not Supported by the Trial Record

The prosecutor's purported concerns about Ms. Sam's ability to abide by the reasonable doubt standard of proof arose from his interpretation of her responses to questions 79[67] and 116:[68] "If we can prove without a doubt that the crime was committed. We must be very careful to listen," and "maybe it has been randomly imposed and some criminals get harsher charges than others. It seemed to depend on the situation, the person, the crime." (RT 8:2603.) When asked, "Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty?" Ms. Sam checked, "yes," and wrote, "if it can be proven without a doubt by evidence the crime was committed. We must be very careful to listen." (7 SCT 17:4974.) She

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[67] "There are no circumstances under which a jury is instructed by the court that it must return a verdict of death. No matter what the evidence, the jury is always given the option in the penalty phase of choosing either life without the possibility of parole or the death penalty. Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole? Why? Given the fact that you will have both options of life or death available, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty? Why? Are your feelings about the death penalty such that you would refuse to find the defendant guilty of first degree murder and/or special circumstances true, solely to avoid having to make a decision on the death penalty?" (7 SCT 17:4973-4974.)

[68] "Do you feel the death penalty is used too often? Too seldom? Randomly? Please explain." (7 SCT 17:4981.)

also stated that "if we impose death we need to be sure they did the crime." (7 SCT 17:4976.)

In response to questions 74, 75, 79 and 84, Ms. Sam wrote that she was for the death penalty, would vote to keep it in effect and could apply it in an appropriate case; she also wrote that it should be applied, depending on the circumstances. (7 SCT 4968, 4973-4974, 4975-4976.) She believed in the deterrent effect of the death penalty. (7 SCT 17:4979.)

It is unwarranted to assume that Ms. Sam's answer that she would require proof of the crime "without a doubt" before imposing the death penalty translates into a demand that the state fulfill a burden greater than that required by the law. When examined in context, it appears that she merely wanted a strong degree of certainty of someone's guilt before imposing a death sentence. (See 7 SCT 17:4976 ["if we impose death we need to be sure they did the crime"].) If the prosecutor had some doubt about this, it behooved him to voir dire her on this subject. Yet, the prosecutor did not ask for Ms. Sam to appear for *Hovey* voir dire (RT 8:2249-2255), and he did not ask her any questions when she took her seat in the jury box. (RT 8:2545-2578.) The failure to take any of these steps in order to resolve doubts he may have had indicates that these reasons were a pretext for a racially-motivated peremptory challenge. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 244, 246; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280-281.)

It was disingenuous for the prosecutor to fail to voir dire Ms. Sam regarding her understanding of the prosecution's burden of proof and then use this issue as the purported basis for striking her from the jury. Because the prosecutor did not question Ms. Sam regarding this issue, defense

counsel had no idea that he had this concern and thus had no opportunity to rehabilitate her.

The trial court's justification for allowing the prosecutor to strike Mr. Dredd also does not pass muster. The prosecutor took issue with Mr. Dredd's questionnaire response that "care should be used in sentencing someone to death. There should be no doubt." (7 SCT 10:2778.) In response to a different question, Mr. Dredd wrote, "I feel the death penalty should be used in extreme cases where there is no doubt." (7 SCT 10:2782; RT 8:2605.)

Then, when Mr Dredd returned to the jury box after being questioned at the bench regarding his health, the prosecutor asked him if he understood that "the burden of proof in a criminal case is proof beyond a reasonable doubt[?]" Mr. Dredd answered affirmatively, and confirmed that he would not hold the prosecution to a "no doubt" standard of proof. (RT 8:2582.) It is hard to understand how these responses form the basis for a non-discriminatory strike. Mr. Dredd's answers reveal that he would not hold the state to a burden greater than beyond a reasonable doubt, but that when it came to imposing the death penalty he thought there should be no doubt of its propriety. This represents a juror who understands the law and takes his responsibilities seriously.

Further, during voir dire, the prosecutor questioned both Mr. Dredd and seated juror 47B regarding their understanding of the prosecution's burden of proof. Like Mr. Dredd, during voir dire juror 47B[69] stated that

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[69] Jurors 37B and 47B are not identified by number in the Reporter's Transcript; the appeals clerk identified them by number in the Supplemental Clerk's Transcript. Both of these jurors were female,

(continued...)

she understood that the prosecution has the burden of proof beyond a reasonable doubt. (RT 8:2556-2557.) Thus, both Mr. Dredd and juror 47B told the prosecutor and court that they would abide by the reasonable doubt standard of proof. There is no explanation for the prosecutor's choice to accept juror 47B and strike Mr. Dredd other than the fact that Mr. Dredd was Black and juror 47B was not.

The trial court was also wrong when it accepted the prosecutor's claim that Ms. Davis was biased against the death penalty. On her questionnaire, Ms. Davis plainly stated, "I am for the death penalty." (7 SCT 15:4327.) Although other questionnaire responses indicated that she, like many responsible citizens, was hesitant to take on the burden of serving as a capital juror, Ms. Davis had strong leanings toward the death penalty: "I just don't feel anyone who killed someone deserves life in prison – why they can live on when the other person is gone" (7 SCT 15:4328), "I feel if you kill someone you don't have the right to live" (7 SCT 15:4329), and "any one who kills someone" should always receive the death penalty. (7 SCT 15:4330.)

Had she not been Black, Ms. Davis would have been "ostensibly acceptable to [a prosecutor] seeking a death verdict." (*Miller-El v. Dretke*, *supra*, 545 U.S. at p. 265.) She was concerned that criminals may have more rights than their victims, and she thought that persons who were accused of violent crimes were treated too leniently and thus became

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[69](...continued)
unmarried and unemployed. However, by comparing their questionnaire responses to their voir dire responses regarding the ages of their children, appellate counsel was able to determine that juror 47B was the individual who was questioned about her understanding of the prosecution's burden of proof.

recidivists. (7 SCT 15:4321, 4322.) She wanted to serve as a juror, saying that she thought she would learn a lot, but she was concerned that it was a murder case. She did not want to judge another person, but ultimately decided to step up because "if it was my family that was hurt or killed I would like someone to want to serve as a juror otherwise the people would get away with things they do." (7 SCT 15:4325; see also 7 SCT 15:4340 ["I really don't like to judge people. But if I have to I guess I could."].)

During the *Hovey* voir dire, the prosecutor agreed with Ms. Davis that it was reasonable for a prospective juror to be hesitant to impose a death sentence: "That's perfectly understandable. I don't think any party in this courtroom wants to do that." (RT 8:2336.) Ms. Davis confirmed that she would take on the responsibility of service as a capital juror: "I mean I don't really like it, but I know I could do it, I mean, if I had to." (RT 8:2337.) She also responded affirmatively when defense counsel asked her "if the circumstances warranted you could vote for the death penalty?" (RT 8:2339.) The prosecutor did not challenge her for cause. (RT 8:2341.)

With regard to Ms. Kimbrough, the most obvious indicator that the prosecutor's stated grounds for excusing her were pretextual is that, before striking her, the prosecutor accepted the jury with Ms. Kimbrough on it three times. (RT 8:2638, 2672, 2674.) The prosecutor claimed that this happened because, after he approved the jury, defense counsel used peremptory strikes to remove the individuals that the prosecutor believed had the capacity to challenge Ms. Kimbrough for leadership of the deliberating jury. (RT 9:2711.) He also claimed that he initially approved her as a juror because the trial court's statements during the hearings on appellant's first *Batson/Wheeler* motion had a "chilling effect." (RT 9:2697-2698.)

However, a look at the numbers game involved in the exercise of the peremptory challenges reveals what really happened here. As defense counsel pointed out, had the prosecutor not struck Ms. Kimbrough when he did, he most likely would have exhausted his peremptory challenges before the lone remaining Black prospective juror was called to the jury box. (See RT 8:2592; RT 9:2709, 2711-2713.) The prosecutor knew that the defense was likewise running out of peremptory challenges and was close to approving the jury, and he knew that defense counsel probably would not strike Ms. Kimbrough.

Although "that the prosecutor accepted a jury containing minorities 'may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection . . . it is not a conclusive factor.'" (*People v. Gray* (2005) 37 Cal.4th 168, 188, quoting *People v. Snow* (1987) 44 Cal.3d 216, 225.) Appellant's prosecutor should not benefit from this presumption of good faith. When he struck Ms. Kimbrough, it was obvious to both parties that, based upon the number of peremptory challenges remaining on both sides and the number of prospective jurors seated in the gallery, the defense would approve the jury before the other Black prospective juror would be called to the jury box. This prosecutor purposely timed the exercise of this peremptory challenge – it was his last chance to get rid of Ms. Kimbrough and ensure that no Blacks would sit on appellant's jury. (See *People v. Motton* (1985) 39 Cal.3d 596, 607-608;[70]

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[70] In *People v. Motton*, this Court quotes the dissenting opinion of Justice Clinton White in the Court of Appeal: "'If the presence on the jury of members of the cognizable group in question is evidence of intent not to

(continued...)

People v. Allen, *supra*, 115 Cal.App.4th 542, 553, fn. 9; *People v. Gonzales* (1989) 211 Cal.App.3d 1186, 1201-1202; *Williams v. Runnels*, *supra*, 432 F.2d 1102, 1109 [fact that prosecutor accepted jury, including Blacks, several times before exercising first peremptory challenge does not refute inference that when peremptories exercised they were exercised in racially biased manner]; *Turner v. Marshall*, *supra*, 121 F.3d 1248, 1254 [fact that prosecutor accepted jury containing Blacks not dispositive of lack of group bias vis-a-vis excusal of other Blacks]; see also *People v. Johnson*, *supra*, 47 Cal.3d at pp. 1220-1221 [factors considered when challenging a prospective juror "may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side."].)

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[70](...continued)
discriminate, then any attorney can avoid the appearance of systematic exclusion by simply passing the jury while a member of the cognizable group that he wants to exclude is still on the panel. This ignores the fact that other members of the group may have been excluded for improper, racially motivated reasons. In fact, the offending counsel who is familiar with basic selection and challenge techniques could easily accept a jury panel knowing that his or her opponent will exercise a challenge against a highly undesirable juror. If, for instance, three people on the panel exhibit a proprosecution bias, then the prosecutor could pass the jury with at least three members of the group which he ultimately wishes to exclude still remaining on the jury-knowing that he will have a later opportunity to strike them. By insisting that the presence of one or two black jurors on the panel is proof of an absence of intent to systematically exclude the several blacks that were excluded, the People exalt form over substance.'" (*People v. Motton*, *supra*, 39 Cal.3d 596, 607-608.)

As with Ms. Sam, it was disingenuous for the prosecutor to fail to voir dire Ms. Kimbrough regarding her opinions about the death penalty and then use this issue as the purported basis for striking her from the jury. (*Miller-El v. Dretke*, *supra*, 545 U.S. at pp. 244, 246; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 280-281.) During voir dire, he merely asked her whether she understood and accepted that a defendant was not obligated to testify in his own defense ("yes"), and if she could serve for the duration of the case ("yes"); he did not challenge her for cause. (RT 8:2587-2590.) Because the prosecutor did not question Ms. Kimbrough regarding this issue, defense counsel had no idea that he had this concern and thus had no opportunity to rehabilitate her.

Ms. Kimbrough's questionnaire responses say that she could return a death verdict:[71] "I would be open to voting for the death penalty, but I wouldn't necessarily always vote for it." (7 SCT 20:5747 [emphasis in original].) In fact, unlike many other prospective jurors, she was aware that "guilt or innocence is a separate issue from the penalty and should be handled as such." (7 SCT 20:5748.) Ms. Kimbrough said that she could sentence someone to death where "the circumstances may warrant it" (7 SCT 20:5746), and that she "would need to listen to the testimony in the penalty phase and then decide. I wouldn't automatically vote for a death

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[71] Like Ms. Davis, Ms. Kimbrough was aware of the burden that came with service on a capital jury, but she was willing to serve: "In general, I do not believe people should decide who gets to live and who has to die. However, I recognize that there may be times that this difficult choice must be made. It should not be made lightly." (7 SCT 20:5746.) She admitted that she had "never had to face my thoughts about it before. I don't think positively or negatively about it. I see it more as a part of our society/system that we unfortunately have to deal with periodically." (7 SCT 20:5750.)

sentence." (7 SCT 20:5753.) Is this not what capital jurors are supposed to do?

An objective review of the questionnaires and voir dire record also rebuts the prosecutor's inaccurate claims regarding the backgrounds, opinions and other purported liabilities of the excused Black prospective jurors:

Sandra Davis: Contrary to the prosecutor's characterization, Ms. Davis most certainly was a stable resident of the community. She had an educational background in child development; she took classes in that field at "Valley College" and "RCC," and later received a certificate from "ICS," a home study program. (7 SCT 15:4305.) She was a new homeowner who was about to open a home day care center. (7 SCT 15:4309, 4338.) She had been employed for seven and one-half years at Kaiser Permanente in Riverside. (7 SCT 15:4306.) She resided at one home for five years, then two others for a total of five years. (7 SCT 15:4304.) She divorced after a four-year marriage (7 SCT 15:4303); the questionnaire did not ask whether any of her address changes were related to her separation and/or divorce, or otherwise why she had moved. Ms. Davis was a Girl Scout leader. (7 SCT 15:4309.)

Ms. Davis also verified that she was a stable, employed member of the community. Her job only would pay for a total of thirty days of jury service; Ms. Davis informed the court that she had just purchased a house and needed her income to pay her mortgage payment, but that her employment needs would not affect her decision making as a juror. The court informed her that if necessary, she could be excused from the jury and replaced with an alternate if she experienced a financial hardship if the trial went past thirty days. (RT 8:2340.) Ms. Davis did not ask to be excused.

Additionally, Ms. Davis was more likely to favor the prosecution because she had two sisters who worked in law enforcement (correctional officers). (7 SCT 15:4307; see *Kesser v. Cambra* (9th Cir. 2006) 465 F.3d 351, 369.)

Regina Sam: Regina Sam had been married for eleven years to an electrical engineer. (7 SCT 17:4948.) She had lived at her current home for three years, and had three residences in the previous ten years. (7 SCT 17:4949.) She had a four-year associate's degree in business from Cerritos College, and a "B.S.M." from Pepperdine University. (*Ibid.*) She had been at her current job for five years, and at her previous job for eleven. (7 SCT 17:4951.) She also sold real estate and life insurance part-time. (7 SCT 17:4983.)

Contrary to the prosecutor's characterization, Ms. Sam was not strident about her feelings about racial issues in the criminal justice system. Rather, she expressed a concern about fairness that is shared by many citizens of all races – "the system is not always fair, sometimes race seems to play a part. That definitely needs to be changed. . . . We should keep race out of it." (7 SCT 17:4966.) When asked what should be done about the crime problem, she replied, "a fair justice system and harsher crimes [sic] when deserved. We must put race behind, whether black, white, both should be given a fair trial." (7 SCT 17:4967.) Ironically, Ms. Sam also wrote, "Also the jury selection should include all races, not just one race." (7 SCT 17:4970.)

As for her "juvenile delinquent" brother, Ms. Sam said that he committed some theft misdemeanors and did community service. She did not visit him in jail or go to court with him, and she felt that he had been treated fairly by the police and the judge. In response to the question asking

what she felt were the most important causes of crime, Ms. Sam made it clear that she was not sympathetic to "juvenile delinquents:" "in my opinion the laws could be more strict especially for under 18 year olds, they're getting more dangerous than the adults because they get off." (7 SCT 17:4986.)

Ms. Sam closed her questionnaire by reminding the reader that she "already stated the whole idea of a jury is to be fair." (7 SCT 17:4989.)

Huey Dredd: Mr. Dredd had been married for eighteen years and was the father of four adults in professional careers. He had lived in the same home for seventeen years. (7 SCT 10:2754-2755.) He had bachelor's and master's degrees, and worked for over two decades as an elementary school teacher and administrator. (7 SCT 10:2756-2757.)

Mr. Dredd's questionnaire responses rebut the prosecutor's claim that he was "weak" on the death penalty. Mr. Dredd plainly said, "I feel that the death penalty does have a place in the system. It may or may not deter crime but I feel that without it, crime could be worse. I also feel that care should be used in sentencing someone to death. There should be no doubt." (7 SCT 10:2778.) He said that he could sentence someone to death "if justice would be serve[d]" (7 SCT 10:2780), and he supported the Briggs Initiative because he "hope[d] that would deter serious crime" (7 SCT 10:2782). He made clear his feeling that "the death penalty should be use[d] in extreme cases" (7 SCT 10:2782), but he felt "that life in prison could be the just punishment for one who intentionally murder[s] another person." (7 SCT 10:2783.)

The prosecutor also overstated Mr. Dredd's health concerns. Mr. Dredd merely wrote on the questionnaire, "I am on medication for hypertension." He marked "no" when asked, "Do you have any type of

physical disability, handicap, or any other reason that might make it difficult to sit through this trial and give it your full and complete attention?" (7 SCT 10:2786.) During voir dire he said that he had no concerns regarding the duration of the trial (RT 8:2579), and that his health was "fine." (RT 8:2581.) Mr. Dredd did not seek a hardship excusal.

Elizabeth Kimbrough: Ms. Kimbrough had been married for twenty-three years, and had lived in her home for almost two years. She had two prior residences in ten years, and seemed to have recently moved to California from Minnesota. She had a bachelor's degree in management, and worked as a regional personnel director for Target. (7 SCT 20:5722-5725.) At some earlier point, she was on the board of directors for a battered women's shelter in Minneapolis. (7 SCT 20:5728.)

The prosecutor cast aspersions on Ms. Kimbrough's ability to serve because her husband played on the same football team with O.J. Simpson for one year, but had no further contact with Simpson thereafter. Ms. Kimbrough did not follow the Simpson trial closely. (7 SCT 20:5738.) Nor did she have strong feelings about the Simpson verdict: "They had been presented all of the facts. I had not, so there was no way for me to judge the correctness of their verdict." (7 SCT 20:5740.) During voir dire, she stated that neither she nor her husband paid close attention to the Simpson case and neither knew the victims in that case, that her husband only was still in contact with one of his former teammates, and that she had no idea if her husband knew any of Simpson's wives. (RT 8:2586.) For no apparent reason, the prosecutor refused to take her at her word.

2. The Prosecutor's Grounds for Striking the Prospective Black Jurors Do Not Withstand "Mixed Motive" Scrutiny

Assuming arguendo that this Court finds sufficient evidence on the record to support the trial court's stated grounds for permitting the prosecutor to strike the four Black prospective jurors (e.g., their opinions regarding the prosecution's burden of proof and/or the death penalty), this finding is not dispositive. This case demands a "mixed motive" analysis because, during the second stage of the *Batson/Wheeler* inquiry, the prosecutor arguably scattered a couple of ostensibly valid race-neutral grounds for excusing the Black prospective jurors amongst his litany of pretextual race-neutral grounds. In cases where, as here, there may be both race-neutral and race-biased motives for striking a prospective Black juror, and the trial court inadequately assesses the veracity of all of the prosecutor's grounds for striking a Black juror, if no mixed motive analysis occurs there is an implied acceptance of a certain level of racism within the body of justifications for striking an otherwise acceptable juror.

Although neither this Court nor the United States Supreme Court has addressed this issue to date,[72] several federal courts have confronted this situation. The more prevalent recommendation is for a reviewing court to apply a "mixed motive analysis" in which, during the third stage of the *Batson* inquiry, the burden shifts back to the prosecutor to prove that he would have struck the juror absent the improper ground(s). (See *Kesser v.*

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[72] See *People v. Schmeck* (2005) 37 Cal.4th 240, 276 ["Defendant acknowledges that neither in *Wheeler* nor in any other subsequent decision has our court actually addressed or decided the question whether a mixed-motive peremptory challenge could constitute a violation of a defendant's constitutional rights[.]"]

Cambra, *supra*, 465 F.3d 351, 372-374 (Wardlaw, J., concurring); *Howard v. Senkowski* (2nd Cir. 1993) 986 F.2d 24, 28-30 [if the challenging party proves a discriminatory purpose, the challenged party has an opportunity to show the peremptory strike would have been exercised even if the improper factor had not, in part, motivated the decision to strike]; *Gattis v. Snyder* (3rd Cir. 2002) 278 F.3d 222, 232-235 [upholding mixed motive analysis by Delaware state court]; *Weaver v. Bowersox* (8th Cir. 2001) 241 F.3d 1024, 1032 [recognizing Missouri state court's mixed motivation analysis as consistent with *Batson*]; *United States v. Darden* (8th Cir. 1995) 70 F.3d 1507, 1530-1532 [upholding mixed motive analysis on direct appeal]; *United States v. Tokars* (11th Cir. 1996) 95 F.3d 1520, 1531-1534 [upholding district court's mixed motive analysis on direct appeal]; *Wallace v. Morrison* (11th Cir. 1996) 87 F.3d 1271, 1274 [upholding mixed motive analysis by Alabama state court]; *Jones v. Plaster* (4th Cir. 1995) 57 F.3d 417, 420-421[remanding for reconsideration under the standards set forth in, inter alia, *Howard v. Senkowski*].)

However, at least two former Justices of the United States Supreme Court, and a number of federal and state lower appellate courts, have stated that in "mixed motive" situations there is no need to proceed to the third stage of the *Batson* inquiry because the constitutional violation is established as soon as a prosecutor states any improper rationale during the second stage, i.e., the invalid reason vitiates the valid reasons. (See *Wilkerson v. Texas* (1989) 493 U.S. 924, 924-928 (Marshall, J. and Brennan, J., dissenting from denial of certiorari); *Kesser v. Cambra*, *supra*, 465 F.3d at pp. 376-377 (Berzon, J., concurring); *State v. Lucas* (Ariz. 2001) 18 P.3d 160, 163; *McCormick v. State* (Ind. 2004) 803 N.E.2d 1108, 1112-1113; *Payton v. Kearse* (S.C. 1998) 495 S.E.2d 205, 210; *Rector v.*

State (Ga. 1994) 444 S.E.2d 862, 865; *United States v. Greene* (C.M.A. 1993) 36 M.J. 274, 278-282; *Moore v. State* (Tex.App. 1991) 811 S.W.2d 197, 199-200.)

The standard for mixed motive analysis described in Justice Wardlaw's concurrence, and followed in the line of cases stemming from *Howard v. Senkowski,* is based upon the United State Supreme Court's holdings in other legal contexts. As acknowledged by this Court in *People v. Schmeck, supra*, 35 Cal.4th at p. 276, the federal high court has on many occasions permitted burden-shifting and/or found the existence of impermissible racism in situations where the offending party's reasoning was not purely based on racial concerns. (See *Arlington Heights v. Metropolitan Housing Development* (1977) 429 U.S. 252, 265 [in seeking to establish that zoning decision was motivated by racial bias in violation of the Equal Protection Clause, challenger need not establish "that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"]; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 241, 258 [in action under title VII of the federal Civil Rights Act of 1964, plaintiff need not prove that unlawful discrimination was the sole factor motivating an employment decision in order to establish a violation of the act]; *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 101-102 [mixed-motive case under 1991 amendments to Title VII].) This Court also has recognized the difficulty of establishing a purely racial motive in other criminal law contexts, and has found statutes applicable when racism was not the only motivation for a prescribed action. (See *In re Sassounian* (1995) 9 Cal.4th 535, 549, fn. 11 [to satisfy national origin special

circumstance, Pen. Code, § 190.2, subd. (a)(16), killing need not have been solely because of victim's "nationality or country of origin"]; *In re M.S.* (1995) 10 Cal.4th 698, 716 [prohibited bias only need be a substantial factor in the commission of the crime].)

The United States Supreme Court's equal protection cases have particular applicability in the *Batson/Wheeler* context – at their core, both *Batson* and *Wheeler* are equal protection cases. (See *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 98-99; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 276.) Indeed, the *Arlington Heights* decision is cited and discussed repeatedly in *Batson*. (*Batson v. Kentucky*, *supra*, 476 U.S. at pp. 93-94.) Further, the *Batson* court itself noted that it was relying on "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 . . . ." (*id.* at p. 94, fn.18), and this Court itself has recognized that Title VII cases are "authoritative in the *Batson* context." (*People v. Johnson*, *supra*, 30 Cal.4th at p. 1314.)

Assuming arguendo that this Court finds the existence of valid race-neutral reasons for the peremptory excusal of Ms. Davis, Ms. Sam, Mr. Dredd and/or Ms. Kimbrough, but also finds that other of the prosecutor's stated grounds were pretextual excuses for race-based bias, this Court should address the mixed motive issue and conclude that reversal of appellant's conviction is required because the state cannot now meet its burden to prove that the prosecutor would have peremptorily excused any of these prospective jurors had they not been Black. (See *Arlington Heights v. Metropolitan Housing Development*, *supra*, 429 U.S. 252, 265; *Howard v. Senkowski*, *supra*, 986 F.2d 24 at pp. 28-30; *Kesser v. Cambra*, *supra*, 465 F.3d at pp. 372-374.)

H. Reversal of the Entire Judgment Is Required

This case involves a Black defendant, represented by Black attorneys, who was charged with the capital murder of a white teenager. He was tried by a prosecutor who struck from appellant's jury every Black prospective juror that he could–a Girl Scout troop leader and licensed day care provider; a real estate and life insurance salesperson; a former public school teacher, principal and administrator; and a human resources manager for a large department store chain. No Blacks served on appellant's jury.

The prosecutor excused Black prospective jurors at a rate highly disproportionate to the rate that he struck non-Blacks, and *all* of the prosecutor's purported race-neutral grounds for excluding the Black prospective jurors were contradicted by the record of voir dire and the juror questionnaires, and undermined by his acceptance of seated jurors and alternates who shared the same views or characteristics as the purportedly undesirable Black prospective jurors.

Despite having two opportunities to shut down this abhorrent prosecutorial conduct, the trial court erroneously denied both of appellant's *Batson/Wheeler* motions. The court was unaware of the true content of the voir dire record and the juror questionnaires, and it consequently failed meaningfully to evaluate the prosecutor's proffered grounds for excluding 100 percent of the Black prospective jurors. Because its review was inadequate, the trial court failed to recognize that the prosecutor's various justifications were transparent pretexts for purposeful racial discrimination. The appellate record does not support a finding that the trial court engaged in a reasoned attempt to evaluate each of the prosecutor's justifications for challenging each of the Black prospective jurors. If the trial court had done

so, it would have recognized that the prosecutor exercised his peremptory challenges against these jurors for racially-motivated reasons.

Consequently, reversal of the entire judgment is required. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 97; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 283.)

II

THE TRIAL COURT ERRED BY FAILING TO SUA SPONTE INSTRUCT THE JURY ON ANY LESSER INCLUDED OFFENSES OF FIRST DEGREE MURDER

A. Introduction

Appellant was charged with first degree malice murder and murder by lying in wait for the killing of Joshua Rexford, and with the attempted murders of Walter Pupua and Freddie Badibanga. (CT 310-317.) As to the two attempted murder counts, the court instructed the jury on the lesser offenses of assault with a deadly weapon and attempted voluntary manslaughter. (RT 16:5211-5220, 5227-5228.) However, the trial court failed to sua sponte instruct the jury on any lesser included offense of first degree malice murder, despite the existence of substantial evidence raising a question as to whether all elements of first degree murder were present.

The trial court's failure to properly instruct on lesser offenses to first degree malice murder left appellant's jury with an all-or-nothing binary choice between a capital murder conviction and acquittal. The court's failure violated state law and deprived appellant of his rights to a fair jury trial, due process of law, and reliable guilt and special circumstance verdicts, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and reversal of appellant's first degree murder conviction, special circumstance findings, and penalty verdict is required. (*Beck v. Alabama* (1980) 447 U.S. 625, 632; *People v. Cooper* (1991) 53 Cal.3d 771, 827; *People v. Wickersham* (1982) 32 Cal.3d 307, 332-336; *People v. Sedeno* (1974) 10 Cal.3rd 703, 719; *People v. Valentine* (1946) 28 Cal.2d 121, 132.)

B. The Trial Court's Obligation to Instruct on Lesser Included Offenses

The trial court has the obligation to instruct on the general principles of law relevant to issues in the case before it; including giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present. (*People v. Vasquez* (2004) 32 Cal.4th 73, 115 [defendant has state constitutional right to have jury determine every material issue presented by evidence].)

This Court has acknowledged that the criminal justice system has a vested interest in requiring instructions on lesser included offenses as a method of ensuring the integrity of the system itself:

> "Our courts are not gambling halls but forums for the discovery of truth." [Citation omitted.] Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an "all or nothing" choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence.

(*People v. Barton* (1995) 12 Cal.4th 186, 196.)

Thus, trial courts in this state have the obligation to ensure that the jury will be accorded the full range of possible verdicts in a case whenever the evidence suggests the defendant may be guilty of a lesser offense than

the one charged. This obligation exists even if the parties object to such instructions. (*People v. Breverman* (1989) 19 Cal.4th 142, 154, 159 [obligation to give lesser included offense instruction not limited by the strategy, ignorance, or mistake of the parties].) This is the only way to give effect to the *Barton* edict that the verdict be no harsher nor more lenient than the evidence merits. (*Id.* at p. 159.) Further, the rule is to be interpreted broadly, so that the trial court must instruct on all lesser included offenses raised by the evidence; not just those which seem the strongest based on the evidence or those upon which the parties have openly relied. (*Id.* at p. 155.)

Consequently, "[a] trial court must instruct on lesser included offenses whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) Substantial evidence is evidence sufficient to deserve consideration by the jury; evidence that a reasonable jury could find persuasive. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8; see *People v. Vasquez*, *supra*, 32 Cal.4th at p. 116.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the trial court to instruct" on a lesser included offense. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

This Court must independently review the issue of whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) This determination is a mixed question of law and fact and is made without deference to the trial court's ruling. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) There is a presumption, however, that "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People*

v. Ratliff (1986) 41 Cal.3d 675, 694; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685.)

The requirement that the jury receive comprehensive instructions on every supportable theory of a lesser included offense is particularly critical in capital cases. "[F]orcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction." (*Beck v. Alabama* (1980) 447 U.S. 625, 632.) In *Beck*, the United States Supreme Court established that every capital defendant is entitled to a reliable lesser included noncapital offense instruction if the offense exists under state law and the evidence supports the instruction. (*Id.* at p. 627; *Hopper v. Evans* (1982) 456 U.S. 605, 611 ["*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction"]; see also *Everette v. Roth* (7th Cir. 1994) 37 F.3d 257, 261 [omission of lesser included voluntary manslaughter instructions violates federal due process where it results in "fundamental miscarriage of justice"]; *Vujosevic v. Rafferty* (3d Cir. 1988) 844 F.2d 1023, 1028 [failure to instruct on lesser included offense supported by the evidence violates federal due process].) Thus, in a capital case, where the evidence warrants a lesser included offense instruction, due process requires that the court give the instruction sua sponte. (*Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 374.)

C. The Trial Court Had a Sua Sponte Duty to Instruct the Jury on Second Degree Murder

The trial court did not instruct the jury on second degree murder because it found no evidence in the record that the case was anything other than a premeditated and deliberate murder. (RT 14:4565-4566.) The trial

court's assessment was wrong and its failure to instruct on second degree murder constitutes reversible error.

1. General Legal Principles Applicable to Second Degree Murder

Appellant was charged with the premeditated first degree murder of Joshua Rexford. (CT 310-317.) A premeditated and deliberate killing with express malice is murder in the first degree; otherwise an unjustified killing is presumed to be second degree murder. (Pen. Code, § 187; *People v. Anderson* (1968) 70 Cal.2d 15, 25-26; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes lesser and greater crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [second degree murder is lesser offense of first degree murder].)

Second degree murder occurs when the perpetrator intended unlawfully to kill a human being with malice aforethought, but the evidence is insufficient to prove deliberation and premeditation. (Pen. Code, §§ 187, 189; *People v. Nieto-Benitez* (1992) 4 Cal.4th 91, 102; *People v. Cooper* (1991) 53 Cal.3d 771, 827.) Malice can be express or implied. To prove express malice, the prosecution must prove beyond a reasonable doubt that the defendant acted with a deliberate and wrongful intent to kill. (*People v. Saille* (1991) 54 Cal.3d 1103, 1113-1114; see also *In re Christian S.* (1994) 7 Cal.4th 768, 778, 780, fn. 4.) Implied malice is proved when the evidence demonstrates the defendant acted with a conscious disregard of the danger to human life. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.)

Additionally, a second degree felony murder occurs when the defendant commits a homicide during the course of a felony that is inherently dangerous to human life, but is one not enumerated in Penal Code section 189. The grossly negligent discharge of a gun is an inherently

dangerous felony[73] that can support a conviction for second degree felony murder; the *People v. Ireland*[74] assault/murder merger doctrine does not apply when the killing results from the defendant's commission of a felony with a collateral and independent purpose from the resulting homicide. (*People v. Robertson* (2004) 34 Cal.4th 156, 164-165 ["The felony-murder rule eliminates the need for proof of malice in connection with a charge of murder, thereby rendering irrelevant the presence or absence of actual malice, both with regard to first degree murder and second degree felony murder"]; *People v. Clem* (2000) 78 Cal.App.4th 346, 351; 1 Witkin and Epstein, Cal. Criminal Law (3d ed. 2000) § 174, p. 787; 1 Witkin and Epstein, Cal. Criminal Law, *supra*, § 187, p. 797.) In other words, "[t]he court-created second degree felony murder rule acts as a substitute for the mental component of malice[,]" and, "[w]hen the felony-murder rule applies, 'the only criminal intent required is the specific intent to commit the particular felony.' [Citation omitted.]" (*People v. Lewis* (2006) 139 Cal.App.4th 874, 882.) While "[t]he first degree felony-murder rule is a creation of statute . . . [,] [t]he second degree felony-murder rule is a common law doctrine." (*People v. Robertson*, *supra*, 34 Cal.4th at p. 166.)

Thus, a defendant can be convicted of second degree rather than first degree murder if the defendant subjectively experiences heat of passion or provocation at the time of the murder, such that it negates deliberation or

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[73] " [A]ny person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison." (Pen. Code, § 246.3.)

[74] *People v. Ireland* (1969) 70 Cal.2d 522, 538-539.

premeditation. (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1208 [defense applies even when subjective belief unreasonable]; see *People v. Johnson* (1993) 6 Cal.4th 1, 42-43 [sua sponte instruction on provocation and second degree murder must be given where evidence of provocation would justify jury determination that accused had formed intent to kill as direct response to provocation and had acted immediately to carry it out].)

2. The Facts of This Case Required the Trial Court to Instruct on Second Degree Murder

The trial court declined to instruct appellant's jury on second degree murder because it "could not think of any theory other than a first degree" murder:

> [J]ust off these facts I don't think there is any way that the jury could conclude – and I think it would just be to invite a compromised verdict if I instructed on second degree.

(RT 14:4584-4585; see also RT 14:4564-4566.)

The facts of this case present several viable alternative theories to first degree murder and first degree murder by lying in wait. Since the inferences to be drawn from the evidence support an unpremeditated killing as well as a premeditated killing, the trial court should have instructed the jury on the full range of possible verdicts supported by the evidence. (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)

a. Instructions on Second Degree Murder Were Required Because There Was Substantial Evidence That the Shooting Was Consistent with Implied Malice Second Degree Murder

The trial court ignored substantial evidence showing that appellant did not intend to kill Josh Rexford, but instead shot him as the result of an unplanned reckless act, intentionally done by a defendant who subjectively

knew that his act endangered the lives of the apartment occupants. (See *People v. Dellinger*, *supra*, 49 Cal.3d at pp. 1215, 1217.) In assessing mental state at the time of a charged crime, "a defendant is entitled to have the jury take into consideration all the elements in the case which might be expected to operate on his mind." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064; *People v. Smith* (1907) 151 Cal. 619, 628.) Any "theory of implied malice is focused squarely on defendant's actions and mental state, and cannot be described as a peripheral issue in a murder charge." (*People v. Lewis, supra*, 139 Cal.App.4th 874, 890.)

A properly instructed jury could have concluded that appellant and the other men intended to frighten the apartment occupants into telling all they knew about the Manuel Farias killing. The prosecution's evidence established that appellant only wanted to talk to "Josh" in order to find Brian. (RT 11:3431, 3433 ["They said Brian was the one who killed my brother and that Josh was his cousin and they were going to get through him to find Brian"].) Detective Franks testified that Linda Farias told him that appellant was purportedly overheard discussing a "Josh," but never specifically said "Josh Rexford." (RT 15:4706, 4725-4726.) No witness testified to hearing appellant make threats to harm Mr. Rexford; nor would appellant's interests have been served by killing Mr. Rexford without first talking to him about Brian. A reasonable juror could easily have concluded that appellant sought out a "Josh" to get information from him, not to kill him.

Moreover, neither survivor testified that a gun was aimed directly at Mr. Rexford. Mr. Pupua testified that, as soon as the door opened, the black man pointed the black gun toward "us," not Mr. Rexford specifically. (RT 9:2874; see also RT 9:2876, 2879.) Mr. Badibanga testified that

appellant's gun was pointed "upwards," but he did not say that the gun was pointed at anyone in particular. (See RT 9:3123-3124.) The lack of a readily-identifiable target supports a reasonable inference that appellant fired recklessly without intending to kill anyone.

Further, the fact that Mr. Rexford was the only person who was shot does not necessarily mean that the men who entered the apartment planned to kill him. When the shooting began, both Mr. Pupua and Mr. Badibanga immediately went to the floor. (See RT 9:2882; RT 10:3127-3128.) Mr. Rexford stood straight up. (RT 10:3127-3128.) Even the prosecutor conceded that this was a reasonable interpretation of the evidence:

> Why did Joshua Rexford die as oppose to the other two people [?] . . . Joshua Rexford did something you should not do in the situation. You're in a situation with untrained killers, killers who are keyed up, and on raw edge. And they're just firing at them, and then all of a sudden somebody stands up and they start following the moving target.

(RT 17:5508.) Like the prosecutor, most certainly a properly instructed juror could have accepted the tragic, but reasonable, probability that Mr. Rexford was the only man who was shot because he was the only one who stood up.

The fact of the jury's conviction indicates the jurors believed appellant bore some culpability for the killing. But despite this, one or more of the jurors could have reasonably believed that appellant did not act with a mental state that qualified for first degree murder. Consequently, the trial court erred when it "ignored the jury's right to believe" the evidence "which negate[d] the commission of [first degree murder] or that [appellant] acted with wilfulness, deliberation, or premeditation." (*People v. Jeter* (1964) 60 Cal.2d 671, 676.) The trial court's instructions limited

the jury to either accepting the prosecution's theory of premeditation and deliberation, or accepting appellant's testimony that he acted under duress and/or did not have a gun. There was, however, a reasonable middle ground supported by substantial evidence. Yet, the trial court left appellant's jury in the dark regarding the lesser included offense of implied malice second degree murder, and instead only instructed the jury on the elements of the death-qualifying greater offense. The court erred in doing so.

b. Instructions on Second Degree Murder Were Required Because There Was Substantial Evidence That the Shooting Was Consistent with Express Malice Second Degree Murder

The trial court held the view that if the jury were to return a guilt verdict on Count One of the Information, it could only be for first degree murder. (RT 14:4564, 4566.) This view, and the subsequent failure to instruct on second degree murder, ignored substantial evidence that could have supported a finding of second degree murder based upon an express malice theory.

This Court has identified three categories of evidence that are relevant in determining whether there is sufficient evidence to demonstrate premeditation and deliberation when a defendant has been charged with first degree murder: planning activity, motive, and manner of killing. (*People v. Manriquez* (2005) 37 Cal.4th 547, 577.) By extension, if these categories of evidence are relevant to determining whether the state has proven first degree murder, it logically follows that the presence of substantial evidence indicating one or more of these categories of evidence is not present in a case must inform whether a trial court should instruct on

second degree murder. Making that examination in this case leads to the conclusion that the trial court erred by not giving such an instruction.

i. Planning Activity

This Court has defined "planning" as "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 26.) Although there was testimony that appellant was purportedly armed and lying in wait for the apartment occupants, there was absolutely no direct or conclusive evidence that he or the other assailants planned to kill or injure anyone in Mr. Pupua's apartment. It is equally as reasonable and likely that appellant and the other men waited at the apartment complex to talk to the apartment occupants about "Brian" and the Farias killing, and impulsively fired their guns in response to provocation or to force them to sit still and cooperate.

Appellant's actions before the shooting were not "explicable as intended to result in [a] killing." Rather than furtively concealing himself in a vehicle or hidden area and sneaking into the Pupua apartment when no other persons were in sight, appellant went out of his way to interact with Nancy and Sebrina Smith and Michael Honess. He lounged in common areas and stairwells where he could be observed by other tenants and their visitors. He knocked on the door of the Pupua apartment, when he could have tried the latch and entered the unlocked door unannounced.

The facts described above all undermine any belief that the only reasonable conclusion a jury could have drawn was that appellant was planning to kill Josh Rexford. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [evidence of planning where defendant "surreptitiously" entered the victim's home while she was outside in her car]; *People v. Haskett* (1982)

30 Cal.3d 841, 850 [evidence of planning where defendant sat for several minutes in car parked outside of victim's residence and entered her home unannounced]; *People v. Anderson*, *supra*, 70 Cal.2d at p. 27 [finding strong planning evidence in *People v. Hillery* (1965) 62 Cal.2d 692, 704, based upon "the defendant's surreptitious conduct, subjection of his victim to his complete control, and carrying off of his victim to a place where others were unlikely to intrude"].) The facts as readily undermine the component of planning activity as support it. Consequently, an issue certainly existed as to whether this category of evidence relevant to premeditation and deliberation was present.

ii. Motive

The prosecution theorized that appellant targeted Mr. Rexford to retaliate for the murder of Manuel Farias. (RT 17:5489, 5501-5502.) Establishing a motive was important to demonstrate that appellant had a connection to Joshua Rexford prior to the shooting and that he was seeking to harm him. The essence of the "motive" evidence was: (1) Raymond and Linda Farias's testimony that appellant was a friend of their deceased brother Manuel, who was the victim of an unsolved murder (RT 11:3427, 3431, 3405-3407); (2) Linda Farias's testimony that, during the reception after Manuel's funeral, she overheard appellant and others talking about contacting a "Josh" in order to find Josh's cousin, Brian, who purportedly killed Manuel Farias;[75] (3) Raymond Farias's and Christina Hogue's

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[75] Linda Farias testified that she met appellant at the reception after her brother's funeral and overhead appellant and three other young men talk about a "Josh" (not specifically Joshua Rexford). (RT 11:3427-3429.) She heard them say that "Josh was Brian's cousin and they would get through him to find Brian." (*Id.* at p. 3431.) She also testified that "[t]hey said

(continued...)

testimony that appellant told Raymond that he killed Josh Rexford, that Raymond delivered to appellant and Jake Carroll a newspaper containing an article about the Rexford shooting, and that Raymond told Hogue that Rexford was shot to "get back" at Brian (RT 11:3407-3408; RT 12:3569-3570, 3578, 3582-3584; and (4) Troy Holloway's testimony that, before the shooting, appellant questioned him about what Mr. Rexford was like and "where he hung out."[76] (RT 11:3443-3447, 3456.)

The purported evidence of motive was undermined by the defense throughout the course of the trial; both the evidence itself was questioned and the witnesses who delivered the evidence were rendered suspect. In fact, even the origination of the motive theory was questionable.

Christina Hogue, a friend of Manuel Farias, brought the "motive" theory to the attention of Dawn Hall, the victim's mother. (RT 11:3408; RT 12:3564.) According to Ms. Hogue, at Manuel Farias's funeral reception, she overhead a conversation about revenge and the name "Brian" was mentioned; the name "Josh" was not. (RT 12:3567, 3580-3581.) A couple of months after the funeral, Ms. Hogue met Ms. Hall while Ms. Hall was in front of a store handing out flyers about the shooting. (RT 13:4251.) She told Ms. Hall about the conversation at the funeral reception. Ms. Hall's recollection was that Ms. Hogue mentioned appellant by name; whereas

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[75](...continued)
Brian was the one who killed my brother and that Josh was his cousin and that they were going to get through him to find Brian." (RT 11:3433.)

[76] Holloway also testified that appellant said that he wanted to "talk" to Mr. Rexford. (RT 11:3456.)

Ms. Hogue testified that she was not sure if appellant participated in the conversation she overheard at the funeral. (RT 12:3566, 3579-3580.)

After she talked to Christina Hogue, Ms. Hall wrote a series of letters to Raymond Farias asking him to talk to her. (RT 13:4252-4253.) Linda Farias called Ms. Hall to find out why Raymond was receiving letters. They had two conversations; during the second conversation Ms. Farias mentioned Sean Flores's name.[77] During both conversations, Ms. Hall told Ms. Farias to call Detective Franks–the investigating detective on both the Farias and Rexford homicides. (RT 13:4251-4253; RT 15:4700.)

After the second conversation, Ms. Hall called Detective Franks, and he re-interviewed Linda Farias. (RT 11:3438; RT 13:4252-4253; RT 15:4725-4730.) According to Franks, when he first interviewed Ms. Farias about the alleged connection between her brother's death and Josh Rexford's, she did not mention anything about appellant's purported comments at Manuel's funeral.[78] (RT 15:4692-4693.) When Franks interviewed Ms. Farias on April 2, 1997, she told him for the first time that appellant "was present" when the men talked about "Josh" after Manuel's

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[77] Sean Flores testified at appellant's trial. He denied participating in or overhearing any conversation of this nature at the funeral. (RT 14:4358-4359.)

[78] Although Linda Faris testified that she told Franks about the conversation at the funeral reception when he first interviewed her, she acknowledged that no such statement was on the audiotape of their conversation. She claimed that Franks only recorded part of their conversation and that she told Franks about the revenge conversation after he turned off the tape recorder. (RT 11:3438-3440.) Franks, however, testified that though he had turned off the tape recorder at one point, he then restarted the tape and went back over all of the information they covered prior to it being turned off. (RT 15:4725-4730, 4735, 4736, 4738-4739.)

funeral. (RT 14:4700-4701.) However, when he questioned her on April 17, 1997 – after she talked to Dawn Hall – she told him that appellant not only was present during the conversation, he was doing most of the talking. (RT 15:4707-4708, 4725-4730.)

At trial, Linda Farias denied that she was biased against appellant, and said that she did not believe he had any involvement in her brother's murder. (RT 11:3436-3437.) However, Franks testified that Ms. Farias twice told him that she believed appellant was in some way responsible for Manuel's death. (RT 15:4734.)

Additionally, appellant proffered substantial evidence that Detective Franks harassed and coerced Raymond Farias, a mentally and physically impaired 17 year old.[79] Franks extensively interrogated Raymond at the Farias home for approximately 90 minutes. When he did not get what he wanted, over the adult family members' objections and demands that they be allowed to call their attorney, Detective Franks removed Raymond from his home and took him to the police station, where he interrogated the

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[79] Raymond Farias suffered from cerebral palsy, and was under a psychiatrist's care when he was interrogated. (RT 11:3406, 3423.) Cerebral palsy is a severe developmental disability. (See Pen. Code, § 1370.1(H) ["As used in this section, 'developmental disability' means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual, and shall not include other handicapping conditions that are solely physical in nature. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature."].

disabled boy for another two hours. (RT 14:4655-4658.) While at the police station, Franks threatened to take the boy to "the judge" if he did not accept Franks's version of the facts. (RT 11:3410-3415, 3422.) As a result, Raymond told Franks about appellant's purported admission. (RT 11:3414, 3422.)

Dawn Hall was also responsible for Troy Holloway's involvement in the case. Troy Holloway was a very close friend of Mr. Rexford's and was deeply affected by Mr. Rexford's murder. (RT 11:3441, 3443, 3449, 3459; RT 12:3633-3635, 3669; RT 13:4228-4229.) He attended Mr. Rexford's wake. (RT 13:4221.) In contrast, Holloway barely knew appellant, and had met him only because they had a mutual friend, Patrick Wiley. (RT 11:3443, 3524.)

After Ms. Hall learned that Holloway called her house and left a message regarding a cassette tape he had received from appellant, she called Holloway to ask him to tell the police all that he knew. (RT 13:4222, 4226, 4261-4263.) However, Holloway's mother interceded, and ordered Ms. Hall to not call Holloway again. (RT 13:4222-4223, 4264.) Hall called Detective Ortiz on the same day that she received Holloway's message about the audiotape. (RT 13:4263-4264.)

The transcript of the audiotaped Franks/Holloway interview reveals that Holloway twice stated that appellant told him that he only wanted to *talk* to Mr. Rexford. (SCT 3:825, 833.) Under cross-examination, Holloway could not explain why he failed to warn Mr. Rexford if he believed that appellant's questions about Mr. Rexford were part of a "set-up." Even though he saw Mr. Rexford on the day after his purported conversation with appellant, Holloway testified that he failed to tell his

close friend about appellant's inquiries or warn him about being set-up because it "didn't seem too important." (RT 11:3492-3494.)

Under direct examination by the prosecutor, Holloway testified that Bennett Brown was the only witness to his and appellant's conversation about Mr. Rexford.[80] (RT 11:3457.) However, under cross-examination, Holloway conceded that he told the police that there were two females present when he and appellant talked. (RT 11:3491.) Then, he claimed to have told the police that Brown *and* the two females were present during the conversation but the two women did not hear the conversation. (RT 12:3549.) These inconsistencies alone could certainly have been enough to lead a reasonable juror to cast doubt on whether Holloway and appellant ever spoke about Mr. Rexford.

Additionally, appellant presented substantial evidence that, just as he did with Raymond Farias, Detective Franks coerced and threatened Holloway into implicating appellant. (RT 14: 4425-4447, 4456, 4533-4535.) However, even though the trial court limited appellant's presentation of evidence on the issues pertaining to police misconduct, it instructed the jury in great detail on how they could and could not use the evidence of Frank's misconduct:

> And Mr. Faal properly has gone into the various things – specifically, let's talk about Troy Holloway – gone into things that Detective Franks told Troy Holloway that the judge was going to do such and such and so on. That's proper for your consideration from the standpoint of the question of whether Troy Holloway is telling the truth. It's proper for your consideration from the standpoint, "Is Troy Holloway telling the truth?" [¶][¶] And it may be very relevant – it's up to you

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[80] Mr. Brown testified at trial, but was not questioned about this alleged conversation.

> – but it may be very relevant in deciding whether a witness is believable to say, "Well, were there some kind of threats? What would I – if somebody threatened that the judge was going to do this to me, would that cause me to tell a lie" and that's all legitimate. You can take that into account. . . . [¶][¶] I suppose it would be appropriate for you having heard the things that Scott Franks told Troy Holloway you have figured out were unethical, that you could use that in evaluating whether you think Scott Franks as a witness is a truthful person or not. . . . [¶] [Y]ou heard him say things to Troy Holloway under circumstances that were not true, and I think it's perfectly okay for you to say "is this guy a truthful person or not a truthful person?"

(RT 14:4451-4455.)

In light of the considerable evidence of coercive investigation tactics used by Franks to obtain the unreliable statements and testimony of Raymond Farias and Troy Holloway; the victim's mother's involvement in eliciting the statements and testimony of both Farias siblings, Holloway and Hogue; and the inconsistent, biased and incredible nature of the motive witnesses' testimony, a properly instructed reasonable juror could have been persuaded to reject the most critical component of the prosecution's theories of first degree murder, and accepted that, at worst, appellant's motive in contacting Mr. Rexford was to find Josh's purported cousin, Brian, not to kill Josh Rexford.

Finally, although the prosecution spent significant trial time attempting to prove a motive to kill, in the end even the prosecutor understood that the case for a premeditated motive to kill was weak, as evidenced by his statement to the jury during closing argument that motive is nice to have, but not necessary to convict. (RT 16:5258.) The court, too, saw the impotence of the prosecution's motive evidence when, during the Penal Code section 190.4 hearing, the court found "no motive of

consequence." (RT 18:6141.) Consequently, the lack of a motive to deliberately and premeditatedly kill seriously undermines any notion that this was a first degree murder.

iii. Manner Of Killing

A premeditated and deliberate first degree murder requires a manner of killing "so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way." (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27, citation omitted.) As discussed elsewhere, there was substantial evidence that the Rexford shooting was the result of a reckless act intended not to kill, but to scare the apartment occupants into revealing information about the Manuel Farias murder and the whereabouts of "Brian."

In addition, that Mr. Rexford had five bullet wounds (RT 10:3202) reasonably supports a finding that the shooting occurred not with premeditation and deliberation but as the result of an unreasonable "explosion" of passion. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626 [multiple wounds or acts of violence consistent with impassioned "explosion" of violence]; *People v. Anderson*, *supra*, 70 Cal.2d at p. 24 ["It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation"]; *People v. Jiminez* (1950) 95 Cal.App.2d 840, 842-843 [stabbing victim eight times consistent with subjective heat of passion].) The prosecutor himself acknowledged this likelihood by arguing that the crime was not the result of trained killers, but rather persons keyed up and on edge. (RT 17:5507-5508.)

This was not a precise, carefully targeted execution. The spraying of bullets all over the apartment, and the leaving of survivors (including Mr.

Rexford), suggests an explosion of violence as opposed to a calculated murder. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626; *People v. Anderson*, *supra*, 70 Cal.2d at p. 24.)

That the men left without making sure that Mr. Rexford was dead also supported a reasonable conclusion that they were not there to kill him. There was no evidence that, after they stopped firing, the men could not see Mr. Rexford walking around the living room. Mr. Pupua testified that Mr. Rexford was walking in the living room immediately after the shooting, despite having mortal wounds. (RT 9:2883-2884.) Deputy Quezada testified that, by time he arrived, Mr. Rexford was in a bedroom, still conscious and able to speak. (RT 12:3868-3869.) The cumulative effect of this evidence could have persuaded a reasonable juror to believe that, if the gunmen truly premeditated an intent to kill Mr. Rexford, there was absolutely nothing to prevent them from shooting him until they were certain that he was dead.

This Court's holding in *People v. Bradford*, *supra*, 14 Cal.4th at p. 1229, instructs on this point. There, and here, the trial court and defense counsel believed "that the record [contained] no evidence that the killing occurred without premeditation or deliberation." (*Id.* at p. 1345.) However, this Court held that:

> The record contains substantial evidence from which the jury reasonably could find that defendant killed either or both victims without premeditation or deliberation. Although defendant's initiation of the offenses by luring the victims to the same isolated location exhibits considerable premeditation and deliberation, the nature of the murders themselves would not preclude a finding that defendant acted upon impulse. The circumstance that the manner of killing, ligature strangulation, might be somewhat more time-consuming than other methods, for example firing a weapon, does not obviate

the conclusion that defendant might not have premeditated or deliberated before killing the victims.

(*Ibid.*)

In sum, while the trial court impliedly acknowledged that it did not believe that motive had been proven, in reaching its finding that Mr. Rexford's killing was undoubtably a first degree murder, it ignored the absence of evidence of killing-focused planning activity, the scattershot manner of killing that was indicative of an explosion of violence, and substantial evidence that appellant recklessly fired his gun after his attempt to talk to the apartment occupants went awry. It also ignored the *Anderson* checklist for assessing this evidence. Thus, there was no evidentiary foundation for the court's conclusory finding that the jury could not reasonably conclude that a second degree express malice murder had occurred rather than a premeditated killing. (See RT 14:4566.)

c. The Trial Court Erred By Failing to Instruct on an Aiding Abetting Theory of Second Degree Murder

The trial court instructed the jury on accomplice liability for aiding and abetting a first degree murder by providing CALJIC Nos. 3.00, 3.01 and 3.03. (RT 16:5207-5209; CT 3:443-445.) Apparently, the trial court gave these instructions because of the belief that the jurors could find that someone other than appellant fired the shots that killed Mr. Rexford, disbelieve appellant's theory of defense, yet still believe he was an aider and abettor to the Rexford killing. (RT 14:4539-4540.)

Logic dictates that if the trial court believed it was necessary to instruct on aiding and abetting a first degree murder because of the reasons it proferred, it also should have sua sponte instructed the jury on the law pertaining to aiding and abetting a second degree murder that was the

natural and probable consequence of an assault with a firearm. (See CALJIC No. 3.02.) As noted previously, appellant's testimony and statements alone provided substantial evidence that warranted an instruction on this lesser included offense. (See *People v. Lewis*, *supra*, 25 Cal.4th at p. 646; see also *People v. Young* (2005) 34 Cal.4th 1149, 1200 [determination as to viability of instruction must be made without reference to credibility of evidence].)

Appellant presented substantial evidence – through his trial testimony and the two pre-arrest audiotaped statements that were played for the jury – that a Mexican male shot and killed Mr. Rexford. (RT 15:4820-4821, 4936-4944; 3 SCT 863-865, 919-921.) Specifically, appellant testified that he did not have a gun (RT 15:4816), and he knew that the Mexican male and his white male companion were armed and "dangerous." (RT 16:5052.) He also said that he stopped at Mr. Pupua's door only because that was where the Mexican male stopped, and that the Mexican male knocked on, then opened, the front door. Then, he pushed appellant aside and shot into the apartment using a silver .25 caliber pistol in one hand and a black nine millimeter pistol in the other. (RT 15:4821.)

The shooting survivors and the prosecution's forensic technician also provided substantial evidence that there was a second gunman at the scene. The survivors agreed that appellant was only holding one gun, and the crime scene technician testified that she found both nine millimeter and .25 caliber cartridges at the scene but could not identify the caliber of the three bullets that the pathologist removed from Mr. Rexford's body. (RT 9:2874-2875, 2900, 2950; RT 10:3123, 3146; RT 12:3692, 3702-3703.)

Further, as discussed extensively elsewhere, there was substantial evidence that appellant and the Mexican male were at the apartment to talk

to the occupants, not to shoot them, and that the reckless spray of gunfire that left two of the occupants unharmed was not indicative of premeditated and deliberate first degree murder. The prosecutor acknowledged as much by arguing to the jury that the untrained killers were nervous and keyed up. (RT 17:5507-5508.)

In addition to appellant's statements and testimony, both Mr. Pupua and Mr. Badibanga saw more than one man at the apartment door prior to the shooting. (RT 11:2950, RT 10:3125-3126, RT 14:4622-4623.) Thus, there was direct evidence linking "[another] person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

On these facts, appellant's jury could reasonably have convicted him of aiding and abetting a second degree murder that was the natural and probable consequence of an assault with a firearm. Under the natural and probable consequences doctrine, a defendant who aids and abets an assault may be guilty of an unintended murder, if the killing was a natural and probable consequence of the intended assault. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) "To trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269; see *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190 ["Thus, the ultimate factual question is whether the perpetrator's criminal act, upon which the aider and abettor's derivative criminal liability is based, was 'reasonably foreseeable' or the probable and natural consequence of a criminal act encouraged or facilitated by the aider and abettor"].)

The facts of this case fall squarely within the elements of aider and abettor liability under a natural and probable consequences theory, as set

forth in *People v. Prettyman, supra*, 14 Cal.4th at pp. 262, 267. Appellant's jury could reasonably have found from the evidence that:

- appellant acted with knowledge of the unlawful purpose of the perpetrator – appellant's "fireworks" comment to Michael Honess and his testimony that the situation was "dangerous" (RT 14:4392; RT 16:5052) indicate that he knew that the men were going to use the guns to assault someone at some point;
- appellant acted with the intent and purpose of committing, encouraging, or facilitating the commission of a predicate or target offense – knowing that the men had weapons and ammunition and were going to set off "fireworks" in the form of assault with a firearm, appellant provided the vehicle the men used to travel to and from Mr. Pupua's apartment complex (RT 15:4801-4802, 4823-4824);
- appellant by act or advice aided, promoted, encouraged or instigated the commission of a predicate or target crime – in addition to providing transportation for the shooters, appellant, according to Michael Honess, gave orders to the other men who invaded Honess's apartment, and was the one who signaled to the others when to leave Mr. Honess's apartment (RT 10:3005, 3016, 3018);
- the defendant's confederate committed an offense *other than* the target crime – during his assault on Mr. Pupua and/or Mr. Badibanga, the Mexican male shot and killed Mr. Rexford (RT 15:4821); and
- the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted – an unlawful killing is a natural and probable consequence of assault by firing a gun, especially where the shooting occurs in one room of an apartment and the room is occupied by three individuals. (See *People v. Hickles* (1997) 56 Cal.App.4th 1183, 1192-1193; *People v. Woods* (1992)

8 Cal.App.4th 1570, 1593; *Solis v. Garcia* (9th Cir. 2000) 219 F.3d 922, 924-925, 927.)

Accordingly, the trial court erred in failing to provide appellant's jury with instructions on aider and abettor liability for second degree murder under the natural and probable consequences theory.

d. Instructions on Second Degree Murder Were Required Because There Was Substantial Evidence That the Shooting Was a Second Degree Felony Murder

A killing committed in the course of discharging a firearm in a grossly negligent manner is second degree murder. (*People v. Robertson*, *supra*, 34 Cal.4th 156, 164.) There was substantial evidence that appellant was at Mr. Pupua's apartment not to harm the "Josh" that he found, but rather to talk to him about how to locate "Brian," the man purportedly involved in Manuel Farias's death. Thus, Mr. Badibanga's testimony that appellant's gun was pointed "upwards" when he began shooting (RT 9:3123-3124), his and Mr. Pupua's testimony that all three of the apartment occupants made sudden movements when they saw appellant standing at the door with a gun (RT 9:2870, 2882, RT 10:3127-3129), the disorganized nature of the shooting, and the fact that Mr. Pupua and Mr. Badibanga were not shot could have persuaded a reasonable, properly instructed juror to conclude that appellant was guilty of second degree felony murder because he recklessly scattered shots throughout the room, not intending to hit anyone but rather wanting to frighten the three occupants into keeping still and giving up the information he wanted about "Brian."

Such a result would be consistent with the case law. In *People v. Robertson*, *supra*, 34 Cal.4th at p. 156, in addition to second degree express

and implied malice murder, the jury was instructed on second degree felony murder predicated upon the defendant's grossly negligent discharge of a firearm. Mr. Robertson admitted that he was safely inside his home when he heard a loud noise outside; from the window, he could see four men either dismantling or stealing his car. He retrieved a gun, stood on his porch and fired at the men, then ran to the sidewalk or street and, as the men were running away, opened fire again "upwards into the air" intending to scare them. However, he killed one of the men with a shot to the back of the head. (*Id.* at pp. 161-162.) In finding that the merger doctrine was inapplicable, this Court addressed the predicate felony of discharging a firearm:

> In the *Mattison* case, we concluded that use of the second degree felony-murder rule was appropriate when the purpose of the predicate felony was independent of or collateral to an intent to cause injury that would result in death. [Citation.] . . . The defendant's asserted underlying purpose was to frighten away the young men who were burglarizing his automobile. According to the defendant's own statements, the discharge of the firearm was undertaken with a purpose collateral to the resulting homicide, rendering the challenged instruction permissible. As Justice Werdeger pointed out in her concurring opinion in *Hansen* [*People v. Hansen* (1994) 9 Cal.4th 300], a defendant who discharges a firearm at an inhabited dwelling house, for example, has a purpose independent from the commission of a resulting homicide if the defendant claims he or she shot to intimidate, rather than to injure or kill the occupants. ([*People v. Hansen*, *supra*, 9 Cal.4th at p. 318 (conc. opn. of Werdegar, J.)].)

(*Id.* at pp. 615-616; see *People v. Randle* (2005) 35 Cal.4th 987, 999 [*Robertson* distinguishable; merger doctrine barred second degree felony-murder conviction because defendant admitted that he shot *at* victims after he fired above their heads].)

In the instant case, we have appellant's purported statements – at the Farias funeral and to Troy Holloway and Detective Franks – that the "asserted underlying purpose" for contacting "Josh" was to find "Brian." Since appellant could not obtain information from a dead man, it is reasonable to conclude from the totality of the evidence that he negligently sprayed the room with bullets to "intimidate, rather than to injure or kill" Mr. Rexford. Consequently, in the face of this evidence, the trial court had a duty to sua sponte instruct the jury on the predicate felony (Penal Code section 246.3) and the common law principles applicable to second degree felony murder.

3. Conclusion

There is ample evidence that appellant went to the apartment to contact Mr. Rexford for the sole purpose of finding Brian. Being armed suggests that appellant and his companion intended to use the weapons to obtain the needed information from Mr. Rexford concerning Brian's location. Then, once they entered the apartment, the situation immediately deteriorated and shots were fired without the premeditation or deliberation required for first degree murder.

The scattershot method of firing shows no intent to kill, but an intent to do a dangerous act with a conscious disregard for human life. The same evidence supports second degree felony murder, where the felony was the grossly negligent discharge of a firearm.

Finally, completely overlooked by the court and counsel was that based on appellant's testimony alone, the jury could have believed that appellant aided and abetted a second degree murder by his companion, the actual shooter, that was the natural and probable consequence of an assault with a firearm.

Consequently, the trial court's failure to sua sponte instruct appellant's jury on all possible theories of second degree murder supported by substantial evidence violated state law and appellant's federal constitutional rights to due process, a fair trial by jury, and a reliable guilt phase determination.

D. The Trial Court Erred By Failing to Instruct Sua Sponte on Voluntary Manslaughter

Penal Code section 192, subdivision (a), provides that a killing committed without malice and "upon a sudden quarrel or heat of passion" is voluntary manslaughter. Thus, a defendant who commits an intentional and unlawful killing, but who lacks malice, is guilty of voluntary manslaughter. (*People v. Barton*, *supra*, 12 Cal.4th at p. 199; *People v. Breverman*, *supra*, 19 Cal.4th at p. 153.) And an absence of malice is presumed if the killing is "shown to have been committed in a heat of passion upon sufficient provocation." (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 719.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 326; *People v. Sedeno*, *supra*, 10 Cal.3d at p. 719.)

Voluntary manslaughter has both subjective and objective components. First, the defendant must actually have killed in the heat of a reason-obscuring passion. Second, the provocation must be of a nature that, under the circumstances, would provoke a reasonable person to a state of passion. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1044; *People v. Steele* (2002) 27 Cal.4th 1230, 1252; *People v. Wickersham*, *supra*, 32 Cal.3d at pp. 326-327.) The first element is viewed subjectively and the second is viewed objectively. (*People v. Cole*, *supra*, 33 Cal.4th 1158, 1215.)

Whether the two prongs of this test have been met is a question for the jury. (See *People v. Valentine* (1946) 28 Cal.2d 121, 132.) As to the objective component, no specific type of provocation is required to meet the test. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Valentine*, *supra*, 28 Cal.2d at pp. 141-144; *People v. Lasko*, *supra*, 23 Cal.4th at p. 108.) As to the subjective component, evidence of provocation itself can be circumstantial evidence from which the jury can infer that the defendant killed in an intense emotion, or a heat of passion. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 323, 329.)

Thus, a voluntary manslaughter occurs if the killer's reason was actually obscured as the result of a strong passion aroused by provocation sufficient to cause an ordinary person of average disposition to act from this passion rather than judgment; that is, to act rashly or without due deliberation and reflection. Intentional killings can be voluntary manslaughters. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.)

Additionally, voluntary manslaughter occurs when a defendant honestly, but unreasonably, kills in self-defense. This is considered to be imperfect self-defense, and occurs when a defendant has a subjective belief in the need to defend himself, but that belief is objectively unreasonable. Under these circumstances, the defendant has acted without malice and is guilty of manslaughter. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) In this case, that means that an imperfect self-defense theory would focus on how appellant actually and honestly interpreted and responded to his interaction with Mr. Rexford and the other apartment occupants, rather than on how a hypothetical similarly situated reasonable person would have acted. When supported by substantial evidence, a trial court must sua

sponte instruct on unreasonable belief self-defense. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 683.)

1. The Court Should Have Instructed the Jury on Voluntary Manslaughter Because There Was Substantial Evidence That the Shooting Occurred as a Result of Heat of Passion and Provocation

The fact that appellant was convicted of attempted voluntary manslaughter on the attempted murder counts clearly indicates that the jury unanimously believed that appellant lacked malice in firing at Mr. Pupua and Mr. Badibanga.[81] (See *People v. Von Ronk* (1985) 171 Cal.App.3d 818,

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[81] Appellant's jury was instructed as follows regarding lesser included offenses in general, and attempted voluntary manslaughter and assault with a deadly weapon in particular:

> Thus, you are to determine whether or not the defendant is guilty or not guilty of the crimes charged in Counts 2, 3, 4, and 5, or of a lesser crime charged. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on any crimes charged or lessers included. . . . [¶] So we're talking about lessers. Voluntary manslaughter: every person who attempts to unlawfully kill another human being, without malice aforethought, but with the intent to kill, is guilty of voluntary manslaughter in violation of Penal Code section 192. In order to prove this crime, each of the following elements must be proved:
>
> Number one, a human being was attempted to be killed;
>
> Two, the attempted killing was unlawful,
>
> And, three, it was done with the intent to kill.
>
> An attempted killing is unlawful if it was not justifiable or excusable.

(continued...)

824-825 [defendant charged with attempted murder may be convicted of attempted voluntary manslaughter where there is evidence of an attempt to kill but not malice aforethought]; *People v. Tucciarone* (1982) 137 Cal.App.3d 701, 705 [same].)

Although, as a general matter, the provocation in voluntary manslaughter must ordinarily come from the victim (*People v. Spurlin* (1984) 156 Cal.App.3d 119, 126), there are exceptions to that rule grounded in the common law principle of transferred intent. Specifically, provocation/heat of passion is available as mitigation where, as here, there is substantial evidence that the defendant believed that his intended targets (Mr. Pupua and Mr. Badibanga) engaged in provocative conduct and the defendant accidentally killed a bystander (Mr. Rexford) while attempting to assault or kill his targets. (See *People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Brooks*, *supra*, 185 Cal.App.3d at p. 694; *People v. Spurlin*, *supra*, 156 Cal.App.3d at pp. 125-126; see also *People v. Levitt* (1984) 156 Cal.App.3d 500, 507 ["just as 'one's criminal intent follows the corresponding criminal act to its unintended consequences,' so too one's lack of criminal intent follows the corresponding []act to its unintended consequences"].)

The jury seems to have concluded that, despite their denials (RT 9:2954; RT 10:3084, 3146), Mr. Pupua and/or Mr. Badibanga had a gun in the apartment. After the shooting, Mr. Pupua's upstairs neighbor, Allen Smith, heard a voice coming from the front of Mr. Pupua's door say, "I couldn't get to my gun in time." (RT 13:4010.) The trial court admitted

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[81](...continued)
(RT 16:5227-5228.)

this testimony over the prosecutor's objection because the statement was relevant by inference to show that the occupants of Mr. Pupua's apartment were engaged in dangerous and violent enterprises, and the statement likely was made by someone who was in the apartment during the shooting. (RT 13:4015-4017.)

Although both Mr. Pupua and Mr. Badibanga may have dropped to the floor upon seeing unknown men at the front door of the apartment (RT 9:2882; RT 10:3127-3128), to find attempted voluntary manslaughter the jury must have concluded that at least one of them provoked appellant to shoot in their direction. Mr. Pupua testified that although he was seated directly next to an escape route (the living room patio door) when he saw the gunmen, he dove into a corner of his living room that held a stereo speaker – an item in which a weapon could easily be hidden. (RT 9:2870, 2882.)

Further, there was substantial evidence that Mr. Pupua was impulsive and aggressive. By his own admission, Mr. Pupua was involved in two fights in the approximately thirty hours before the shooting. On the Friday night before the shooting, Mr. Pupua and Mr. Rexford were involved in a large fight at a high school football game; he fought against Mexicans, Blacks and whites. (RT 9:2915-2917, 2951-2953, 2960.) Additionally, several hours before the shooting, there was a violent fight in Mr. Pupua's apartment; Mr. Pupua slammed his fist through his glass patio door because some of his furniture was damaged. (RT 9:2917-2919.) His neighbors described this fight as more angry and violent than the other drunken brawls that Mr. Pupua routinely hosted. (RT 9:2917-2920; RT 10:3083-3084, 3218-3221; RT 13:4009, 4087-4088, 4106, 4113-4117, 4122.)

Similarly, the jury could have found that Mr. Badibanga provoked appellant to shoot. Like Mr. Pupua, Mr. Badibanga did not try to escape through the patio door. Instead, he dropped to the floor and crawled out of the room, then jumped through a bedroom window. (RT 10:3127-3129.) Although Mr. Badibanga ultimately escaped from the apartment, the shooter could have reasonably concluded that he crawled away to obtain a weapon. The jury could have found that his actions were sufficient to provoke appellant to shoot at him.

One of this Court's key voluntary manslaughter decisions is on point here, where there are multiple parties who may have influenced appellant's criminal act. In *People v. Breverman*, *supra*, 19 Cal.4th 142, the victim rode to the scene of the crime with a group of young men who wanted to confront Mr. Breverman and his friends over a verbal altercation that had occurred the previous night. When his car alarm was triggered, the defendant fired shots at the group first from the front door of his home, and then from the sidewalk. However, there was no specific evidence that the deceased victim was armed or challenged the defendant to fight, and there was uncontroverted evidence that he was *not* among the group of young men who vandalized the defendant's car. (*Id.* at pp. 150-151, 163.)

In reaching its decision, this Court examined all of the circumstances leading to the shooting – including the acts of the victim's companions – and considered how these circumstances affected the defendant's state of mind, as well as how they would have affected a reasonable person. The Court concluded that the evidence was sufficient for a jury to find that the defendant killed the victim in a reasonable heat of passion. (*People v. Breverman*, *supra*, 19 Cal.4th at p.163.) More importantly for the purposes of the instant argument, the Court also confirmed that heat of passion is *not*

a mere defense which the defendant may control. Rather, as a lesser included offense of murder, heat of passion comes within the broadest version of the California duty to provide sua sponte instructions on all the material issues presented by the evidence. (*Id.* at pp. 158-159.)

Appellant's jury should have been empowered to undertake the same type of examination of the circumstances of Mr. Rexford's fatal shooting. Given that the jury believed that Mr. Pupua and/or Mr. Badibanga provoked appellant, it could have also reasonably concluded that appellant was guilty of voluntary manslaughter, not first degree murder, because he accidentally killed Mr. Rexford while responding to that provocation. The trial court's failure to so instruct the jury was error.

2. The Court Should Have Instructed the Jury on Voluntary Manslaughter Because There Was Substantial Evidence That the Shooting Occurred as a Result of Imperfect Self-Defense

As described in the preceding subsection of this argument, which is incorporated by reference as if fully set forth herein, the trial court ignored substantial evidence of aggressive physical movements by the occupants of the apartment that merited a provocation-based voluntary manslaughter instruction. This same evidence also supported a sua sponte instruction on the theory of imperfect self-defense – i.e., that appellant honestly, but unreasonably, believed that his life was in imminent harm and needed to shoot to defend himself. (See *In re Christian S.*, *supra*, 7 Cal.4th at p. 783.) Here, the unreasonable belief theory was so "commonly or openly" connected with "the facts of this case that the trial court should be held to have committed error for failure to instruct without request." (*People v. Flannel*, *supra*, 25 Cal.3d at pp. 681, 683.)

E. The Failure to Instruct on any Lesser Included Offenses of First Degree Murder Violates the Supreme Court's Holding in *Beck v. Alabama*

The United States Supreme Court has established that a capital defendant is entitled to instruction on a lesser included noncapital offense if the offense exists under state law and there is evidence to support it. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 627.) Since its issuance, however, the *Beck* holding has been observed by this Court entirely in its breach rather than in its application.

This Court has stated that *Beck* is satisfied as long as a capital jury receives a single noncapital third option between the capital charge and acquittal. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 167.) Thus, *Beck* is automatically satisfied in every capital case because there is always a noncapital option of first degree murder without special circumstances. (*People v. Horning* (2004) 34 Cal.4th 871, 906, citing *People v. Sakarias* (2000) 22 Cal.4th 596, 621, fn. 3; see also *People v. Waidla* (2000) 22 Cal.4th 690, 736, fn. 15 [finding *Beck* inapplicable in part because the jury "could have found [the defendant] guilty of first degree murder on a theory of willful, premeditated, and deliberate murder under no special circumstances – a result that would have precluded any exposure to the death penalty whatsoever"].)

This Court has also found the *Beck* rule inapplicable in California because a jury here is not forced into an all-or-nothing choice between a conviction of murder that would legally compel it to fix the penalty at death, on the one side, and a finding of innocence, on the other. The Court believes *Beck* is satisfied because a jury always has the option of sentencing a defendant to life imprisonment without the possibility of parole rather than death. (*People v. Valdez* (2004) 32 Cal.4th 73, 119.)

Finally, the Court has held that the constitutional infirmity of the statute at issue in *Beck* was partly the result of the barrier erected in capital cases in Alabama that prohibited instructions on lesser offenses, even though such instructions were available in noncapital cases. Since California does not preclude lesser offense instructions in capital cases, this Court has found the *Beck* rationale to be inapplicable to capital trials here. (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 118-119.)

None of these justifications for holding *Beck* satisfied or inapplicable withstands scrutiny in this case.

1. A Murder with No Special Circumstance Finding Is No Third Option under *Beck*

The United States Supreme Court has consistently affirmed that the third option required by *Beck* is a lesser included offense, and no other. (*Hopkins v. Reeves* (1998) 524 U.S. 88, 90; *Schad v. Arizona* (1991) 501 U.S. 624, 646 [referring to "the *Beck* rule" that mandates lesser included noncapital offense instructions in capital cases]; *Hopper v. Evans* (1982) 456 U.S. 605, 610 ["our holding [in *Beck*] was that the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict'"]; see also *Howell v. Mississippi* (2005) 543 U.S. 440, 442 ["'[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case,'" quoting *Beck*, 447 U.S. at p. 638, and dismissing writ of certiorari as improvidently granted because petitioner failed to raise *Beck* claim in state court].)

In *Beck* itself, the high court rejected Alabama's argument that the jury was provided with a mistrial as a viable third option. The *Beck* jury

had been instructed that a mistrial would be declared if it was unable to agree on a verdict, and that in the event of a mistrial, the defendant could be tried again. The State argued that this third option was enough to safeguard against an absent lesser included offense instruction because it provided the jury with a choice between a verdict of death or an acquittal. The high court, however, concluded that the mistrial third option was not "an adequate substitute for proper instructions on lesser included offenses." (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 643-644.)

"*Beck* made clear that in a capital trial, a lesser included offense instruction is a necessary element of a constitutionally fair trial." (*Spaziano v. Florida* (1984) 468 U.S. 447, 454.) Thus, under clearly established federal law, as determined by the Supreme Court of the United States, before reaching a reliable verdict on guilt, every capital jury must have at least three concurrent options to choose from: (1) the capital offense, (2) a noncapital lesser included offense existing under state law and supported by the facts, and (3) acquittal. That is the only way to satisfy *Beck*.

As suggested by this Court's "between" language in *Breverman*, *Sakarias*, and *Horning*, first degree murder without special circumstances is not a lesser included "offense" of first degree murder with special circumstances. In *People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, the appellate court held precisely that. (*Id.* at p. 1231 ["The lying-in-wait special circumstance is not . . . an added element which would create a greater offense out of the charged murder"].) On automatic appeal this Court affirmed the *Jurado* Court of Appeal decision as law of the case, in part because the decision was not a manifest misapplication of the law and there had been no intervening change in the controlling law. (*People v. Jurado* (2006) 38 Cal.4th 72, 96.) Accordingly, *Sakarias* and *Horning* were

wrong to conclude that *Beck* is satisfied if the jury is instructed on first degree murder without special circumstances.

Assuming that respondent nevertheless argues that first degree murder without special circumstances is an adequate substitute for an actual lesser included offense, *Beck's* reliability mandate would still not be met. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623 ["the Eighth Amendment imposes heightened reliability standards for both guilt and penalty determinations in capital cases," citing *Beck*].) The United States Supreme Court has observed that *Beck* would not "be satisfied by instructing the jury on *just any* lesser included offense, even one without any support in the evidence." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 648, italics added.) The Court has also said, "The element the Court in *Beck* found essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the existence of the instruction introduced into the jury's deliberations." (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 455.) At bottom, "*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the guilt determination' in capital cases." (*Schad*, 501 U.S. at p. 647.)

Here, as required by California law, the court instructed the jury to find guilt first, before the jury was even permitted to consider the lying-in-wait special circumstance allegation. (Pen. Code, § 190.1, subd. (a); CT 3:463; CALJIC No. 8.80.1 ["if you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true"]; see also *People v. Cain* (1995) 10 Cal.4th 1, 56 [the "correct order" of deliberations under Penal Code section 190.1, subd. (a) is guilt first, then the truth of the special circumstances]; *People v. Odle* (1988) 45 Cal.3d 386, 411, fn. 11 ["the special circumstance findings are

made at the close of the 'guilt phase' trial, following a first degree murder verdict"].)[82] The court also instructed the jury on two theories of first degree murder, deliberate and premeditated murder and lying-in-wait murder. (CT 3:454, 456; CALJIC Nos. 8.20, 8.25.)[83]

Presumably the jury followed the court's instructions (*People v. Elliot* (2005) 37 Cal.4th 453, 474), and confronted a choice between two, not among three, options: first degree murder and acquittal. Only after finding first degree murder, based on one or both instructed theories, did the jury consider the lying-in-wait special circumstance allegation. (CT 3:465; CALJIC No. 8.81.15.) According to *Sakarias*, *Waidla*, and *Horning*, it would be at this point that jurors had the third option of finding no special circumstance if they desired to spare appellant's life. But this "option" was too late to be an option at all, and could not satisfy *Beck's* primary concern with the reliability of the guilt conviction.

Beck relied on a line of cases in which the Court "invalidated procedural rules that tended to diminish the reliability of the sentencing determination," and held that "[t]he same reasoning must apply to rules that diminish the reliability of the guilt determination." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Throughout *Beck*, the Court focused on the

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[82] That the guilt phase verdict and the special circumstance finding are truly separate components of a capital trial in California is underscored by the fact that under the California scheme, a jury can find guilt and hang on the special circumstance, and be replaced by a second jury or even a third jury to find the truth of the special circumstance, though guilt has already been established. (Pen. Code, § 190.4, subd. (a).)

[83] The jury found the prior murder special circumstance in a later proceeding under Penal Code section 190.1, subdivision (b). (RT 17:5574-5575; CT 3:484-485.)

reliability of the guilt conviction. (See, e.g., *id.* at p. 637 ["For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense . . . the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction"]; *id.* at p. 642 ["In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, . . . the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished"]; *id.* at p. 645 [recognizing "the risk that the jury may return an improper [guilt] verdict because of the unavailability of a 'third option'"].)

This emphasis on the reliability of the guilt conviction continued in the Supreme Court cases following *Beck*. In *Hopper*, the Court noted that "our holding [in *Beck*] was that the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" (*Hopper v. Evans*, *supra*, 456 U.S. at p. 610.) The Court further clarified that because lesser included offense instructions were required by due process "*only* when the evidence warrants such an instruction, [t]he jury's discretion is . . . channelled so that it may convict a defendant of any crime fairly supported by the evidence." (*Id.* at p. 611, italics in original; see also *Spaziano v. Florida*, *supra*, 468 U.S. at p. 455 ["The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that

the defendant is guilty of capital murder, but simply to avoid setting the defendant free"]; *Schad v. Arizona*, *supra*, 501 U.S. at p. 646 ["Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital *conviction* if the only alternative was to set the defendant free with no punishment at all," italics added]; *id.* at p. 647 ["*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the *guilt determination*' in capital cases," italics added].) Accordingly, under *Beck* and its progeny, the United States Supreme Court requires reliability at each stage of a capital trial.

Thus, because California law and the trial court in this case required the jury to reach a guilt conviction on the murder charge before even deliberating on the special circumstance, the theoretical possibility that the jury could find no special circumstance is irrelevant. The jury had already reached its unreliable guilt verdict, and thereby violated *Beck* due to the absence of a lesser included offense instruction that the jury could have considered in making its guilt finding on the charged offense.

Moreover, to propose, as *Sakarias*, *Waidla*, and *Horning* have proposed, that a capital jury has the three contemporaneous options of (1) first degree murder with a special circumstance, (2) first degree murder with no special circumstance, and (3) acquittal, is to suggest that the jury may violate its oath to follow the law and may engage in jury nullification. Under Penal Code section 190.1, subdivision (a), a jury must reach a decision on guilt before it determines whether the special circumstance allegation is true. A jury that believes it has the simultaneous option of voting for guilt on the capital offense and finding no special circumstance violates its oath to decide the question of guilt first. And, as this Court

stated in *People v. Williams* (2001) 25 Cal.4th 441, a juror, let alone an entire jury, who refuses to follow the law and engages in jury nullification is subject to discharge for violating the juror's oath. (*Id.* at p. 463.)

Finally, to illustrate how first degree murder without a special circumstance finding is not a reliable third option under *Beck*, one need only consider that the prosecutor below also alleged a prior murder special circumstance. The jury heard the prior murder evidence in a separate proceeding after it had already returned a guilty verdict on the capital offense. (RT 17:5566-5575; Pen. Code, § 190.1, subd. (b).)[84] As this case demonstrates, proving a prior conviction is strictly a formality and the resulting affirmative finding inevitable, assuming the formality is correctly executed. (RT 17:5566 [the prosecutor submitted two documents to prove the prior murder and rested].) Clearly, a jury that hears a prior murder allegation as the sole special circumstance does not have the option of finding first degree murder with no special circumstance, and any jury that would so find would almost certainly engage in jury nullification.

Accordingly, a properly instructed California jury that abides by its oath to follow the law does not have a third option under *Beck* to return a finding of no special circumstance; it only has a choice, as in this case, between two options, first degree murder or acquittal.

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[84] Non-prior murder special circumstance allegations are also separately tried from the guilt phase where highly prejudicial evidence is relevant to a special circumstance but not to guilt. (*People v. Bigelow* (1984) 37 Cal.3d 731, 747.)

2. *Beck* Applies Even Where the Jury Is Not Compelled to Impose Death

This Court was similarly mistaken in *Valdez* and *Waidla* in asserting that "'the *Beck* rule [is] not implicated in its purpose . . . because the 'jury was not forced into an all-or-nothing choice between a conviction of murder that would *legally compel it to fix the penalty at death*, on the one side, and innocence, on the other: Even if it found [the defendant] guilty of [felony murder under the special circumstance allegations], it was not legally compelled to fix the penalty at death, but could fix it instead at a term of imprisonment for life without possibility of parole.'" (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119, quoting *People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15, italics added by *Valdez*.)

The following passage from *Beck* explains why the reasoning employed in *Valdez* and *Waidla* is incorrect:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason – its belief that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason – that, whatever his crime, the defendant does not deserve death.

(*Beck v. Alabama*, *supra*, 447 U.S. at pp. 642-643, footnote omitted.)

Thus, as *Beck* explained, the fact that a jury is legally compelled to fix the penalty at death operates to encourage the jury to acquit, not to convict. The reason a jury convicts a defendant of first degree murder is

because of its belief that the defendant is guilty of some serious crime and should be punished. (See *People v. Breverman*, *supra*, 19 Cal.4th at p. 161, fn. 8 [the federal guarantee of a lesser included offense instruction "seeks only to prevent the state from coercing a judgment of death eligibility by preventing the jury from considering a lesser included noncapital charge as an alternative to setting the defendant free"].)

That a jury in California ultimately has the option of fixing the penalty at life in prison without parole actually puts pressure on the jury to return a first degree murder verdict where no lesser included offense is instructed because the jury can spare the defendant's life at the penalty phase. *Waidla* and *Valdez* therefore missed the point. Moreover, in this regard California's death penalty scheme is actually worse for a defendant than Alabama's scheme in *Beck*, because there is no pressure on a California jury to acquit, while there is pressure on the jury to find the defendant guilty of first degree murder. And again, because *Beck* was concerned chiefly with the reliability of the guilt conviction, not the penalty determination (*Herrera v. Collins* (1993) 506 U.S. 390, 407, fn. 5 ["To the extent *Beck* rests on Eighth Amendment grounds, it simply emphasizes the importance of ensuring the reliability of the guilt determination in capital cases in the first instance"]), a California court violates *Beck* when it fails to offer a lesser included offense to eliminate the uncertainty and unreliability caused by its absence.

Further, as *Beck* explained, reliance on a later stage in a capital trial to make up for the unreliability of an earlier stage is constitutionally unacceptable. The State argued in *Beck* "that, even if a defendant is erroneously convicted, the fact that the judge has the ultimate sentencing power will ensure that he is not improperly sentenced to death." (*Beck v.*

Alabama, *supra*, 447 U.S. at p. 745.) The Court, however, was "not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a 'third option.' If a fully instructed jury would find the defendant guilty only of a lesser, noncapital offense, the judge would not have the opportunity to impose the death sentence." (*Ibid.*) Here, too, if a fully instructed jury would find appellant guilty of a lesser, noncapital offense, the jury would not have the opportunity to impose the death sentence.

In addition, the United States Supreme Court has consistently applied *Beck* to cases where, even after convicting the defendant of the capital offense, the jury had discretion at the sentencing phase to impose alternatives to the death penalty. Thus, in *Spaziano*, the Court addressed the defendant's *Beck* claim on the merits, even though the Court knew that the Florida jury, like a California jury, was not legally compelled to fix the penalty at death after returning a first degree murder verdict, but could recommend life. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 451.) In fact, the *Spaziano* jury recommended life imprisonment, which the trial judge disregarded in sentencing the defendant to death. (*Id.* at p. 452.) For this reason alone, this Court is incorrect in insisting that the *Beck* rule is not implicated in its purpose unless the jury is legally compelled to fix the penalty at death.

Spaziano further undermines *Valdez* and *Waidla*. The *Spaziano* trial court had offered to instruct the jury on several noncapital offenses, but only if the defendant waived the statute of limitations, which had expired on all offenses but capital murder. The defendant refused and the court accordingly instructed the jury solely on capital murder. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 450.) Spaziano claimed that he was entitled

to the benefit of the *Beck* rule even though the statute of limitations prevented him from actually being punished for a lesser included offense. Seven members of the United States Supreme Court held that "the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses." (*Id.* at p. 456; see also *People v. Cole*, *supra*, 33 Cal.4th 1158, 1220 [expressing *Spaziano's* holding].) Thus, under *Spaziano*, had the defendant waived the statute of limitations, the trial court would have been required to instruct the jury on the lesser included offenses of capital murder, notwithstanding that the Florida jury was not compelled to fix the penalty at death. (*Spaziano v. Florida*, *supra*, 468 U.S. at p. 451.)

In *Schad*, the Court again dealt with the merits of a *Beck* claim, despite acknowledging that a jury convicted Mr. Schad of first degree murder, but a judge, not the jury, sentenced him to death. (*Schad v. Arizona*, *supra*, 501 U.S. at p. 629.) Thus, the *Schad* jury, too, was not legally compelled to return a death verdict. Finally, in *Reeves* the Court addressed the merits of a *Beck* claim, even though it explicitly recognized that the jury was prohibited from imposing sentence and that a three-judge sentencing panel had the option of sentencing the defendant to life imprisonment. (*Hopkins v. Reeves*, *supra*, 524 U.S. at pp. 98-99.) Clearly that jury was under no compulsion to impose a death sentence in that case either.[85]

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[85] Thus, contrary to this Court's view, when *Spaziano* and *Schad* referred to "capital murder," the United States Supreme Court did not mean "murder that legally 'require[s]' the jury 'to impose the death penalty'" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 736, fn. 15, citing *Beck v. Alabama*, *supra*, 447 U.S. at p. 629), given that the Court used the term to

(continued...)

Federal courts of appeals have also applied a *Beck* analysis, though the jurisdictions from which the cases arose permitted, like California, jury discretion to impose a sentence less than death following conviction of a capital offense. (*Mitchell v. Gibson* (10th Cir. 2001) 262 F.3d 1036, 1049 ["*Beck* applies even 'where the convicting jury later had the discretion to sentence the defendant to life, instead of death,'" quoting *Hooks v. Ward* (10th Cir. 1999) 184 F.3d 1206, 1223-1229 (Oklahoma); *LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1253, 1262-1263 (Arizona); *Ransom v. Johnson* (5th Cir. 1997) 126 F.3d 716, 724-726 (Texas); *Kornahrens v. Evatt* (4th Cir. 1995) 66 F.3d 1350, 1354-1355 (South Carolina); but see *Livingston v. Johnson* (5th Cir. 1997) 107 F.3d 297, 312-13 (Texas).)[86]

Furthermore, as a practical matter, the possibility that a jury might choose life at the sentencing stage is an inadequate substitute for an option to convict of a lesser included offense. First, any doubt a jury had about whether first degree murder had been proven at the guilt phase could easily be erased by the kind of evidence a jury typically hears in the penalty phase. Victim impact evidence, which often evokes deep sympathy in the jury for

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[85](...continued)
refer to the murder verdicts before it, and neither Florida in *Spaziano* nor Arizona in *Schad* required the jury to impose death after a verdict of "capital murder." (*Spaziano v. Florida*, *supra*, 468 U.S. at pp. 451-452; *Schad v. Arizona*, *supra*, 501 U.S. at p. 629.)

[86] In fact no jurisdiction today compels a jury to fix the penalty at death after returning a first degree murder verdict because any such compulsion would violate well established law against automatic death penalties. (See, e.g, *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, J., Powell, J., and Stevens, J.) [striking down as unconstitutional a rule making the death penalty mandatory for first degree murder].)

the victim's family, could cause a jury to forget very quickly any doubt it previously harbored, even though victim impact evidence is clearly irrelevant to guilt. (Pen. Code, § 190.3, factor (a).) Even more troubling, evidence of other violent criminal activity (Pen. Code, § 190.3, factor (b)) and prior felonies (Pen. Code, § 190.3, factor (c)) would likely convince a jury that the defendant was indeed the kind of person who would commit first degree murder, despite the fact that such information would be excluded during the guilt phase as propensity evidence under Evidence Code section 1101.

Second, the constitutionality of a death sentence should not depend upon the vagaries of whether a defendant's lawyer argued lingering doubt of guilt at the penalty phase. Moreover, this Court has repeatedly affirmed a trial court's refusal to instruct the jury on lingering doubt. (See, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1067 ["Notwithstanding defendants' motion to have the trial court instruct on lingering doubt, the trial court was within its authority to deny the motion]; *People v. Earp* (1999) 20 Cal.4th 826, 903 ["[t]here is no constitutional entitlement to instructions on lingering doubt"].) The lack of both an argument and a lingering doubt instruction would virtually extinguish any possibility that the jury would review the doubt it had at the guilt phase.

Third, jurors would likely have a vested interest in their guilt verdict during the penalty phase and as a result be disinclined to reconsider their guilt verdict at that point. "In sum, a jury that gets to stage two based on an unreliable determination at stage one may not be able to convey accurately its doubt about guilt through its sentencing determination." (*Hooks v. Ward*, *supra*, 184 F.3d at p. 1229.)

Accordingly, the United States Supreme Court and the circuit courts of appeal will consider a *Beck* claim on the merits even though the "'jury was not forced into an all-or-nothing choice between a conviction of murder that would legally compel it to fix the penalty at death, on the one side, and innocence, on the other . . . .'" (*People v. Valdez*, *supra*, 32 Cal.4th at p. 119.) And so should this Court consider appellant's *Beck* claim on the merits.

3. A Denial of Due Process Is a Denial of Due Process

Valdez also distinguished the Alabama law invalidated in *Beck* from California law on the basis that Alabama erected an "artificial barrier" prohibiting lesser included offenses in capital but not noncapital cases, whereas California does not have such a barrier. (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 118-119.) But this is a distinction without significance. "*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction." (*Hopper v. Evans*, *supra*, 456 U.S. at p. 611.) In fact, *Beck* held that due process demands "that the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" (*Id.* at p. 610.) Thus, it makes no difference whether a capital defendant was deprived of a lesser included offense because state law prohibited it, as in Alabama, or because the trial court failed, as here, to instruct the jury on a lesser included offense required under state law. In either case, the capital defendant is denied due process. (See *Ransom v. Johnson*, supra, 126 F.3d at p. 725, fn. 2 ["A plain reading of *Beck* and *Hopper* inexorably leads to the same conclusion. If due process is violated because a jury cannot consider a lesser included

offense that the 'evidence would have supported [citation] the source of that refusal, whether by operation of law or refusal by the state trial judge, is immaterial.'"].)

Moreover, *Beck* expressly noted that Alabama was the only state to erect an artificial barrier prohibiting lesser included offenses in capital but not in noncapital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 635 ["Alabama's failure to afford capital defendants the protection provided by lesser included offense instructions is unique in American criminal law"].) Yet this uniqueness did not prevent the United States Supreme Court from considering *Beck* claims that arose from Florida (*Spaziano*), Arizona (*Schad*), and Nebraska (*Reeves*).

4. Conclusion

In sum, *Beck* requires a lesser included offense instruction in all capital trials, where supported by the evidence and available under state law. First degree murder without a special circumstance is not a lesser included offense of murder with special circumstances, nor is it an adequate substitute. *Beck* applies even where the jury is not legally compelled to fix the penalty at death. And lastly, a capital defendant is denied due process when a trial court fails to instruct on any lesser included offense that was raised by the evidence. Accordingly, *Beck* applies in California and the rationalizations offered by this Court to thwart its application are unsound.

F. This Claim is Not Forfeited

1. Relevant Facts

The following colloquy occurred during the guilt phase jury instruction conference:

> "The Court: . . . Does everybody agree there's no manslaughter here?

Mr. Faal: Yes.

The Court: Do you want me to instruct on second degree?

Mr. Faal: No. No. And the record should reflect that I've discussed that with my client.

The Court: I don't know that you have a veto on it, but is that – is that also your request not to instruct on second degree?

Defendant Smith: Yes, it is, your Honor."

(RT 14:4563-4564.)

Rather than asking counsel (or appellant) why he did not want the second degree murder and voluntary manslaughter instructions, the court merely made a record of its personal beliefs about counsel's "wisdom" or "judgment," and speculated about counsel's reasons for refusing the instructions:

> The Court: . . . I think that even apart from any tactical issue I can't think of a theory upon which anybody could second-guess your decision, Mr. Faal, because I cannot think . . . of any theory other than a first degree, whoever did it, that it was a first degree and – and I would not want anyone to perceive – to sit around and try and second-guess your wisdom or your judgment because I don't see a theory there.

(RT 14:4564.)

When given another opportunity to offer express tactical grounds for rejecting instructions on the two lesser offenses, counsel offered none:

> The Court: . . . just off these facts I don't think there is any way that the jury could conclude – and I think it would just be to invite a compromised verdict if I instructed on second degree.
>
> Mr. Faal: I would agree with the court.

(RT 14:4566.)

The prosecutor directed the court's attention to *People v. Daya* (1994) 29 Cal.App.4th 697, where the reviewing court upheld a sua sponte second degree murder instruction that was given over the defendant's objection.[87] (*Id.* at p. 713.) After reviewing the note on *Daya* in the "[CJER] Mandatory Criminal Jury Instructions Handbook," the court again said that it did not "think there is any evidence at all in this case that this was other than a premeditated and deliberate murder," and added that "it would just be to invite a compromised verdict if I instructed on second degree." (RT 14:4565-4566.)

Later, the court acknowledged that appellant's jury would have to make an all-or-nothing choice between acquittal and capital murder.

> My logic was this: That if they don't find the first degree murder we all go home and there's no compromises. So . . . that's kind of a clean call. They either do or do not find the first degree murder. If they find a first degree murder, then we know we're going to have a separate trial on the special circumstance of the prior murder[.]

(RT 14:4569.)

However, the trial court took a different approach to the instructions on lesser offenses of attempted murder. The court first indicated that it believed that appellant was entitled to instructions on assault with a deadly weapon with respect to the Freddie Badibanga and Walter Pupua attempted

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[87] The prosecutor also offered his unsupported opinion that "it sounds like defense counsel for obvious tactical reasons would prefer not to have those things." (RT 14:4565.) However, as more fully discussed below, the prosecutor's divinations are irrelevant: "[t]he issue centers on whether counsel deliberately caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result." (*People v. Wickersham* (1982) 32 Cal.3d 307, 335.)

murder counts. However, the court was "not inclined to sua sponte do it." (RT 14:4583.)

Defense counsel asked for the instruction on assault with a deadly weapon, and the trial court agreed to read the instruction over appellant's personal objection: "I appreciate Mr. Smith wants the jury not to compromise on this case, and I understand that loud and clear. . . . But I think off these facts, that a jury could absolutely conclude that the killer came in intending to kill Joshua, and it was just random shots that happened to coincidentally be near Freddie and Walter." (RT 14:4584-4585.)

The court also ignored appellant's desires when it acknowledged that it had to instruct the jury on attempted voluntary manslaughter. (RT 15:4681-4684.) Both defense counsel initially said that they only wanted the assault with a deadly weapon instruction; however, they "submit[ted] the issue to the court and let the court decide" after the prosecutor stated that the CALJIC use note mandated that the instructions for assault with a deadly weapon and attempted voluntary manslaughter accompany each other. The court instructed the jury on both lesser offenses. (RT 15:4685-4686; RT 16:5227-5228.)

While at break during his closing argument, Mr. Faal informed the court that he would not argue any lesser included offenses, even those on which the jury would be instructed (i.e., assault with a deadly weapon and attempted voluntary manslaughter), "because my client has instructed me not to argue on lessers." Appellant confirmed this. (RT 17:5394.) However, when the prosecutor expressed his confusion regarding why appellant had asked for instructions on lesser offenses if he had no intention of arguing the issues, Mr. Faal conceded that the "decisions" were not

based upon any tactical or strategic considerations but instead upon the whims of his client:

> Mr. McDowell: We have a problem there then. Counts 2 and 3 [Pupua and Badibanga attempted murders] have included lessers. At the specific request of defense counsel, [Penal Code section] 245 is not a necessarily lesser-included offense, but it was put in there because the defendant has requested it.
>
> Mr. Faal: It is true. I – my professional judgment was that it was something that should be requested. We requested it, and I would have argued it. However, if a client is instructing me not to argue that, I'm –
>
> The Court: You are not asking that it be removed . . . you are just advising me that you are not going to argue it.
>
> Mr. Faal: And the reason –
>
> The Court: I think that's appropriate, Mr. McDowell.
>
> Mr. McDowell: With the court wording [sic] what the court just used and counsel's acceptance of what the court just said, I think the record is in fact protected.

(RT 17:5394-5395.)

2. This Issue Is Cognizable on Appeal

A trial court has a sua sponte duty to instruct on all lesser included offenses, including "all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) The court's duty to instruct is not dependent upon counsel's judgments and is not waived by counsel's failure to demand instructions. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 333-334.)

When, as here, a court fails to instruct on all lesser included offenses supported by the evidence, invited error "will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Vasquez*, *supra*, 32 Cal.4th at p.

115, citing *People v. Cooper*, *supra*, 53 Cal.3d at p. 830, *People v. Wickersham*, *supra*, 32 Cal.3d at p. 332.) For invited error to be found, counsel's tactical reasons for rejecting a relevant instruction must be clear from the record:

> For the doctrine to apply, "it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it must also be clear that counsel acted for tactical reasons and not out of ignorance or mistake."

(*People v. Duncan* (1991) 53 Cal.3d 955, 969, quoting *People v. Bunyard* (1988) 45 Cal.3d 1189, 1234.)

Further, the invited error doctrine cannot be invoked unless there is a direct cause and effect between the defendant's "invitation" and the trial court's error: "[t]he issue centers on whether counsel deliberately caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 335; see *People v. Barton*, *supra*, 12 Cal.4th at p. 198 [invited error applies when, for tactical reasons, a "defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence"]; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264, emphasis in original ["Although defense counsel failed to argue vigorously or persuasively in support of the instruction and ultimately expressed agreement with the court's reasoning, counsel in no sense *caused* the trial court to omit the instruction"].)

The invited error doctrine cannot be invoked here. The one essential requisite for application of the invited error doctrine is that defense counsel must engage in affirmative actions, supported by tactical reasons, that cause the trial court to act in the manner complained of. Defense counsel never

expressed a deliberate tactical purpose for acquiescing in the rejection of instructions on lesser homicide offenses.

Defense counsel made three statements on the record with respect to the omitted instructions: (1) he "agree[d] there's no manslaughter here" (RT 14:4563); (2) after consulting with appellant, he did not want the court "to instruct on second degree" (*ibid.*); and (3) he agreed with the court that based on the evidence, there was no way a jury could find second degree murder, and an instruction on second degree murder would just invite a compromise verdict. (RT 14:4566.)

Defense counsel never expressed a clear, deliberate tactical purpose for foregoing instructions on lesser included offenses of homicide. Rather, counsel's remarks merely reflect the same mistaken belief held by the court – that there was no evidentiary basis for any instruction other than first degree murder. As demonstrated by this argument, the trial court and counsel were both wrong.

Defense counsel merely accepted the trial court's assessment that the evidence did not support instruction on lesser offenses; acceptance of this kind is not invited error. In *People v. Stitely* (2005) 35 Cal.4th 514, this Court considered the Attorney General's claim of invited error under circumstances not entirely dissimilar from those extant in this case. In rejecting the claim of invited error, the Court held that "the court's decision to withhold [the consent instruction] was not induced by defendant, but by the court's unwavering belief that the instruction lacked evidentiary support." (*Id.* at p. 533, fn. 19.) It is clear that this was the basis for the trial court's actions in this case.

The trial court's belief that no lesser offense instructions were justified by the evidence is what distinguishes this case from cases such as

People v. Horning (2004) 34 Cal.4th 871. In that case, this Court found invited error where the trial court advised the defendant that it believed instruction on the lesser offenses of second degree murder and manslaughter were warranted by the evidence, but the defendant specifically and affirmatively rejected them because they were inconsistent with his defense that he was not present at the time of the offenses. (*Id.* at p. 905.) The defendant then tried to claim error on appeal because of the trial court's failure to instruct on the lesser offenses.

In appellant's case, however, the trial court did not find that the evidence supported lesser included instructions, but expressly said that the evidence did not support the instructions. (RT 14:4564-4566.) Thus, neither appellant nor his counsel persuaded the trial court of anything; before the instruction conference even began, the court had already decided that lesser included instructions on the Rexford homicide were unwarranted. Under these circumstances, the invited error doctrine does not come into play.

G. The Trial Court's Errors Were Prejudicial and Require Reversal Under Federal and State Law

1. The Failure to Instruct the Jury on a Lesser Included Offense Is Reversible per Se

As shown, the failure of the trial court to provide the jury with a noncapital lesser included offense instruction violated appellant's rights under the federal Constitution. Under *Beck*, reversal is automatic. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 646.)

In *Cordova v. Lynaugh* (5th Cir. 1988) 838 F.2d 764, the Fifth Circuit analyzed *Beck* and *Hopper v. Evans*, *supra*, and concluded that *Beck* error can never be harmless. The very nature of the error, that a jury could have rationally convicted of a less than capital offense but was not allowed

to consider that offense, precludes a harmless error analysis. (*Id.* at p. 770, fn. 8.)

In *Vickers v. Ricketts* (9th Cir.1986) 798 F.2d 369, the Ninth Circuit reached the same conclusion. There, the defendant did not request any instructions on lesser included offenses of first degree murder and none were given. The jury convicted the defendant of first degree murder and the trial judge sentenced him to death. On appeal of the denial of his federal habeas petition, the defendant argued *Beck* error due to the trial court's failure to sua sponte instruct the jury on unpremeditated second degree murder. Finding a due process violation, the Ninth Circuit reversed the district court order denying the writ without engaging in harmless error analysis. (*Id.* at p. 374.)

Other courts have also held that *Beck* error is reversible per se. (See *Hogan v. Gibson* (10th Cir. 1999) 197 F.3d 1297, 1312, fn. 13 ["*Beck* error can never be harmless"]; *Eaddy v. State* (Fla. 1994) 638 So.2d 22, 25 [reversed for denial of due process because of failure to instruct on lesser offenses where death penalty imposed]; *Berry v. State* (Miss. 1990) 575 So.2d 1, 11 ["The unconstitutional denial of a lesser included offense instruction in a capital case can never be harmless error"]; *United States ex rel. Reed v. Lane* (D.C. Ill. 1983) 571 F.Supp. 530, 534, fn. 11, affd. *United States ex rel. Reed v. Lane* (7th Cir. 1985) 759 F.2d 618 ["what *Beck* teaches is that by definition the omission of an instruction that enhances the risk of a death sentence cannot be harmless"].) Appellant is entitled to automatic reversal of his conviction because the jury was not presented with a noncapital alternative to first degree murder.

2. The Error Was Not Harmless under *Chapman v. California*

Appellant is aware that this Court has not applied a reversible per se test to *Beck* error. The Court's reasoning, however, is flawed. Further, reversal is required even if the Court utilizes the federal test for harmless error.

This Court has concluded that *Beck* error is subject to *Chapman* harmless error analysis. More particularly, the Court has consistently utilized the harmless error test set forth in *People v. Sedeno* (1974) 10 Cal.3d 703 in determining whether the *Chapman* test has been met where the issue is failure to instruct on a lesser offense. (*People v. Elliot*, *supra*, 37 Cal.4th 453, 475 [no prejudice to defendant from failure to instruct on lesser offense when factual question posed by omitted instruction was resolved in another context].) In this case, the state cannot meet its burden of showing harmless error under *Chapman*, and the *Sedeno* test is unavailing.

Chapman's core concern is whether the guilty verdict actually rendered was unattributable to the error at issue. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) The essence of *Beck* error is that the jury was denied a noncapital option where substantial evidence supported a finding of guilt on a noncapital offense. (*Hopper v. Evans*, *supra*, 456 U.S. at p. 610.) In that situation, it is axiomatic that a reasonable jury could conclude that the lesser but not the greater offense occurred (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162), and taking that option away from the jury has a harmful effect on the verdict because it enhances the risk of an unwarranted conviction and diminishes the reliability of the verdict. (*Howell v. Mississippi*, *supra*, 543 U.S. 440, 442 [state cannot withdraw lesser offense

option from jury in capital case where unavailability of the option enhances risk of unwarranted conviction]; *Schad v. Arizona*, *supra*, 501 U.S. at p. 647 ["*Beck* was based on th[e] Court's concern about 'rules that diminish the reliability of the guilt determination' in capital cases"].) Hence, even under *Chapman*, *Beck* error requires reversal of the guilt verdict, special circumstance findings, and death judgment in this case.

Viewing *Chapman* through the prism of *Sedeno* does not yield a different result. The defendant in *Sedeno* was charged with first degree murder and claimed on appeal that the trial court erred in failing to give an instruction on involuntary manslaughter; an instruction that would have required the jury to specifically determine whether the defendant had acted without an intent to kill. This Court found that any error was harmless because the jury had been instructed on second degree murder, which required the jury to specifically determine whether the defendant had acted without an intent to kill. (*People v. Sedeno*, *supra*, 10 Cal.3d at pp. 711, fn. 2, 720-721.) Thus, because the *Sedeno* jury was instructed on second degree murder without an intent to kill, the jury had the opportunity to review specific jury instructions that gave them the option of returning a verdict that encompassed no intent to kill. The jury, however, specifically rejected a lack of intent to kill and chose intent to kill.

The lesson from *Sedeno* is not so much that the failure to instruct on a lesser offense may be harmless error, but that the failure to instruct on every lesser offense may not be prejudicial error if the record makes clear that the jury affirmatively rejected the essential concept embodied in the omitted instruction by considering and rejecting that option in a separate lesser offense instruction that was provided to them. The key in *Sedeno* was the jury was given that option. Here, the jury was not given that option.

This essential fact of *Sedeno* was recognized by the Court in *People v. Wickersham* (1982) 32 Cal.3d 307. There, the defendant was convicted of first degree premeditated and deliberate murder with malice aforethought, and argued on appeal that the trial court should have instructed on unpremeditated second degree murder. Applying *Sedeno*, this Court found that the error was not harmless, stating:

> [N]o instruction presented the jury with a theory of intentional homicide which was not premeditated and deliberate. Once the jury found that the killing was intentional, it had no choice but to return a verdict of first degree murder. Hence, "the factual question posed by the omitted instruction" – whether appellant had acted with malice and intent, but without premeditation and deliberation – was not "necessarily resolved adversely to the defendant under other, properly given instructions." Since the jury was not required to decide specifically whether appellant had committed an intentional but nonpremeditated, nondeliberate murder, the trial court's error in failing to instruct on second degree murder cannot be deemed to be harmless.

(*Id.* at p. 336, citation omitted; see *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352 ["jury verdict of first degree premeditated murder did not necessarily resolve question that would have been posed by erroneously omitted second degree murder instruction – whether the defendant acted with malice and intent but without premeditation and deliberation"].)

The seemingly clear path for resolution of this type of issue, which was followed by *Sedeno* and *Wickersham,* took a deviant turn in *People v. Edelbacher* (1989) 47 Cal.3d 983. There the defendant was convicted of first degree lying-in-wait murder (*id.* at p. 1019), with a special circumstance finding that the defendant intentionally killed the victim while lying in wait (*id.* at p. 995). The defendant contended that the trial court

erred in refusing to instruct on second degree murder on a theory of implied malice or lack of premeditation. This Court found any error harmless under *Sedeno* because in returning a true finding on the lying-in-wait special circumstance, the jury expressly found that the murder was intentional and committed while lying in wait. "Thus, the jury found that the murder was committed with express malice and in a manner which, by force of statute, elevated it to first degree murder." (*Id.* at pp. 1028-1029.)

This holding either misconstrues the intent of *Sedeno* and *Wickersham* or it extends *Sedeno* in a manner that renders its philosophy inapplicable to capital cases where *Beck* is a concern. In either event, it does not present a sound philosophic basis for denying appellant relief.

As *Sedeno* and *Wickersham* explained, the erroneous omission of a lesser included offense instruction is only harmless if the jury specifically and necessarily rejected – through other proper instructions – the same essential element which would have been provided by the omitted instruction. In *Sedeno*, that meant the jury was given an option to first degree murder that included a determination the defendant lacked an intent to kill, and the jury rejected that option. That they were not provided yet a different option was rendered harmless by their rejection of the theory that the defendant lacked the intent to kill. In *Wickersham*, there was no harmless error finding because the error in failing to instruct on unpremeditated second degree murder was not cured since the jury was given no instruction that provided them with the option of finding that the intentional homicide was not premeditated and deliberate. Therefore, there was no specific and affirmative finding that resolved the issue that would have been presented by the omitted instruction.

The *Edelbacher* jury, however, was not provided this type of option. Yet, this Court affirmed. The Court found that in returning a true finding on a lying-in-wait special circumstance, the jury expressly found that the murder was intentional and was committed while lying in wait. Thus, the jury found that the murder was committed with express malice and in a manner which, by force of statute, elevated it to first degree murder. Because of that, the failure to instruct the jury on second degree murder was necessarily harmless. (*People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1028-1029.)

This holding failed to discuss the fact that the jury was not given the opportunity to focus on an instruction that addressed the lack of premeditation and deliberation. They were presented with the type of all or nothing finding that the *Beck* Court decried. The *Edelbacher* opinion is essentially a finding that because the jury convicted the defendant of what he was charged with, despite the fact they were given no legitimate options, the failure to provide those options must necessarily be harmless error. Under this approach, every failure to instruct on a lesser included offense would be harmless error. This is not the criteria set forth by the *Sedeno* Court.

In any event, *Edelbacher* is distinguishable from this case. Here, with respect to Mr. Rexford, the jury found appellant guilty of first degree murder based on premeditated deliberate murder or lying-in-wait murder or both. The *Edelbacher* jury was only instructed on lying-in-wait murder. (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1019.) Thus, because appellant's jury was instructed on two theories of first degree murder that both require premeditation and deliberation or their equivalent (CT 3:456; CALJIC No. 8.25; *People v. Hardy* (1992) 2 Cal.4th 86, 162 ["a showing of

lying in wait obviates the necessity of separately proving premeditation and deliberation"]), the jury was not given the option of finding that appellant had committed an intentional but unpremeditated, nondeliberate, murder (second degree murder.) Thus, they never made a finding pursuant to any other proper instruction that rejected this theory.

Moreover, appellant's jury was instructed on one theory of first degree murder that requires intent to kill and malice–premeditated and deliberate murder with malice aforethought, and one that does not require intent to kill– lying-in-wait murder. (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1148.) Consequently, there is no way of knowing on which theory the jury relied; therefore, the jury was not required to address whether appellant committed an intentional killing without malice–the issue encompassed by a voluntary manslaughter instruction. Furthermore, unlike the *Edelbacher* jury, the jury in this case could have found first degree murder based on both theories so that any later special circumstance finding that included intent to kill would simply be redundant and a foregone conclusion. Hence, even under *Sedeno*, the trial court's error in failing to instruct on second degree murder (with its emphasis on a lack of premeditation and deliberation) and voluntary manslaughter (with its emphasis on intent to kill but a lack of malice) cannot be deemed harmless.

This Court has also misapplied the harmless error standard by utilizing special circumstance findings to render harmless the erroneous omission of an instruction on a lesser offense. For example, in *People v. Elliot*, *supra*, 37 Cal.4th 453, the Court relied on the jury's special circumstances findings to conclude that the jury had necessarily resolved the factual question posed by the omitted instruction adversely to the defendant under other, properly given instructions. (*Id.* at p. 476 ["the true

finding as to the attempted-robbery-murder special circumstance establishes here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder"].) In fact this Court has repeatedly relied on the *Sedeno* test and special circumstance findings to hold any *Beck* error harmless. (See, e.g, *People v. Horning*, *supra*, 34 Cal.4th 871, 906 [any *Beck* error was harmless because the jury found burglary and robbery special circumstances, which meant it necessarily found the killing was first degree felony murder].) And the Court has been repeatedly incorrect in doing so.[88]

As this Court has stated, the purpose of *Beck's* lesser included offense requirement is "to prevent the state from coercing a judgment of

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[88] In *People v. Breverman*, *supra*, 19 Cal.4th 142, this Court "abrogat[ed] the *Sedeno* standard of reversal for instructional error on lesser included offenses in noncapital cases" (*id.* at p. 178, fn. 26), after referring to "the *Sedeno* standard of near-automatic reversal" (*id.* at p. 149). Since *Breverman* was decided, this Court has applied the *Sedeno* test of near automatic reversal to 19 capital cases, and 19 times the Court has *not* reversed but has found any error to instruct on a lesser included offense harmless. (*People v. Cook* (2006) 39 Cal.4th 566, 597; *People v. Demetrulias* (2006) 39 Cal.4th 1, 24; *People v. Chatman* (2006) 38 Cal.4th 344, 392; *People v. Hinton* (2006) 37 Cal.4th 839, 885; *People v. Manriquez* (2005) 37 Cal.4th 547, 582; *People v. Elliot* (2005) 37 Cal.4th 453, 475; *People v. Blair* (2005) 36 Cal.4th 686, 747; *People v. Horning* (2004) 34 Cal.4th 871, 906; *People v. Haley* (2004) 34 Cal.4th 283, 313; *People v. Coffman* (2004) 34 Cal.4th 1, 97; *People v. Heard* (2003) 31 Cal.4th 946, 982; *People v. Yeoman* (2003) 31 Cal.4th 93, 129; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086; *People v. Seaton* (2001) 26 Cal.4th 598, 672; *People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Coddington* (2000) 23 Cal.4th 529, 593; *People v. Sakarias* (2000) 22 Cal.4th 596, 620; *People v. Earp* (1999) 20 Cal.4th 826, 886.)

death eligibility by preventing the jury from considering a lesser included noncapital charge as an alternative to setting the defendant free." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 161, fn. 8, citing *Schad v. Arizona*, *supra*, 501 U.S. at pp. 646-648.) Moreover, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 634, citing *Keeble v. United States* (1973) 412 U.S. 205, 208 [the requirement of a lesser included offense instruction is based on the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free].)

Thus, to effectuate these policies, the lesser included offense instruction must be considered by the jury before it reaches a guilty verdict. Without a lesser included offense instruction, once the jury reaches its verdict, the damage is done. At that point the defendant has been subjected to the risk that the jury was coerced into reaching a more serious verdict than it should have. And at that point the defendant has been deprived of the full benefit of the reasonable doubt standard. All because the court failed to instruct the jury on a lesser included offense.

To believe that a later special circumstance finding by the jury can undo the damage caused by the lack of a lesser included offense instruction is illogical. A later special circumstance finding is simply irrelevant to whether the jury was coerced into its guilty verdict – at which point *Beck* error has already occurred – and the defendant was deprived of the full benefit of the reasonable doubt standard due to the lack of a lesser included offense instruction. This is especially true in this case because the special

circumstance finding merely parrots the lying-in-wait murder verdict on the question of premeditation and deliberation.

Moreover, if the jury, without the benefit of a lesser included offense instruction, found that appellant committed murder with express malice while lying in wait, it would necessarily find the lying-in-wait special circumstance. Consistent with *Elliot* and *Horning*, this Court would then use this finding to prove that the failure to instruct on the lesser included offense was harmless under *Sedeno*. But this proves too much. Given that the first degree murder verdict was unreliable under *Beck*, the unreliable murder verdict more likely tainted or dictated the special circumstance finding rather than the special circumstance finding making harmless any error in reaching the guilt verdict.

Thus, because the trial court in this case required that the jury reach a guilt conviction on the murder charge without considering the lesser included offense instructions demanded by *Beck,* and before deliberating on the special circumstance, the first degree murder conviction was already unreliable and unconstitutional under *Beck*, and therefore could not be made harmless by the later special circumstance finding. Applying *Sedeno* to appellant's *Beck* claim violates *Beck*.

3. The Trial Court's Errors Were Prejudicial Under State Law Because it is Reasonably Probable That Had the Jury Been Properly Instructed, it Would Have Returned a More Favorable Verdict for Appellant

This Court, while acknowledging the constitutional component of a failure to instruct on a lesser offense, has also viewed such a failure to be an error of state law. (See *People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) For the reasons discussed above, appellant believes that assessing the

failure to instruct on second degree murder and voluntary manslaughter as if it were merely state law error is not supportable. However, even if the Court chooses to follow this approach, reversal is required because it is reasonably probable that appellant's jury would have returned a voluntary manslaughter or second degree murder verdict if the jury had been instructed on these offenses. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

a. Voluntary Manslaughter

In deciding whether an instructional error was prejudicial, a court must examine the evidence, the arguments, and other factors to determine whether it is reasonably probable that the error affected the jury's verdict. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682; see *College Hospital Inc. v Superior Court* (1994) 8 Cal.4th 704, 715 [reasonable probability does not mean more likely than not, but merely a reasonable chance, more than an abstract possbility; *People v. Blakely* (2000) 23 Cal.4th 82, 94 [*Watson* requires reasonable probability, not theoretical possibility, that instructional error affected outcome of trial].) When that examination is made here, prejudice is shown.

The evidence, the arguments, and the verdicts returned by the jury all support a finding that there is a reasonable probability the jury would have returned a voluntary manslaughter verdict if properly instructed. The verdicts the jury returned when properly instructed regarding the counts involving Mr. Pupua and Mr. Badibanga are especially instructive.

In acquitting appellant of the attempted murders of Mr. Pupua and Mr. Badibanga, the jury concluded that appellant was not out to kill whoever happened to be in the apartment. Moreover, in reaching the attempted voluntary manslaughter verdicts, the jury found that appellant did

not form the intent to kill until he was inside the apartment. Thus, the jury's rejection of the prosecutor's pivotal argument on which the entire case turned undermines any confidence in the jury's first degree murder verdict, and alone makes it much more than an abstract possibility that this jury would have returned a lesser verdict than first degree murder had it been appropriately instructed.

A reasonable inference from the record is that when appellant shot at Mr. Pupua, Mr. Badibanga, and Mr. Rexford, he was firing indiscriminately and the targets were virtually interchangeable, or of no moment as far as specific identify goes. In other words, appellant had the same intent towards each target, and as found by the jury – instructed on attempted murder and the lesser included offense, attempted voluntary manslaughter with respect to Mr. Pupua and Mr. Badibanga – that was an intent to kill without express malice. (CALJIC No. 8.66; 3 SCT 1:459.) Hence, the jury's attempted voluntary manslaughter verdicts demonstrate at least a reasonable probability that had the jury been instructed on voluntary manslaughter in the death of Mr. Rexford, it would have returned a voluntary manslaughter verdict.

The prosecutor's explanation to the jury as to why Mr. Rexford was shot also supports a finding of voluntary manslaughter: "Why did Joshua Rexford die as opposed to the other two people, even though both people were shot at, Mr. Pupua, Mr. Badibanga? They were shot at. There were holes around where they were sitting. Joshua Rexford did something you should not do in the situation. You're in a situation with untrained killers, killers who are keyed up, and on raw edge. And they're just firing at them, and then all of a sudden somebody stands up and they start following the moving target." (RT 17:5508.) The prosecutor thus concluded that

appellant did not kill Mr. Rexford because appellant believed that the person in front of him was Joshua Rexford; rather he killed that person, whose identity was unknown to appellant, because the person suddenly stood up. Neither survivor testified that a gun was aimed directly at Mr. Rexford. Mr. Pupua testified that, as soon as the door opened, the black man pointed the black gun toward "us," not Mr. Rexford specifically. (RT 9:2874; see also 9:2876, 2879.) Mr. Badibanga testified that appellant's gun was pointed "upwards," but he did not say that the gun was pointed at anyone in particular. (RT 9:3123-3124.)

Other evidence also supports a reasonable inference that this was a case of voluntary manslaughter. Linda Farias testified that she overheard appellant and others talking at her brother Manuel's funeral that they wanted to contact "Josh" (no mention of "Rexford") to find "Brian" (no last name), the purported killer of Manuel Farias. (RT 11:3429, 3431, 3433.) But the prosecution presented no evidence that anyone named Brian killed Manuel Farias. More important, the prosecution presented no evidence that appellant believed that Joshua Rexford had a cousin Brian who killed Manuel Farias.

At most, the prosecution presented evidence that appellant and his friends were dissatisfied with the police investigation into Manuel's death. (RT 15:4977, 4986.) But any such dissatisfaction does not lead to the inference that appellant was motivated to kill three innocent persons who apparently had no part in the death of Manuel Farias. (RT 15:4789; RT 16:5061-5062, 5066.) The lack of a plausible premeditated motive to kill is why the prosecutor virtually conceded to the jury that he failed to prove a motive to commit first degree murder (RT 16:5258 ["'Motive' is a nice thing to have, but it is not a necessary thing for you to make your decision

in this case"]; RT 16:5259 ["the reasons why Mr. Smith committed the particular crimes in this particular case and the reasons why he did them and the way that he did it, those particular questions were not answered particularly well"]), and the trial court found "no motive of consequence" (RT 18:6141).

But, if the prosecutor's motive evidence had any significance, it could only have supported the belief that appellant sought out Joshua Rexford with the intent to question him about where to find Brian. Moreover, because there was no evidence that appellant believed that Joshua Rexford was the Josh who had a cousin Brian, in questioning Mr. Rexford, appellant would have wanted first to establish that Mr. Rexford had a cousin Brian. Intending to kill Mr. Rexford without talking to him simply made no sense.

The jury also could have drawn a reasonable inference that events transpired inside the apartment that demonstrated a lack of express malice. Mr. Rexford was belligerent, short-tempered, and had many enemies. (RT 13:4254-4255; RT 14:4462-4463, 4471-4472; RT 14:4391-4397, 4415-4421.) Evidence was before the jury that he had engaged in many physical altercations with others. (RT 9:2914-2917, 2951-2953, 2960; RT 13:4205, 4238-4240; RT 14:4377-4386, 4410-4411.) Given Mr. Rexford's background, and given the fact that the occupants of the apartment were expecting a friend, and not an unknown black man and an unknown Mexican male (RT 9:2872-2873, 10:3109, 3121, 3159-3160), it is not surprising that Mr. Rexford would be the one person to react to the entry in a potentially aggressive fashion by immediately springing to his feet.

The forensic evidence also supported any inference the jury may have drawn in this regard. It demonstrated that Mr. Rexford was facing the

shooter straight-up and head-on when he was shot. (RT 10:3198, 3200; 3 SCT 775-776, 782.)

An upstairs neighbor of Mr. Pupua provided testimony that would have led the jury to a further inference that at least one of the occupants of the apartment was attempting to obtain a weapon after the shooters entered the apartment. After the Rexford shooting, Mr. Pupua's upstairs neighbor heard someone in front of Mr. Pupua's door speak the words, "I couldn't get to my gun in time." (RT 13:4010.) The trial court admitted this testimony because the statement was probably made by someone who was in the apartment during the shooting. (RT 13:4015-4017.) Thus, when Mr. Pupua and Mr. Badibanga dove for cover, it must have appeared to the shooter that they were reaching for their weapons, particularly Mr. Pupua, since he dove behind a six-foot speaker in the corner of his living room, a good location to keep a gun. (RT 9:2882.)

In addition, the jury's not guilty findings on the attempted murder charges support the conclusion that the jury rejected the testimony of Mr. Pupua and Mr. Badibanga that appellant entered and immediately fired. Had the jury accepted their testimony, it would have concluded that appellant formed the specific intent to kill before opening the door and was therefore guilty of attempted murder. (CALJIC Nos. 3.31, 8.66; 3 SCT 1:446, 459.)[89]

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[89] The jury's burglary verdict does not alter this conclusion. (CT 3:472.) It is impossible to tell from the verdict and the court's instructions whether the jury found that appellant entered the apartment with the intent to commit theft or to commit a felony including, for example, assault with a firearm. (3 CT 1:470-472, 473 ["If you are satisfied beyond a reasonable doubt and agree unanimously that defendant made an entry with the specific

(continued...)

In sum, appellant did not know Mr. Rexford, and it was sheer misfortune that Mr. Rexford was killed. This is why the prosecutor had to argue that appellant formed the intent to kill all the occupants before entering the apartment to prevail on the murder and attempted murder charges. But the jury rejected that argument in finding that appellant formed the intent to kill Mr. Badibanga and Mr. Pupua after entering the apartment. It is reasonably probable that had the jury been properly instructed, it would have returned a voluntary manslaughter verdict as to the assault on Mr. Rexford.

b. Second Degree Express Malice Murder

The fact the jury acquitted appellant of the attempted murders of Mr. Pupua and Mr. Badibanga, and returned guilty verdicts on attempted voluntary manslaughter, means that appellant did not form the intent to kill until he was in the apartment. If appellant had formed the intent to kill before entering the apartment, the jury would have found him guilty of attempted murder. Thus, it is reasonably probable that a properly instructed jury would have returned a verdict of unpremeditated second degree murder with express malice as to the Rexford killing

Moreover, as the above discussion of the evidence demonstrates, if appellant shot Mr. Rexford, it was not as a result of deliberation and premeditation, particularly given that appellant did not conceal himself at

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[89](...continued)
intent to steal or to commit a felony, you should find the defendant guilty. You are not required to agree as to which particular crime the defendant intended to commit when he entered"].) Thus, the burglary verdict is no support for finding that appellant entered the apartment with the intent to kill.

the apartment complex, spoke openly with Michael Honess and Nancy and Sebrina Smith, and knocked on Mr. Pupua's unlocked door, rather than open it without permission. Further, the most plausible interpretation of the prosecution's motive evidence is that appellant went to Mr. Pupua's apartment to speak with Mr. Rexford, not to shoot him

The prosecutor's explanation to the jury as to how appellant and the Mexican male felt right before the shooting supports a finding of second degree express malice murder: "I mean their nerves are on raw edge at this point." (RT 11:5507.) "Smith just starts trying to kill everybody. He's on raw edge now." (RT 17:5508.)

A sampling of recent cases shows that juries often return second degree murder verdicts even where there is evidence that could support the prosecution's first degree murder theories. (See, e.g., *People v. Robertson*, *supra*, 34 Cal.4th at pp. 161-164 [second degree felony murder where defendant ran from home into street to shoot at escaping burglars]; *People v. Karapetyan* (2003) 106 Cal.App.4th 609, 612, 622 [defendant initiated gun battle]; *People v. El* (2002) 102 Cal.App.4th 1047, 1051 [defendant killed victim 15 minutes after arguing with him]; *People v. Johnson* (2002) 98 Cal.App.4th 566, 570, 573 [defendant shot victim who had his back turned]; *People v. Crowe* (2001) 87 Cal.App.4th 86, 89-90, 97 [defendant went to hotel expecting to find victim unarmed, then shot him in the back].) Second degree express malice murder would have been a viable option for the jury in this case if it had been so instructed.

c. Second Degree Implied Malice Murder and Second Degree Felony Murder

The attempted voluntary manslaughter verdicts mean that appellant did not act with express malice in shooting at Mr. Pupua and Mr.

Badibanga. It would have been no stretch for the jury to reach a similar conclusion with respect to appellant's shooting Mr. Rexford, particularly given the prosecutor's view that appellant acted with the same intent towards all three victims because appellant had no idea which man was Mr. Rexford.

Here, too, the prosecution's motive evidence strongly suggests that Mr. Rexford was killed unintentionally, because his death would not have served the purpose for appellant's appearance at Mr. Pupua's apartment: to talk to Josh to find Brian, the purported killer of Manuel Farias. Being armed indicates that appellant and his companion may have intended to use the weapons to obtain the needed information from Mr. Rexford concerning Brian's location, or to defend themselves if necessary. Appellant's comment to Mr. Honess, "you can go watch the fireworks if you want to" (RT 15:4932), intimates a hyperbolic invitation to a showy display that might include gunfire, depending on the reaction of the apartment's occupants. The actual scattershot method of firing exhibits no intent to kill, but an intent to do a dangerous act with a conscious disregard for human life – second degree implied malice murder. The same evidence supports second degree felony murder, where the felony was the grossly negligent discharge of a firearm. It is reasonably probable that the jury would have found either had it been properly instructed on both.

d. Aiding and Abetting Voluntary Manslaughter or Second Degree Murder

Although the jury found that appellant used a firearm in the first degree murder of Mr. Rexford and the attempted voluntary manslaughters of Mr. Pupua and Mr. Badibanga (CT 3:467, 469, 471), the evidence that appellant was the shooter was not strong. Moreover, as explained below,

even if appellant was a shooter, there was no proof that he fired the fatal shots. Therefore, based on the aiding and abetting instructions (3 SCT 1:443-445, 485), the jury could have rejected appellant's duress claim and concluded that appellant aided and abetted the Mexican male in the first degree murder of Mr. Rexford. But because the prosecutor virtually ignored that person's mental state, in particular whether he acted with malice or with premeditation and deliberation, it is reasonably probable that the jury would have returned a more favorable verdict if it had been instructed on aiding and abetting voluntary manslaughter, aiding and abetting second degree express malice murder, and aiding and abetting second degree murder that was the natural and probable consequence of an assault with a firearm.[90]

e. Weak Evidence that Appellant Was a Shooter

The accuracy of Mr. Pupua's and Mr. Badibanga's identifications of the shooter was highly doubtful. When Mr. Pupua called 911, he told the operator that two Black men walked into his apartment but only one began shooting; however, he told a police officer that there had been three Black men.[91] (RT 14:4498, 4622-4623, 4633; 3 SCT 4:1133; see also RT 9:2950

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[90] Although the court did not instruct the jury on the natural and probable consequences theory of aiding and abetting (CALJIC No. 3.02), the court's aiding and abetting instructions nonetheless could have led the jury to convict appellant of aiding and abetting the Mexican male in the attempted voluntary manslaughters of Mr. Badibanga and Mr. Pupua. (See 3 SCT 1:443-445, 483.)

[91] During the preliminary hearing, Mr. Pupua initially claimed that he never told the police that he saw a second person at the door, but then contradicted himself and testified that he may have reported a second

(continued...)

[he only saw appellant but felt there could be another person].) Mr. Pupua admitted that he only saw "a little bit of [the shooter's]" face (RT 9:2922), and he closed his eyes and dropped to the floor as soon as the shooting started. (RT 9:2882, 2900.)

Mr. Pupua's testimony about the shooter's appearance was consistently inconsistent. At the second trial, Mr. Pupua testified that the shooter wore a black beanie. At the first trial, he said it was a white baseball cap. (RT 9:2890-2891, 2899.) Mr. Pupua testified at the second trial that the assailant wore a black jacket with orange lining. At the first trial, he could not remember what the gunman was wearing. (RT 9:2890-2891.) On the day of the shooting, he told the police that the gunman was 5'9" and 165 to 175 pounds. (RT 14:4506.) At the second trial, Mr. Pupua said that he was 6'1" or 6'2" and weighed 185 pounds. (RT 9:2922-2923.)

Mr. Badibanga testified as well that there were two intruders, but only one shooter. (RT 10:3121-3127, 3147.) Mr. Badibanga also saw a person behind and to the right side of appellant. Mr. Badibanga could only see a portion of his body; it could possibly have been a light-skinned Caucasian. (RT 10:3125-3126.) Mr. Badibanga only saw the gunman for "just a glance actually." He did not see the second person's face. (RT 10:3162.) Mr. Badibanga was not looking at the gunman when he dropped to the floor. (RT 10:3163.)

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[91](...continued)
person. (CT 1:86-87.) He also testified that the gunman was light-skinned. (CT 1:81.) It would appear, based on Mr. Badibanga's testimony that the person with appellant was "lighter" than appellant, that appellant has a dark complexion. (RT 10:3138-3140.)

Additional evidence undermined Mr. Pupua's and Mr. Badibanga's ability to identify the shooter. Mr. Pupua and Mr. Badibanga only slept for about three hours the night before the shooting, after being up for about 19 hours, partying, smoking marijuana, and drinking alcohol. (RT 9:2932, 2935-2937, 2939; RT 10:3164.) Their ability to accurately identify someone they saw for a split second was likely hampered by their lack of sleep and the residual effects of their alcohol and drug use. Moreover, both Mr. Pupua and Mr. Badibanga were hysterical during and after the shooting; Mr. Pupua was too hysterical to provide the first responding officer with any information about the suspects. (RT 10:3147-3149; RT 12:3869-3870; RT 14:4623, 4628.)

In sum, the accuracy of Mr. Pupua's and Mr. Badibanga's testimony regarding whether appellant or the Mexican man fired the bullets that killed Mr. Rexford is doubtful to say the least.[92]

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[92] Additionally, because the jury could have readily concluded that Mr. Pupua's and Mr. Badibanga's photo lineup identifications of appellant were unreliable, they also could have reasonably concluded that their identifications of the fatal shooter were equally unreliable. Eleven days after the shooting, Detective Franks learned that appellant's fingerprint had been found on Michael Honess's telephone. (RT 12:3903, 3905.) The next day he presented a sequential photo lineup, containing appellant's picture, first to Mr. Badibanga and then later to Mr. Pupua. (RT 12:3908; RT 14:4642.) Mr. Pupua testified that he had seen a flyer with appellant's picture on it before he made the photo lineup identification. (RT 9:2909.) Both men – in, according to Franks, almost exactly the same manner – identified the person in photo number 3 as the shooter. Appellant was photo number 3 in both lineups. (RT 14:4644-4645.)

The photo lineups shown to Mr. Badibanga and Mr. Pupua by Detective Franks contravened law enforcement procedures for conducting sequential photo lineups. (See U.S. Dept. of Justice, Eyewitness Evidence:

(continued...)

Further, even if Mr. Badibanga did get a better view of the intruders than Mr. Pupua, his view of appellant running away supports the conclusion that appellant was not the shooter. Mr. Badibanga testified that he saw appellant's whole body as appellant ran from the apartment and appellant did not have a gun in his hand. (RT 10:3139.) Mr. Badibanga's observation is consistent with appellant's testimony that he did not have a gun. (RT 16:5134.)

Although Michael Honess testified that appellant had a gun, he failed to mention this to Detective Hards, who interviewed him on the day of the

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[92](...continued)
A Guide for Law Enforcement (October 1999) pp. 30-35; California Commission on the Fair Administration of Justice, Report and Recommendations Regarding Eye Witness Identification Procedures (April 13, 2006) p. 5 ["Commission Report"]; G. Ryan, Governor of Illinois, Report of Governor's Commission on Capital Punishment (Apr. 15, 2002) p. 32 [instructing law enforcement on proper procedures for conducting sequential photo lineups].) Detective Franks placed a photo of appellant in the same number three position for both Mr. Badibanga and Mr. Pupua. (RT 12:3905, 3908; 14:4642-4645.) He failed to remove photo number three after each had reviewed it and before each had moved on to review photos four, five, and six. (RT 12:3908; 14:4644-4645.) Worst of all, he conducted a sequential lineup, notwithstanding his knowledge that number three was a photo of appellant, Franks's suspect. (RT 12:3905, 3908; 14:4644-4646.)

Witnesses Sebrina Smith, Nancy Smith and Michael Honess spent considerable time in appellant's presence. (RT 10:2978-3024, 3252-3269; RT 12:3826-3831.) Yet, none of the three was able to identify appellant from the same photograph that purportedly only gave Mr. Badibanga and Mr. Pupua pause. (RT 14:4642.) Further, the improper photo lineups compounded the inherent cross-racial identification problems with Mr. Pupua, a Tongan (RT 9:2946), identifying appellant, a Black man. (Commission Report at pp. 7-8; see also *People v. Williams* (1991) 228 Cal.App.3d 146, 150 [cross-racial identifications can be unreliable].)

shooting, though Mr. Honess managed to tell the detective that the other man in his apartment had a gun. (RT 10:2991; RT 14:4506, 4511.) Mr. Honess's belated testimony that appellant had a gun was belied by his failure to relate this important fact to Detective Hards.

The prosecutor claimed that Esau Boche's testimony was significant because it helped prove beyond a reasonable doubt that appellant had a gun. (RT 16:5276.) However, Mr. Boche's testimony actually is of limited value. Although Mr. Boche testified that he saw appellant running away from Mr. Pupua's apartment with a gun in his hand (RT 10:3229), Mr. Badibanga testified that he saw appellant's whole body as appellant ran from the apartment and appellant did not have a gun in his hand. (RT 10:3139.) The jury must have thought the question of appellant's gun possession was close because it asked for and received a readback of Esau Boche's testimony. (RT 17:5523; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror requests to have testimony reread indicate that deliberations were close].)

Here, after a 20-day trial in a factually uncomplicated case about a single occasion where appellant admitted his presence at the scene of the crime, and where there was no complex scientific testing, the jury deliberated more than 22 hours over 5 days. (CT 3:455-464.) In *In re Martin* (1987) 44 Cal.3d 1, the jury deliberated less than 22 hours over 5 days. This Court found that the lengthy deliberations practically compelled the conclusion that "the case was evidently very close." (*Id.* at pp. 51-52; compare *People v. Cooper* (1991) 53 Cal.3d 771, 837-838 [the inference of a close case was weak where the jury deliberated in a capital case for 27 hours over 7 days after more than 3 months of trial, where dozens of

witnesses testified, some about complex scientific testing, and well over 700 exhibits were admitted].)

In light of the length of jury deliberations and the readback of Mr. Boche's testimony, a fair inference is that the jury's decision was close on the overall issue of guilt, and especially so on the issue of whether appellant was the shooter.

f. Lack of Evidence that Appellant Killed Mr. Rexford

Even assuming that the jury believed that appellant was the shooter and used a nine millimeter gun, the jury could not have concluded that appellant's gun killed Mr. Rexford. No witness, ballistics expert or otherwise, testified that the bullets found in Mr. Rexford came from a nine millimeter gun. The prosecutor tried to finesse the issue with the testimony of Medical Examiner Nenita Duazo, who said that the three bullets, two of which were fatal, that she removed from Mr. Rexford were large caliber (whatever that would mean to jurors), and that one bullet was preserved ("there is no significant deformity that is produced, because some bullets can be deformed as they pass through the body") and measured approximately nine millimeters in diameter at the base. (RT 10:3197.)

The medical examiner did not testify, however, that the preserved bullet necessarily came from a nine millimeter gun or even that the bullet was a nine millimeter. "Approximately" nine millimeters could be anywhere from 8.50 millimeters to 9.49 millimeters, or .335 inches to .374 inches. A reasonable inference is that the prosecutor had the medical examiner testify in terms of millimeters rather than inches to give the jury the impression that the bullet was shot from a nine millimeter rather than

from a .357 caliber or .38 caliber gun. Detective Franks admitted, however, that a nine millimeter bullet is similar to a .38 caliber bullet. (RT 12:3920.)

Of even more significance is the fact that Dr. Duazo was the person who removed the two bullets that she concluded were the fatal bullets, yet she did not testify that one of the fatal bullets was the preserved bullet. Consequently, it is reasonable to infer that the preserved bullet was *not* one of the two fatal bullets. (RT 10:3199-3202.) Hence, there was no evidence from Dr. Duazo that the two fatal bullets were shot from a nine millimeter gun.

Furthermore, Forensic Specialist Rice, who had worked at over 2,500 crime scenes (RT 12:3691), and opined that two of the bullets found at the crime scene were nine millimeter (RT 12:3698), could not determine the caliber of the three bullets taken from Mr. Rexford; including the one bullet that was preserved (RT 12:3703). Clearly, the jury could not have rationally concluded, based on the testimony of the medical examiner and the forensic specialist, that the bullets, let alone the fatal bullets found in Mr. Rexford, were from a nine millimeter gun. If anything, Ms. Rice's testimony might lead one to conclude that the preserved bullet was not a nine millimeter, given that Ms. Rice was able to identify two of the bullets found at the crime scene as nine millimeter.

Specialist Rice also testified that there were seven fired cartridge cases and six bullet holes in Mr. Pupua's apartment. (RT 12:3697-3698.) If there were six bullet holes in the apartment and three bullets were found in Mr. Rexford, then there should have been at least nine fired cartridge cases found. Deputy Sheriff Carlos Quezada, the first law enforcement officer at the scene, testified that when he arrived, the shell casings were being kicked around by Mr. Pupua and Mr. Badibanga, which probably explains why

some of the seven fired cartridge cases were found outside the apartment. (RT 12:3697.) Deputy Sheriff Quezada also admitted that he was unable to contain the scene to preserve the evidence due to Mr. Pupua's and Mr. Badibanga's disruptive behavior. (RT 12:3871.)

Of the seven cartridges found, six were nine millimeter and one was .25 automatic. (RT 12:3698.) If only seven bullets had actually been shot, then one could conclude that at least one of the fatal bullets was a nine millimeter. But because there were at least nine bullets shot – Mr. Badibanga testified that there were 15 or 16 shots (RT 9:2882), while Mr. Pupua said there were up to 11 shots (RT 10:3125) – and at least two cartridges were missing, there was no way for the jury to determine the caliber of the two fatal bullets found in Mr. Rexford. That is, the two missing fired cartridge cases could have been .25 auto, or even some other caliber, such as .357 caliber or .38 caliber.

Thus, even if the jury believed that appellant was a shooter, it could not have concluded, based on the evidence, that his gun caused Mr. Rexford's death. Hence, the jury could have found that appellant aided and abetted the Mexican male, the actual perpetrator, in committing Mr. Rexford's murder.

Focusing almost entirely on appellant's mental state, the prosecutor never mentioned the Mexican male's mental state, except to say that, like appellant, he had "taken time to build up [his] courage," his "nerves [we]re on raw edge at this point" (RT 17:5507), and he was "keyed up, and on raw edge" (RT 17:5508). This description of the Mexican male's mental state is consistent with voluntary manslaughter and second degree murder. Keyed up and on raw edge, he would have been provoked by the slightest movement of the apartment occupants. Moreover, the Mexican male may

have appeared at the apartment for the purpose of assaulting the occupants, perhaps in retaliation for the fight at the football game two days before, but he killed Mr. Rexford instead, a natural and probable consequence of the assault. Finally, when Mr. Rexford turned around and confronted the Mexican male, while Mr. Pupua and Mr. Badibanga were diving for weapons, he could have shot in unreasonable self-defense or acted reasonably as a result of the provocation.

Accordingly, it is reasonably probable that the jury could have returned a verdict of aiding and abetting voluntary manslaughter or aiding and abetting second degree murder had it been instructed on these lesser included offenses.

g. Conclusion

Appellant's jury did not believe that the first degree murder case against appellant was strong, but returned a guilty verdict because it believed that appellant – who admitted his presence at the shooting – was involved in Mr. Rexford's death, and the jury had no option other than first degree murder. The jury found that appellant lacked malice in the attempted voluntary manslaughters of Mr. Pupua and Mr. Badibanga. The prosecutor argued that appellant had the same intent with respect to all three victims because appellant did not know which of the three was Mr. Rexford, who appellant thought was Black. The considerable evidence of provocation in this case suggests that the jury, if properly instructed, would have found voluntary manslaughter with respect to Mr. Rexford based on provocation or unreasonable self-defense, particularly since the most plausible explanation for appellant's appearance at Mr. Pupua's apartment – based on the *prosecution's* motive evidence – is that appellant was there to talk to Josh in order to find Josh's purported cousin, Brian, the alleged killer

of Manuel Farias. Intending to kill Mr. Rexford without talking to him first about whether he had a cousin Brian and if so, where his cousin could be found, was completely at odds with the evidence of appellant's conspicuous conduct before the shooting, which is why the prosecutor and the trial court effectively acknowledged that the prosecutor failed to prove a motive to kill.

The actions of the apartment occupants also could have led the jury to a finding of unpremeditated second degree murder. The excited response by occupants to seeing two unknown men enter the room when they expected their friend instead, combined with Josh Rexford's confrontation of the men, supports the view that the shooting was an impulsive and unpremeditated response.

A properly instructed jury would have also found implied malice second degree murder based on the evidence that appellant went to the apartment to contact Mr. Rexford to find Brian. Being armed suggests that appellant and his companion intended to use the weapons if necessary to obtain the needed information from Mr. Rexford concerning Brian's location. The scattershot method of firing shows no intent to kill, but an intent to do a dangerous act with a conscious disregard for human life. The same evidence supports second degree felony murder, where the felony was the grossly negligent discharge of a firearm.

Finally, completely overlooked by the court and counsel was that the jury could have concluded, if instructed on either, that appellant aided and abetted voluntary manslaughter or second degree murder by the Mexican male, the actual shooter.

Consequently, the trial court's failure to sua sponte instruct appellant's jury on all possible theories of voluntary manslaughter and

second degree murder supported by substantial evidence was prejudicial error under *Watson*. Appellant's first degree murder conviction, gun use and special circumstances findings, and penalty verdict must be reversed.

III

TROY HOLLOWAY'S OUT-OF-COURT STATEMENTS AND TRIAL TESTIMONY WERE INADMISSIBLE BECAUSE THEY WERE INVOLUNTARY AND COERCED

A. Introduction

Troy Holloway was a linchpin witness for the prosecution's fragile theory of premeditated murder. The state needed Holloway's testimony for its theory to have any currency at all. Detective Franks secured this testimony by telling Holloway that he was acting under the direction of the trial court and threatening him that the trial court would take action to jail Holloway if Holloway was not cooperative with Franks. These improper threats all took place under the auspices of Holloway's military superiors, who were present while these coercive techniques were employed. Unsurprisingly, Holloway changed his previous story and implicated appellant.

Appellant moved to exclude both Holloway's statements to Franks and his trial testimony on the basis that both were the result of coercion, and as such constituted inherently unreliable evidence that should not be admitted at trial. The trial court denied appellant's motions and admitted this tainted evidence; evidence which was crucial in securing appellant's conviction and sentence.

The admission of this evidence violated appellant's rights to due process, a fair trial, and a reliable determination of guilt, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution, and demands reversal of appellant's conviction and sentence. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206-207; *Lyons v. Oklahoma*

(1944) 322 U.S. 596, 602-603; *People v. Badgett* (1995) 10 Cal.4th 330, 347; *People v. Douglas* (1990) 50 Cal.3d 468, 499-504; *People v. Brommel* (1961) 56 Cal.2d 629, 630-634, overruled o.g., *People v. Cahill* (1993) 5 Cal.4th 478.)

B. Background Facts

1. Detective Franks's Coercion of Troy Holloway

Troy Holloway was first interviewed by Detective Frank Gonzales on March 8, 1995.[93] Holloway said that he feared for his life after his close friend Mr. Rexford was shot – "they got him, they might try to come and get me." (4 SCT 4:1139; see also 4 SCT 4:1144.) The night after Mr. Rexford was killed, Holloway purchased a nine millimeter pistol from Steve Blackshire. He kept the gun for about three days, then threw it into a drainage duct next to Interstate 10 and Citrus Street in Fontana. (4 SCT 4:1139-1142, 1147-1149, 1159-1160.) Holloway had fired two shots from the gun while showing off for friends Ernie Negrete and Jesse Lawless; he removed the remaining four bullets from the magazine before he threw the gun into the duct. After tossing the gun, he drove to a different location and threw the bullets into a field near a generator and a housing complex called "the tracks." (4 SCT 4:1149-1150, 1155-1157.)

Gonzales confronted Holloway with his disbelief that Holloway would throw away a gun he purchased for cash only three days before, and separately dispose of the gun and bullets, unless he suspected that the gun had been used in his friend's shooting. (4 SCT 4:1151-1154, 1159-1160.) In response, Holloway said that he could pass a lie detector test, and gave

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[93] An edited audiotape of this interview was played at trial and an edited transcript was admitted as evidence of a prior inconsistent statement by Holloway. (RT 13:4173; 15:4740-4742; 4 SCT 4:1138-1162.)

Gonzales detailed directions and a map to the field where he tossed the bullets. (4 SCT 4:1160-1165.)

Approximately two years later – ten days before the trial court declared a mistrial due to the prosecution's unexpected attempt to introduce purported motive evidence from Holloway and other witnesses (RT 6:1827) – Detective Franks interrogated Holloway via telephone. (RT 12:3952, 15:4695.) Franks located Holloway on a Navy ship in Virginia. Before he talked to Holloway, Franks told a naval intelligence officer that Holloway was being sought as a crime witness. (RT 12:3955.)

According to the transcript of the phone call between Holloway and Franks, the call occurred under the supervision of a single military officer, Investigator Ricks of the U.S.S. Saipan. (RT 11:3529-3530; 3 SCT 3:801, 820; Exh. 62.) However, Holloway testified that two additional military officials, Petty Officer Ricket and Petty Officer Luke, also were present during the interrogation. Holloway further testified that different military police –"masters at arms" – informed him that a police detective wanted to talk to him. (RT 11:3530.)

The record demonstrates that Franks had never been sent to the trial court to discuss this investigation (RT 12:4178); never received any directives from the trial court (RT 14:4668); and, in fact, was pursuing this aspect of the investigation on his own free time. (RT 12:3950.) Yet, from the beginning of his phone conversation, Franks began the process of convincing Holloway that he was acting as an agent of the trial court.

Franks started down this road by telling Holloway that "things are being said in court that's involving you now" (3 SCT 3:802), and used Jesse Lawless's and Ernie Negrete's statements to the police regarding Holloway's backyard gun show to fool Holloway into believing that

Lawless and Negrete had testified to those facts in the trial court. (3 SCT 3:802-804.) In fact, Negrette had yet to testify and Lawless never testified.

Franks then took his lies to a reprehensible and unconscionable level by telling Holloway that the trial court had ordered him to call Holloway and intimidate him into changing his recollection of events. Included in these falsehoods were representations that Holloway would be held in both military and civilian jails if he did not alter what he had previously said:

> . . . Troy, please listen to me. You're in no trouble now, but you gotta be totally honest because anything that counterdicts [sic] what these guys are saying, this is a death penalty case and this . . . the . . . the judge is going to order me to go pick you up and bring you forthwith from Virginia to stand tall in front of him. . . . And he . . . he'll hold you in contempt of court. . . . [Y]ou're young, you got your whole career ahead of you . . . don't do anything to screw it up man. Because the judge is really P.O.'d about what's been going on. He feels that people are screwing with his case and he's . . . ordered me to read this on the phone and [I'm] to go report back to him and he's gonna make a determination whether or not I have to call . . . your commanding officer there and have them take you in custody and then I have to fly down there, pick you up and present you to the judge and he is going to make you stand tall in front of him and tell [him] the truth or he'll hold you in contempt of court.

(3 SCT 3:804-805.[94])

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[94] Franks also lied to Holloway about the superior court's ability to force him to cooperate with the police. The superior court cannot use its contempt powers to force a citizen to cooperate with a police investigation. (See Code Civ. Proc., § 1209, subd. (a).) Indeed, because he knowingly told the lie that a superior court judge had "ordered" him to get Holloway to change his story, Detective Franks himself could have been cited for "falsely pretending to act under authority of an order or process of the court." (Code Civ. Proc., § 1209, subd. (a)(4).)

Franks's threats and lies had the desired effect of causing Holloway to realize he had to change his story regardless of whether the new story was true or not. This is shown by Holloway asking: "[I]f I tell [the judge] the truth and he don't think it's the truth, he can still hold me in contempt?" (3 SCT 3:805.) Franks responded: "It's just . . . uh . . . we just got too many people counterdicting [sic] what's going on." (*Ibid.*)

Holloway then made one final attempt to withstand Franks's coercive lies and re-affirmed the truth of his statements to Gonzales that he purchased the gun from his friend Steve Blackshire after the Rexford shooting – "for my protection, 'cause if they killed my friend, why can't they kill me . . .?'"– and three days later disposed of it in a "freeway trough." (3 SCT 3:807-808, 810.) Holloway told Franks that he did not dispose of the gun because he believed it had been used during the Rexford shooting; he got rid of it because he was afraid his mother would find out that he had brought a gun into her home. (3 SCT 3:809-810.) Holloway also told Franks that he never possessed a .25 caliber handgun, but he thought that Patrick Wiley had one. (3 SCT 3:810-811.)

Clearly dissatisfied with Holloway's failure to inculpate appellant, Franks spelled out the prosecution's motive theory for him:

> Det. Franks: Well do you know there's a link, there is a link between . . you know a person named Manuel Farias?
>
> Troy Holloway: No.
>
> [Franks]: It's well, Manual Farias was a friend of Sugar Ray and Carnot Ledbetter and Jake Carroll.
>
> [Holloway]: Okay.

> [Franks]: Supposedly, they believed Josh's brother was responsible for Manual Farias's death and this was all supposed to be a retaliation.
>
> . . .
>
> [Franks]: That's right. . . . they hit the wrong person. . . . they were looking for somebody named Brian and they believed Brian was . . . Josh was Brian's brother.
>
> [Holloway]: (Sigh) See this is all new to me.
>
> [Franks]: . . . I'm explaining . . . this all to you, because . . . it's no secret anymore because . . . we're four weeks in the trial."

(3 SCT 3:813-814.)

Franks then reiterated to Holloway that he was talking to him because the trial court ordered him to do so, and directed Holloway to the specific parts of the case theory that Franks obviously wanted to shore up:

> Det. Franks: Right. And like I said, uh . . the judge has ordered me to talk with you because he's got some concerns [be]cause these people are coming in and . . . I'm gonna . . uh . . exactly read this statement here. "Lawless said it was a nine millimeter, but he did not know the brand and Sugar Ray gave the gun to Troy and Sugar Ray was involved in the murder of Josh Rexford."

(3 SCT 3:814-815.)

After Holloway protested that Lawless never saw appellant give him a gun, Franks told Holloway that, because it was partially Holloway's fault that the trial had been suspended, he was facing a jail sentence:

> Det. Franks: Yeah, well I'm just telling you, quote-unquote what it said and then the judge uh, yesterday uh . . dismissed court at noon and, he is not gonna pick this again until the thirty-first, called us in there and said this is what you need to do. You find these people and if they give you stories you

> don't believe, you take them into custody and bring them forthwith to me and they're gonna tell me . . . their story and if I don't believe them I'm gonna hold them in contempt of court.

(3 SCT 3:815; see also *id.* at p. 816 ["[W]e're gonna get the truth from people or people are gonna spend time in jail. That's what it comes down to."].)

Franks told Holloway there was only one thing he could do to escape the court's wrath – work with the police to convict appellant:

> Det. Franks: . . . And the best thing you could do is work with us and put these people behind bars, man. I'm telling you straight up, man to man.

(3 SCT 3:817.)

Holloway invited Franks to come to Virginia to speak to him – presumably outside of the earshot of the military officers – if he wanted a statement. (3 SCT 3:818-820.) In response, Franks again threatened him with military custody as well as the court's contempt power:

> Det. Franks: By one o'clock California time, I'm gonna be talking to the judge and by three o'clock I may be on that plane . . and that all depen. . . . you may be in custody down there, so you need to get in touch with me, man.

(3 SCT 3:821.)

When Holloway said that he did not want to talk because he feared for his life[95] (3 SCT 3:822), Franks once again raised the threat of imprisonment:

> Det. Franks: Well Troy, ... [o]ne way or the other, I'm gonna come down there, probably and I'm gonna end up getting you and one way or the other, you're gonna stand in front of that judge. . . . [Y]ou can be a cooperative witness or you can be in handcuffs. That's up to you.

(*Ibid.*)

This last in the series of unconscionable threats caused Holloway to relent and alter his story to match the prosecution's motive and weapon disposal theories. He told Franks that word on the streets was that "Josh and a couple of his friends set Manuel [Farias] up ["for some herb"] and killed him . . . [s]o Sugar Ray [appellant] turns around like you say, retaliation" (3 SCT 3:823, 830); that, at an unspecified time before the shooting, appellant drove Holloway to appellant's apartment, asked him questions about Josh, and told him that he "just wanted to talk to Josh" (3 SCT 3:825, 830-833, 839-841); that, before the shooting Holloway had asked appellant to get him a gun and, after the shooting, appellant gave him a nine millimeter gun; however, he gave it back to appellant two days later because he was afraid of what his mother would do if she found a gun in

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[95] Holloway also told Franks that some "motherfuckers already tried to kill me . . . his friends." Franks replied that "they wanted to . . . they were going to beat the truth out of you. The whole thing is man, is we . . . we just wanted the truth from you." (3 SCT3:843-844.) At trial, Holloway confirmed that "they" were Josh Rexford's friends, not appellant's. (RT 11:3499.) Defense counsel did not delve into whether Franks's use of "we" meant that he had some knowledge of the attempt to beat the truth out of Holloway.

her home (3 SCT 3:836-838); and that Patrick Wiley had a .25 caliber weapon (3 SCT 3:834, 844).

After providing this altered story in response to Franks's coercion, Holloway sought to ensure that it was sufficient to meet Franks's needs, and presumably to protect him from any retribution from Franks:

> Troy Holloway: It's like this, Detective . . if I go to court . . . my information is like the missing piece.
>
> Det. Franks: It is. That's the truth. . . . your information is the missing piece. . . . [N]ow I'm not BS-ing you man.
>
> [Holloway]: The whole story comes together now that I have told you.
>
> [Franks]: I know.

(3 SCT 3:846.)

2. The Hearing on Appellant's Motion

Appellant moved to exclude Holloway's testimony and the statements he made to Franks on the ground they were involuntary and violated the principles set forth in *People v. Douglas* (1990) 50 Cal.3d 468, *People v. Leach* (1985) 41 Cal.3d 92, and *People v. Markham* (1989) 49 Cal.3d 63. (RT 10:3186, 3280.) The court heard arguments on the motion, and admitted into evidence for purpose of the hearing only a transcript of Franks's phone conversation with Holloway, but no testimony was taken relating to the issue. (RT 11: 3285-3296.)

The court and the parties agreed that appellant was not asking the court to vindicate Holloway's personal Fifth Amendment right against the prosecution's use of a coerced confession, but rather was challenging the "case of a non-involved person who gives one story and then, whether or

not the person is coerced, later gives a different story." (RT 10:3282.) Even so, much of the court's analysis of the issue addressed whether Holloway had suffered some infringement of his Fifth Amendment rights. (RT 11:3285-3294.) This occurred despite trial counsel's assertion that the issue being considered was whether the admission of Holloway's statements deprived appellant of a fundamentally fair trial. (RT 11: 3288-3291.)

Based on this misperception of the issue before it, the trial court indicated it would admit Holloway's testimony because there had been no violation of his Fifth Amendment rights. (RT 11:3294.) In response to this tentative ruling, the prosecutor expressed his belief that the issue before the court was actually whether a witness's testimony should be excluded when it was deemed unreliable–appellant's real contention. (RT 11:3294.) The court, however, rejected the prosecutor's understanding of the issue when it stated: "I don't see that's the issue before me." (RT 11:3294.) The prosecutor then clarified for the court his understanding that appellant was arguing his right to a fair trial would be denied if trial testimony was admitted that was obtained through coercion. (RT 11:3295.) The trial court then acknowledged that it considered that to be an additional argument being put forth by appellant. (RT 11:3295.) Trial counsel then affirmed that the prosecutor was correct and that claim was before the court, whereupon the trial court once again denied the motion. (RT 11:3296.)

C. A Defendant Is Denied a Fair Trial and Due Process of Law When the State Is Permitted to Introduce Testimony Which Was Obtained by Coercion

A defendant's Fifth Amendment right to a fair trial is violated when the state is permitted to use at trial witness statements that were improperly obtained. (*People v. Douglas*, *supra*, 50 Cal.3d at p. 499.) The focus is on whether the evidence actually admitted against the defendant was the

product of coercion; if so, the right to a fair trial has been violated because coerced testimony is inherently unreliable and should not be used to secure a conviction. (*Id.* at p. 500.) The burden to show that the testimony was so tainted is upon the defendant (*ibid.*), and the claim is reviewed de novo by the appellate court. (*People v. Badgett*, *supra*, 10 Cal.4th at p. 350.)

California courts apply the rules regarding coerced confessions of a defendant to statements by a witness. (*People v. Lee* (2002) 95 Cal.App.4th 772, 785.) Further, this Court employs the terms "coerced" and "involuntary" interchangeably to refer to confessions or statements obtained by physical or psychological coercion, by promises of leniency or benefit, or when the totality of circumstances indicate the confession or statement was not a product of a person's free and rational choice. (*People v. Cahill* (1993) 5 Cal.4th 578, 482, fn. 1.) Thus, a confession or statement may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by exertion of improper influence. (*People v. Maury* (2003) 30 Cal.4th 342, 404.) A statement may also be inadmissible if it was obtained by using deception of such a nature that it would produce an untrue statement. (*People v. Lee*, *supra*, 95 Cal.App.4th at p. 785.)

More specific to this case, a statement may be inadmissible if the person's will to resist making the statement was overborne by pressures engendered by law enforcement officers. (*In re Cameron* (1968) 68 Cal.2d 487, 498.) In making this determination, it is immaterial that the police may have had a proper purpose in mind when eliciting the statement; the only issue for consideration is whether the person's abilities to reason, comprehend, or resist were so disabled that the person was incapable of free or rational choice. This determination is made by considering the totality of the circumstances surrounding the interrogation. (*Ibid.*)

D. Troy Holloway's Involuntary Out-Of-Court Statements To Detective Franks Should Have Been Suppressed

As discussed above, the totality of the circumstances that led to the challenged statement or testimony must be examined in determining whether its admission compromised appellant's right to a fair trial. In this case, there are three major factors that should be considered in making this determination: 1) the inherently coercive military setting under which the Holloway/Franks phone call took place; 2) Franks's misrepresentations and threats regarding his purported judicial authorization to pursue Holloway; and 3) Franks's promises of leniency if Holloway changed his story.

1. Troy Holloway's Out-of-Court Statements Were Obtained in a Coercive Military Environment

A naval intelligence officer and two petty officers placed 20-year-old Holloway in a room, made him call Detective Franks, and remained in the room during the course of the phone call. (RT 11:3441, 3529-3530; 3 SCT 3:801, 820.) At least one of the officers told Holloway that he could not speak to Franks outside their presence. (See 3 SCT 3:817.) Reinforcing the coercive nature of the military presence, Franks threatened during the interrogation to personally contact Holloway's commanding officer to tell him that Holloway was to be taken into custody. (3 SCT 3:805.)

Military courts have long acknowledged that a serviceperson would reasonably believe that he was in an environment where he lacked free will even where the circumstances might not be tantamount to coercion against a private citizen. (*United States v. Remai* (C.M.A. 1985) 19 M.J. 229, 233 ["In the military society there exist subtle pressures which do not exist in civilian society"]; *United States v. Kruempelman* (A.C.M.R. 1985) 21 M.J. 725, 726 [referring to the subtle pressure created by rank or duty to respond to an incriminating question].) Because he has been "[c]onditioned to

obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say – whether it is true or not." (*United States v. Armstrong* (C.M.A. 1980) 9 M.J. 374, 378; see *Calley v. Calloway* (5th Cir. 1975) 519 F.2d 184, 202, fn. 30 ["Because of the inherently coercive environment of the military command structure, more self-incrimination protections have been given accused servicemen than their civilian counterparts."].)

The United States Court of Appeals has also recognized that members of the military feel coercion in circumstances where a civilian might not. (*United States v. Baird* (D.C. Cir. 1988) 851 F.2d 376, 382 [holding that district court finding to this effect was proper recognition of this principle].) Holloway's situation was certainly an example of this principle: he was in a room being observed by a naval intelligence officer and two petty officers; had been told that he could not talk to Franks outside their presence; and was told by Franks that he was going to tell Holloway's commanding officer to take him into custody. Holloway was being interrogated and pressured in what can only be described as a coercive environment.

2. Troy Holloway Changed His Story After Detective Franks Threatened Him With Punishment by the Trial Court

This case has at least two elements that make it somewhat unique in the pantheon of cases that have considered coercive techniques by police officers in obtaining statements. The first is the use of the military as a tool of coercion, as discussed above. The second is the extensive use of the coercive tactic of telling the subject of the interrogation that the interrogator

is acting on behalf of the court, and the interrogator then making open threats on the court's behalf. Similar types of situations have come before this Court before, but none as blatant and inherently coercive as this. If there is a hall of fame for reprehensible police conduct during the course of an investigation, Detective Franks should be a first ballot inductee.

This Court has previously condemned tactics somewhat similar to those used by Detective Franks. For example, in *People v. Brommel*, *supra*, 56 Cal.2d 629, this Court found an officer's techniques coercive where he invoked the prospect of being branded a liar in front of a trial court as a method for getting a suspect to change his statement from an exculpatory one to an inculpatory one. The Court found the officer's tactics condemnatory despite the fact that the officer was referring to a prospective sentencing proceeding that would indeed take place if the suspect were to be convicted of the offense at issue.[96] (*Id.* at pp. 630-634.) Here, Detective Franks's statements were not tethered to a concrete situation that could arise in the future, but were extravagant falsehoods made up out of whole cloth.

The pertinent part of Franks's coercive comments occurred when he told Holloway:

> . . . Troy, please listen to me. You're in no trouble now, but you gotta be totally honest because anything that counterdicts [sic] what these guys are saying, this is a death penalty case and this . . . the . . . the judge is going to order me to go pick you up and bring you forthwith from Virginia to stand tall in

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[96] The basis for reversal was that the officer's statements amounted to a promise of leniency in return for a confession. This aspect of *Brommel* is discussed in the following subsection. Though it was the promise of leniency that rendered the statement involuntary, the officer's utilization of the trial court as a way to obtain the statement is still noteworthy because it is inextricably intertwined with the promise of leniency.

> front of him. . . . And he . . . he'll hold you in contempt of court. . . . [Y]ou're young, you got your whole career ahead of you . . . don't do anything to screw it up man. Because the judge is really P.O.'d about what's been going on. He feels that people are screwing with his case and he's . . . ordered me to read this on the phone and [I'm] to go report back to him and he's gonna make a determination whether or not I have to call . . . your commanding officer there and have them take you in custody and then I have to fly down there, pick you up and present you to the judge and he is going to make you stand tall in front of him and tell [him] the truth or he'll hold you in contempt of court.

(3 SCT 3:804-805.)

The distinctive parts of Franks's statement are that he told Holloway: 1) the trial court was about to order Franks to pick Holloway up in Virginia to be hauled back to court and held in contempt; 2) the judge was mad about the fact he thought people–impliedly Holloway–were screwing up the case; 3) the judge had ordered Franks to tell Holloway the things he was telling him; and 4) Franks was going to report back to the judge and the judge was going to decide whether Franks should call Holloway's commanding officer so that Holloway could be taken into military custody. These statements, taken in the context of Franks's clear refusal to accept the truth of Holloway's recitations up until that point, effectively told Holloway that unless he changed his story to inculpate appellant–the story that Franks wanted to hear–he would be taken into custody by his commanding officer, removed from his vessel, brought to a court in California, and thrown into jail by the trial court.

Whether the interrogator lies to the person making the statement is a factor to be considered in determining the voluntariness of a statement. While this factor alone does not render a statement involuntary, deception

about an important aspect of the case weighs against a voluntariness finding. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.)

The fact that Franks used his lies and misrepresentations to convey the impression to Holloway that the judiciary had an interest in him changing his story is a significant factor in evaluating the totality of the circumstances that led to Holloway's statement and subsequent testimony. When one evaluates the effect of the threats and promises that Franks conveyed, as discussed in the following subsection, the evaluation must be made in light of the concern that the threats and intimations of leniency were seemingly coming from the trial court and not Franks.

3. Troy Holloway Did Not Change His Story Until Detective Franks Threatened Him and Promised Him Leniency

Representing to Holloway that he was acting on the court's behalf, Franks threatened: 1) to call Holloway's naval commander; 2) to ask the naval authorities to take Holloway into custody; 3) to fly to Virginia himself to take Holloway into police custody[97]; 4) to tell the trial court that Holloway's version of events contradicted other witnesses who had already testified; and 5) to haul Holloway before the trial court to "stand tall" and tell his version of events. He also told Holloway that the trial court would subject Holloway to its contempt power and imprisonment if Holloway did not adopt Franks's "truth" and change his statement to reflect such. (3 SCT 3:804-805, 815-817, 821-822.) Franks's statements carried the implied promise that if Holloway was a "cooperative witness" neither he nor the

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[97] Franks's supervisor, Detective Wagner, conceded at trial that Franks made an implied threat when he told Holloway that being taken into custody would ruin his military career. (RT 14:4338.)

trial court would act upon any of the threats. (3 SCT 3:822.) Immediately after making these threats and conveying the implied promise of leniency, Holloway changed his version of events to conform with the version Franks wanted. (3 SCT 3:823.)

The overall tenor of Franks's statements to Holloway was a combination of threats and an implied promise of leniency if he changed his story to match Franks's version of events. This is just the combination of threats and promise of leniency that this Court condemned in *People v. Brommell, supra*, 56 Cal.2d 629, 633-634. Just as the *Brommel* detective impliedly promised the suspect that the trial court would be more lenient if he confessed, Franks promised Holloway that the trial court would be more lenient with him if he changed his story, e.g., "And the best thing you could do is work with us and put these people behind bars, man. I'm telling you straight up, man to man," and "Now you're gonna have to tell me or you're gonna have to go tell the court and stand tall." (3 SCT 3:817.) As this Court made clear in *Brommel*:

> [A]ny promise made by an officer or person in authority, express or clearly implied, of leniency or advantage for the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law. [Citations.] It is now settled that the same test must be applied to all incriminating statements whether they be confessions in the strict sense or only admissions.

(*People v. Brommel, supra*, 56 Cal.2d at p. 632.)

The use of threats and the promise of leniency demonstrates that Franks's intent was not to obtain the truth from Holloway, but rather to produce a version of the events that fit Franks's theory of the case. A statement that is obtained under such circumstances is an unreliable

statement and should not be used to secure a conviction. (See *People v. Lee*, *supra*, 95 Cal.App.4th at p. 786 [error in admitting statement when police crossed line between legitimate interrogation and use of threats to establish predetermined set of facts].) In addition to its holding in *Brommel*, this Court reaffirmed this principle in *People v. McClary* (1977) 20 Cal.3d 218, by finding a statement coerced and involuntary due to the threats of punishment and the promises of leniency that were continuous during the interaction between the police and the person giving the statement. (*Id.* at p. 229.)

This case should not be confused with one where the interrogator is simply exhorting a person to tell the truth. (See *People v. Azure* (1986) 178 Cal.App.3d 591, 602; see also *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409, quoting *People v. Howard* (1988) 44 Cal.3d 375, 398 ["'[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.'"].) Franks told Holloway that he would not accept any version of events that did not inculpate appellant and that, unless Holloway changed the facts of his story, the trial court would put Holloway in jail for being an uncooperative liar. This is far from a simple exhortation to tell the truth.

The military presence, the coercive setting for the interview, the lies, the absolute deceit involved in Franks's representation that he was speaking for the court, the threats, and the promises of leniency, create a totality of circumstances that compel a finding that Holloway's rational intellect and free will were overborne. Holloway changed his statement in response to these coercive techniques and the trial court should not have endorsed

Franks's actions by permitting the statement or Holloway's subsequent testimony to be used at appellant's trial.

E. The Government Coercion Was Ongoing at Trial

The nature of a claim that a witness's testimony was coerced must by necessity focus on the trial testimony of the witness, since the denial of a fair trial occurs when inherently unreliable testimony is used to convict a defendant. Consequently, a claim such as this one can succeed only when it is shown that the witness's trial testimony was involuntary at the time it was given. (*People v. Douglas*, *supra*, 50 Cal.3d 468, 500.) Thus, when pretrial coercion is a focal point, as it is here, it is necessary for a defendant to show that the pretrial coercion was such that it would actually affect the reliability of the evidence to be presented at trial. This does not mean that evidence of the pretrial coercion is not relevant and important, just that the fact a pretrial statement might have been coerced does not end the inquiry for these purposes. (*People v. Badgett*, *supra*, 10 Cal.4th at p. 348 and fn. 3.)

The factors that led to the coercion of an unreliable pretrial statement from Holloway were still present at the time he testified. When Holloway testified, he was still subject to the coercive pressures of military and civilian authorities. He testified that he was on "terminal leave" status with the Navy as of four days prior to his trial appearance, and that his general discharge proceedings were in process, meaning that he was still subject to military authority. (RT 12:3561.) The record also indicates that he was being kept under the supervision of county law enforcement at the time of his testimony; the prosecutor verified that Detective Franks accompanied Holloway to his hotel when he left court for the day. (RT 11:3279.)

The continued pressure by Franks provides a continuing link between the coerced pretrial statement and Holloway's trial testimony.

Franks's continued supervision served to reinforce Holloway's understanding that he needed to provide the critical link in the prosecution's case. (3 SCT 3:846.) Holloway continued to be aware that to avoid being thrown in jail for contempt, he had to both change his version of events and testify in accordance with that changed version. (3 SCT 3:804-805, 817.) This is important because it meant that Holloway's testimony was not "conditioned entirely upon [him] telling the truth;" instead, Holloway was required "to testify to a particular version of events, [and] in conformity with [his] prior statement" to Franks. (*People v. Boyer* (2006) 38 Cal.4th 412, 444; see also *People v. McClary*, *supra*, 20 Cal.3d at pp. 224, 229; *People v. Lee*, *supra*, 95 Cal.App.4th at pp. 785-786.) This rendered both the statement and the testimony coerced.

The fact that Holloway's testimony regarding the interrogation does not match the audiotaped and transcribed evidence, or the testimony of Franks, is also an indicia that he was still feeling coerced at the time of his testimony. It can be taken as an indication that he was aware if it appeared as if he had been coerced into giving his original statement that his subsequent testimony would also seem coerced; thus diminishing its value and leaving him vulnerable for the threatened retribution Franks had proffered initially. For example, Holloway testified that Franks did *not* tell him that he would be locked up if he failed to tell truth. He also first testified that Franks did not tell him that he would be held in contempt if he failed to cooperate, but, even though only two months had elapsed between the phone call and his trial testimony, he then claimed that he could not remember anything that was said about contempt charges. (Compare RT 11:3531 with 3 SCT 3:804-805, 815-816.) However, he admitted that Franks told him that the judge was "pissed off" about the case, and that he

was at risk of being handcuffed and taken into custody once Franks talked to the court. (RT 11:3532.)

Detective Franks, on the other hand, admitted he told Holloway that the court had ordered him to take Holloway into custody if Franks did not believe him. Franks also testified that he told Holloway that his being taken into custody by his military commanding officer "was a possibility," and that he told Holloway "several" times that he would be held in contempt of court if he did not change his story. (RT 14:4668-4669.)

Under the circumstances presented here, there was even more coercive pressure on Holloway when he assumed the witness stand than during his phone interrogation by Franks. At trial, Troy Holloway had no "mental freedom" left. Neither his out-of-court statements nor his trial testimony was voluntary, and the admission of this evidence violated appellant's rights to due process and a fair trial.

F. Appellant Was Prejudiced by the Trial Court's Failure to Suppress Troy Holloway's Statements and Testimony

Because the admission of Holloway's coerced trial testimony and out-of-court statements violated appellant's due process rights (*People v. Benson, supra*, 52 Cal.3d at p. 778; *People v. Douglas*, *supra*, 50 Cal.3d at p. 500), the error is of federal constitutional dimension, and this Court must determine whether respondent can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lee*, *supra*, 95 Cal.App.4th at p. 789 [applying *Chapman* standard after finding police coerced third party witness].) Respondent cannot meet this burden.

The most severe damage inflicted by Holloway was his testimony that, prior to the shooting, appellant was specifically looking for Joshua

Rexford, not another Josh with an unknown last name who purportedly was related to someone named Brian. (See RT 11:3445-3448, 3455-3458, 3468-3469; 12:3556-3557.) It provided an incriminatory context for Linda Farias's testimony and statements that, after her brother Manuel's funeral, she heard appellant and others talking about "Josh," not "Josh Rexford." (See RT 11:3431, 15:4706.) It also undermined appellant's testimony that he never planned to retaliate against anyone for the Farias murder (RT 15:4828), that he never asked Holloway about Josh Rexford (RT 15:4828), and that another Josh, not Rexford, was allegedly involved in the Farias killing. (3 SCT 3:871-872: RT 16:5048.) Consequently, Troy Holloway was the missing link for the prosecution on issues critical to the motive element of the government's theory of first degree premeditated murder.

The importance of Holloway's testimony to the prosecution also is apparent from the 28 pages of attention placed upon it during defense counsel's closing argument. (See RT 16:5341-5366, 17:5395-5396, 5410-5411, 5419.) In addition to describing how Holloway's testimony was uncorroborated, inconsistent, willfully false and biased, defense counsel noted "two statements that Troy Holloway made that are very significant. One statement was when Floyd Smith asked him where Josh hung out; the second one was when he said Sugar Ray gave him a gun. Both statements are false." (RT 16:5342.)

"'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) Here, the jurors' deliberations were relatively lengthy (almost 4 days – see RT 17:5522-5529), given that it was undisputed that appellant was at the front door of Mr. Pupua's apartment

when the shooting occurred. Lengthy jury deliberations, requests for testimony readback (RT 17:5523), and the failure to convict on all charged counts (CT 3:463-481[98]) – all of which occurred here – are well recognized, objective indicia of a close case. (See *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353 [readback]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours of deliberations]; *People v. Robinson* (1954) 42 Cal.2d 741, 745 [jury's failure to convict on all counts shows close case]; *People v. Epps* (1981) 122 Cal.App.3d 691, 698 [same].)

G. Conclusion

Appellant's first degree murder conviction, special circumstances and gun use findings, and death sentence must be reversed because Troy Holloway's out-of-court statements and trial testimony were involuntary and the product of coercion. Consequently, appellant was denied due process and a fair trial.

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[98] The jury returned verdicts of not guilty on the charge of dissuading witness Honess, and convicted appellant of attempted voluntary manslaughter on the Badibanga and Pupua attempted murder counts.

IV

THE TRIAL COURT ERRED BY DENYING APPELLANT THE RIGHT TO REPRESENT HIMSELF DURING THE PENALTY PHASE CLOSING ARGUMENT

A. Introduction

At the close of the penalty trial, appellant moved for permission to represent himself so that he could personally argue to his sentencing jury that his life should be spared. The trial court denied this request.

In doing so, the court violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to self representation, due process, and a reliable penalty verdict. Because this caused a "miscarriage of justice" under article VI, section 13 of the California Constitution, appellant's penalty verdict must be reversed. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Faretta v. California* (1975) 422 U.S. 806, 834-835; *Green v. United States* (1961) 365 U.S. 301, 304; *People v. Cahill* (1993) 5 Cal.4th 478, 487; *People v. Windham* (1977) 19 Cal. 3d 121, 128-129.)

B. Background Facts

On the morning scheduled for the defense penalty-phase closing argument, defense counsel informed the trial court that appellant had just informed counsel that he wanted to personally argue the case for his life. Appellant confirmed this; the court declared the request a "*Faretta* issue." (RT 18:6040-6041.)

Appellant told the court that he was making the decision "to relieve Counsel of their current duties as my representatives" because he wanted the "jury to understand the significance of every piece of [penalty] evidence." More significantly, he wanted the opportunity to show the jury that he personally accepted the guilt verdict. Appellant also said that he was best qualified to speak about himself: "I really want to look at these

people in their faces, in their eyes, and address them to the best of my ability before they go in that jury room and deliberate on my life." (RT 18:6041-6042.)

The trial court considered appellant's motion under the rules set forth in *People v. Windham* (1977) 19 Cal.3d 121:

> Once a Defendant has chosen to proceed to trial represented by Counsel, demands by such Defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the Court. [¶] In other words, it is not mandatory that that be permitted. In contra position, earlier on page 128, the Court says, "When a motion to proceed pro se is timely interposed, a trial court must . . . permit a Defendant to represent himself upon ascertaining that he has voluntarily and intelligently selected to do so, irrespective of how unwise such a choice might appear to be." [¶] So we have to look to a different standard. It says, "when such a mid-trial request for representation is presented, the trial court shall inquire sua sponte into the specific [factors] underlying the request, thereby ensuring a meaningful record in the event that appellate review is later required."

(RT 18:6042-6043, quoting *People v. Windham*, *supra*, 19 Cal.3d at p. 128.)

The trial court then mentioned a few of the factors listed in *Windham* – e.g., the quality of defense counsel's representation, appellant's proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the anticipated disruption or delay arising from self-representation. (RT 18:6043-6044; see also *People v. Windham*, *supra*, 19 Cal.3d at pp. 128-129.) The court declared defense counsel, who it felt had done "wonderful lawyering," "two of the finest attorneys" it had ever seen. (RT 18:6043.) The court accepted appellant's statement that he did not intend to testify through argument. The court was concerned, however, that appellant would do so unintentionally and face constant objections from the

prosecutor, which would eventually cause appellant to lose his temper in front of the jury. (*Id.* at p. 6044.)

Having made these observations, the court proceeded to render a decision without making a "meaningful record" regarding the other *Windham* factors. Instead, it focused on whether or not appellant was making a wise decision:

> Contrary to your statement, I believe you have demonstrated 30 years of breathtakingly bad judgment. And even Dr. Glaser, your – your psychiatrist, recognizes that your insights, your ability to see yourself as others see you, your ability to understand facts as they really are, is really breathtakingly deficient. So I'm – there is no doubt in my mind that it does not serve any of your purposes at all to represent yourself.

(RT 18:6044.)

Appellant reiterated that he no longer wanted to be represented by defense counsel, but the court refused to alter its ruling. Defense counsel then presented appellant's penalty-phase closing argument. (RT 18:6045.)

C. A Criminal Defendant Has a Sixth Amendment Right to Self-Representation As Long As the Assertion of That Right Will Not Delay the Trial Proceedings or Obstruct Justice

In *Faretta v. California*, *supra*, 422 U.S. 806, the United States Supreme Court established that a criminal defendant has a federal constitutional right to proceed without counsel as long as the election to do so is voluntary and intelligent. (*Id.* at p. 807.) Shortly thereafter, this Court held that in order to invoke this "constitutionally mandated unconditional right of self-representation," a defendant had to do so within a reasonable time prior to the start of trial. (*People v. Windham*, *supra*, 19 Cal.3d 121, 127-128.) There was a need to address the timeliness aspect of the right in

Windham, whereas *Faretta* had not presented that aspect of the right.[99] In making its pronouncement, however, this Court made clear that the "reasonable time" requirement should not be used to limit a defendant's constitutional right of self-representation. Rather, it was only to be used to ensure that a defendant not misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. (*Id.* at p. 128, fn. 5.)

For that reason, cases immediately after *Windham* focused on the delay aspect of the equation. (See *People v. Harris* (1977) 73 Cal.App.3d 76, 82 [substantial delay would have been necessary if request granted]; *People v. Hall* (1978) 87 Cal.App.3d 125, 129 [defendant requested 30-day continuance along with right of self-representation].) In fact, in *People v. Tyner* (1977) 76 Cal.App.3d 352, a case where the request for self-representation was made immediately prior to impanelling the jury, the court of appeal specifically noted this Court's statement in *Windham* that the "reasonable time" requirement should not be used to limit a defendant's right of self-representation. (*Id.* at pp. 354-355 [error to deny right to defendant who specifically stated he was not requesting continuance].)

The case law from this Court has been less consistent in the manner of approaching the concerns involved when a capital defendant seeks self-representation sometime after the start of trial.[100] Contrary to indications

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[99] The defendant in *Faretta* had requested the right of self-representation well in advance of trial. (*Faretta v. California*, *supra*, 422 U.S. at p 807.)

[100] The fact that a capital defendant has the right to self-representation is not in dispute. (*People v. Blair* (2005) 36 Cal.4th 686, 737-738.)

from this Court, the fair reading of *Windham* is not that the federal constitutional right of self-representation disappears once a jury is selected, but rather that the criteria for assessing the implementation of this right changes. This is the only reading that makes sense; for the right of self-representation for a criminal defendant in California has its source in the federal Constitution.

The impetus for *Faretta* was this Court's decision in *People v. Sharp* (1972) 7 Cal.3d 448, which held that there was no right of self-representation under either the state or federal Constitution. Since *Faretta*, the decisions from this Court and the courts of appeal that have addressed a defendant's right of self-representation have centered on the proper application of that decision. Consequently, to say–as this Court has said–that once a trial begins a defendant's right to self-representation does not have a constitutional basis is hard to understand.[101] (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.) There simply is no basis in California for the right to self-representation other than a federal constitutional basis.

The most logically consistent explication of this Court's interpretation of the right to self-representation is set forth in *People v. Mayfield* (1997) 14 Cal.4th 668. There, the Court held that the right is absolute only when it is asserted a reasonable time before the trial begins, and that self-representation motions made after that time are addressed to the trial court's sound discretion. The timeliness requirement was identified

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[101] It is possible that this statement worked its way into the state's jurisprudence because appellant in *Bloom* based his argument upon the supposition that he did not have a constitutional right to self-representation after the trial began, and this Court merely accepted that statement as being correct. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)

as the tool that prevents a defendant from misusing a *Faretta* motion to delay the trial or obstruct the orderly administration of justice. (*Id.* at p. 809.) This is the same type of language used by the Court in *People v. Horton* (1995) 11 Cal.4th 1068, where the assertion of a right to self-representation made prior to the start of trial was categorized as the "constitutionally mandated unconditional right of self-representation." (*Id.* at p. 1110.)

It is apparent from the language in its opinions that this Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial and discretionary if asserted close to the time of trial or after trial has begun. Yet, no opinion of the Court really discusses why this is the case, either legally or logically. There is nothing in *Faretta* itself that warrants such a distinction, and a reading of *Windham* that is consistent with *Faretta* does not warrant such a distinction. Apart from the aspect of a knowing and voluntary relinquishment of the right to counsel, there is no logical or legal reason why the federal constitutional right to self-representation should be dependent upon anything more than an unequivocal request and a determination by the trial court that granting the request will not result in an unreasonable delay or affect the orderly administration of justice. To the extent that this Court has held that concerns other than these should be factored into a trial court's assessment of whether to grant a *Faretta* motion, such holdings are without foundation. While the assessment of the factors of delay and obstruction of justice may alter depending upon the stage of the trial at which the defendant asserts the right of self-representation, the factors themselves remain the same, and these are the only factors that can be considered under the federal Constitution.

Apart from its illogic, holding that the federal constitutional right of self-representation evaporates once a trial begins impinges on a defendant's Sixth Amendment rights in a manner not condoned by the federal Constitution itself. The right of self-representation recognized in *Faretta* finds support in the structure of the Sixth Amendment and is fundamental in nature. (*Faretta v. California*, *supra*, 422 U.S. at p. 818; *Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161.) Because this Court has established a rule that significantly interferes with the exercise of a fundamental constitutional right, the validity of that rule must be assessed by applying the strict scrutiny standard; a doctrine that applies when there is a real and appreciable impact on, or significant interference with, the exercise of a fundamental right. (*People v. Ramos* (2004) 34 Cal.4th 494, 512; *Vannier v. Superior Court* (1982) 32 Cal.3d 163, 171 see Winick, *New Directions in the Right to Refuse Mental Health Treatment: the Implications of Riggins v. Nevada* (1993) 2 Wm. & Mary Bill Rts. J. 205, 225-226 & fn. 117 [citing *Faretta* for proposition that a criminal defendant's right to control his or her defense is a fundamental constitutional right, the infringement of which warrants heightened scrutiny].)

Under the strict scrutiny standard, the state must establish a compelling interest which justifies the rule at issue, and must establish that the distinctions drawn by the rule are necessary to further the purpose of that interest. (*Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 738.) To the extent that *Windham* changes the equation for determining whether a defendant can exercise his or her right of self-representation based solely upon the fact that the right is asserted after the start of the trial, it does not meet this test. Any compelling interest for regulating the assertion of the right to self-representation is encompassed by the *Faretta* standards

themselves. As discussed previously, the concept of obstruction of justice and delay of the trial are concepts that can be given proper effect at any point in the trial; consequently, establishing a different, and discretionary, test merely because the trial has begun does not reflect a purpose or interest that withstands strict scrutiny.

Appellant acknowledges that the discretionary aspect of the *Windham* decision has essentially been adopted by all federal jurisdictions when applying *Faretta* to a self-representation request that is made after the start of trial. (See, e.g., *United States. v. Mayes* (10th Cir. 1990) 917 F.2d 457, 462; *United States v. Wesley* (8th Cir. 1986) 798 F.2d 1155, 1155-1156; *United States v. Brown* (2d Cir. 1984) 744 F.2d 905, 908.) But the distinction there is that federal courts have long recognized the right of self-representation by dint of federal statute. [See 28 U.S.C. § 1654.] All the *Faretta* decision did as far as its applicability to federal cases was make clear that self-representation was a fundamental constitutional right when asserted before the start of trial. Thus, federal courts simply continued to follow the same practice as they always had regarding self-representation rights asserted after the start of trial.

This state was in a different posture when *Faretta* was decided, however, because it did not recognize the right of self-representation. Consequently, *Faretta* was not a clarifying holding that confirmed an accepted practice, it was a revolutionary holding that created new law for this state. *Windham*, therefore, was a case that did not–as the post-*Faretta* federal cases did–say that *Faretta* had no effect on existing law interpreting the right of self-representation at a later stage of trial; rather, *Windham* was a case that said the United States Supreme Court, in *Faretta*, was making a doctrinal distinction between an assertion of a self-representation right

made pretrial as opposed to during trial. That is an unreasonable interpretation of the *Faretta* decision and should not be followed.

The clear constitutional doctrine established by *Faretta* is that a criminal defendant has a fundamental constitutional right to represent himself or herself. (*Faretta v. California*, *supra*, 422 U.S. at pp. 833-834.) The fact that the establishment of this doctrine arose from a case where the demand was made pretrial is not, in and of itself, significant. *Windham* was simply incorrect in ascribing meaning to this fact.

D. The Trial Court's Denial of Appellant's *Faretta* Motion Was Error

The trial court abused its discretion when it denied appellant's motion for self-representation. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 961 [abuse of discretion standard applicable].) The initial problem with the ruling is that it employed stricter standards than called for by *Faretta*. Appellant understands that the trial court was merely attempting to follow the dictates of *Windham*, but as explicated above, this was the wrong standard to employ. The standard should simply have been whether the request was timely, unequivocal, and made knowingly and intelligently.

The record reflecting the trial court's consideration of this issue comprises four pages. (RT 18:6041-6044.) There is nothing whatsoever in the record to indicate the request was anything other than knowing, intelligent, and unequivocal. Consequently, denying the motion on one of these bases would constitute a clear abuse of discretion. The timeliness aspect has been discussed previously. Appellant's position is that a request is only untimely if it will cause a delay in the trial. It is clear from the record that appellant was fully prepared to present final argument on his own behalf without the necessity of a continuance. Other than the fact that

the request was made after the start of the trial, there is no basis for a finding that the request was untimely. Based on appellant's earlier arguments, this fact alone is not a sufficient basis for denying a *Faretta* motion; thus, the trial court abused its discretion in not granting appellant's motion for self-representation.

The trial court abused its discretion even if the *Windham* standard is the measuring stick. When a midtrial request for self-representation is made, the trial court must ensure a meaningful record for its ruling by considering factors such as: 1) the quality of counsel's representation; 2) the defendant's prior proclivity to substitute counsel; 3) the reasons for the request; 4) the length and stage of the proceedings; and 5) the disruption or delay which might reasonably be expected if the motion were to be granted. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) Examination of these factors in light of the record made by the trial court reveal that the court abused its discretion in denying appellant's request for self-representation.

The trial court only explicitly addressed one of these factors; that relating to the quality of counsel's representation.[102] The court believed that appellant's counsel had done "wonderful lawyering" in the case. (RT 18:6043.) If appellant's request had been at the beginning of the penalty phase rather than at the end of the penalty phase, this finding may have had

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[102] The trial court need not explicitly address these factors in making its ruling, as long as the record is sufficient to permit the reviewing court to determine if the ruling constituted an abuse of discretion. (*People v. Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) Appellant's point is not that the ruling was required to be more explicit, but that a consideration of the explicit parts of the ruling, along with the record of the hearing itself, establishes an abuse of discretion.

more resonance.[103] Coming as it did, however, just prior to penalty phase argument, its worth was diminished when factored into the overall determination as to whether appellant should be permitted to represent himself.

Appellant's request for self-representation came at a unique juncture of the trial; a time when lawyering may be the least significant factor to be considered. As this Court has often said, a penalty phase jury in California makes a normative decision as to whether a defendant lives or dies. Appellant simply wanted to make a plea for his own life so that the jury making that normative decision could consider his words rather than a lawyer's words. (RT 18:6041-6042.) Jurors realize that while a defendant's lawyer might be making statements on the defendant's behalf in order to convince the jury to spare the defendant's life, that same lawyer might well be uttering the same words in the future to convince a different jury to spare a different defendant's life. Those words would have an entirely different meaning coming from the person on trial than they would coming from a lawyer whose job it is to make such arguments all the time. The "quality of the lawyering" factor does not have the same significance when we are addressing a request to merely make the penalty phase closing argument that it might have if the request concerned a different stage of the trial.

The only other factor that was even implicitly addressed by the trial court was whether granting the motion would cause disruption or delay. There was no indication that simply granting the request for self-

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[103] Appellant makes no concession that this finding is accurate in any way. He believes, however, that for purposes of resolving this issue the trial court's belief is not determinative.

representation would cause delay, since appellant was making no request for continuance and was ready to proceed with the presentation of a final argument. The trial court did express a concern that appellant would use the final argument as a way to present testimony and that the prosecutor would have proper objections to that. The trial court also noted, however, that there was no record upon which to base these concerns and that it was willing to accept appellant's representation that he would not use final argument to do that. (RT 18:6044.)

Even accepting that this concern on the part of the court was an attempt to address the factor that granting self-representation could result in a disruption of the proceedings because appellant would abuse the right, the record does not support the validity of such a finding. The court itself openly acknowledged that the record did not provide a basis for such a concern and that it did not have a basis for disbelieving appellant's representation that he was not going to misuse the right of self-representation. Any finding that this factor militated against self-representation would have to be based on the trial court's belief that the report of appellant's "doctor" permitted a finding he could not control himself–despite the fact that the trial record belied such a finding–and speculation on how objectionable his argument could be. The former is not a creditable finding and the latter was so speculative as to be without merit.

The record does not permit an inference that any of the remaining factors militated against the grant of self-representation. Appellant's proclivity to substitute counsel does not, in that he made only one unequivocal *Marsden* motion prior to this request–a motion which was granted. (RT 1A:1.) The factor relating to the length and stage of the proceedings militates in appellant's favor because the request affected only

a finite portion of the very end of the proceedings. That is significant because even if the trial court's fears regarding disruption of the trial due to repeated–and assumingly proper–objections from the prosecutor did materialize, the court could have easily retracted the right of self-representation and had counsel finish the argument. Since counsel was clearly prepared to present argument, this would have necessitated no delay whatsoever.

Faretta itself acknowledges that the drafters of the Bill of Rights undoubtedly "understood the inestimable worth of free choice." (*Faretta v. California*, *supra*, 422 U.S. at pp. 833-834.) At no time is that right more inestimable than at the penalty phase of a capital trial when a defendant seeks to make a personal plea to the jury to spare his life. Appellant should have been allowed to make that plea.

E. Appellant's Penalty Judgment Must Be Reversed

The deprivation of a defendant's right of self-representation under *Faretta* is not subject to harmless error analysis and requires automatic reversal. (*McKaskle v. Wiggins* (1984) 465 U.S. 166, 177, fn. 8; *Faretta v. California*, *supra*, 422 U.S. at p. 806; *People v. Joseph* (1983) 34 Cal.3d 936, 948.) This is logical since the right of self-representation is embodied within the structure of the Sixth Amendment and structural error defies harmless error analysis. (*United States v. Gonzales-Lopez* (2006) ___ U.S. ___ [126 S.Ct. 2557, 2564].) Consequently, to the extent this Court accepts appellant's argument that the denial of his right of self-representation violated the federal Constitution, the error mandates reversal.

Because *Windham* holds that a defendant's midtrial assertion of the right of self-representation is not a right based on the federal Constitution, intermediate appellate courts in this state have held that any error attendant

to denying this right is subject to analysis under *People v. Watson* (1956) 46 Cal.2d 818. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058.) This view is flawed and automatic reversal should follow when a trial court errs in denying self-representation pursuant to the *Windham* standard.

People v. Rivers, *supra*, 20 Cal.App.4th 1040 is the case most commonly relied upon for the rule that the *Watson* test is applicable to a denial of the assertion of the right of self-representation which comes after the start of the trial. In *Rivers*, the trial court denied a *Faretta* motion as untimely without engaging in any of the discussion or inquiry required by *Windham*. Consequently, the record was devoid of any evidence which would have permitted a reviewing court to conclude that the trial court had acted properly. Because of this, the appellate court found that the trial court erred when it denied the request for self-representation. (*Id.* at pp. 1048-1049.) The court then went on to find that because the right affected was not a constitutional right, but rather a right based on case law, the rule of automatic reversal did not apply. The court analogized to this Court's holding in *People v. Crandell* (1988) 46 Cal.3d 833, and utilized the harmless error standard rather than a reversible per se standard.

It is difficult to understand how the *Rivers* Court arrived at this conclusion after considering both the nature of the error and this Court's holding in *Crandell*. The basic problem is that this type of error is not a proper subject for harmless error analysis. That is why both the United States Supreme Court and this Court have held that reversal is automatic when a defendant's *Faretta* right has been violated. Even if the right to self-representation is not unqualified if it is requested midtrial, the nature of the right itself is not altered by the juncture of the trial at which it is

asserted. If the nature of the right has not changed, the type of harm analysis does not change, despite the fact that the way to measure whether the error itself occurred may be different. In other words, the fact that the trial court may have the discretion to engage in an analysis of additional factors in determining whether to grant a midtrial request for self-representation does not change the impact of its decision to grant or deny self-representation. The *Rivers* Court was wrong to assume otherwise.

The additional problem with *Rivers* is that the opinion in *Crandell* is an inapt analogy to have used in arriving at its conclusion. *People v. Crandell*, *supra*, 46 Cal.3d 833 involved a situation where a trial court had denied a request for advisory counsel based on the mistaken belief that such a right did not exist. This Court used a harmless error standard because it found the trial record contained sufficient facts to show that if the trial court had exercised its discretion and denied the defendant's motion it would not have been an abuse of discretion. (*Id.* at p. 864.) In other words, the error on the part of the trial court was in believing that such a right did not exist, and the harmless error standard was not being applied to the result of that error–the impact of the failure to appoint advisory counsel–but to the fact that the trial court's erroneous belief was harmless because the trial record revealed facts such that even if the trial court understood the right existed, it still would have ruled against the defendant.

The result in *Crandell* must be compared to the result in *People v. Bigelow* (1984) 37 Cal.3d 731 in order to fully understand the *Rivers* Court's misperception. In *Bigelow*, the trial court also mistakenly believed there was no right to advisory counsel, but the record there showed enough facts so that this Court could determine that if the trial court had denied the request on the record, rather than on its misperception of the law, it would

have been an abuse of discretion. Because of that, the error was found to be reversible per se. The Court found reversal per se to be the proper standard because it was impossible to assess the impact of any prejudice from this error. (*Id.* at pp. 744-745.) In doing so, the Court analogized to *Faretta*. (*Id.* at p. 745.)

The *Crandell* Court itself summarized the proper application of the prejudice test in a situation such as appellant's when it noted that the reversal per se standard applies if the trial court's denial of the defendant's request would have been an abuse of discretion, but the harmless error standard applies if the trial court's denial would not have been an abuse of discretion. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 864.) This is the correct rule and the rule set forth in *Rivers* is not. Under the correct interpretation, if the trial court erred by denying appellant's request for self-representation, the penalty phase verdict must be set aside.

Even if this Court chooses to use a harmless error test which considers the result of the incorrect ruling, reversal is warranted. The cases where this type of error has been found to be harmless are markedly dissimilar to appellant's situation. For example, in *People v. Rogers*, *supra*, 37 Cal.App.4th 1053, the error was found harmless because the trial resulted in an extremely beneficial verdict in light of the evidence. (*Id.* at p. 1058.) In *People v. Rivers*, *supra*, the only thing the defendant would have done if granted the right of self-representation would have been to challenge the admission of a penitentiary packet under Penal Code section 969b and represent himself at the sentencing hearing. The appellate court found that since the penitentiary packet was basically self-admitting, and the defendant could make whatever representations he wanted to make to

the court by giving a statement to the probation officer, any error by the trial court in denying self-representation was harmless. (*Id.* at p. 1052.)

In a case more analogous to the instant case, the court of appeal found this type of error to not be harmless, and a reversal of a special circumstance finding to be warranted, because it believed it might have been to the defendant's advantage to present opening and closing arguments, thereby giving the jury an opportunity to hear from him. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 595.) This holding reflects a view remarkably similar to the sentiment expressed by appellant when he told the trial court: "I really want to look at these people in their faces, in their eyes, and address them to the best of my ability before they go in that jury room and deliberate on my life." (RT 18:6042.) To find that denying a human being the opportunity to plead for his own life is harmless error is to condone a view that we, as a just society, should not be willing to accept.

V

THE USE OF APPELLANT'S JUVENILE CONVICTION TO PROVE THE PRIOR MURDER SPECIAL CIRCUMSTANCE AND AS AN AGGRAVATING PENALTY FACTOR WAS FEDERAL CONSTITUTIONAL ERROR

A. Introduction

The prosecutor used appellant's 1984 Riverside County first degree murder conviction to prove the Penal Code section 190.2, subdivision (a)(2), prior murder special circumstance. Appellant was 16 years old when the crime was committed (3 SCT 3:785; RT 18:5750); he completed his California Youth Authority commitment and was honorably discharged. Later, the conviction was expunged pursuant to Welfare & Institutions Code section 1772.

Appellant submits that under prevailing precedent from the United States Supreme Court, it is constitutionally impermissible to use a murder conviction sustained while appellant was under age 18 to make him death eligible pursuant to the prior murder special circumstance. Further, the use of appellant's juvenile conviction to prove the prior murder special circumstance infected his death eligibility determination with unreliability because the juvenile conviction arose from case charging and transfer procedures that denied appellant his rights to substantive due process and equal protection under the law.

Consequently, appellant's special circumstance finding and penalty verdict are unlawful and were obtained in violation of his rights to be free from cruel and unusual punishment, to equal protection, and to reliable and appropriate determinations of death eligibility and penalty, as guaranteed by the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California

Constitution. (*Roper v. Simmons* (2005) 543 U.S. 551; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223.)

B. Factual Background

Appellant was charged with the Penal Code section 190.2, subdivision (a)(2), special circumstance of having been previously convicted of first degree murder. (CT 2:310-317.) Appellant's first trial counsel, the San Bernardino County Public Defender, demurred to the grand jury indictment, in part, because it could not be determined from the face of the indictment whether or how appellant had been found fit to be tried as an adult. (CT 1: 21-28.) The trial court overruled the demurrer, but made it clear that it did not intend to preclude the filing of other, "non-statutory" motions. (RT I:17-18.)

Successor trial counsel, Edi Faal, filed a motion to strike the prior murder special circumstance. (CT 2:321-325, 334-335; RT 4:788-797; RT 17:5559-5562.) Although the trial court thought that the issue of whether juvenile convictions could be used by the prosecution to prove a capital special circumstance was "a very provocative question" (RT 4:795), and that it "may be an issue that the 9th Circuit would perhaps see differently," it denied the defense motions on state law grounds. (RT 4:795; RT 17:5561.)

During the guilt phase, for the purpose of the "prior felon" weapons enhancements, appellant stipulated that he had previously been convicted of a felony in California. (RT 13:3991.) To prove that appellant had a prior murder conviction, the prosecution introduced into evidence a January 17, 1985, fingerprint card, which was the comparison fingerprint used by the

forensic team on the Rexford homicide to identify appellant from the fingerprint lifted from Michael Honess's apartment (see RT 12:3739-3742); a Riverside County Superior Court minute order showing that, when appellant was 16 years old, he pled guilty to murder and was sentenced to incarceration in the California Youth Authority; and a certified copy of appellant's California Youth Authority discharge package. (RT 17:5566; 3 SCT 3:788, 790-791; Exhs. 23 & 24.) Appellant did not present any evidence. After one half hour of deliberations, the jury found the special circumstance to be true. (RT 17:5574-5575.)

C. The Federal Constitution Bars the Use of a Juvenile Murder Conviction As a Death Penalty Eligibility Factor

1. *Roper v. Simmons* Bars California From Using a Murder Conviction Obtained When the Defendant Was Under the Age of 18 at the Time of the Crime As a Prior Murder Special Circumstance

In *Roper v. Simmons* (2005) 543 U.S. 551, the United States Supreme Court made clear that, because "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," it is "the age at which the line for death eligibility ought to rest." (*Id.* at p. 574; see also *id.* at p. 587 (O'Connor, J., dissenting) ["The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense"]; *Id.* at p. 608 (Scalia, J., dissenting)[the *Simmons* majority "determin[ed] that capital punishment of offenders who committed murder before age 18 is 'cruel and unusual' under the Eighth Amendment[.]"].)

The *Simmons* majority set forth three reasons why individuals who commit murder while they are under 18 years of age should not, then or

later, be made death eligible based upon that offense. First, the Court found that, in persons under age 18, a "lack of maturity and . . . underdeveloped sense of responsibility. . . . often result in impetuous and ill-considered actions and decisions." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569 [internal citations omitted].) The Court also recognized that juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." Juveniles "have less control . . . over their own environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a criminogenic setting." (*Id.* at p. 569 [internal citations omitted].) Additionally, the Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 570; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 ["But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"]; see also *Johnson v. Texas* (1993) 509 U.S. 350, 367 ["[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"].)

The testimony regarding the circumstances of the killing that underlay appellant's juvenile murder conviction demonstrates that he was profoundly affected by the impulsive and vulnerable characteristics of immaturity that led the Court in *Simmons* to establish a categorical exemption from death penalty eligibility for minors under age 18. Appellant's childhood and adolescence was characterized by pre-natal toxicity and abuse, physical, psychological and sexual trauma,

abandonment, neglect, and institutional failure. When he was 13, his mother had him arrested and made a ward of the juvenile court and, between the ages of 13 and 17, appellant lived in six foster placements. (RT 17:5603-5627, 5687, 5695; RT 18:5925-5943.) When the juvenile murder occurred, 16-year-old appellant had been abandoned by his mother and was living with his 19-to-20 year-old sister. (RT 18:5925-5931, 5945-5948.) On the evening of the crime, appellant was out with three older acquaintances (one female, two males) in their early 20s. (RT 18:5751, 5789.) Appellant and his leaders were drinking from large bottles of wine, and had just finished all of the alcohol right before the crime occurred. The female told the young men orbiting around her to rob Virgil Fowler. Appellant pulled out a gun and told Fowler to lay on the ground. Fowler went down, then jumped up and tried to run away; appellant shot him. (RT 18:5777-5783.) On the orders of one of the older men, appellant and the other members of the group initially told the police that Fowler had been the victim of a drive-by shooting by some Mexicans. Appellant later admitted his culpability, and pled guilty to murder. (RT 18:5784, 5790; Exh. 24.)

In *Simmons*, the Court declared itself "required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 574.) After doing so, the Court unequivocally decided that the Eighth Amendment to our federal Constitution mandates that individuals cannot be made eligible for the death penalty because they committed a murder before they reached 18 years of age. (*Ibid.*) The substantive rule of law announced in *Simmons* applies retroactively to persons who, before March 1, 2005 – the *Simmons* publication date – were found to be death eligible on the basis of a murder conviction sustained before the individual

was 18 years old. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 577 [in cases "yet to arise," *Stanford v. Kentucky* no longer controls death penalty eligibility for individuals who were convicted of murder while they were still juveniles]; *Saffle v. Parks* (1990) 494 U.S. 484, 494-495 [Supreme Court decisions are substantive if they place particular conduct or persons within the scope of a criminal statute beyond the state's power to punish]; *Little v. Dretke* (W.D. Tex. 2005) 407 F.Supp.2d 819, 824 ["By its nature, the holding in *Roper* forbids the State from imposing a particular type of sentence upon petitioner"].)

In the wake of *Roper v. Simmons*, California can no longer use a juvenile conviction to prove the prior murder special circumstance. The controlling factor is that when the juvenile murder was committed, the individual was "one whose culpability or blameworthiness [was] diminished, to a substantial degree, by reason of youth and immaturity." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 571.) When the juvenile murder conviction is resurrected during a future adult criminal proceeding, the circumstances causing the juvenile's diminished culpability and blameworthiness when the juvenile crime was committed are still present and frozen in time, even though the individual has chronologically aged. After *Simmons*, the defendant's age at the time of the juvenile murder conviction – over 18, or under 18 – controls the future death penalty eligibility decision when the source of the eligibility is that conviction. Eighteen is now the bright line "age below which a juvenile's crimes can never be constitutionally punished by death[.]" (*Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 848 (O'Connor, J., concurring).)

Because appellant was 16 years old when he pled guilty to the Virgil Fowler homicide, it was unconstitutional for the state to use this homicide

conviction to make appellant death eligible under the prior murder special circumstance. As stated by the United States Supreme Court, "the qualities that distinguish juveniles from adults do not disappear when an individual turns 18." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 574.) The prior murder special circumstance finding in this case must be set aside.

2. It Is Unconstitutional for Death Eligibility to be Based Upon California's Unreliable and Arbitrary Procedures For Transferring Minors From Juvenile to Superior Court

Even if this Court disagrees that *Roper v. Simmons* categorically bars the states from using a juvenile murder conviction to make an adult convicted of first degree murder death eligible under Penal Code section 190.2, subdivision (a)(2), it is still constitutionally impermissible for California to use a juvenile murder conviction to make an individual death eligible. California's juvenile transfer policies permit the exercise of arbitrary prosecutorial and juvenile court discretion that turns a juvenile homicide adjudication into an adult trial, with no guarantees of due process or jury trial to protect the minor's constitutional interests. The level of systemic discretion, combined with the legislature's failure to require the juvenile *or* superior court to make a meaningful evaluation of the alleged juvenile offender's level of maturity before he can be convicted of murder in superior court, makes future death penalty eligibility determinations under Penal Code section 190.2, subdivision(a)(2), based upon juvenile convictions unreliable in violation of the Eighth Amendment.

To comply with the Eighth Amendment, capital punishment must be reserved only for those offenders most deserving of execution. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 569; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 311.) Regardless of how many state code sections must be reconciled,

death penalty eligibility procedures must rationally define and limit the class of death-eligible defendants and provide for heightened reliability in death eligibility and sentencing proceedings. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 568 ["Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force"]; *Tuilaepa v. California* (1994) 512 U.S. 967, 973 [death eligibility determination must be principled and make rationally reviewable the process for imposing a sentence of death]; *Lockett v. Ohio* (1978) 438 U.S, 586, 604; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Dillon* (1983) 34 Cal.3d 441, 481-483, discussing and quoting *Enmund v. Florida* (1982) 458 U.S. 782, 798-801.) When viewed in the context of future death penalty eligibility consequences, California's juvenile case transfer procedures permit juvenile courts and prosecutors to make arbitrary and unreliable choices regarding which homicides committed by a person under age 18 can later be used to establish death eligibility.

In California, any person who is under the age of 18 when he allegedly commits a crime falls under the jurisdiction of the juvenile court.[104] (Welf. & Inst. Code, § 602.) However, Welfare and Institutions Code, section 707, subdivision (c), controls fitness determinations for youths 16 years of age and over charged with homicide (one of the offenses

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[104] But see the 2000 amendments to Welf. & Inst. Code, section 602, described as follows by this Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 550: "Section 602, subdivision (b), which specifies circumstances in which a minor must be prosecuted in a court of criminal jurisdiction, also was amended by Proposition 21. The revised statute decreases the juvenile's minimum age for such mandatory criminal prosecutions from 16 years to 14 years and alters in some respects the list of crimes for which a criminal prosecution is required."

enumerated in section 707, subdivision (b)). Under subdivision (c), in 1984 when he was charged with the Virgil Fowler homicide, appellant was *presumed* to be unfit for juvenile court adjudication. To rebut this presumption, the burden was upon *him* to ask the juvenile court to order a probation investigation and report on his "behavioral patterns and social history," and to present the court with "extenuating or mitigating circumstances." These conditions still exist under the current version of the statute.

Even after submission of the "extenuating or mitigating" evidence, a minor charged with homicide was presumed to be unfit for juvenile adjudication unless the court found that the minor would be "amenable" to treatment programs provided through the facilities of the juvenile court, based upon the court's evaluation of (1) the child's "degree of criminal sophistication;" (2) whether "rehabilitation" of the minor can be accomplished while the juvenile court retains jurisdiction; (3) the child's previous "delinquent history;" (4) the "success" of previous attempts by the juvenile court to rehabilitate the minor; and (5) the "circumstances and gravity" of the alleged offense. Section 707 requires the juvenile court to make positive findings on each and every one of these five enumerated factors in order to finds the juvenile fit to remain in juvenile court. (Welf. & Inst. Code, § 707, subds. (b)-(d); *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 680-681 [child carries burden of rebutting presumption of unfitness under each of the criteria by a preponderance of the evidence]; *Green v. Municipal Court* (1976) 67 Cal.App.3d 794, 803 ["the primary thrust" of the 1976 amendments to section 707 was "to specify and enlarge the bases for making a finding of unfitness"].)

There is no statutory requirement that a juvenile court base its amenability determination upon the individualized psychosocial development considerations related to the young offender's level of maturity that buttress *Roper v. Simmons*. Nor does the statute require that the juvenile court, before making a case transfer determination with future capital eligibility repercussions, provide for someone more competent than a probation officer – e.g., a qualified psychiatrist, psychologist, or social worker – to assess the youth in accord with the mental factors so critical to the United States Supreme Court's decision in *Simmons*.

In this case, the record on appeal indicates that the prosecutor went directly to superior court with the charges against appellant arising from the Virgil Fowler homicide. There is no juvenile court minute order transferring the matter from juvenile to superior court. There is no evidence that, in 1984, the juvenile court made findings regarding appellant's maturity, sense of responsibility, vulnerability to peer pressure or coercion, control over his environment and/or character before transferring appellant to superior court for adult criminal proceedings. There is no suggestion that a probation report was investigated and submitted, or that appellant presented a juvenile court with evidence to rebut the statutory presumption of unfitness. Nor does the record on appeal include a juvenile probation report, or a transcript of the "hearing" (if any) during which a juvenile court explained its decision to transfer appellant to superior court. (See 3 SCT 3:788, 790-791; Exhs. 23 & 24.)

The failure in appellant's case to document all evidence relevant to the transfer from juvenile court and, ultimately, the capital jury's death-eligibility decision, occurred even though California purports to require substantial evidence that a minor is unfit for treatment as a juvenile before

the child can be certified to adult court. (See Welf. & Inst. Code, § 707; *Jimmy H. v. Superior Court* (1970) 3 Cal.3d 709, 714-715; *In re J.L.P.* (1972) 100 Cal.App.3d 86, 89 ["the considerations relative to the proper disposition of the minor are different from those that bear upon a determination that a crime has been committed"].)

Additionally, although appellant was charged in juvenile court with the Fowler homicide and transferred to superior court for reasons that cannot be determined from the appellate record, the Welfare and Institutions Code is also problematic vis-a-vis future death penalty eligibility determinations because it permits prosecutors to file homicide charges against some minors directly in superior court *without* a judicial determination of unfitness or maturity by the juvenile court:

> Before the passage of Proposition 21, certain minors who were 16 years of age or older at the time they committed specified crimes were required to be prosecuted in a court of criminal jurisdiction-without any requirement of a determination by the juvenile court that the minor was unfit for treatment under the juvenile court law. Section 602, former subdivision (b), provided that an individual at least 16 years of age, who previously had been declared a ward of the court for having committed a felony after the age of 14 years, "shall be prosecuted in a court of criminal jurisdiction if he or she is alleged to have committed" any of several enumerated serious offenses, such as first degree murder where the minor personally killed the victim, certain violent sex offenses, and aggravated forms of kidnapping. (Stats. 1999, ch. 996, § 12.2.) When such a prosecution lawfully was initiated in a court of criminal jurisdiction, the individual would be subject to the same sentence as an adult convicted of the identical offense, subject to specified exceptions. (Pen. Code, § 1170.17, subd. (a).)

(*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 549.)

The current statute sets forth three situations in which the prosecutor may on his own discretion choose to file an accusatory pleading against a minor in superior court: (1) a minor 16 years of age or older is accused of committing one of the violent or serious offenses enumerated in Welfare and Institutions Code section 707, subdivision (b); (2) a minor 14 years of age or older is accused of committing certain serious offenses under specified circumstances; and (3) a minor 16 years of age or older is accused of committing specified offenses, and the minor previously has been adjudged a ward of the court because of the commission of any felony offense when he or she was 14 years of age or older. (Welf. & Inst. Code, § 707, subds. (d)(1)-(3); see *Manduley v. Superior Court*, *supra*, 27 Cal.4th at pp. 549-550, 556 [when making decision whether to file petition in juvenile court or pleading in criminal court, prosecutor might consider circumstances ordinarily at issue in a fitness hearing but not required to do so].)

Consequently, California's statutory scheme for handling juvenile homicide cases gives prosecutors – not juries or judges – wide discretion to channel some child offenders, but not others, into future death eligibility without guaranteed constitutional due process and fair trial protections, or a meaningful evaluation of the juvenile offender's individualized level of maturity. (See *Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 567 ["a prosecutor's decision pursuant to section 707(d) to file charges in criminal court does not implicate any protected interest of petitioners that gives rise to the requirements of procedural due process"]; *Id.* at p. 591 (dis. opn. of Kennard, J.) ["There is no hearing, . . . no right to counsel [and] no judicial review"].)

Appellant concedes that, once his case reached superior court, to defend against the homicide charges on their merits, he had the opportunity to avail himself of the substantive and procedural due process and fair trial protections afforded to adult defendants. Appellant is challenging the constitutional due process and fair trial deprivations inherent in the state's procedures for moving him from juvenile court to superior court, which placed him in the zone of adult death eligibility.

In this regard, the prosecutorial and judicial discretion granted by California's juvenile charging and transfer statutes runs afoul of federal constitutional due process requirements. (See *Kent v. United States* (1966) 383 U.S. 541, 544, 552-553; *In re Gault* (1967) 387 U.S. 1, 20 [even in quasi-civil juvenile delinquency proceedings "[d]ue process of law is the primary and indispensable foundation of individual freedom"]; *Id.* at pp. 30-31 [in *Kent*, the Supreme Court held that a juvenile court's waiver of jurisdiction "must measure up to the essentials of due process and fair treatment"]; see also *Alverado v. Hill* (9th Cir. 2001) 252 F.3d 1066, 1068-1069 [*Gault* and *Kent* hold "that a state court must follow constitutionally adequate procedures in making factual and legal determinations when those determinations result in statutorily specified adverse consequences for a juvenile. . . . when a juvenile court has such authority it must be exercised in a manner consistent with due process"].)

This Court has not addressed the intersection of the Welfare and Institutions Code sections governing the barely limited discretionary powers of juvenile courts and prosecutors to transfer homicide cases to superior court and the death eligibility provision of the Penal Code section 190.2, subdivision (a)(2), special circumstance. Although the prior murder conviction special circumstance may not be disproportionate in the abstract

when applied to prior murder convictions sustained by individuals over 18 years of age, *Roper v. Simmons* informs us that death eligibility based upon a juvenile murder conviction is unreliable and arbitrary when the state cannot prove that the juvenile court based its decision to send a juvenile to superior court on a *meaningful individualized assessment* (with adequate procedural and substantive protections for the minor) of the young offender's level of maturity and other psychosocial factors related to his fitness to be tried as an adult. (See *Roper v. Simmons*, *supra*, 543 U.S. at p. 571; *Jimmy H. v. Superior Court*, *supra*, 3 Cal.3d at pp. 714-715; *In re J.L.P.*, *supra*, 100 Cal.App.3d at p. 89.)

3. California's Use of Juvenile Murder Convictions, But Not Juvenile Murder Adjudications, For Death Eligibility Purposes Cannot Survive Equal Protection Scrutiny

In *Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 537, a non-capital case, this Court found no due process or equal protection violations arising from the 2000 amendments to Welfare and Institutions Code section 707 (via Proposition 21, the Gang Violence and Juvenile Prevention Act of 1998) expanding the circumstances under which prosecutors may exercise their discretion to try a minor in superior court without a prior fitness adjudication in juvenile court. However, Mr. Manduley and his fellow petitioners only challenged "the aspect of section 707(d) that confers upon the prosecutor the discretion to file certain charges against specified minors directly in criminal court, without any judicial determination that the minor is unfit for a juvenile court disposition." (*Id.* at pp. 545-546, 550-551.)

Appellant's contention presents a somewhat different, and more complex, issue than that presented by the *Manduley* petitioners. Appellant submits that using a criminal court conviction of a juvenile to prove the

Penal Code section 190.2, subdivision (a)(2), special circumstance violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution because by doing so it enables the state's death penalty scheme to permit unsupportable and unreliable distinctions between adult defendants who have previously been found to have committed murder before they reached 18 years of age. The distinctions regarding the future death penalty eligibility of similarly situated individuals are based solely upon the the juvenile court's and/or prosecutor's choice of forum, which may or may not be made based upon an individualized determination of the juvenile offender's level of maturity.

In California, some juveniles who are charged with homicide in the juvenile court are deemed unfit for juvenile adjudication and sent to superior court for reasons having nothing to do with their level of maturity. If convicted in superior court, they are subject to future death penalty eligibility under Penal Code section 190.2, subdivision (a)(2). Other adults who, as juveniles, allegedly committed homicides of the nature and circumstances committed by the first group of individuals, are not death eligible simply because their prior murder charges were adjudicated in juvenile court. The former become eligible for a future death sentence, but the latter do not. Similarly, under Welfare and Institutions Code section 707, simply by operation of statute and without individualized consideration of the level of maturity of the juvenile offender, a prosecutor can make a choice to send some juveniles charged with homicide to juvenile court for adjudication, and others to superior court for trial and future death eligibility based simply upon the age of the offender and whether the minor is charged with a crime enumerated in Welfare and Institutions Code section 707, subdivision (b).

"The basic rule of equal protection is that those persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." (*People v. Karsai* (1982) 131 Cal.App.3d 224, 243-244.) Further, "the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) When some youth who commit homicides are subject to a murder conviction and future death penalty eligibility, while others are retained in juvenile court for an adjudication without future death penalty ramifications, the state must guarantee that this selection process is based upon reliable criteria with a rational relationship to legitimate law enforcement interests, and not an arbitrary discriminatory purpose of the prosecuting authority. (*Mandulay v. Superior Court*, *supra*, 27 Cal.4th at pp. 568-569, citing *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 836.)

The current death penalty eligibility scheme, as it relates to basing eligibility upon prior murders committed by individuals under the age of 18, fails to consider the constitutional equal protection ramifications of allowing some, but not all, individuals who commit murder as juveniles to be death eligible under Penal Code section 190.2, subdivision (a)(2), without judicial review – at any level – to ensure that the juvenile charging and case transfer decisions were guided by constitutionally permissible, non-arbitrary, non-discriminatory considerations. Penal Code section 190.2, subdivision (a) (2), although neutral on its face, when applied to juvenile murder convictions, affects two similarly situated groups of offenders in an unequal manner.

As described in the previous subsection of this argument, the statutes governing the juvenile case transfer procedures permit arbitrary and unreliable judicial and prosecutorial transfer decisions that have nothing to do with the level of maturity of the juvenile offender. In approving the Welfare and Institutions and Penal Code provisions described herein, neither the California legislature nor this Court reflected upon the extent to which the exercise of prosecutorial and/or judicial case transfer powers in juvenile homicide cases injects unreliability into future death penalty eligibility determinations.

The disparate treatment of similarly situated offenders based solely on the fact of which court had jurisdiction over their juvenile murder case violates equal protection. The key inquiry here is not whether juveniles charged with homicide and tried in a superior court are similarly situated for the purposes of juvenile prosecutions with juveniles charged with homicides that are adjudicated in juvenile court, but rather whether unconstitutional distinctions have been made with respect to the future death penalty eligibility of the two similarly situated classes of juvenile offenders. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253; *In re Gary W.* (1971) 5 Cal.3d 296, 303 [a state may not arbitrarily "impose disabilities upon one class unless some rational distinction between those included in and those excluded from the class exists"]; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223 [denial of equal protection in a statutory scheme which discriminated among prisoners based on whether their subsequent convictions were in-state or out-of-state].) It offends constitutional notions of equal protection for the state to use as the foundation for appellant's death sentence a 1984 juvenile "conviction" that

could just as easily have been a juvenile "adjudication" without future death eligibility repercussions.

Being allowed to continue one's life is the penultimate fundamental interest. The state has no rational basis or compelling state interest in making a life or death distinction based merely upon a perhaps decades old, arbitrary, unexamined choice of forum for the prosecution of a juvenile homicide charge.

D. Appellant's Prior Murder Special Circumstance Verdict Must Be Reversed and the Penalty Determination Must Be Re-Weighed

Under the Eighth Amendment, there is greater constitutional scrutiny of the death-eligibility determination than the assessment of a capital defendant's deathworthiness. (*Buchanan v. Angelone* (1998) 522 U.S. 269, 275-276 ["It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition"].) In accord with the rule of *Roper v. Simmons*, this Court must vacate the prior murder special circumstance finding in this case. If the Court also finds that the lying-in-wait special circumstance finding was constitutionally impermissible, it must summarily vacate appellant's penalty verdict. (See Pen. Code, § 190.2, subd. (a); *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1322 ["Without a valid special circumstance finding, [the defendant] is ineligible for the death penalty"].)

If the lying-in-wait special circumstance is upheld by this Court, appellant's death judgment still must be vacated. Appellant has no other prior murder convictions; the improperly admitted juvenile conviction was

the sole evidence that permitted the jury to weigh against appellant the Penal Code section 190.3, factor (c), prior felony conviction aggravating factor. In addition, the jury was permitted to "double count" their finding on the section 190.2, subdivision (a)(2), prior murder conviction special circumstance as an aggravating circumstance of the Joshua Rexford homicide under section 190.3, factor (a). Even assuming that the facts and circumstances underlying the Virgil Fowler murder could be considered by the jury as aggravating evidence of violent criminal activity under Penal Code section 190.3, factor (b), the fact that appellant's jury was instructed during the penalty phase to consider the inadmissible juvenile conviction under two statutory aggravating factors requires this Court to re-weigh the penalty phase evidence to assess whether the weight assigned by the jury to the juvenile conviction and special circumstance finding impermissibly "skewed its balancing of aggravators with mitigators." (*Brown v. Sanders* (2006) 546 U.S. 212, ___ [126 S.Ct. 884, 890, 893]; see *People v. Ledesma* (2006) 39 Cal.4th 641, 713-714 [applying *Sanders* standard of review to invalidated robbery-murder special circumstance].) This is a case where, under constitutional due process and fair trial principles, the presence of an invalid eligiblity factor and aggravating circumstance was not harmless, thus the death sentence must be vacated. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 754; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Constitutionally impermissible "skewing" occurred here. A prior murder conviction may be the special circumstance most likely to trigger a death sentence. The jury is not faced with a person who has killed for the first time. Rather, they believe they are judging a person who has gone through the legal process of being found responsible for murder, been punished and "rehabilitated" for that murder, and yet has not been deterred

from killing again. Although there is no way to determine what weight the jurors assigned to the aggravating and mitigating evidence presented during the penalty phase, it is only reasonable that they would accord substantial weight to the aggravating factor represented by a prior murder conviction – evidence that is so significant that it is used to determine death eligibility. (See *Brown v. Sanders*, *supra*, 546 U.S. at p. ___ [126 S.Ct. at p. 895] (Stevens, J., dissenting) [when a jury recognizes that a legislature has declared an act or condition to be a death eligibility factor, a jury "may consider this a legislative imprimatur on a decision to impose death and therefore give greater weight to its [eligibility] finding than the circumstances of the crime would otherwise dictate. . . . [A] weight has been added to death's side of the scale, and one cannot presume that this weight made no difference to the jury's ultimate conclusion"].)

The true finding on the constitutionally invalid prior murder special circumstance allowed the prosecutor in his penalty closing argument to portray petitioner as a person who was morally unaffected by his prior responsibility for a murder, even after serving a term in the California Youth Authority. (See RT 18:6032, 6036, 6038.) He repeatedly argued that appellant deserved a death sentence because of his juvenile murder conviction. (RT 18:6025-6026, 6029, 6032, 6036, 6038.) Under these circumstances, the jury's perception of petitioner as a person who learned no lessons from his involvement in a murder and prior incarceration in the Youth Authority undoubtably was a decisive – and perhaps outcome determinative – factor in the verdict of death. (See *Brown v. Sanders*, *supra*, 546 U.S. at p. ___ [126 S.Ct. at p. 898] (Breyer, J., dissenting) [jury may give special weight to an invalid aggravating factor "if the judge or prosecutor led it to believe that state law attaches particular importance to

that factor: Indeed why else would the State call that factor an 'aggravator' and/or permit it to render a defendant death eligible?"].)

Further, "the finding of more than one special circumstance has crucial significance in the penalty phase." (*People v. Harris* (1984) 36 Cal.3d 36, 65.) *Harris* recognized the important penalty phase role played by special circumstance findings (*id.* at p. 65), and the risk that a jury might "give undue weight to the mere number of special circumstances found to be true." (*Id.* at p. 66.) This risk, in turn, "improperly inflates the risk that the jury will arbitrarily impose the death penalty. . . ." (*Id.* at p. 67.) That risk is even more pronounced here. Appellant's jury was instructed that the death penalty should be imposed when the aggravating circumstances outweigh the mitigating. (CALJIC 8.84.2.) Where a special circumstance considered by the jury is invalid, such a risk cannot be tolerated. (*People v. Green* (1980) 27 Cal.3d 1, 69; see also *People v. Morton* (1953) 41 Cal.2d 536, 545.)

Here, because it is impossible to decide on review which factors were determinative in the jury's decision, "'any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial. [citations omitted]'" (*People v. Robertson* (1982) 33 Cal.3d 21, 54.) It is not necessary for every juror to rely upon an improper factor in order for a defendant to be prejudiced by an invalid aggravating factor. The jury was not required to reach an unanimous decision as to any particular aggravating factor. As stated by this Court, "if only one of the twelve jurors was swayed by the . . . error, then, in the absence of that . . . error, the death penalty would not have been imposed. What may affect one juror might not affect another." (*People v. Hamilton* (1963) 60 Cal.2d 105, 137, 383.)

The Eighth Amendment requires a heightened degree of reliability in the penalty phase of a capital case. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Zant v. Stephens* (1983) 462 U.S. 862, 884-885.) In this case, the presence of the unconstitutional prior murder special circumstance finding, combined with the penalty phase double counting of appellant's juvenile conviction as a circumstance of the crime and a prior felony conviction, prejudicially inflated the risk that appellant's jury would impose the death penalty. Appellant's death sentence must be reversed.

E. Conclusion

Per *Roper v. Simmons*, it was federal constitutional error for the state to use appellant's prior juvenile conviction to establish death eligibility under the Penal Code section 190.2, subdivision (a)(2), prior murder special circumstance. The prejudice arising from this error was exacerbated when the trial court instructed appellant's jury to also use the juvenile conviction and the invalid special circumstance finding as aggravating penalty evidence, thus creating a strong likelihood that this evidence was crucial to the jury's determination of death.

On review, it is impossible to determine whether the prior murder special circumstance finding was penalty-determinative. In light of the United States Supreme Court's proscription against basing death eligibility upon murders committed before the defendant reached the age of 18, as well as the higher standards of reliability applicable to capital verdicts, the use of appellant's juvenile conviction as the predicate for the capital prior murder special circumstance was federal constitutional error, and reversal of appellant's prior murder special circumstance finding and death sentence is required.

VI

THE TRIAL COURT ERRED AT THE PENALTY PHASE WHEN IT INSTRUCTED THE JURY TO NOT REFER TO THE GUILT PHASE INSTRUCTIONS WHILE OMITTING FROM THE PENALTY PHASE INSTRUCTIONS ANY GUIDELINES FOR HOW THE JURY WAS TO EVALUATE THE EVIDENCE

At the conclusion of the guilt phase of appellant's trial, the court issued several standard jury instructions that provided the jury with a framework to use in evaluating the evidence.[105] At the penalty phase, the trial court admonished the jury as follows:

> You will now be instructed as to all of the law that applies to this penalty phase of this trial. You must determine what the facts are from the evidence received during the entire trial, and the entire trial means the first part and this part. You may consider the first part and this part.
>
> You must determine what the facts are from the evidence received during the entire trial, unless you were instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.[106]
>
> I mean what I say. We took those other instructions back. You won't get those other instructions. That means those don't apply to this part of the case. The instructions that apply to this part of the case are this packet of instructions that you have.

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[105] The trial court gave CALJIC Nos. 1.00, 1.01, 1.02, 1.03, 1.05, 2.00, 2.02, 2.09, 2.11, 2.13, 2.20, 2.21.1, 2.21.2, 2.22, 2.27, 2.40, 2.51, 2.52, 2.70, 2.71.5, 2.72, 2.80, 2.81, 2.90, 2.91, 2.92. (RT 16:5190-5207; 3 Supp. CT 1:408-441.)

[106] The trial court repeated this admonition twice more. (RT 18:5987, 5988.)

> THE BAILIFF: Excuse me, your Honor. They still have their packets of instructions.
>
> THE COURT: Okay. I'll just tell you, they don't apply to this phase of the case. So don't go back and rehash those. I think we have covered every single thing that you need to concern yourself with in this phase of the case in these instructions.

(RT 18:5986.)

As this instruction makes clear, the court explicitly informed the jury that it was to disregard all of the guilt phase instructions and give them no application when engaging in penalty phase deliberations. However, when the trial court actually gave the jury the penalty phase instructions it provided them with no instructions on the general principles of law to use when engaging in the penalty phase deliberations. (CT 3 SCT 526-540; RT 18:5985-5998.) The court's failure to give standard instructions at the penalty phase regarding how the jury should consider evidence and argument violated state law, as well as appellant's constitutional rights under the Eighth and Fourteenth Amendments of the federal Constitution and article I, sections 7, 15, and 17 of the California Constitution.

The trial court has a sua sponte duty to instruct at the penalty phase of a capital trial on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885.) This duty exists even in the absence of a request by defense counsel. (*People v. Moon* (2005) 37 Cal.4th 1, 37.) A trial court can fulfill its duty either by instructing the jury which guilt phase instructions pertaining to principles of evaluating evidence to apply at the penalty phase (see, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1256-1257 [trial court explained to jury

which guilt phase instructions applied at penalty phase]) or by reinstructing the jury on those principles. Here, the trial court did neither.

The court's failure to reinstruct the jury at the penalty phase left the jury without guidance as to how to evaluate the evidence admitted over the course of the trial. The court told the jury to disregard the instructions given at the guilt phase, including instructions informing it how to consider circumstantial evidence, prior inconsistent statements, and statements of the judge and counsel, as well as instructions explaining how to evaluate the credibility of witnesses, conflicting testimony, confessions, and admissions. Though the jury was told it could consider the guilt phase evidence while engaging in its penalty phase deliberations, the jury was not told it had to consider the evidence under the same rules that applied at the guilt phase. By abdicating its duty to instruct the jury sua sponte on general principles for evaluating evidence, the trial court left the jury at the penalty phase to its own devices to figure out how to assess the evidence admitted at the guilt and penalty phases of appellant's capital trial.

While this Court has held that the trial court's failure to reinstruct the jury on general principles for evaluating the evidence does not necessarily constitute reversible error (see, e.g., *People v. Daniels*, *supra*, 52 Cal.3d at p. 885), that rule is not applicable here. For one thing, this case is different from those cases that reject failure-to-reinstruct claims by following the reasoning that the jury, having heard no instructions or argument to the contrary, likely believed the guilt phase instructions were applicable at the penalty phase. (See *People v. Wharton* (1991) 53 Cal.3d 522, 600; *People v. Daniels*, *supra*, 52 Cal.3d at pp. 884-885.) That is logical, since it can be presumed that a juror would have no reason to believe that the evidentiary principles from the guilt phase of the trial would not be equally applicable

to the penalty phase of the trial. However, that logic is inapplicable to this case, where the trial court told the jury repeatedly and emphatically to disregard the guilt phase instructions.

It is instructive to look at the exact words used by the trial court to understand why this case presents reversible error, while cases where there was just a general failure to reinstruct did not warrant reversal. Prior to reading the penalty phase instructions, the trial court advised the jurors that they were about to be instructed on all of the law that applied to the penalty phase; that they could consider all of the evidence admitted at the entire trial; but that they should "[d]isregard all other instructions given to you in other phases of the trial." (RT 18:5986.) Under these circumstances, a juror would logically assume that the general instructions on the law which were given at the guilt phase should not be followed at the penalty phase.

The court went on to tell the jurors that it meant what it said; that the other instructions were taken back from them; that they would not get the other instructions again; that this meant they did not apply to the penalty phase of the case; and that the only instructions that applied were about to be read to them. (RT 18:5986.) Then, when the bailiff informed the court that the jurors still had their packets of instructions, the court once again told the jurors they could not discuss those and that the penalty instructions they were about to receive "covered every single thing that you need to concern yourself with in this phase of the case . . ." (RT 18:5986.) It is hard to envision how the trial court could have been more emphatic in emphasizing to the jurors that they were to disregard the guilt phase instructions–the only instructions that told them the general principles of law to apply to the evidence.

Since the law presumes that a jury follows the court's instructions, it must be presumed that the jury followed the court's admonition that the guilt phase instructions should not be applied at the penalty phase. (See, e.g., *Richardson v. Marsh* (1987) 481 U.S. 200, 211; *People v. Bonin* (1988) 46 Cal.3d 659, 699.) Not only does that mean that the jury had no general guidelines to follow in assessing the evidence, it means that a juror could reasonably have believed that the guidelines that were provided for the assessment of the guilt phase evidence were specifically inapplicable at the penalty phase. In other words, a juror could logically have felt that at the penalty phase he or she could consider all of the evidence admitted at trial in whatever fashion the juror wanted and for whatever purpose the juror desired.

Obviously, the only way to find out how the jurors assessed the evidence is to ask them. However, since the law of this state forbids the admission of evidence concerning a juror's mental state during deliberations, pursuit of that avenue is barred to appellant. Thus, appellant has no definitive method of establishing the reasonable probability that a death sentence would not have been imposed if the court had properly instructed the jury on the general principles of law to utilize when evaluating the evidence at the penalty phase of his trial. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Despite this, one can certainly see that the court's specific instructions would have led any reasonable juror to believe that he or she was free to make a standardless assessment of the evidence presented at both phases of the trial when determining appellant's sentence at the penalty phase.

This Court has previously found harmless error where a trial court both failed to re-instruct on general principles of law at the penalty phase

and advised the jury to disregard the guilt phase instructions. The Court seems to place a burden on appellant to demonstrate some tangible impact that the failure to reinstruct had on the jury's evaluation of the evidence. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1221.) As discussed above, this is a highly speculative venture and appellant should not be required to bear the burden of demonstrating the presence of such an intangible factor. Nonetheless, in this case, such an inference can be drawn.

One of the reasons the Court found this type of error harmless in *Carter* was the fact that the failure to reinstruct likely benefitted the defendant more than it did the state. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1221.) Here, that was not the case. In fact, here there were significant instructions bearing on the proper manner to evaluate the penalty phase evidence offered by the state that should have been given, but were not.

The state adduced significant aggravating evidence from Felton Manuel that appellant committed several violent felony offenses against him; offenses committed by use of a deadly weapon. (RT 17:5658-5664.) There was a significant enough issue about Manuel's ability to even testify that the court conducted an Evidence Code section 402 hearing before letting him appear before the jury. (RT 17:5651.) The court ultimately found him competent to testify, but once before the jury his identification of appellant as the person who assaulted him was highly contradictory. He pointed to appellant as the person who had attacked him 13 years earlier, while also stating that he could not remember what his assailant was wearing or his assailant's facial features. (RT 17:5666-5670.)

The Manuel testimony is a textbook example of the type of evidence that calls for instruction pursuant to CALJIC Nos. 2.20 and 2.92, so that the

jury has some guidance in determining both the credibility of the witness and the factors to use in assessing the witness's identification evidence. However, since the jury had specifically been told to not apply these instructions, which had been given at the guilt phase, the jury did not have this guidance. This was especially harmful in light of an instruction the court did give–a modified version of CALJIC No. 2.91. (3 SCT 531.) In this instruction, the jurors were told that they could not consider the Manuel offenses as aggravating evidence "[i]f, after considering the circumstances of the identification [and any other evidence in this case]," they had a reasonable doubt whether appellant was the person who committed the crimes. (*Ibid.*) This instruction focused the jury on the circumstances of the identification itself, but not the many factors set forth in CALJIC No. 2.92 that affect the ability of a witness to make an identification, e.g., the witness's capacity–a significant issue here, the time lapse between the crime and the identification, the extent to which the witness is certain or uncertain, etc. Further, the specific instruction to disregard CALJIC No. 2.92, which had been given at the guilt phase, solidified the fact that the jury would ignore any factors relating to the witness himself when evaluating this evidence.

This case is not one where the failure to reinstruct the jury on general principles of law could not have affected its evaluation of evidence offered against appellant at the penalty phase of the trial. Thus, cases as *Carter* are inapplicable to appellant. In fact, in *Moon*, this Court said the importance of *Carter* is that it shows that the way to evaluate harm regarding this type of error is to examine the nature of the evidence presented and determine whether it was likely the omitted instructions affected the jury's evaluation of the evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 38.) When one

does that here, the harm to appellant is clear and reversal of the penalty verdict is required.

The trial court's failure to instruct the jury on how to evaluate the evidence when determining whether appellant lived or died also precluded appellant from receiving a fair and reliable capital-sentencing determination, in violation of appellant's Eighth and Fourteenth Amendment rights. Typically, the failure to reinstruct the jury on general evidence-evaluation principles does not violate a capital defendant's constitutional rights because appellate courts presume that the jury adhered to the guilt phase instructions at the penalty phase. (See, e.g., *People v. Danielson* (1992) 3 Cal.4th 691, 722.) However, for the reasons discussed above, such an assumption is unwarranted in this case.

Because this Court cannot indulge the presumption that the jury followed the guilt phase instructions regarding the assessment of evidence, appellant's case is distinguishable from the failure-to-reinstruct claims this Court has rejected in the past: cases where the trial court did not specifically instruct the jury to disregard at the penalty phase the evidence-evaluation instructions given at the guilt phase. (See *People v. Sanders* (1995) 11 Cal.4th 475, 561; *People v. Danielson*, *supra*, 3 Cal.4th at p. 722; *People v. Wharton* (1991) 53 Cal.3d 522, 600; *People v. Brown* (1988) 46 Cal.3d 432, 460, *People v. Williams* (1988) 45 Cal.3d 1268, 1321.) It is the combination of the lack of affirmative guidance at the penalty phase and the specific instruction to not follow the guidance provided at the guilt phase that violated appellant's right to a fair, reliable, and evenhanded capital-sentencing determination. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Without this type of guidance, the jury could not properly consider evidence at the

penalty phase, including appellant's mitigating evidence and the prosecution's aggravating evidence, and appellant was deprived of a fair and reliable penalty trial. (See *Buchanan v. Angelone* (1998) 522 U.S. 269, 276-278; *Boyde v. California* (1990) 494 U.S. 370, 380.)

The state cannot demonstrate beyond a reasonable doubt that no harm resulted from the trial court's failure to provide guidance to the jury as to how to assess the evidence when determining appellant's sentence. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) The jury's sentencing decision is a discretionary, fact-specific determination (see *Tuilaepa v. California* (1994) 512 U.S. 967, 974), and the process by which the decision is reached is one that affords the jurors wide latitude as to how they arrive at an appropriate punishment. The process being what it is, it is particularly essential that the jury be cognizant of the framework they must use in utilizing the evidence that was presented during the course of the trial. By leaving the jury unfettered by any bounds whatsoever in that regard, the trial court removed any assurances that the verdict was reached in a fair, reliable, and trustworthy fashion. Thus, the death sentence should be set aside.

VII

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO CONSIDER WITH CAUTION EVIDENCE OF APPELLANT'S ALLEGED PRE-OFFENSE ADMISSIONS REQUIRES REVERSAL OF APPELLANT'S FIRST DEGREE MURDER CONVICTION

A. Introduction

The prosecution's theory as to why appellant had a motive to commit the instant offense was constructed around pre-offense statements he purportedly made to Linda Farias and Troy Holloway. California requires a trial court to sua sponte instruct the jury to view a defendant's pre-offense statements with caution. Yet, the trial court failed to do that here.

The trial court's failure to instruct the jury on how to properly consider Linda Farias's and Troy Holloway's testimony – the cornerstone of the prosecution's structurally unsound motive theory – violated state law. Additionally, it violated appellant's rights to a reliable guilt determination, due process, a fair trial by a properly instructed jury, and freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

B. Relevant Facts

Linda Farias's and Troy Holloway's testimony allowed the prosecution to theorize that appellant targeted Mr. Rexford to retaliate for the murder of an acquaintance, Manuel Farias. (RT 17:5489, 5501-5503.) This testimony was essential to show that appellant even had any knowledge of a "Josh" prior to the shooting, let alone that he was seeking to harm a "Josh." The essence of the "motive" evidence was Raymond and Linda Farias's testimony that appellant was a friend of their deceased

brother Manuel, who was the victim of an unsolved murder (RT 11:3427, 3431, 3405-3406); Linda Farias's testimony that, during the reception after Manuel's funeral, she overheard appellant and others talking about contacting a "Josh" in order to find Josh's cousin, "Brian," who purportedly killed Manual Farias; and Troy Holloway's testimony that, at an unspecified time before the shooting, appellant asked him questions about Joshua Rexford's whereabouts and that, during the evening after the shooting, appellant gave Holloway a nine millimeter gun. (RT 11:3445-3448, 3455-3458, 3468-3469; 12:3556-3557; see also 3 SCT 3:825, 830-833, 836-838, 839-841.)

Linda Farias testified that at the reception after her brother's funeral, she overhead appellant and three other young men talk about a "Josh" (not specifically Joshua Rexford). (RT 11:3427-3429.) She heard them say that "Josh was Brian's cousin and they would get through him to find Brian." (*Id.* at p. 3431.) Near the end of her direct testimony, Ms. Farias stated: "They said Brian was the one who killed my brother and that Josh was his cousin and that they were going to get through him to find Brian." (RT 11:3433.)

Detective Scott Franks testified that when he first interviewed Ms. Farias about her brother's death, she did not mention anything about appellant's purported statements. (RT 15:4692-4693.) Subsequently, when Franks interviewed Ms. Farias on April 2, 1997, she told him for the first time that appellant "was present" when the men talked about "Josh" after Manuel's funeral. (RT 14:4700.) However, when he questioned her on April 17, 1997 – after she talked to Dawn Hall, Joshua Rexford's mother – Ms. Farias told Franks that appellant not only was present during the

conversation, he was doing most of the talking. (RT 15:4707-4708, 4725-4733.)

A transcript of an interview between Detective Franks and Troy Holloway revealed that Holloway twice stated that appellant told him that he only wanted to talk to Mr. Rexford. (SCT 3:825, 833.) Under cross-examination, Mr. Holloway could not explain why he failed to warn Mr. Rexford if he believed that appellant's questions about Mr. Rexford were part of a "set-up." Even though he saw Mr. Rexford on the day after his purported conversation with appellant, Mr. Holloway failed to tell his close friend about appellant's inquiries or warn him about being set-up because it "didn't seem too important." (RT 11:3492-3494.)

The jury was never instructed pursuant to CALJIC No. 2.71.7. The trial court did instruct the jury with CALJIC No. 2.70 (Confession and Admission – Defined).[107] (CT 434.) CALJIC No. 2.70, however, merely distinguishes an admission[108] from a confession. It does have a bracketed paragraph stating generally that "evidence of [an oral confession] [or] [an oral admission] of the defendant not made in court should be viewed with

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[107] The jurors were also instructed, pursuant to CALJIC No. 2.51, that they "may consider motive or lack of motive as a circumstance in this case," and that the "[p]resence of motive may tend to show the Defendant is guilty." (CT 3:429.) The trial court also instructed the jury with CALJIC No. 2.71.5 (Adoptive Admission – Silence, False or Evasive Reply to Accusation). (CT 3:435.) However, the court gave this instruction to guide the jury's consideration of appellant's post-crime conversations with Detective Franks. (See RT 14:4553-4554.)

[108] "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence." (CALJIC No. 2.70.)

caution," but the trial court failed to include this paragraph in its instructions to the jury. (CALJIC No. 2.70; RT 16:5203-5204; CT 3:434.)

Appellant asked the court to read CALJIC No. 2.71 (Admission – Defined); the court denied his request. (RT 14:4548-4553; see *People v. Lang* (1989) 49 Cal.3d 991, 1021 [failure to give CALJIC No. 2.71.7 cured by giving of CALJIC No. 2.71].)

C. The Trial Court Erred By Failing to Sua Sponte Instruct the Jury That Linda Farias's and Troy Holloway's Testimony Regarding Appellant's Alleged Pre-Offense Statements Ought to be Viewed With Caution

CALJIC No. 2.71.7 (Pre-Offense Statement by Defendant) instructs the jury that:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed.
>
> It is for you to decide whether the statement was made by [a] [the] defendant.
>
> Evidence of an oral statement ought to be viewed with caution.

Unless a tape recording is presented to the jury, trial courts have a sua sponte duty to instruct jurors to consider with caution evidence of a defendant's alleged pre-offense oral admissions. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [rule applies to "statements which tend to prove guilt"].) "The purpose of [this] cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) The requirement certainly was made necessary by the state's use of Linda Farias's testimony regarding appellant's alleged

funeral reception statements and Troy Holloway's testimony regarding appellant's purported questions about Mr. Rexford's whereabouts.

As this Court has repeatedly explained, purportedly inculpatory pre-offense oral admissions must be:

> [R]eceived with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.

(*People v. Bemis* (1949) 33 Cal.2d 395, 398-399; see also *People v. Frye* (1998) 18 Cal.4th 894, 959; *People v. Ford* (1964) 60 Cal.2d 772, 800.)

Linda Farias and Troy Holloway are textbook examples of the type of witness that warrants a sua sponte cautionary instruction to the jury. In light of the considerable evidence of the victim's mother's involvement in eliciting Linda Farias's and Troy Holloway's statements and testimony regarding appellant's purported pre-offense admissions, and the biased and suspect nature of their testimony, a properly instructed reasonable juror could have been persuaded to view these witnesses' testimony regarding appellant's alleged interest in finding "Josh" and/or "Joshua Rexford" with deserved skepticism and to reject motive – the most critical component of the prosecution's theory of first degree murder. Had the trial court read CALJIC No. 2.71.7 – or, at a minimum, the cautionary language of CALJIC No. 2.70 – a reasonable juror could have accepted that, at worst, appellant's motive in contacting Mr. Rexford was to find Josh's purported

cousin, Brian, not to kill Mr. Rexford. The trial court erred in failing to sua sponte instruct the jury with CALJIC No. 2.71.7.

D. Appellant Was Prejudiced By the Trial Court's Errors

Reversal is required where it is reasonably probable the jury would have returned a different verdict absent the trial court's error. (*People v. Breverman*, (1998) 19 Cal.4th 142, 165-179; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.) "There is a reasonable probability of a more favorable result within the meaning of *Watson* when there exists 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result.'" (*People v. Mower* (2002) 28 Cal.4th 457, 484, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 837.)

Determining prejudice from the failure to instruct with CALJIC No. 2.71.7 involves examining the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were reported accurately. (*People v. Dickey* (2005) 35 Cal.4th 884, 905.) The reviewing court should also consider whether the oral admissions were reported by witnesses friendly to the accused or biased against him (*People v. Lopez* (1975) 47 Cal.App.3d 8, 14), and the relative importance of the admissions. (*People v. Ford* (1964) 60 Cal.2d 772, 800; *People v. Lopez*, *supra*, 47 Cal.App.3d at p. 14.) When all of these factors are taken into consideration in this case, reversal is warranted.

There was conflicting evidence as to the truth of Linda Farias's testimony regarding appellant's purported statement regarding finding "Josh" and "Brian." For example, Christina Hogue's testimony corroborates Ms. Farias's April 2, 1997, statement to Detective Franks; the statement preceding Dawn Hall's intervention. Ms. Hogue testified that, at Manuel

Farias's funeral repast, she overhead the conversation about "Brian." (RT 12:3566.) Unlike Linda Farias, Ms. Hogue did not hear anyone mention a "Josh." (RT 12:3580.) More importantly, Ms. Hogue was not sure if appellant participated in the conversation. (RT 12:3566, 3579; RT 13:4251.) Additionally, Linda Farias made pretrial statements mentioning Sean Flores's name in connection with the post-funeral conversation (RT 13:4251-4253); Sean Flores testified and denied any knowledge of any conversation of this nature. (RT 13:4358-4359.) Obviously, regarding the purported statements of appellant during the post-funeral conversation, there was conflicting evidence as to the content of that conversation, the words used, and their meaning.

Further, the purported statements of appellant were provided to the jury by a witness who was biased against him. There was substantial evidence that an extremely biased third party – the victim's mother, Dawn Hall – hand-delivered the Farias retaliation theory and witnesses to Franks long after the police investigation into her son's shooting had grown cold. The "motive" theory was first brought to the attention of Ms. Hall by Christina Hogue, a friend of Manuel Farias. (RT 11:3408; RT 12:3564.) A couple of months after the funeral, Ms. Hogue met Ms. Hall while Ms. Hall was in front of a store handing out flyers about the shooting. She told Ms. Hall about the conversation at the funeral repast. (RT 12:3566, 3579; RT 13:4251.)

After she talked to Ms. Hogue, Ms. Hall wrote a series of letters to Raymond Farias asking him to talk to her. (RT 13:4252-4253.) Linda Farias called Ms. Hall's mother's home to find out why Raymond was receiving letters. They had two conversations; during both, Ms. Hall told Ms. Farias to call Detective Franks. (RT 13:4251-4253.) After the second

conversation, Ms. Hall called Detective Franks. Franks then re-interviewed Linda Farias. (RT 11:3438; RT 12:4252-4253; RT 15:4725-4732.) According to Franks, when he first interviewed Ms. Farias about her brother's death, she did not mention anything about appellant's purported comments at Manuel's funeral.[109] (RT 15:4692-4693.) When Franks interviewed Ms. Farias on April 2, 1997, she told him for the first time that appellant "was present" when the men talked about "Josh" after Manuel's funeral. (RT 14:4700.) Then, when he questioned her on April 17, 1997 – after she talked to Dawn Hall – she told him that appellant not only was present during the conversation, he was doing most of the talking. (RT 15:4707-4708, 4725-4733.)

Linda Farias was biased against appellant. While she denied that she was biased, and testified that she did not believe appellant had any involvement in her brother's murder (RT 11: 3436-3437), the sheriff's investigator on both the Rexford and Manuel Farias homicides, Detective Scott Franks, testified that Ms. Farias twice told him that she believed appellant was in some way responsible for her brother Manuel's death. (RT 12:3498-3499; RT 15:4733.)

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[109] Although Linda Farias testified that she told Franks about the conversation at the funeral reception when he first interviewed her, she acknowledged that no such statement was on the audiotape of their conversation. She claimed that Franks only recorded the part of their conversation that occurred inside, and that she told Franks about the funeral conversation while they were outside. (RT 11:3438-3439.) Franks testified that, when they went back inside, while the tape was running he went back over all of the information they covered while they were outside. (RT 15:4725-4733, 4735, 4738.)

There was also conflicting evidence regarding whether appellant made the pre-offense statements to Troy Holloway that Mr. Holloway related to the jury. Apart from appellant's direct contradiction of his testimony, on direct examination, Mr. Holloway testified that Bennett Brown was the only witness to his and appellant's conversation about Mr. Rexford.[110] (RT 11:3457.) On cross-examination, however, Mr. Holloway conceded that he told the police that there were two females present when he and appellant talked. (RT 11:3491.) Then, he claimed to have told the police that Mr. Brown *and* the two females were present during the conversation but the two women did not hear the conversation. (RT 11:3549.) These inconsistencies alone could certainly have been enough to lead a reasonable juror to have doubts about whether Mr. Holloway and appellant ever spoke about Mr. Rexford.

Dawn Hall, a person obviously biased against appellant, was also responsible for Troy Holloway's involvement in the case. Troy Holloway was a very close friend of Mr. Rexford, and was deeply affected by Mr. Rexford's murder. (RT 11:3441, 3443, 3449, 3459; RT 12:3633-3635, 3669; RT 13:4228-4229.) He attended Mr. Rexford's wake. (RT 13:4221.) In contrast, Holloway barely knew appellant, and had met him only because they had a mutual friend, Patrick Wiley. (RT 11:3443, 3524.) After Ms. Hall learned that Holloway called her house and left a message regarding a cassette tape he had received from appellant, she called Holloway to get him to talk to the police. (RT 13: 4222, 4226, 4261-4263.) Mr. Holloway was a witness who was biased against appellant.

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[110] Mr. Brown testified at trial, but neither the prosecutor nor defense counsel asked him any questions about this alleged conversation.

The importance of the evidence encompassed by a cautionary instruction pursuant to CALJIC No. 2.71.7 is palpable. The most severe damage inflicted by Troy Holloway was his testimony that, prior to the shooting, appellant was specifically looking for Joshua Rexford, not another Josh with an unknown last name, who purportedly was related to someone named Brian. (See RT 11:3445-3448, 3455-3458, 3468-3469; 12:3556-3557.) This lent credence to Linda Farias's testimony about the alleged post-funeral converation (RT 11:3431; 15:4706), and undermined appellant's testimony that he never planned to retaliate against anyone for the Farias murder (RT 15:4828), that he never asked Mr Holloway about Josh Rexford (RT 15:4828), and that another Josh, not Rexford, was allegedly involved in the Farias killing. (3 SCT 3:871-872, RT 16:5048.) Troy Holloway was the missing link for the prosecution regarding motive.[111]

Based upon this body of evidence, there exists a reasonable probability – not a mere theoretical possibility – that, if properly instructed that they "ought to" view Linda Farias's and Troy Holloway's testimony regarding appellant's pre-offense statements with caution, appellant's jury would not have found appellant guilty of first degree murder. The Farias/Holloway testimony left with the jury a false impression that appellant planned to confront Mr. Rexford about the murder of Manuel Farias. "Under any standard of proof, the effect of the [cautionary language would have been] beneficial to [the] defendant. The courts have long

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[111] The importance of Holloway's testimony to the prosecution also is apparent from the 28 pages of attention placed upon it during defense counsel's closing argument. (See RT 16:5341-5366, 17:5395-5396, 5410-5411, 5419.)

recognized the dangers and abuses inherent in evidence of verbal admissions." (*People v. Frye* (1998) 18 Cal.4th 894, 959.)

Other evidence and verdicts also demonstrate that there was a reasonable probability that, if properly instructed to view Farias's and Holloway's testimony with caution, appellant's jurors would have concluded that the prosecution's motive theory was not proven and that they would not have found beyond a reasonable doubt that appellant was guilty of first degree murder in shooting Mr. Rexford. The jury convicted appellant of attempted voluntary manslaughter, not attempted murder, on the Pupua and Badibanga counts. In doing so, the jury necessarily found that appellant did *not* act with malice aforethought when he shot at Mr. Pupua and Mr. Badibanga. Mr. Rexford was literally sitting shoulder-to-shoulder with Mr. Pupua and Mr. Badibanga when the shooting began; he stood up and they dove to the floor. When he conceded that this was a reasonable interpretation of the evidence, the prosecutor also conceded that no malice aforethought may have existed when Mr. Rexford was shot: "Why did Joshua Rexford die as opposed to the other two people[?] . . . You're in a situation with untrained killers . . . on raw edge. And they're just firing at them, and then all of a sudden somebody stands up and they start following the moving target." (RT 17:5508.) Moreover, there was substantial evidence of third party culpability and that the shooting was the result of unplanned reckless gunfire.

"'[I]n a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) The prosecution went to great pains to present testimony of motive in order to convince the jury to return a first degree

murder conviction. A retaliation motive is the only logical basis for distinguishing the purpose for the shots fired at Mr. Rexford from those fired at the other two men. The jury verdicts are a strong indication the jurors recognized that distinction and credited the retaliation theory when they returned a first degree murder conviction. This is a quintessential example of prejudice.

E. Conclusion

"Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) The trial court's failure to instruct the jury that Linda Farias's and Troy Holloway's testimony about appellant's alleged inculpatory pre-offense admissions ought to be viewed with caution "diminished the reliability of the guilt determination" in violation of the Eighth Amendment and enhanced the risk of an unwarranted capital murder conviction. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)

The trial court's omission left the jurors with the impression that, approximately a month before the crime, appellant planned to kill Mr. Rexford to avenge the death of Manuel Farias. Given the absence of any other motive theory or evidence, the jury's attempted voluntary manslaughter verdicts with respect to the shooting survivors, the substantial evidence of third party culpability and unplanned reckless gunfire, and the closeness of the guilt deliberations, there is a reasonable probability that appellant's jury would have elected not to convict appellant of first degree murder. Consequently, appellant's first degree murder conviction, special circumstance, and penalty judgments must be reversed.

VIII

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS, A TRIAL BY JURY, AND RELIABLE VERDICTS, AND REQUIRES REVERSAL OF THE JUDGMENT

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*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) The reasonable doubt standard is the bedrock principle at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *In re Winship*, *supra*, 397 U.S. at p. 363.) Jury instructions violate these constitutional requirements if there is a reasonable likelihood that the jury understood them to allow conviction based on proof insufficient to meet the standard of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court instructed the jury with CALJIC Nos. 2.02, 2.21.2, 2.22, 2.27, 2.51, 2.62 and 8.20. (3 SCT 1:418, 428, 429, 430, 431, 433, 454.) These instructions violated the above principles and thereby deprived appellant of his constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15) and trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16). (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265.) They also violated the fundamental requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

Because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here in order for this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.[112]

A. The Instruction on Circumstantial Evidence Under CALJIC No. 2.02 Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was instructed with CALJIC No. 2.02 that if one interpretation of the evidence regarding mental state "appears to be reasonable, you must accept [it] and reject the unreasonable" interpretation. (3 SCT 1:418; RT 16:5197-5198.) In effect, the instruction informed the jurors that if appellant reasonably appeared to be guilty, they were to find him guilty as charged of first degree premeditated murder even if they entertained a reasonable doubt as to whether he had premeditated the killings. The defects in this instruction were particularly damaging here where the prosecution's premeditation case rested almost exclusively on circumstantial evidence and appellant countered with his own version of

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

what happened. The instruction 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; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)[113]

First, the instruction compelled the jury to find appellant guilty using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instruction directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (3 SCT 1:418; RT 16:5197-5198.) However, an interpretation that appears reasonable is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than the constitutionally-mandated one.

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[113] Although defense counsel did not object to the giving of CALJIC No. 2.02, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (Pen. Code, § 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

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

Here, the instruction plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you must accept the reasonable interpretation and reject the unreasonable." (3 SCT 1:418.) In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction which 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. Accordingly, this Court should invalidate the instructions given in this case, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instruction had the effect of reversing, or at least significantly lightening, the burden of proof, since it required the jury to find appellant guilty of first degree murder as charged unless he came forward with evidence reasonably explaining the incriminatory evidence put forward by the prosecution. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the

prosecution's case. Nevertheless, under the erroneous instruction the jury was required to convict appellant if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684.)

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

B. The Instructions Pursuant to CALJIC Nos. 2.21.2, 2.22, 2.27, 2.51, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave five other standard instructions which magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard – CALJIC Nos. 2.21.2 (witness wilfully false), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), 2.51 (motive), and 8.20 (deliberate and premeditated murder). (3 SCT 1:428, 429, 430, 431, 454; RT 16:5201-5202, 5213-5214.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and vitiated the constitutional prohibition against the conviction of a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p.

278; *Cage v. Louisiana*, *supra*, 498 U.S. at pp. 39-40; *In re Winship*, *supra*, 397 U.S. at p. 364.)[114]

The jury was instructed with former CALJIC No. 2.51 as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(3 SCT 1:431; RT 16:5202.) This instruction allowed the jury to determine guilt based on the presence of alleged motive alone and shifted the burden of proof to appellant to show absence of motive to establish innocence, 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]; see *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 in contrast to CALJIC No. 2.62, which told the jury that appellant's failure to deny or explain the evidence against him was "not sufficient by itself to prove guilt." Containing no similar admonition, the motive instruction thus appeared to include an intentional omission allowing the jury to determine guilt based on motive alone. Indeed, the jurors reasonably could have concluded that if motive were

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[114] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See fn. 113, above, which is incorporated by reference here.)

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]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [failure to instruct on effect of a reasonable doubt as between any of the included offenses resulted in erroneous implication that rule requiring finding of guilt of lesser offense applied only as between first and second degree murder]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the prosecution's heavy reliance on evidence of the alleged Manuel Farias revenge motive highlighted the omission in CALJIC No. 2.51, increasing the likelihood that the jury would have understood that motive alone could establish guilt.

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (3 SCT 1:428; RT 16:5201.) 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' testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact

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

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.

(3 SCT 1:429; RT 16:5201-5202.) The instruction specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing. 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." 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.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (3 SCT 1:430; RT 16:5202), 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.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the necessary 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. . . ." (3 SCT 1:454; RT 16:1313-1314.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

"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 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 upon a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process (U.S. Const., 14th Amend.;

Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th & 14thAmends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14thAmends.; Cal. Const., art. I, § 17).

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

Although each of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [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*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 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 which dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [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 which contain their own independent references to reasonable doubt.

D. Reversal Is Required

Because the erroneous circumstantial evidence instruction required conviction on a standard of proof less than proof beyond a reasonable doubt, its delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) At the very least, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

The prosecution cannot make that showing here, because its proof of appellant's guilt was weak for all of the reasons previously discussed. Given the dearth of direct evidence, the instructions on circumstantial evidence were crucial to the jury's determination of guilt. Because these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined.

Further, CALJIC No. 2.51 permitted the prosecution to only establish motive for the jury to conclude that appellant was guilty. The instructional error was particularly prejudicial in this case given that the prosecution's theory of appellant's guilt for the attack on the Pupua apartment and the killing of Mr. Rexford was based on, in the trial court's words, "no motive of consequence." (See RT 17:5489, 5501-5503; RT 18:6141.) The instruction allowed the jury to convict appellant on the motive evidence alone and this error, alone or considered in conjunction with all the other instructional errors set forth in this brief, requires reversal of appellant's judgment.

The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment must be reversed in its entirety.

IX

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. The Broad Application of Penal Code Section 190.3, Subdivision (a), Violated Appellant's Constitutional Rights

Penal Code Section 190.3, subdivision (a), directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; 3 SCT 1:527.) Prosecutors in this state have argued that juries could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Equally important 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 the instant case, the prosecutor repeatedly argued that the method of killing and appellant's alleged motive (RT 18:6021-6022, 6032) were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the 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].) 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) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

B. 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. (3 SCT 1:527-529, 539-540.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) 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: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and, the jury had to decide whether the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 3 SCT 1:539-540.) Because these additional findings were required before the jury could impose the death sentence, *Ring*,

Apprendi, and *Blakely* require that each of these findings be made beyond a reasonable doubt. The 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.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and appellant is, therefore, constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (3 SCT 1:527-528; 539-540), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate 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 Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally

provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 3 SCT 1:530.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by appellant (RT 18:5658-5666) and devoted a considerable portion of its closing argument to arguing these alleged offenses. (RT 18:6024-6025.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Failed to Inform the Jurors that Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be returned unless the jury concludes "that the aggravating circumstances outweigh the mitigating circumstances." (3 SCT 1:539; RT 18:5997.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The instructions failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The decisions in *Boyde v. California* (1990) 494 U.S. 370, 376-377, and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307, do not foreclose this claim. In those cases, the high court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is

the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

5. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there

is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

6. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. 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.

D. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); 3 SCT 1:527-528) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant 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. (RT 18:6016-6034 [prosecutor notes that factors (d), (e), (f), (g) and (h) were inapplicable to this case].) The trial court failed to omit those factors from the jury instructions (3 SCT 1:527-528), likely confusing the jury and preventing the jurors from making any 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. (3 SCT 1:527-528.) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. 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 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.

F. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the equal protection clause of the Fourteenth Amendment to the federal Constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325.) 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. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

G. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court numerous times 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 to the federal Constitution, 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 recent 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.

X

BASING A LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING ON THE FACTS OF THIS CASE VITIATES THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND VIOLATES APPELLANT'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT

The lying-in-wait special circumstance finding in this case must be set aside because it fails to serve the narrowing function required by the federal Constitution. Because the Eighth Amendment demands that a capital sentencing scheme genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder (*Loving v. United States* (1996) 517 U.S. 748, 755), a special circumstance 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." (*Godfrey* v. *Georgia* (1980) 446 U.S. 420, 427.) As applied in this case, the lying-in-wait special circumstance failed to fulfill its narrowing function. Thus, finding appellant to be eligible for a death sentence based upon this special circumstance violates appellant's Eighth and Fourteenth Amendment rights.

Even assuming the sufficiency of the evidence to support the lying-in-wait special circumstance, given this Court's interpretation of the applicable law, the evidence adduced in that regard does not serve to differentiate this case from other first degree murder cases in California. Although a jury may have inferred that appellant concealed his purpose, perpetrators typically conceal their homicidal purpose before committing murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 515 (conc. and dis. opn. of Moreno, J.); *People v. Webster* (1991) 54 Cal.3d 411, 466

(conc. and dis. opn. of Broussard, J.); *People v. Morales* (1989) 48 Cal.3d 527, 574-575 (conc. and dis. opn. of Mosk, J.).) Thus, any surprise that existed in this case flowed from a factor common to all murders. (See *People v. Webster*, *supra*, 54 Cal.3d at p. 466 (conc. and dis. opn. of Broussard, J.) ["Since the first criterion [of the lying-in-wait special circumstance] was concealment of purpose, the attack is necessarily a surprise and the victim unsuspecting"].)

The facts of this case, even if sufficient to meet the test for a lying-in-wait special circumstance, do not justify appellant's death eligibility. The facts of this case do not present a meaningful basis for distinguishing appellant from other persons who commit murders. The extent of planning and degree of victimization that are necessary to justify making lying-in-wait a death-eligible circumstance are not presented by these facts.

Based on the evidence presented at appellant's trial, the lying-in-wait special circumstance did not provide a meaningful basis for distinguishing this case from those cases in which the death penalty is not imposed. Therefore, rendering appellant death-eligible based upon the lying-in-wait special circumstance in this case violated appellant's Eighth and Fourteenth Amendment rights, and this Court must set aside the special circumstance finding.

CONCLUSION

For the foregoing reasons, the convictions and judgment of death must be reversed.

DATED: October 3, 2007

Respectfully submitted,

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CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630(b)(1)(A)

I, BARRY P. HELFT, am the Chief Deputy State Public Defender and am filing appellant's opening brief on behalf of FLOYD DANIEL SMITH. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 90,519 words in length.

DATED: October 3, 2007

BARRY P. HELFT
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Floyd Daniel Smith Cal. Supreme Ct. No. S065233

I, Victoria Morgan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed respectively, as follows:

Gil Gonzalez
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Mr. Floyd Daniel Smith
(Appellant)

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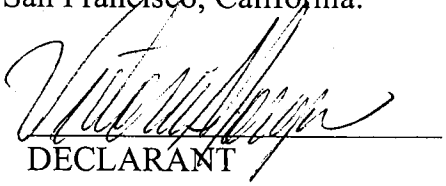
Each said envelope was then, on October 3, 2007, sealed and deposited in the United States Mail in San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 3, 2007, at San Francisco, California.



DECLARANT